

**FOREIGN ISSUER PRIVATE PLACEMENTS AND RULE 144A
OFFERINGS IN THE UNITED STATES**

December 1, 1999

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Traditional private placements and Rule 144A offerings of securities in the United States have become significant financing vehicles for foreign issuers. The annexed memorandum is an introductory primer discussing the financing strategies, issues and procedures involved in traditional U.S. private placements and Rule 144A offerings.

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TIME CHECK*

NEW YORK E.S.T.	(0900)	9:00 A.M.	MONDAY	
BERMUDA	(1000)	10:00 A.M.	MONDAY	+ 1 HOUR
LONDON	(1400)	2:00 P.M.	MONDAY	+ 5 HOURS
BRUSSELS	(1500)	3:00 P.M.	MONDAY	+ 6 HOURS
JERUSALEM	(1600)	5:00 P.M.	MONDAY	+ 7 HOURS
NEW DELHI	(1950)	7:30 P.M.	MONDAY	+ 10½ HOURS
HONG KONG	(2200)	10:00 P.M.	MONDAY	+ 13 HOURS
TAIPEI	(2200)	10:00 P.M.	MONDAY	+ 13 HOURS
TOKYO	(2300)	11:00 A.M.	MONDAY	+ 14 HOURS
LOS ANGELES	(0600)	6:00 A.M.	MONDAY	- 3 HOURS
CALGARY	(0700)	7:00 A.M.	MONDAY	- 2 HOURS
CHICAGO	(0800)	8:00 A.M.	MONDAY	- 1 HOUR

* Note: Adjust times for Spring and Fall adjustments in U.S. and Europe

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CHAPTER 1

OVERVIEW OF UNITED STATES REGULATION OF FOREIGN ISSUERS OF SECURITIES

Introduction. Private placements of securities with United States¹ institutional and financially sophisticated individual investors have increasingly become a key source of capital for issuers of securities who are organized outside of the U.S. (“foreign issuers”). The U.S. private debt and equity markets currently provide extraordinary opportunities for foreign issuers to quickly raise substantial amounts of capital.

Raising capital in the U.S. private market potentially offers foreign issuers a number of advantages over offerings made to the public. Since private offerings are not subject to registration under the U.S. Securities Act of 1933 (the “1933 Act”) and the concomitant review by the U.S. Securities and Exchange Commission (the “SEC”), the primary regulator of issuers of securities and activities subject to U.S. federal securities laws, they may be closed much more quickly than public offerings, allowing the issuer to obtain the offering proceeds sooner. The private market is not as vulnerable to the volatility of the public markets, so a private offering may be able to proceed even if the issuer’s stock price and the market in general have been negatively affected by market forces. In general, underwriting, accounting and legal fees for a private offering are less than those incurred in a public offering. In addition, private offerings coupled with subsequent registration of the securities offered and sold may allow a foreign issuer to establish or broaden the public market for its securities in the U.S.

Certain definitions and distinctions are critical to understanding U.S. regulation of foreign issuers. One distinction concerns the difference between “reporting” and “non-reporting” issuers. A foreign issuer is a “reporting issuer” if it is subject to the registration and periodic reporting obligations of the U.S. Securities Exchange Act of 1934 (the “1934 Act”). Reporting issuers register securities and file periodic reports with the SEC. Accordingly, foreign issuers who are required to file 1934 Act periodic reports with the SEC may be referred to in this Memorandum as “reporting issuers” and foreign issuers who are not required to file such

¹ As used in this Memorandum, “United States” or “U.S.” means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

periodic reports may be referred to as “non-reporting issuers.” The securities registration process and periodic reporting to the SEC are relatively complicated and expensive and generally include the filing of financial statements prepared in accordance with or reconciled to U.S. generally accepted accounting principles (“U.S. GAAP”).

In addition, the SEC rules under the 1934 Act draw an important distinction between “domestic” issuers and “foreign private issuers.” A foreign private issuer is any issuer that is a corporation or other organization incorporated or organized under the laws of any foreign country, *unless*² (i) more than 50 percent of the outstanding voting securities of such issuer are held of record² either directly or through voting trust certificates or depositary receipts by U.S. residents; *and* (ii) any one of the following applies: (A) the majority of the issuer’s 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 U.S. or (C) the business of the issuer is administered principally in the U.S. If a foreign issuer does not meet the definition of foreign private issuer it is treated like a domestic issuer. Thus, certain foreign issuers with significant U.S. contacts may be deemed to be domestic issuers for purposes of U.S. securities laws and references in this Memorandum to “foreign issuers” generally include only “foreign private issuers.”

² “Record” ownership refers to the title holder, the name under which a particular security is registered. “Beneficial” ownership refers to the actual owner, the person who enjoys the benefits of ownership even though title is in another name. Under current rules, foreign private issuer status is determined by reference to the listed address of the record owners of the issuer’s securities, except that the issuer must look through Cede & Co. and other book-entry depositories to the address of participants in the depository system for whom securities are held. Effective September 30, 2000, the SEC revised this by requiring that an issuer also look through banks, broker-dealers and other nominees to the ultimate beneficial owner, to determine whether a majority of its voting securities are held by U.S. residents. See “Pending SEC Proposals and Recent Rulemaking” below.

The distinction between a foreign private issuer and a domestic issuer is significant because the SEC provides, in many instances, separate and less stringent regulations applicable to foreign private issuers.³ For example, there is a separate integrated disclosure system for foreign private issuers that are reporting issuers. A foreign private issuer that is a reporting issuer is not required to file quarterly reports with the SEC; instead, the issuer is required to furnish to the SEC the documents that it makes public in its home country. Also, a foreign private issuer that is a reporting issuer is not subject to the SEC's proxy rules, and its officers, directors and 10% or greater shareholders are exempt from provisions of the 1934 Act requiring stock transaction reporting and imposing liability for "short-swing profits." These and other accommodations to foreign practices, some of which are also applicable to foreign non-reporting issuers, reduce the reporting, disclosure and other compliance obligations of foreign issuers that offer securities in the U.S. These accommodations notwithstanding, foreign reporting issuers must generally provide the SEC with financial statements prepared in accordance with or reconciled to U.S. GAAP.

Registration Requirements of the 1933 Act and Exemptions for Private Offerings.

The 1933 Act provides that any offer or sale of a security that makes use of the U.S. mails or any means or instruments of transportation or communication in U.S. interstate commerce ("U.S. jurisdictional means"), including offers and sales of securities issued by a foreign issuer, must be made pursuant to a current registration statement that is filed with and declared effective by the SEC, unless the securities themselves or the offer and sale transaction are exempt from such registration requirement. In general, any offer or sale of a security to a person resident in the U.S. will make use of U.S. jurisdictional means.

The 1933 Act registration requirements are in addition to the requirements to register securities under the 1934 Act, although the disclosure and reporting obligations of both statutes are similar and may in certain cases be satisfied by incorporating prior filings by reference under the SEC's "integrated disclosure system." The 1933 and 1934 Acts, and the SEC rules and regulations promulgated thereunder, serve the policies of protecting investors and facilitating sound capital markets through a system of comprehensive and accurate disclosure of all information material to investment decisions.

³ SEC regulations also provide a multi-jurisdictional disclosure system ("MJDS"), which involves a reciprocal arrangement between the SEC and the provincial Canadian Securities Administration under which each country essentially accepts, for certain issuers of the other country, the disclosure documents prepared and reviewed under the laws and regulations of the other country. To be eligible to use the MJDS, a Canadian foreign private issuer must meet specified requirements concerning the "seasoning" of the issuer (the length of time of public reporting) and its "public float" (the market capitalization of the issuer's voting stock held by non-affiliates).

The 1933 Act (and rules and regulations promulgated by the SEC under the 1933 Act) contain private or limited offering exemptions from the registration requirements for specified securities transactions. These exemptions allow foreign and domestic issuers to offer and sell securities to institutional and financially sophisticated individual investors without being subject to 1933 Act registration. The 1933 Act and regulations thereunder similarly provide exemptions from the registration provisions that foster liquidity in privately placed securities by permitting their resale by the purchasers of the securities, either offshore pursuant to Regulation S under the 1933 Act (“Regulation S”),⁴ or in the U.S. to institutional and financially sophisticated individual investors. These subjects are discussed in further detail below and in Chapters 2, 3 and 4.

⁴ Regulation S clarifies the extraterritorial reach of the 1933 Act by providing “safe harbors” from 1933 Act registration for sales and resales of securities that occur outside the U.S. A “safe harbor” is an objective set of conditions which, if satisfied, assure eligibility for a general statutory exemption. Safe harbors are generally non-exclusive; that is, a failure to satisfy all of the conditions does not preclude reliance on a more general, statutory exemption, based on the particular facts and circumstances.

Effective April 27, 1998, the SEC adopted amendments to Regulation S with respect to offshore sales of equity securities by domestic issuers. Since the amendments were primarily intended to curb abuses by domestic issuers involving resales into the U.S. of domestic equity securities sold offshore under Regulation S, the amendments generally do not have an impact on the private offerings of foreign private issuers. See Chapter 4.

Registration Requirements of the 1934 Act. The offer and sale of the securities of a foreign issuer to U.S. investors does not automatically subject the issuer to the registration and periodic reporting obligations of the 1934 Act and the rules and regulations promulgated thereunder. Such obligations generally depend upon whether the foreign issuer (i) has registered securities under the 1933 Act, (ii) has any securities listed on a U.S. securities exchange⁵ or quoted on The Nasdaq Stock Market (“Nasdaq”)⁶ or the NASD Bulletin Board⁷ or (iii) whether the foreign issuer meets certain tests regarding the number of its shareholders worldwide and in the U.S. and the amount of its total assets. These requirements are discussed further below.

⁵ As used in this Memorandum, the term “exchange” generally refers to national securities exchanges such as the New York Stock Exchange or the American Stock Exchange. Each exchange has its own numerical listing standards and corporate governance requirements.

⁶ The Nasdaq Stock Market is a computerized over-the-counter market system which is operated by the National Association of Securities Dealers, Inc. (“NASD”). Over-the-counter (“OTC”) stocks are securities not listed or traded on an exchange. Nasdaq has two trading tiers. The top tier is the Nasdaq National Stock Market, which generally contains the most actively-traded OTC stocks. A second tier, the Nasdaq SmallCap Stock Market, generally contains the stocks of middle or small market issuers that do not meet the criteria for quotation on the National Market.

⁷ The NASD Bulletin Board is a quotation service that displays real-time quotes, last-sale prices, and volume information for domestic and certain foreign securities. Eligible securities include national, regional, and foreign equity issues, and warrants, units and ADRs not listed on any other U.S. national securities market or exchange. Unlike the Nasdaq Stock Market or other listed markets where individual companies apply for listing and must meet and maintain strict listing standards, individual brokerage firms or market makers initiate quotations for specific securities on the NASD Bulletin Board.

If a foreign private issuer makes a U.S. public offering of securities, the issuer must register those securities under the 1933 Act prior to their offer and sale and must deliver a statutory prospectus to each offeree in connection with the sale of the securities.⁸ Having registered securities under the 1933 Act, the issuer generally becomes subject to the periodic reporting obligations of the 1934 Act.⁹

Foreign private issuers are also subject to 1934 registration if any of their securities are listed on a U.S. exchange or are quoted on Nasdaq or the NASD Bulletin Board, upon which secondary trading of the issuer's securities may take place. If a foreign issuer wishes to list securities on a U.S. exchange or arrange for their quotation on Nasdaq, the issuer must meet and comply with specific eligibility and listing requirements of the particular exchange or Nasdaq.

⁸ The statutory prospectus forms a substantial part of a 1933 Act registration statement. A foreign private issuer may elect to file 1933 Act registration statements on Forms F-1, F-2, F-3 or F-4 depending on the type of offering, the amount of the foreign private issuer's public float of equity securities and the seasoning of the issuer. These forms parallel the registration forms S-1, S-2, S-3 and S-4 used by domestic issuers in the domestic integrated disclosure system.

Form F-1 is the principal registration form for initial public offerings ("IPOs") and offerings by foreign private issuers not qualifying for the more streamlined Forms F-2 and F-3. Within a Form F-1 prospectus is all the data considered by the SEC to be relevant to an investment decision: descriptions of the issuer's business, properties, management and management compensation; management's discussion and analysis of the issuer's financial condition and results of operations; audited fiscal year-end financial statements; a description of the security being offered and the intended use of the offering proceeds; and a description of the underwriting arrangements or other plan of distribution for the offered security.

Form F-2 is a more streamlined form of registration available to certain foreign private issuers which have filed periodic reports under the 1934 Act for at least 36 months. A Form F-2 prospectus incorporates into itself such 1934 Act filings by reference. As a result, it need not contain business, management, management compensation and financial data (the issuer data as opposed to the offering data) so long as there is delivered with or attached to the prospectus copies of the issuer's most recent annual Form 20-F, discussed below.

Form F-3 is the most streamlined form for public offerings, available to foreign private issuers which have filed periodic reports under the 1934 Act for at least 12 months and which have a public float of at least U.S. \$75 million. A Form F-3 prospectus incorporates the foreign private issuer's recent 1934 Act filings by reference, and its only mandatory contents are the plan of distribution and other offering data (such as use of proceeds), a selling shareholders section, a risk factors section if appropriate, and previously undisclosed material changes or additions to the information in the issuer's incorporated 1934 Act filings. A Form F-3 prospectus need not be accompanied, as a Form F-2 prospectus is, by any of such incorporated filings or by reports to shareholders. Foreign private issuers that are eligible to file a registration statement on Form F-3 may also qualify to file a "shelf" registration statement, which the foreign issuer uses to register securities for delayed or continuous offerings that the issuer expects to complete during the two years following the effective date of the registration statement.

Form F-4 is used to register securities issued in mergers, exchange offers and other business combinations.

⁹ A foreign private issuer not eligible for MJDS may file both its 1934 Act registration statement and subsequent annual reports on Form 20-F, whereas a domestic issuer files its 1934 Act registration statement on Form 10 (or Form 10-SB for small business issuers) and its subsequent annual reports on Form 10-K (or Form 10-KSB for small business issuers). Canadian issuers eligible for MJDS may use the simplified Form 40-F (a "wraparound" on their "home country information") for both registering and reporting under the 1934 Act.

Issuers with securities listed on an exchange or quoted on Nasdaq must also comply with certain quantitative and qualitative standards in order to retain their listing or quotation.

Secondary trading of a foreign issuer's securities may also take place in the OTC market through which quotes of bid and ask prices may be reported in the pink sheets and on the NASD Bulletin Board. A foreign issuer does not need to comply with any listing requirements to have its securities quoted in the pink sheets, although a broker or dealer must have certain information about the issuer in its records in order to publish a quotation for the issuer's securities. Foreign issuers that wish to be eligible to have the prices of their securities quoted on the NASD Bulletin Board are required by the NASD to file a 1934 Act registration statement.¹⁰

¹⁰ Subject to a phase-in period that expires in June 2000, domestic issuers that are quoted on the NASD Bulletin Board will also be required to register their securities under the 1934 Act.

For a foreign private issuer, 1934 Act reporting requirements are triggered if its securities are registered under the 1933 Act or listed on an exchange or quoted on Nasdaq, or can also be triggered when the foreign private issuer has total assets of at least U.S. \$10 million (on the last day of the issuer's most recent fiscal year) and a class of equity securities held of record on that date by at least 500 persons worldwide *and* by at least 300 beneficial owners resident in the U.S.¹¹ These 1934 Act asset and shareholder tests apply whether or not the foreign private issuer has taken any action to offer its securities in the U.S. or to encourage a U.S. trading market for its securities. Accordingly, foreign non-reporting issuers that do not wish to register under the 1934 Act should be cognizant of these asset and shareholder thresholds.

The Rule 12g3-2(b) Information Furnishing Exemption from 1934 Act Registration. So long as a foreign private issuer is not required to register under the 1934 Act by virtue of its listing its securities on an exchange, having them quoted on Nasdaq or making a registered public offering, regardless of the number of the foreign private issuer's U.S. equity holders, the issuer may claim an exemption from 1934 Act registration and its related periodic reporting requirements by complying with Rule 12g3-2(b) under the 1934 Act. Rule 12g3-2(b) is an "information furnishing exemption" that exempts foreign private issuers from registering equity securities under the 1934 Act (and filing periodic reports and certain other obligations) if the foreign private issuer furnishes to the SEC whatever information (sometimes called "home country information"), that it (i) has made or is required to make public under the law of the country of its domicile or in which it is incorporated or organized; (ii) has filed or is required to file with a stock exchange on which its securities are traded and which was made public by such exchange; or (iii) has distributed or is required to distribute to its security holders. Such home country information need only be supplied to the SEC to the extent that the information is material to an investment decision, including, for example, financial results, extraordinary transactions and issuances and acquisitions of securities.

A foreign private issuer claims the Rule 12g3-2(b) exemption by filing an application with the SEC. The issuer must provide the SEC all relevant home country information since the beginning of the issuer's last fiscal year and must explain in its initial submission when and by whom the information was required to be made public. The issuer must also provide certain

¹¹ For purposes of the U.S. resident shareholder threshold, each U.S. registered holder of securities of a foreign private issuer is counted as one investor except for the holders of those securities held in street name, i.e. held of record by a broker, dealer, bank or nominee for any of them for the accounts of customers resident in the U.S., in which case each separate account holder is counted as a record holder.

information regarding the U.S. holders of its equity securities. After its initial filing, the issuer must provide the SEC with required home country information promptly after its release.

Foreign private issuers may voluntarily claim the Rule 12g3-2(b) exemption, which they often do in connection with establishing an ADR program or satisfying the information requirements of Rule 144A. See below and Chapter 3. Information submitted to the SEC under Rule 12g3-2(b) is not deemed to be filed for purposes of Section 18 of the 1934 Act, which makes any person who files a report under the 1934 Act containing a false or misleading statement regarding a material fact liable for damages to any purchaser of a security who relied on the statement. The Rule 12g3-2(b) information is nevertheless subject to the general anti-fraud provisions of Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder. See below and Chapter 6.

American Depositary Receipt Programs. Many foreign issuers sponsor American Depositary Receipt (“ADR”) programs for their debt or equity securities. An ADR is a negotiable certificate issued by a U.S. bank (a “depository bank”) that represents an interest in the securities of a particular foreign issuer that is deposited with a foreign bank (the “custodian”). ADR programs allow U.S. investors to trade the securities of foreign issuers on U.S. markets and permit U.S. settlement of trades and payment of dividends in U.S. dollars. ADRs are generally quoted in dollars and traded on an exchange or quoted on Nasdaq and settle through The Depository Trust Company (“DTC”).

ADR programs were developed to address practical difficulties, such as receiving notices of dividends or transferring ownership, and reduce certain risks encountered by U.S. residents who wished to invest in the securities of foreign issuers. The custodian typically registers the underlying securities in its own name and is the holder of record for the purpose of receiving and distributing to ADR holders dividends and other distributions and company communications. When cash dividends are received in a foreign currency, the depository bank converts them into dollars and pays out the appropriate amounts to the holders of the ADRs. While this does not eliminate currency risk, it simplifies the process and eliminates the transaction fees required to convert relatively modest amounts of foreign currency into U.S. dollars. The depository bank will also assist with making payments and filings relating to foreign withholding taxes.

ADR programs are typically “sponsored” by the foreign issuer of the underlying securities. In rare cases an ADR program may be “unsponsored.”¹² In a sponsored ADR program, the foreign issuer enters into a deposit agreement with the depository bank and the holders of the ADRs. The depository bank often agrees to bear the expenses of the program, but the issuer agrees to assist with SEC compliance and provide English versions of corporate communications.

If a foreign issuer's ADR program is available to the public, the ADRs must be registered under the 1933 Act. A foreign issuer registers (under the 1933 Act) the ADR certificates representing its underlying securities on Form F-6, which is a relatively simple form.

To use Form F-6, the ADR program must meet the following conditions: (i) the holder of the ADRs must be able to withdraw the deposited securities evidenced by an ADR at any time, subject to certain limitations; (ii) the deposited securities must be registered under the 1933 Act or offered and sold in transactions that are exempt from 1933 Act registration; and (iii) as of the filing date of the Form F-6, the foreign issuer of the deposited securities must be either a reporting issuer or a Rule 12g3-2(b) exempt issuer. Pursuant to Rule 12g3-2(c) under the 1934 Act, ADRs (other than listed ADRs) registered under the 1933 Act on Form F-6 (but not the underlying deposited securities) are exempt from registration under the 1934 Act. Instead, registration on Form F-6 requires that the foreign issuer provide the SEC with the home-country information contemplated by Rule 12g3-2(b). If ADRs are listed on a securities exchange and registered on Form F-6, the ADRs, but not the underlying securities, are exempt from 1934 Act registration. If a foreign issuer wishes to have ADRs quoted on Nasdaq, then the ADRs and the underlying securities must be registered under the 1934 Act.

U.S. Private Placement Strategies for Foreign Issuers. A foreign issuer's U.S. private placement strategy will generally depend on whether the foreign issuer is a reporting issuer, the issuer's size, the extent to which there is already an active U.S. trading market for its securities, its ability to raise capital on favorable terms in markets other than in the U.S. and whether it is contemplating issuing equity or debt securities. The private placement market offers issuers

¹² In an unsponsored ADR program, the depository bank, often at the instigation of a broker-dealer, initiates the program itself, causing the purchase and deposit of the foreign issuer's securities, which are then available for trading in the U.S. market. For many years, in such unsponsored programs, the registration of the ADRs with the SEC under the 1933 Act was effected without the underlying issuer's active involvement. Unsponsored ADR programs are rarely initiated today.

considerable flexibility, particularly for larger public companies. Investment bankers can offer issuers financing structures ranging from traditional equity and plain vanilla debt-transactions to more complicated mezzanine and equity-linked financings. The transaction structure and terms will depend on, among other things, market conditions and the demand for the issuer's securities.

Foreign reporting issuers that make a U.S. private placement will typically either (i) structure the offering using an "A/B" exchange offer technique, in which the foreign issuer sells debt or equity securities to institutional investors under Rule 144A under the 1933 Act and shortly thereafter exchanges those securities for identical but freely tradeable Form F-4 registered securities; or (ii) make a traditional private placement of equity or debt securities under Section 4(2) or Regulation D under the 1933 Act and either (A) negotiate registration rights with the purchasers of the securities or (B) demonstrate to the purchasers that while they will acquire "restricted securities"¹³ the resale exemptions provided by Section 4(1) of the 1933 Act, Rule 144A and Rule 904 of Regulation S provide adequate liquidity for resales. The advantage of the registered exchange offer technique is that the first step private placement can close quickly without SEC authorization or review, and yet the investors can subsequently get freely tradeable securities which can be resold by them without their having to deliver a resale prospectus. If the securities are sold pursuant to a registration statement (and prospectus) filed in connection with conventional registration rights, the investor would need to deliver a resale

¹³ The definition of "restricted securities" is found in Rule 144(a)(3) promulgated under the 1933 Act ("Rule 144"). Restricted securities are the following:

- (i) securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering (See Chapter 2);
- (ii) securities acquired from the issuer that are subject to the resale limitations of Regulation D (the private offering safe harbor) (see Chapter 2) or Rule 701(c) under the 1933 Act (an exemption for offers and sales of securities of non-reporting issuers issued pursuant to compensatory plans and contracts);
- (iii) securities that are acquired in a transaction or chain of transactions meeting the requirements of Rule 144A (See Chapter 3);
- (iv) securities acquired from the issuer in a transaction subject to the conditions of Regulation CE (an exemption from 1933 Act registration for offers and sales which qualify for a certain exemption from registration under California securities laws); or
- (v) equity securities of domestic issuers acquired in a transaction or chain of transactions subject to the conditions of Rules 901 or 903 under Regulation S (See Chapter 4).

Rule 144 provides a non-exclusive safe harbor for the resale to the public of restricted and "control" securities without registration under the 1933 Act for resales that meet the requirements of the rule. See Chapter 3 under "Resales to the U.S. Public Under Rule 144." "Control" securities are securities (whether or not previously registered under the 1933 Act) held by affiliates of an issuer. An affiliate of an issuer is a person that directly or indirectly controls, is controlled by, or is under common control with, the issuer. "Control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. Directors, executive officers and significant shareholders should generally be regarded as affiliates for purposes of Rule 144.

prospectus with the sale and would also be subject to certain liability provisions of the 1933 Act applicable to resales by underwriters.¹⁴

¹⁴ The term “underwriter” is defined in Section 2(11) of the 1933 Act as any 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; but the term does not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors’ or sellers’ commission.

Investors generally prefer registered offerings because the offered securities are not subject to the resale restrictions which attach to securities issued in Rule 144A offerings and traditional private placements. Until registered under the 1933 Act or certain holding periods have expired, securities sold in any private placement are restricted securities and not freely tradeable by the purchaser, although securities of a foreign issuer may be sold in offshore transactions under Regulation S. Once a registration statement is filed covering restricted securities, the investor may resell the securities any time during the effectiveness of the registration statement. However, as noted above, a key advantage of private offerings is that the issuer may close the transaction quickly without SEC review or authorization and immediately obtain the offering proceeds.¹⁵

Foreign non-reporting issuers typically make a traditional U.S. private placement to raise capital from longer-term institutional and financially sophisticated individual investors. Depending upon whether there is an active offshore trading market in the securities of a foreign non-reporting issuer, there may be limited liquidity in securities issued in a private placement. Note that investors who make substantial investments in an issuer (such as a venture capital investor) often demand an active role in the issuer's business, including seats on the board of directors, or may otherwise seek to exert some means of control over the issuer's business.

Foreign non-reporting issuers may make a U.S. private placement as the first step of an initiative to establish public trading of its equity securities in the U.S. Also, both foreign reporting and non-reporting issuers will often make U.S. private placements in conjunction with an offshore public offering.

Considerations for a U.S. Private Placement. Given the substantial amount of U.S. regulation of securities activities, it requires a diligent effort by a foreign issuer and its U.S. counsel to guide a private offering through the numerous regulatory requirements. As an

¹⁵ A significant feature of the current SEC registration system is the right of the SEC staff to review any 1933 Act registration statement before it can be declared effective. Virtually all registration statements for IPOs (usually on Form F-1 for foreign issuers) are subjected to extensive staff review. Initial staff comments generally are issued around 40 days after the date of first filing and usually result in the filing of an amendment to the registration statement, along with a memorandum or letter explaining how the amendment responds to each staff comment. The staff often issues a second comment letter on the amendment. As a result, it may take 60 to 90 days after the initial filing date of a fully reviewed registration statement before it is declared effective and a closing can occur. While Form F-2 and Form F-3 filings (made by larger, more seasoned foreign issuers) are selected for full review much less frequently, it is impossible to predict when full staff review may occur (which may include review of the issuer's 1934 Act filings that are incorporated by reference in the registration statement), and even in the case of no review or limited review, it usually takes at least a week after filing for a registration statement to be declared effective.

introduction to these requirements, this Memorandum will discuss the following subject areas as they apply to foreign issuers and private offerings of securities in the U.S.:

- (i) The private offering exemptions from 1933 Act registration and the accepted practices for making traditional private placements of the securities of a foreign issuer in the U.S. (Chapter 2);
- (ii) Rule 144A, which issuers often use to make underwritten offerings to large institutional investors, and the exemptions from 1933 Act registration for resales within the U.S. of securities of foreign issuers purchased in a private placement (Chapter 3);
- (iii) The exemptions from 1933 Act registration for sales and resales of securities of foreign issuers outside of the U.S. under Regulation S (Chapter 4);
- (iv) The exclusions and exemptions from securities registration under “Blue Sky” laws (the securities laws of individual states of the U.S.) applicable to foreign issuers and considerations for foreign broker-dealers and selling agents (Chapter 5); and
- (v) The enforcement provisions of the U.S. securities laws applicable to issuers that make U.S. private placements (Chapter 6).

The reader should note that this Memorandum discusses in summary language general legal concepts that are often complicated to apply in practice and that generally require a significant amount of fact-finding, research and legal analysis. This Memorandum is not intended as a substitute for reference to the detailed provisions of U.S. federal laws and the rules and regulations of the SEC. When faced with a potential legal issue in conducting a U.S. private placement, a foreign issuer and its local counsel should always consult U.S. counsel on the particular facts and circumstances.

Potential Liability and Enforcement Actions Under U.S. Securities Laws.

Although the offer and sale of securities in a private placement are not registered with the SEC, the offering will be, as is any issue of securities, subject to the general anti-fraud provisions of U.S. federal and state securities laws. Thus, a securities transaction may comply with applicable exemptions and still violate one or more anti-fraud rules. An investor that purchases securities on the basis of a material misstatement or omission in the offering documents may file a lawsuit for rescission of the purchase (the purchase price of the securities plus interest) or other damages against the issuer, its officers and directors and other parties involved in the offering. Suits for

such material misstatements or omissions are typically brought under Section 10(b) of the 1934 Act, and Rule 10b-5 thereunder, which is the “catch-all” anti-fraud rule under U.S. securities laws. An issuer and its officers and directors may also face enforcement actions instituted by the SEC and state securities regulators. The risks of legal exposure are minimized by reasonable care in planning and effecting the offer and sale of securities. See Chapter 6 for a more extensive discussion of the enforcement of U.S. securities laws applicable to U.S. private placements.

Additional U.S. Legal Compliance for Foreign Issuers. Foreign issuers should be aware that, in addition to the 1933 and 1934 Acts, other U.S. regulatory regimes may apply when they offer or sell securities in the U.S. For example, investments in a foreign issuer by a single substantial investor, such as a venture capital firm, may give rise to compliance obligations under U.S. antitrust laws. See Chapter 2 under “Compliance Requirements Under Antitrust Laws.”

For issuers that have controlling, but less than majority interests in their subsidiaries, questions may arise under the U.S. Investment Company Act of 1940 (the “1940 Act”), which requires any entity that meets the 1940 Act’s definition of “investment company” to register with the SEC unless the entity qualifies for an exclusion from the definition of investment company or an exemption from the requirements of the 1940 Act. Although an exclusion from the definition of investment company is available to foreign issuers that have fewer than 100 U.S. beneficial owners and that do not propose to make a U.S. public offering, foreign issuers structured as holding companies owning controlling, but less than majority, interests in several subsidiaries should be aware of these provisions of the 1940 Act relating to “inadvertent” investment companies.

The U.S. Foreign Corrupt Practices Act (the “FCPA”) prohibits, subject to certain exceptions, bribery of foreign officials and other corrupt practices. The FCPA generally applies to all domestic companies and to foreign reporting issuers. The FCPA makes it a crime for a foreign reporting issuer to pay bribes to foreign officials or make corrupt payments to political parties in order to obtain or retain business for the issuer. The FCPA contains exceptions which permit payments (i) the purpose of which facilitate or expedite routine government action such as obtaining permits, processing visas or loading or unloading cargo, (ii) that are lawful under the laws of the foreign country or (iii) that were made for a reasonable, bona fide business purpose such as travel or lodging expenses related to the promotion of a product.

The FCPA also requires that foreign reporting issuers keep records that accurately reflect the transactions and dispositions of the assets of the issuer and maintain certain internal accounting controls. The provisions concerning accounting and internal controls will require that a foreign reporting issuer disclose in its financial statements any payments that would

ostensibly be illegal under the FCPA. Failure to make such disclosures could result in violations of the 1934 Act (see Chapter 6) or covenants made in underwriting or subscription agreements (see Chapter 2).

The FCPA's antibribery provisions carry harsh criminal penalties. Convicted individuals may be subject to imprisonment and substantial fines for each violation. Convicted companies may also be fined for each violation. In addition, the Department of Justice and the SEC are authorized to bring civil actions against companies for violations of the FCPA, which can result in substantial fines for each violation.

Pending SEC Proposals and Recent Rulemaking. *Aircraft Carrier Release.* On November 3, 1998, the SEC issued a proposal that would, if adopted, significantly alter the current federal regulation of public offerings of securities in the U.S. The release, which is often referred to as the "Aircraft Carrier" because of its size and scope, focuses primarily on public offerings (so the proposals pertain primarily to reporting issuers), although the proposals may potentially impact an issuer's private placement strategy since the proposals seek to make it easier for issuers to make public offerings.¹⁶ The Aircraft Carrier release proposes substantial changes to, among other things, the 1933 Act registration system, the prospectus delivery requirements, what communications are allowed around the time of public offerings, when public and private offerings will be deemed "integrated," and certain periodic reporting and certification requirements. The proposed changes have generated widespread critical comment and are so numerous and wide-ranging that it is impossible to say when the SEC will take final action on them, when such final action will become effective, or how the changes as adopted will compare with the changes proposed.

The proposals to change the 1933 Act securities registration system would create a three-tiered registration system for offerings consisting of new Forms A, B and C. These forms would replace Forms F-1, F-2, F-3 and F-4, which are currently used by foreign private issuers for 1933 Act registration.

Form A offerings would consist of those primary offerings made by smaller, unseasoned issuers that do not meet the requirements to use Form B. "Seasoned" issuers for this purpose are those that have at least one year's reporting history with the SEC, including at least one annual report. Form A would replace the Form F-1 as the basic registration form for IPOs

¹⁶ The SEC has also adopted new rules that amend current regulations regarding (i) the communications allowed in connection with mergers, tender offers and the filing of proxy statements and (ii) tender offers and 1933 Act registration requirements for cross-border tender offers, business communications and rights offerings.

and other primary offerings made by foreign private issuers. Form A registration statements would generally remain subject to SEC review.

New Form B would be used by large, seasoned issuers. Form B issuers would need to have either a public float of \$250 million or more or have a public float of \$75 million or more and an average daily trading volume on U.S. exchanges only of at least \$1 million. The SEC staff estimates that about one-fourth of all public companies would qualify to use Form B. Form B issuers would not have mandatory prospectus disclosure requirements other than a securities term sheet, which would be delivered to prospective investors prior to the time that they make their investment decision. Current rules require that investors receive a final prospectus only before confirmation of the sale. Issuers eligible to use Form B could also designate the effective date of a registration statement without review by the SEC. The proposals would thus provide greater flexibility for larger, foreign reporting issuers but would not significantly affect public offerings by smaller foreign issuers. Form C would replace Form F-4 for offerings by foreign private issuers relating to business combinations and exchange offers.

The proposals would liberalize the communications permitted around the time of a public offering. Different rules would apply depending on the reporting status of the issuer and the type of communication. For example, larger issuers would be allowed to communicate freely before and after the filing of the registration statement, while an issuer making an IPO would be provided a bright-line safe harbor that would protect communications made more than thirty days prior to the filing of the registration statement. The proposals would also allow greater flexibility in the rules governing the release of analyst research reports around the time of offerings. Although the proposals seek to free communications for a public offering, the SEC may require that the issuer file written materials, and thus the potential for liability for oral and written communications will continue to be a concern for issuers.

The proposals would provide more guidance on when public and private offerings will be deemed “integrated” for purposes of determining when registration under the 1933 Act may be required. Under current rules applicable to integration of offerings, the SEC may examine the substance and timing of an issuer’s public and private offerings to ensure that the issuer does not use a private placement to evade the 1933 Act registration requirements by separating a single non-exempt offering into several exempt offerings. However, under current rules it is not always clear when the SEC will require private and public offerings to be integrated. See Chapter 2 under “Integration Test.”

Offerings solely to Rule 144A Qualified Institutional Buyers (“QIBs”, discussed in detail in Chapter 3) would be eligible for new Form B. If the proposals are adopted, the SEC would eliminate (over the strong objections voiced by the investment banking community) the availability of the registered A/B exchange offer technique discussed above and in Chapter 3

under “Rule 144A Registered Exchange Offers.” According to the SEC, since July 1, 1998, more than one-third of all IPOs have involved registered exchange offers. The SEC is particularly concerned when these two-step offers are made to non-QIBs by smaller, less seasoned issuers.

Under the Aircraft Carrier proposals, issuers would also have additional disclosure requirements in their annual and periodic reports, and officers and directors would be subject to new certification requirements in connection with 1933 Act registration statements and 1934 Act periodic reports.

International Disclosure Standards. The SEC has adopted revisions, effective September 30, 2000, to Form 20-F, the 1934 Act registration and annual report form used by foreign private issuers, to replace the non-financial disclosure requirements with new international disclosure standards developed by the International Organization of Securities Commissions. The international disclosure standards replace most, but not all, of the current Form 20-F non-financial disclosures. The revisions do not affect the financial reporting and GAAP reconciliation requirements of current Form 20-F. The SEC believes that by incorporating the international disclosures standards into Form 20-F, it will bring its foreign issuer disclosure requirements closer in line with the best practices from major international securities markets.

Revision of the Definition of “Foreign Private Issuer.” Also effective September 30, 2000, the SEC is revising the definition of “foreign private issuer.” Under current rules, foreign private issuer status is determined by reference to the listed address of the record owners of the issuer’s securities, except that the issuer must look through Cede & Co. and other book-entry depositories to the address of participants in the depository system for whom securities are held. The SEC revised this by requiring that an issuer also look through banks, broker-dealers and other nominees to the ultimate beneficial owner, to determine whether a majority of its voting securities are held by U.S. residents. The new rules also require that voting securities known to the issuer to be beneficially owned by U.S. residents (by reason of public reports or otherwise) be counted as such in determining foreign private issuer status.

CHAPTER 2

PRIVATE PLACEMENTS OF SECURITIES OF A FOREIGN ISSUER IN THE UNITED STATES

Registration Requirements of the 1933 Act

The 1933 Act requires that any offer or sale of a security that uses U.S. jurisdictional means must be made pursuant to a current registration statement that is filed with and declared effective by the SEC, unless the securities or the securities transaction qualifies for an exemption from 1933 Act registration.¹⁷ The requirement for use of U.S. jurisdictional means is satisfied by almost any contact with the U.S. by mail, telephone or other transmission facilities.

In general, the rules that govern a U.S. private placement of the securities of a foreign issuer are the same rules that govern a U.S. private placement by a domestic issuer. “Traditional” private placements in the U.S. are typically made in reliance upon an exemption from 1933 Act registration such as Section 3(b) or 4(2) of the 1933 Act or Regulation D promulgated thereunder. Section 4(2) provides an exemption from 1933 Act registration for transactions that do not involve a public offering of securities. Regulation D provides a safe harbor from 1933 Act registration for limited or private offers and sales of securities in the U.S. which meet its conditions. U.S. securities law practitioners have developed fairly standardized procedures and documentation which allow issuers to make private placements in the U.S. with

¹⁷ The “securities” exemptions from 1933 Act registration refer to the exemptions found in Section 3 of the 1933 Act, which apply to the offers and sales of specified securities such as those issued by a U.S. federal, state or local government, a bank or certain collective trust funds. The securities “transaction” exemptions from 1933 Act registration refer to the exemptions found in Section 4 of the 1933 Act, which apply to the offers and sales of securities made in transactions such as those not involving a public offering and transactions by any person other than an issuer, underwriter or dealer. This Memorandum addresses only the transaction exemptions of Sections 4 and 3(b) applicable to private sales and resales of securities.

assurance that an exemption under Section 4(2) or Regulation D is available from the 1933 Act registration requirements. Rule 144A under the 1933 Act, although technically an exemption for resales of privately placed securities as opposed to initial placements, is a popular means of privately placing securities with certain large institutional investors and is discussed in Chapter 3.

Since the securities offered and sold in a private placement are subject to resale restrictions and are not freely tradeable, such securities are often sold with an “illiquidity” discount (sometimes called the “haircut”) to the price that would be received in a public transaction. As discussed in Chapter 1, for foreign reporting issuers privately placing securities with investors concerned with liquidity, the offering may be structured as a private placement followed by an A/B exchange offer, or may include registration rights to reduce the discount. Also, if the securities of a foreign issuer may be freely traded in the foreign issuer’s domestic market, the foreign issuer may seek to place securities with U.S. investors that may be resold in that market by U.S. investors pursuant to Rule 904 Regulation S in an effort to reduce or eliminate any illiquidity discount.

In this regard, a U.S. private offering by a foreign issuer is sometimes made in conjunction with a concurrent offshore offering in reliance upon Regulation S which, as discussed in Chapter 4, confirms that the registration requirements of the 1933 Act do not apply to offers and sales that occur outside the U.S. Accordingly, sales efforts made in connection with such U.S. private offerings must, if done at or about the time of an offering outside the U.S., take into consideration the requirements of Regulation S.

The Section 4(2) Exemption From 1933 Act Registration

Introduction. The Section 4(2) exemption from 1933 Act registration applies to “transactions by an issuer not involving any public offering.” For an offering to be “non-public,” investors must purchase the securities without any intent to make a distribution of the securities to the public in the U.S. Any securities purchased in a private placement are deemed restricted securities by SEC rules and are subject to restrictions on resale. See Chapter 1 under “U.S. Private Placement Strategies for Foreign Issuers.” Thus, both the sale and any resale of privately placed securities in the U.S. must be made in compliance with applicable regulations and requirements.

The Section 4(2) exemption reflects the policy that all purchasers in a private placement should be financially sophisticated and thus able to “fend for themselves” so that they do not

need the investor protections that 1933 Act registration was designed to provide. The premise is that purchasers in a private placement should be in a position to obtain information from the issuer similar to that contained in a 1933 Act registration statement.

The availability of the Section 4(2) exemption depends upon a number of factors, including, as a general rule: whether the offerees are able to bear the economic risk of the investment for an indefinite period of time, their relationship to the issuer, their access to relevant information concerning the issuer, the degree of financial sophistication that they or their advisers possess, the number of offerees, the manner in which the offering is made, and the imposition of restrictions on resale. However, the scope of Section 4(2) is often not clear when applied in practice and it can be difficult to ascertain whether the contemplated purchasers, particularly individuals, are financially sophisticated enough and limited in number for the offering to qualify for the exemption.

The Regulation D private placement safe harbor (discussed below) is “non-exclusive,” which means that even if an issuer fails to meet any of the specific conditions of Regulation D, it may nevertheless claim the general statutory Section 4(2) exemption, based on the facts and circumstances of the particular situation. This is significant because, as discussed below, it is recommended that an offshore issuer always seek to meet the objective standards of Regulation D; however, should an offshore issuer inadvertently fail to meet any requirement of Regulation D, it would not be precluded from claiming an exemption under Section 4(2). A substantial portion of the discussion below for the Section 4(2) exemption will also apply to Regulation D offerings.

Offers and Sales. In general, offers and sales under Section 4(2) must be limited to a limited number of offerees who are financially sophisticated investors. If offers and sales will be made to non-institutional investors, it is also helpful if the issuer or its selling agents have a pre-existing relationship with each of the offerees. Further, it is generally recommended that such investors have substantial net worth or current income or substantial business and financial experience, particularly in the same or similar industry as that of the issuer.

Typically, a single investment bank acts as placement agent in a traditional Section 4(2) or Regulation D private placement. An offshore investment bank will often make the U.S. private placement through its U.S. affiliate. If more than one investment bank is involved, there must be precise coordination and scrutiny of the number of U.S. offerees, the manner of the offering, and the eventual number of actual U.S. purchasers and their qualifications. Most traditional private placements are made by the U.S. placement agent on a “best efforts” basis,¹⁸

¹⁸ “Best efforts” refers to an arrangement under which an investment bank agrees to do its best to sell the issuer’s securities to investors as agent for a specified commission and makes no guarantee regarding the amount of

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unless they are done concurrently with an underwritten offering offshore. In a traditional private placement, it may be possible to pay the fees of the placement agent by issuing securities to it in addition to or in lieu of paying cash.

Due diligence in a Section 4(2) or Regulation D offering can be extensive or abbreviated depending on the demands made by the purchasers. Venture capital investors making substantial investments in an issuer will typically require extensive due diligence, which may at times be disruptive to the issuer's operations. If the issuer is directly placing the securities with qualified investors, each investor may wish to have its counsel review and comment on the offering documentation. The involvement of numerous counsel may create delays and increase the expenses of the offering. Prior to the due diligence process the issuer and its counsel should determine the nature of any sensitive due diligence issues and address those matters, particularly any that could affect the timing of the offering.

Offering Amount and Subscription. There is no limitation on the dollar amount of an offering made under Section 4(2) or Rule 506 of Regulation D. In addition, there is no minimum U.S. subscription amount under U.S. securities laws, but large minimum subscriptions, where possible, tend to reduce the number of purchasers and give some comfort as to their qualifications as private investors.

Resale Restrictions. Any securities offered and sold under Section 4(2) are restricted securities and therefore not freely tradeable. To rely on the Section 4(2) exemption the issuer must take reasonable steps to ensure that the investors in the private placement are not acquiring the securities with the intent or effect of distributing the securities offered and sold. The issuer will not be able to use the exemption if qualified investors are used as conduits to unqualified investors. See "Investment Letter Documentation" below.

Publicity and Advertising. In order to qualify for the Section 4(2) exemption, there may be no general advertising to or general solicitation of U.S. purchasers. This means that there should be no advertising or other publicity whatsoever in the U.S. media regarding the private placement. Interviews with U.S. newspapers during the pendency of the offering should also be discouraged. The issuer and persons involved in any simultaneous offshore selling effort

securities to be sold. This is generally contrasted with a "firm commitment" underwriting arrangement under which an investment bank purchases the securities outright and then resells them to investors and earns a spread on the difference between the purchase and sale price.

must also avoid all activities which could be characterized as “directed selling efforts” within the meaning of Regulation S. See Chapter 4.

Meetings between officers of the foreign issuer and prospective investors may occur during a U.S. private placement, but to avoid claims that any meetings constitute a general solicitation of U.S. investors, these activities should not exceed those reasonably necessary to complete the private placement. Solicitations of indications of interest should generally be made only to those persons who have an existing relationship with the foreign issuer or the selling agents involved in the offering or who are otherwise believed to be eligible to purchase the offered securities. Attendance at meetings should be limited to potential investors and their representatives, and access for representatives of securities firms and financial analysts should be restricted.

Press announcements in the U.S. should only be made in compliance with the safe harbor of Rule 135c under the 1933 Act. Rule 135c permits a reporting issuer or foreign private issuer exempt under Rule 12g3-2(b) that proposes to make a private offering to publish a press release or notice without violating the 1933 Act prospectus delivery requirements, provided that the notice is not used to condition the market for the securities, the notice states that the securities will not be registered under the 1933 Act and no more than the name of the issuer and the purpose and basic terms of the offering (without naming the underwriters). Foreign reporting issuers must file the Rule 135c announcement with the SEC on Form 6-K. Foreign private issuers exempt under Rule 12g3-2(b) must furnish the announcement to the SEC.

In 1997 the SEC adopted Rule 135e under the 1933 Act. Rule 135e provides a safe harbor allowing a foreign private issuer to comply with objective standards when marketing securities offshore so that those marketing efforts will not be considered “offers” under U.S. securities laws and thus subject to 1933 Act registration. However, Rule 135e does not shield an issuer from the antifraud or civil liability provisions of the federal securities laws.

Rule 135e provides that, subject to certain conditions described below, foreign private issuers, a selling security holder of the securities of foreign private issuers, or representatives of the foreign private issuer or such holders, will not be deemed to offer any security for sale by virtue of providing any journalist with access to press conferences conducted outside the U.S., conducting meetings with issuer or selling security holder representatives outside the U.S., or providing written press-related materials released (and received by the recipient) outside the U.S. The conditions necessary to come within the safe harbor are as follows:

- (i) The present or proposed offering is not being conducted solely in the U.S. (an offering will be considered not to be made solely in the U.S. only if there is an intent to make a bona fide offering offshore);
- (ii) Access is provided to both U.S. and foreign journalists; and
- (iii) Any written press-related materials pertaining to transactions in which any of the securities are being offered in the U.S. must satisfy the following requirements:
 - (A) the materials must state that they are not an offer of securities for sale in the U.S., that the securities may not be offered or sold in the U.S. absent registration or an exemption from registration, and that any public offering of securities to be made in the U.S. will be made by means of a prospectus that will contain detailed information about the issuer and management, as well as financial statements;
 - (B) if the issuer or selling security holder intends to register any part of the present or proposed offering in the U.S., the materials must include a statement of this intention; and
 - (C) the materials must not include any form of purchase order or coupon that could be returned indicating interest in the offering.

The safe harbor does not cover paid advertisements. However, it does cover analysts' research reports included in a press package (even if other SEC safe harbor rules specifically covering such reports are not complied with) to the same extent, and under the same conditions, as other written materials in the package. "One-on-one" interviews with a U.S. journalist can be covered by the safe harbor. However, if the one-on-one meeting is conducted on an exclusive basis with a primarily U.S. publication and no other one-on-one interviews with foreign journalists are given, the SEC will view the exclusive interview as covered by the safe harbor only if the issuer or its representatives also conduct a press conference that complies with the requirements of the safe harbor (e.g., where both U.S. and foreign journalists are allowed to attend) either before or after the exclusive one-on-one meeting with a U.S. journalist.

If the above requirements are met, a foreign private issuer will not, by reason of these activities, be deemed to have offered a security within the meaning of the 1933 Act, engaged in a general solicitation or advertising within the meaning of Regulation D, or engaged in directed selling efforts within the meaning of Regulation S.

Disclosure Documentation. Although not always required for the purposes of establishing an exemption from 1933 Act registration, U.S. purchasers should have access to adequate information about the issuer upon which to base an investment decision. The form of the information, such as a private placement memorandum or offering circular,¹⁹ and amount of detail required, will vary depending upon the foreign issuer, the type of offering (whether it is, for example, a traditional private placement or a Rule 144A offering), and the marketing requirements of the U.S. underwriters or placement agent.

Offering documentation produced in a non-U.S. jurisdiction should be reviewed early in the transaction to determine whether it is sufficient to meet U.S. legal requirements governing disclosure, as well as the expectations of U.S. institutional investors. A crucial practical consideration for a foreign issuer in a private offering is the commencement of discussions with the issuer's independent accountants concerning the issuer's financial statements. Reconciliation of a foreign issuer's financial statements to U.S. GAAP may, if required, take several weeks to complete. Thus, if such reconciliation is deemed necessary or desirable, the issuer should start this process in advance and seek to identify special issues that could delay the offering. All disclosure documents will be subject to the anti-fraud provisions of the U.S. securities laws imposing liability for materially misleading statements or omissions. See below and Chapter 6.

Generally, U.S. prospectus-type disclosures should be made for sales or resales to non-institutional offerees; less disclosure may be acceptable when securities of a foreign issuer are sold to persons that have a substantial pre-existing relationship with the issuer, its officers or directors. Reporting issuers will often use an abbreviated form of private placement memorandum that incorporates the issuer's most recent annual and quarterly reports. These periodic reports are typically bound together with the memorandum to form the offering "book," and the abbreviated memorandum will include customary legends, the terms of the offering, a discussion of risk factors and transfer restrictions, and the plan of distribution.

The disclosure document must include a prominent discussion of risk factors involved in the investment including risks associated with political change and economic developments in or affecting the countries in which the foreign issuer operates. The disclosure document should, if appropriate, also include risks associated with currency devaluation, inflation, exchange rate

¹⁹ In a global offering the U.S. private placement memorandum is sometimes referred to as the "U.S. wrap" because the U.S. disclosure document is literally wrapped around the offshore disclosure documentation, such as the offshore offering circular or offering memorandum.

fluctuations, security price volatility and confiscatory taxation. In addition, the disclosure document should inform the reader that the issuer's home country accounting, auditing and auditor independence rules may differ from those applicable to U.S. issuers and that it may be difficult to effect service of process on the issuer and others in the U.S. or to enforce overseas a judgment of a U.S. court for liabilities under U.S. securities laws. The U.S. offering documentation must also contain clear and prominent disclosures of the resale restrictions applicable to the foreign issuer's securities. The restrictions on resale should also be printed on the certificates for the securities sold.

The decision to include projections in the disclosure documentation may raise liability concerns for a foreign issuer under U.S. securities laws, and market practice is mixed over whether to include them. Certain offshore exchanges prohibit the inclusion of projections while other exchanges require them. See Chapter 6 under "Rule 10b-5."

Before finalizing the offering documentation, participating placement agents and U.S. counsel should thoroughly review the disclosure, and an adequate opportunity should be allowed for comment and revision. Since a U.S. private placement may be accompanied by a concurrent offshore public offering, special considerations concerning U.S. offers and sales will apply to the offshore tranche as well. Foreign issuers should seriously consider having U.S. counsel involved from the inception of the offering process; introducing U.S. counsel as an afterthought may cause substantial delays.

Investment Letter Documentation. The purchaser of the securities will typically sign a subscription or securities purchase agreement and an "investment letter." The subscription document and investment letter may also be combined. In the investment letter, the purchaser will make representations and warranties regarding its status as an "accredited investor" or a "qualified institutional buyer" (if required), its financial sophistication, its intentions to purchase the securities for its own account and not for distribution, and its ability to hold the securities indefinitely. In all cases, the purchaser must also acknowledge that it is purchasing restricted securities and must represent that it will resell the securities only either outside the U.S. under Regulation S or in the U.S. pursuant to a registration statement or an exemption from 1933 Act registration. Also, investment letters often include a representation of the purchaser that in the absence of registration, resales of the securities will only be allowed if accompanied by a legal opinion that the resale may be effected without 1933 Act registration.

Rule 144A offerings and private placements with a single venture capital investment firm typically involve a securities purchase agreement in lieu of a subscription agreement. A securities purchase agreement generally requires the issuer to make a substantial number of representations, warranties and covenants to the underwriter or investor. The investment bank

acting as the initial purchaser in a Rule 144A offering will typically also require indemnification provisions for losses arising out of material misstatements in the preliminary or final private placement memorandum.

Form of Securities and Legends. As noted above, an essential element of a private placement is the control of resales to ensure compliance with resale restrictions imposed by U.S. securities laws. Certificates issued in a traditional private placement should be clearly labeled and numbered in printed form and legended to indicate that the securities have not been registered for public distribution in the U.S. and are subject to resale restrictions. Also, the issuer's transfer agent should lodge and enforce stop-transfer instructions to prevent unauthorized resales of restricted securities.

Registration Rights Provisions. Foreign reporting issuers will sometimes grant registration rights to investors in the subscription or securities purchase agreement or in a separate registration rights agreement. If the issuer grants the investors "demand" registration rights, the issuer agrees to prepare and file a registration statement with the SEC when the investor makes a requisite demand for registration, or the issuer will be required to file by a certain date, which generally ranges from as little as 45 or as long as 180 days after the closing date of the offering. Since the registration statement will often be subject to full SEC review, if possible, foreign issuers should allow a substantial amount of time to prepare and file the registration statement and have it be declared effective by the SEC, particularly if the financial statements of the issuer or its subsidiaries will require reconciliation to U.S. GAAP.

If the issuer grants the investor "piggyback" registration rights, the issuer does not covenant to register the securities offered and sold by themselves, but agrees to include the investor's shares in registration statements that the issuer files with the SEC during an agreed upon period (other than a registration statement for an exchange offer or for offers to employees of the issuer under an employee benefit plan). Both demand and piggyback registration rights agreements typically provide for indemnity and contribution provisions that allocate losses if the disclosure contained in the registration statement is or is alleged to be defective. Investors who resell their securities pursuant to an effective registration statement will be required to deliver a prospectus to the purchaser at the time of the resale and may have liabilities as underwriters of the securities sold.

Sales of Convertible Securities in the Private Placement. Investors may wish to invest in the issuer by purchasing preferred stock or debentures that are convertible into common equity and that carry a coupon or dividend payment and a liquidation preference. Offerings of these securities will, of course, require that counsel prepare a separate debenture document or certificate of designation for the preferred stock.

Also, as an incentive to encourage investor participation, the issuer in a private offering of common equity will often create an offering “unit” by bundling some number of common shares with a warrant to purchase additional common shares at an exercise price that represents a premium to the then market price of the issuer’s securities. The warrants will typically be the subject of a separate warrant agreement. The common equity underlying any convertible securities will also be covered by the investors’ registration rights.

Compliance Requirements Under Antitrust Laws. If a single investor that is a substantial institution acquires more than \$15 million of securities of an issuer, the investor and the issuer may need to make pre-merger notification filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “Hart-Scott Act”), which requires U.S. regulators to review certain mergers and acquisitions for possible antitrust violations. The Hart-Scott Act also requires the payment of a fee of approximately \$45,000. U.S. regulators review the filings to determine whether the acquisition raises antitrust concerns such as the monopolization of market share. Although relatively small acquisitions generally are not questioned or blocked by regulators, issuers that are privately placing a substantial amount of securities with a single investor should address Hart-Scott Act issues early in the transaction since the review may take 45 days or longer and could conceivably delay the closing of the offering.

The Regulation D Exemptions from 1933 Act Registration

Introduction. Regulation D provides issuers with three non-exclusive safe harbors for private or limited public placements of securities. If a foreign issuer meets the requirements contained in the rules described below, the offer and sale of its securities are deemed to be transactions exempt from 1933 Act registration by virtue of Section 3(b) (an exemption for limited offerings of less than U.S. \$5,000,000 if conditions prescribed by the SEC are met) or Section 4(2) of the 1933 Act.

Rule 504 provides an exemption from registration under Section 3(b) of the 1933 Act for offerings not exceeding U.S. \$1,000,000 in any twelve-month period by non-reporting issuers that are not investment companies or development stage companies without specific business plans or purposes. Rule 504 imposes no limitation on the number of purchasers and permits general solicitation if the issuer complies with certain state laws regarding delivery of disclosure documentation.

Rule 505 provides an exemption under Section 3(b) of the 1933 Act for offerings not exceeding U.S. \$5,000,000 in any twelve-month period by issuers (either reporting or non-

reporting) that are not investment companies. Rule 505 does not permit any general solicitation and, unlike Rule 504, limits sales to “accredited investors” (defined below) and up to 35 non-accredited investors.

Rule 506 was promulgated under Section 4(2) of the 1933 Act and, like Rules 504 and 505, provides an exemption from 1933 Act registration. It is available to any issuer and does not limit the dollar amount of the offering, prohibits any general solicitation in connection with the offering and permits sales to an unlimited number of accredited investors and up to 35 non-accredited (but financially sophisticated) investors.

Definition of “Accredited Investor.” Regulation D defines “accredited investor” to include the following: banks; savings and loan associations; brokers or dealers registered with the SEC; insurance companies; investment companies registered under the 1940 Act; certain employee benefit plans; corporations, partnerships and charitable organizations with total assets in excess of U.S. \$5,000,000; directors, executive officers or general partners of the issuer; persons whose individual net worth, or joint net worth with their spouse, at the time of purchase exceeds U.S. \$1,000,000; persons who had an individual income in excess of U.S. \$200,000 in each of the two most recent years (or joint income with spouse in excess of U.S. \$300,000) and who reasonably expect an income in excess of such amount in the current year; entities in which all of the equity owners are accredited investors; and any trusts not formed for the specific purpose of acquiring the securities offered with total assets in excess of U.S. \$5,000,000, whose purchases are directed by a “sophisticated person.”

Rule 506 and Blue Sky Requirements. As discussed in Chapter 5, the U.S. has a dual federal-state regulatory system applicable to offers and sales of securities. Accordingly, in addition to complying with federal securities laws concerning securities registration, issuers must generally also qualify for a state law exemption from state securities registration for any offer or sale of a security or else register the securities in that state (although certain states have regulatory schemes that are exceptions to this general rule). There are currently two exemptions from state securities registration requirements that are normally available for private placements by foreign issuers: one available for sales to institutions and a second provided under the National Securities Markets Improvement Act of 1996 (“NSMIA”). The institutional investor exemption generally is automatic and requires no filings or fees. The NSMIA exemption may be used for offers and sales pursuant to Rule 506 and, in general, an issuer using it is only required to make a one-time notice filing for the offering with and pay a one-time fee to the state in which the investor resides (although offerings in New York may require additional compliance). These exemptions serve to reduce compliance burdens and thus hold down the costs of the offering. It should be noted that only Rule 506 offerings (but not Rule 504 or 505 offerings or offerings under Section 4(2) of the 1933 Act) generally qualify for the NSMIA exemption. In addition,

most foreign issuers will typically make substantial U.S. private placements which will preclude the use of Rules 504 and 505 based on the offering amount limitations. Accordingly, it is generally recommended that foreign issuers use, and this Memorandum will focus on, Rule 506 rather than Rules 504 and 505. The general requirements to use the Regulation D safe harbor under Rule 506 are discussed below.

No General Solicitation. To qualify for the Rule 506 safe harbor, neither the issuer nor any person acting on its behalf may offer or sell the securities by any form of general solicitation or general advertising. See “Publicity and Advertising” above. Normally, no general solicitation will be deemed to have occurred if there is a pre-existing relationship between the issuer or its selling agents and the offeree sufficient to permit the offeror to evaluate the financial sophistication of the offeree, although the absence of a pre-existing relationship is generally less problematic in the case of offers and sales to institutional investors.

Number of Investors and Their Financial Sophistication. Pursuant to Rule 506 the issuer may make sales to an unlimited number of accredited investors (subject only to general solicitation concerns), plus up to 35 persons who are not accredited investors, and each non-accredited investor must either alone or with such investor’s representative have such knowledge and experience in financial and business matters to be capable of evaluating the merits and risks of the prospective investment, or the issuer must reasonably believe that such purchaser comes within this description. Although the federal securities laws do not specify the level of financial sophistication required of these so-called “sophisticated investors,” case law indicates that previous investment experience in the same or a closely-related line of business, general business experience and the ability to understand financial information are important factors in making this determination.

Information Requirement. Prospective purchasers who are non-accredited investors must receive prior to the sale certain financial and non-financial information specified by Regulation D. The amount and type of such information depends upon the size of the offering and whether or not the issuer is a reporting issuer. This requirement may pose a problem for foreign non-reporting issuers since the information will most likely need to include a reconciliation of the issuer’s financial statements to U.S. GAAP. Accordingly, it is generally recommended that foreign non-reporting issuers not solicit offers and sales to non-accredited investors. The issuer will generally furnish the same financial and non-financial information to accredited investors as well in view of the antifraud provisions of the federal securities laws.

Resale Restrictions and the “Reasonable Care” Test. Securities offered and sold pursuant to Regulation D are restricted securities and thus subject to resale restrictions. The issuer must exercise reasonable care to ensure that the purchasers of the securities are not

underwriters within the meaning of the 1933 Act; in other words, that the investors are not purchasing securities with the intent or effect of distributing the securities to the public. Regulation D identifies certain steps that an issuer should consider implementing for this purpose, such as making a reasonable inquiry as to whether the purchaser is acquiring the securities for its own account or the account of another person, providing notice to purchasers that the securities have not been registered under the 1933 Act and may not be resold unless registered or offered and sold under an exemption from registration, and imprinting an appropriate legend on the securities certificates. Regulation D provides, however, that these steps are not the exclusive means of complying with the reasonable care test.

Integration Test. A Regulation D offering must meet certain requirements regarding the “integration” of public and private offerings to ensure that an issuer does not use a private placement to evade the 1933 Act registration requirements by separating a single non-exempt offering into several exempt offerings. Under the safe harbor provided by Regulation D, offers and sales that are made more than six months prior to a Regulation D offering or more than six months after its completion will not be considered part of that offering, so long as during such six month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D, other than offers or sales of securities under an employee benefit plan.

Issues concerning integration of public and private offerings may also arise in the context of private offerings made pursuant to Section 4(2), Rule 144A or Regulation S. The integration concept may be applied by the SEC to private offerings and registered offerings to determine whether there are issues concerning unregistered sales, general solicitation or “gun jumping” (making offers or sales before the filing of the 1933 Act registration statement). Rule 152 under 1933 Act is a safe harbor for issuers making a registered offering subsequent to making a private placement. As interpreted by the SEC staff, under Rule 152 a completed private placement will not be integrated with a subsequently commenced registered offering.

Form D Filing Requirement. The issuer must file with the SEC a notice of the offering on Form D within fifteen days following the first sale of securities. Form D requires general information regarding the issuer of the securities, including the names of its executive officers, directors and beneficial owners of 10% or more of any class of its equity securities, and information about the offering, such as minimum subscription amounts, persons receiving remuneration for soliciting offers and sales, the number of participating accredited and non-accredited investors, the amounts of their purchases and the proposed use of the proceeds of the offering.

If the offering meets the criteria outlined above, Regulation D provides a non-exclusive safe harbor from 1933 Act registration. As explained above, failure to comply with the safe

harbor conditions of Regulation D, however, does not preclude a private placement from qualifying for another exemption such as the Section 4(2) exemption.

Disclosure Documentation and Offering Procedures for Regulation D Private Placements. Regulation D private placement procedures are fairly standard and closely track the requirements necessary to make a Section 4(2) offering, discussed above. There is no formal requirement for furnishing information to accredited investors purchasing under Regulation D, although a disclosure document is often used by reason of industry practice and to minimize potential liability under Rule 10b-5, the general anti-fraud provision. As under the Section 4(2) exemption, any private placement memorandum in a Regulation D offering should include appropriate disclosures, including financial information. See above under “Disclosure Documentation.” Also, investment letters are typically required to be executed by each purchaser in a Regulation D private placement. See above under “Investment Letter Documentation.” Regulation D private placements are often structured so that the securities are offered and sold in large units or minimum subscription amounts. Such pricing is typical for private transactions but not characteristic of public offerings to retail investors. Frequently, only institutional accredited investors will be permitted to invest in the offering. As discussed above, the securities certificates should contain restrictive legends and be subject to stop transfer instructions to prevent resales that are not in compliance with the 1933 Act.

Debt Offerings Made Pursuant to Regulation D. Regulation D debt offerings are generally made by an investment bank on a best efforts basis and the sizes of the issuances typically range from \$30 million to \$300 million. The investors in Regulation D debt offerings are typically insurance companies or other institutional investors, who generally invest on a buy and hold basis. A rating of the issue generally is not required as institutional investors will make their own credit analyses of the issuer. Maturity ranges and pricing of the debt offered will vary depending on the credit quality of the issuer, the seniority of the debt in the issuer’s capital structure and the covenant protection provided by the issuer. See also Chapter 3 under “Debt Offerings Made Pursuant to Rule 144A.”

CHAPTER 3

RULE 144A OFFERINGS AND RESALES OF THE SECURITIES OF FOREIGN ISSUERS WITHIN THE UNITED STATES

While Section 4(2) and Regulation D provide issuers with exemptions from 1933 Act registration, they do not provide exemptions for resales by investors in and underwriters of securities purchased in a private placement. Rule 144A provides a non-exclusive safe harbor exemption from 1933 Act registration for resales of eligible securities to U.S. qualified institutional buyers, known as “QIBs,” which generally include institutions that own and invest on a discretionary basis at least U.S. \$100 million in securities of non-affiliated issuers. This resale exemption increases the liquidity and marketability of the Rule 144A eligible securities but is only available for resales to the relatively narrow universe of QIBs.

Resales of restricted securities among broader groups of potential purchasers in the U.S. may be made in private transactions under the so-called “Section 4(1½)” exemption, discussed below. Resales of the securities of certain issuers may be made to the U.S. public under Rule 144, which provides a non-exclusive safe harbor for resales of restricted securities and securities held by affiliates of the issuer. Resales outside the U.S. may be made under the somewhat less restrictive provisions of Regulation S, discussed in Chapter 4.

Resales Under Rule 144A

Since its adoption, Rule 144A has proven to be extraordinarily popular, both as an exemption for the immediate resale by underwriters of securities which they purchase from issuers (sometimes called underwritten private offerings) and as an exemption for resale transactions that facilitates a secondary market among substantial U.S. institutions. Since Rule 144A provides an exemption from 1933 Act registration for resales among institutions, it increases the liquidity of those securities and reduces or eliminates the discount typically associated with resales of restricted securities.

Most Rule 144A offerings are conducted on an underwritten basis, with investment banks initially participating in the negotiation of the terms of the offering and purchasing the

Rule 144A securities for immediate resale to QIBs. U.S. securities practitioners have developed standardized documentation and procedures for Rule 144A offerings and most Rule 144A offerings involve the use of preliminary private placement memoranda and road shows, and thus are similar in form to public offerings. Accordingly, the foreign issuer and its investment banks will typically enter into a securities purchase agreement similar to an underwriting agreement used in a registered offering as well as a registration rights agreement. See also Chapter 2 under “Investment Letter Documentation.” A Rule 144A debt offering may also require the issuer to execute an indenture with a trustee for the holders of the debt securities. The purchase agreement and indenture will contain standard representations and covenant protection. QIBs generally will not be represented by individual counsel, and transactions will be effected by confirmations rather than by individually negotiated agreements. Frequently, institutional accredited investors that are not QIBs will be permitted to purchase a portion of the securities in reliance on an exemption other than Rule 144A.

Due Diligence in Rule 144A Offerings. Despite the popularity of Rule 144A offerings, foreign issuers may find the accepted practices involved in a Rule 144A offering to be onerous, such as allowing extensive due diligence by investment banks, which is typically similar to that employed in a public offering, and providing information required under Rule 144A to facilitate secondary market transactions. The due diligence required by Rule 144A underwriters will vary depending on the credit quality and reporting status and seasoning of the issuer. In general, however, the underwriter will wish to conduct a comprehensive document review with a focus on financial information, meetings with officers and site visits. The underwriters may also require a comfort letter from the issuer’s accountants. Despite these substantial due diligence requirements, many foreign issuers generally find Rule 144A offerings to be a useful means to raise substantial amounts of capital from institutional investors, and foreign reporting issuers have increasingly structured Rule 144A offers using securities that are subsequently exchangeable for freely tradeable securities that are registered with the SEC (a so-called A/B exchange transaction). See below under “Rule 144A Registered Exchange Offers.”

Requirements of Rule 144A

Resales to QIBs. Rule 144A does not apply to offers or sales by issuers (except indirectly through underwritten private offerings). It provides a safe harbor only for resales made to QIBs. Thus, an issuer will need to use another exemption from 1933 Act registration, typically Section 4(2), for the initial offer and sale of the Rule 144A eligible securities to underwriters or other initial purchasers.

Rule 144A defines a QIB to include the following institutions that own and invest on a discretionary basis at least \$100 million of securities of issuers that are not affiliated with the institution:

- (i) any insurance company as defined in Section 2(13) of the 1933 Act;
- (ii) any investment company registered under the 1940 Act or any business development company as defined in Section 2(a)(48) of the 1940 Act;
- (iii) any small business investment company licensed by the U.S. Small Business Administration under Section 301(c) or (d) of the Small Business Investment Act of 1958;
- (iv) any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees;
- (v) any employee benefit plan within the meaning of Title I of ERISA;
- (vi) any trust fund whose trustee is a bank or trust company and whose participants are exclusively plans of the types identified in paragraphs (iv) and (v) above, except trust funds that include as participants individual retirement accounts or Keogh plans;
- (vii) any business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940 (the “Advisers Act”);
- (viii) any organization described in Section 501(c)(3) of the Internal Revenue Code, corporation (other than one described in paragraph (x) below), partnership or Massachusetts or similar business trust;
- (ix) any investment adviser registered under the Advisers Act;
- (x) any U.S. or foreign bank or savings and loan or equivalent institution with an audited net worth of at least \$25 million as of a date not more than 16 months (domestic entities) or 18 months (foreign entities) preceding a Rule 144A resale; and
- (xi) any entity all of the equity owners of which are QIBs, acting for its own account or the accounts of other QIBs.

Also, a securities dealer registered under the 1934 Act, acting for its own account or the accounts of other QIBs, is a QIB if it either (i) owns and invests on a discretionary basis at least U.S. \$10 million in securities of non-affiliates, or (ii) is acting in a riskless principal transaction on behalf of a QIB (i.e., a simultaneous purchase and offsetting sale to a QIB). The \$10 million test does not include securities constituting the whole or a part of an unsold allotment to or subscription by a dealer as a participant in a public offering. For purposes of the QIB definition, “own and invest on a discretionary basis” means that funds invested by a QIB for other QIBs on a discretionary basis may be considered in determining QIB status.

The value of securities owned and invested on a discretionary basis by an entity is based on the cost of such securities, except where the entity reports its securities holdings in its financial statements on the basis of their market value, and no current information regarding the cost of those securities has been published. In that case, the securities may be valued at market. Investments in certain instruments and interests are excluded, such as bank deposit notes and CDs; loan participations; repurchase agreements; securities owned but subject to a repurchase agreement; and currency, interest rate and commodity swaps. Securities owned by an issuer’s consolidated subsidiaries may be included if the investments of such subsidiaries are managed under the direction of the issuer, except that, unless the issuer is a reporting issuer, securities owned by such subsidiaries may not be included if the issuer is itself a majority-owned subsidiary of another entity that would be included in the consolidated financial statements of such entity.

“Reasonable Belief” Requirement. To qualify under Rule 144A, the securities must be offered and resold only to QIBs or entities that the seller reasonably believes to be QIBs. In most cases, the seller’s “reasonable belief” may be based on certain published financial information or on an officer’s certificate. In marginal cases, reliance on published sources may be problematic since financial statements generally do not disclose whether investments include excluded investments, or whether investments of consolidated subsidiaries are managed by the purchaser.

Notice Requirement. Rule 144A requires the seller to take reasonable steps to ensure that the buyer is aware that the seller is relying on the rule. This requirement is typically met by including language in the private placement memorandum and the confirmation that the purchaser may rely on Rule 144A. The following legend has been used in a number of offerings:

“WE HEREBY NOTIFY EACH PURCHASER THAT THE OFFER AND SALE OF THE SECURITIES OFFERED HEREBY MAY BE MADE IN RELIANCE UPON THE EXEMPTION FROM THE REGISTRATION

REQUIREMENTS OF THE SECURITIES ACT OF 1933 ACT PROVIDED
BY RULE 144A.”

Purchasers are often required to confirm in writing their awareness that the sale to them is being made in reliance on Rule 144A. In a typical Rule 144A offering, the underwriters acting as initial purchasers will contractually commit to resell securities only pursuant to Rule 144A, and the issuer will generally have a valid Section 4(2) exemption for the initial sale without the use of distribution investment letters or stop-transfer provisions. Use of legends restricting transfer is not, strictly speaking, required, but is recommended. However, if Rule 4(1½) resales, discussed below, are permitted, resale restrictions for those transactions must be implemented.

Non-Fungible Securities. Securities that are eligible to be sold under Rule 144A are debt or equity securities other than securities of a class listed on a U.S. securities exchange or quoted on Nasdaq or securities “fungible” with those securities. This non-fungible securities requirement effectively limits the Rule 144A market to securities of foreign issuers whose primary trading markets for those securities are outside of the U.S. See also below under “Rule 144A Registered Exchange Offers.” A security’s Rule 144A eligibility is determined as of the date of issuance. Listed or quoted ADRs are considered fungible with the underlying securities on deposit. Convertible securities are fungible with the underlying security where the conversion premium is less than 10%. Warrants are deemed fungible with the underlying security if the effective exercise premium is less than 10% or the exercise period of the warrant is less than three years. In general, equity securities will not be considered to be of the same class as outstanding securities if the securities differ as to dividend, liquidation or voting rights.

Information Requirement for Non-Reporting Issuers. For resales of Rule 144A eligible securities of reporting issuers and foreign private issuers that furnish the SEC with home country information pursuant to Rule 12g3-2(b) under the 1934 Act (see Chapter 1), there are no information furnishing requirements beyond the notice requirement discussed above. For foreign non-reporting issuers that are not exempt under Rule 12g3-2(b), the holders and their prospective purchasers of Rule 144A securities must have a right to obtain, upon request, certain information concerning the issuer of the securities. The information must include a “very brief” description of the issuer’s business, products and services, 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).

Securities sold under Rule 144A are subject to the same anti-fraud provisions of the 1933 and 1934 Acts as securities sold in a Section 4(2) or Regulation D offering. For this reason, notwithstanding the limited information-furnishing requirement of Rule 144A, issuers

and underwriters in Rule 144A offerings frequently furnish investors with U.S. prospectus-type disclosures as a cautionary measure. Since the information-furnishing requirement is expressly provided for in Rule 144A, a foreign issuer often undertakes in writing to satisfy these requirements to facilitate future resales by investors in Rule 144A securities. Typically, the foreign issuer agrees that for so long as there are restrictions on transfer imposed by the 1933 Act and the foreign issuer is not a reporting issuer or a Rule 12g3-2(b) exempt issuer, it will furnish the information to facilitate further Rule 144A resales.

Foreign non-reporting issuers that make Rule 144A offerings should consider the advantages of voluntarily claiming the Rule 12g3-2(b) exemption. Issuers of securities to U.S. persons will always be subject to Rule 10b-5 liability for materially misleading statements or omissions relating to a sale of the securities. The Rule 144A information requirement gives rise to an ongoing obligation to keep such information “reasonably current” in relation to the date of a Rule 144A resale and a failure to timely update such information could provide a basis for a Rule 10b-5 claim if such failure was deemed to result in a material omission. If a foreign private issuer is a Rule 12g3-2(b) exempt issuer, the Rule 144A information requirement does not apply and there is no duty to update the Rule 12g3-2(b) information beyond providing its home country information on a prompt basis. In addition, a foreign private issuer will, at a minimum, need to claim the exemption under Rule 12g3-2(b) to establish an ADR program for Rule 144A securities.

No General Solicitation. Since Rule 144A offerings are deemed to be private placements, general solicitation of offerees is not permitted. Any publicity-related announcements should be made within the safe harbors of Rule 135c or Rule 135e under the 1933 Act. See Chapter 2 under “Publicity and Advertising.”

Application of Rule 144A

As discussed in Chapter 2, a foreign issuer may make a traditional U.S. private placement of its securities directly or through a placement agent with accredited investors (typically institutions) under the Section 4(2) or Regulation D exemptions from registration. However, an enhanced distribution may be achieved in an underwritten private offering under Rule 144A. Rule 144A enables underwriters to immediately resell Rule 144A eligible securities to QIBs and those securities may be readily resold to other QIBs, or offshore pursuant to Regulation S. This increased liquidity may reduce or eliminate the traditional discount applied to the purchase price of privately placed securities, increasing the proceeds to the issuer.

In a syndicated Rule 144A offering, a U.S. underwriter or underwriters is chosen to form a U.S. syndicate (which typically would be smaller than that used in a public offering) to market a foreign issuer's securities to U.S. QIBs. The underwriters typically contractually commit to purchase a fixed amount of securities at a pre-determined price, and the securities are sold by the issuer to the underwriters pursuant to the Section 4(2) exemption. The underwriters' commission is generally the spread between the purchase price to the underwriters and the offering price to QIBs.

Foreign issuers will often place a tranche of Rule 144A securities with U.S. investors as part of a global offering or in connection with a concurrent offshore public or private offering. All participants in any such offerings should agree at a minimum not to offer or sell any of their unsold offshore allotment in the U.S. (other than in Rule 144A resales or pursuant to another resale exemption from 1933 Act registration) and not to engage in any directed selling efforts in the U.S. in connection with resales. These provisions help to ensure that the concurrent offshore offering will be considered an offshore transaction for the purposes of Regulation S and thereby not require registration with the SEC. See Chapter 4.

Additional Considerations in Rule 144A Offerings

Debt Offerings Using Rule 144A. Rule 144A debt offerings are generally underwritten transactions and the investors are typically mutual funds, money managers and insurance companies. These investors often make an investment decision based in part on the rating of the issuer, so ratings from two major rating agencies are often required. Rule 144A debt offerings usually require a minimum issue size of \$100 million since a large issuance is needed to create secondary market liquidity. A Rule 144A debt offering may also require the preparation of an indenture in respect of the debt instrument.

Rule 144A Registered Exchange Offers. In a Rule 144A registered “A/B” exchange offer, a technique that is available for offerings of both debt and equity securities of a foreign issuer,²⁰ securities are offered and sold to institutional investors in a Rule 144A private placement, and then the 144A securities are subsequently exchanged for more or less identical Form F-4 registered securities that are freely tradeable. The investment bank involved is usually referred to as the initial purchaser and is not subject to liability as an underwriter under the 1933 Act. To use the technique the investors may not be affiliated with the issuer, must acquire the securities during the ordinary course of business and may not have an arrangement to distribute the securities received in the exchange.

The key advantages of a Rule 144A exchange offer over granting conventional registration rights are that the investors receive freely tradeable securities and generally need not deliver a prospectus when they resell the exchange securities. If the securities were resold pursuant to a registration statement filed in connection with conventional registration rights, the investor would need to deliver a resale prospectus with the sale and would be subject to certain liability provisions of the 1933 Act applicable to resales by prospectus. However, a broker-dealer who was holding the unregistered security for its own account as a result of market making or other trading activities may be deemed an underwriter of the registered security received in the exchange offer, and as such must deliver the exchange offer prospectus in connection with any resale of such security.

Use of an ADR Program in a Rule 144A Offering. A foreign issuer may sponsor an ADR program to issue restricted ADRs in a Rule 144A offering. As noted in Chapter 1, such

²⁰ A domestic issuer may only use the Rule 144A registered exchange offer technique for offerings of nonconvertible debt and investment grade preferred stock.

offerings may only be made by foreign reporting issuers or foreign non-reporting issuers that are exempt from reporting pursuant to Rule 12g3-2(b) under the 1934 Act.

Secondary Market Trading of Rule 144A Securities. The investment banks that act as initial purchasers of Rule 144A securities will often want to arrange for the securities to be transferable through book-entry transfer facilities such as DTC, which allow book-entry trading among QIBs. The NASD operates the Private Offering, Resale and Trading Through Automatic Linkages Market, also known as “PORTAL,” a computerized, screen-based trading market for Rule 144A eligible securities with facilities for clearance and settlement of transactions in Rule 144A securities through DTC or Cedel. However, the majority of Rule 144A resales occur through direct negotiations between buyers and sellers.

Application of Regulation M. The purpose of Regulation M under the 1934 Act is to prevent persons who have an interest in the outcome of an offering from manipulating the market to facilitate the completion of the distribution. Although transactions in securities eligible for resale under Rule 144A are exempted from Regulation M, foreign issuers should be aware of the anti-manipulation provisions.

Regulation M prohibits issuers, selling security holders and their affiliated purchasers from bidding for, purchasing, or attempting to induce any person to bid for or purchase, a security that is the subject of a “distribution” during a “restricted period.”²¹ “Distribution” means any offering of securities, whether or not registered with the SEC, that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods.²² The “restricted period” begins on the later of five business days prior to the date on which the subject security’s price is determined (one business day prior for

²¹ Regulation M similarly prohibits a “distribution participant,” which term includes an underwriter, broker or dealer from bidding for, purchasing or attempting to induce any person to bid for or purchase a security that is subject of a distribution during a restricted period. Regulation M contains an exception applicable to distribution participants for securities that have more than \$1 million in average daily trading volume and a public float exceeding U.S. \$150 million.

²² Offerings of non-convertible debt securities and preferred stock are excepted from the application of Regulation M.

heavily-traded securities) or the date on which the person becomes a distribution participant, and ends upon that person's completion of participation.

Regulation M contains an exception that permits purchases of and bids for Rule 144A eligible securities of a foreign or domestic issuer, provided that sales are made solely to QIBs, or persons deemed not to be "U.S. persons" as defined in Regulation S, during a concurrent Rule 144A offering. These exceptions notwithstanding, distributions to U.S. accredited investors as defined in Regulation D who do not qualify as QIBs would not be excepted from Regulation M during the restricted period. Accordingly, issuers must use caution not to bid for or purchase securities prior to completion of the distribution if offers or sales are being made to U.S. non-QIBs. Also, if an affiliated purchaser of an issuer is a distribution participant, such as an employee of the issuer, the affiliated person may use the Regulation M exemption available to underwriters for transactions that are not effected on a securities exchange.

Research Reports. In a global private placement the broker's research report may be considered an essential document for the offshore tranche, so that foreign issuers often insist on the preparation and distribution of a broker's research report as a condition to the broker's engagement. In the case of Rule 144A/Regulation S offerings, concerns about research derive from the prohibitions against directed selling efforts and general solicitation. Industry practices vary and generally will depend on the internal practices and policies of the lead managers. Some underwriters may impose restrictions on the distribution of syndicate research or the contents of the research distributed. The research should, at a minimum, be properly legended. Since QIBs are deemed to be able to fend for themselves in a Rule 144A transaction, U.S. securities practitioners generally agree that the offshore broker's research report may, in most cases, be distributed to QIBs without violating U.S. securities laws. In any event, U.S. counsel should be consulted prior to the distribution of a broker's research report to ensure 1933 Act compliance and to minimize issuer liability concerns.

Resales Under the "Section 4(1½)" Exemption

The Section 4(2) and Regulation D exemptions are available only to issuers and thus are not available for private resales by purchasers who acquired their securities from the issuer in a private placement. Rule 144A is only available for resales to QIBs and that meet the additional requirements of Rule 144A. Section 4(1) of the 1933 Act exempts from the registration requirements transactions by any person other than an issuer, underwriter or dealer.

Section 4(1) was intended to exempt only routine trading transactions between individual public investors for securities already issued, and a person reselling securities under

Section 4(1) must sell in such limited quantities and in such a manner as not to disrupt trading markets or such person may be deemed an “underwriter” ineligible to rely on Section 4(1). However, the parameters of the Section 4(1) exemption are not always clear, so that the person making a private resale may not be sure that restricted securities have “come to rest” for a sufficient period of time to use Section 4(1) .

In response to these uncertainties, the U.S. securities bar developed an additional technique for the resale by purchasers of securities acquired in private offerings to purchasers who would have qualified as investors in a traditional private placement made pursuant to Section 4(2) or Regulation D. This technique, sometimes called a “secondary private placement” has become known in the legal community as the “Section 4(1½)” exemption because it involves elements of both the Section 4(1) exemption and the Section 4(2) exemption. The “Section 4(1½)” exemption is not found in the 1933 Act but it is recognized by the SEC, and Rule 144A is a partial codification of the exemption for resales to QIBs. Indeed, it has been suggested that the designation “Section 4(1½)” is unnecessary since it is merely a transaction structured to ensure that the parties are not “underwriters” and hence exempt under Section 4(1).

Resales of restricted securities under “Section 4(1½)” generally involve the same procedures employed in an offering under Section 4(2) and Regulation D. See Chapter 2. Thus, resales should be made only to accredited or otherwise qualified investors (preferably institutions) who must execute investment letters, and the certificates for the securities should contain a 1933 Act restrictive legend. In addition, the issuer typically should require an opinion of U.S. counsel to the effect that the resale does not require registration under the 1933 Act.

Resales to the U.S. Public Under Rule 144

Rule 144 provides a non-exclusive set of conditions (a safe harbor) for the resale of “restricted” and “control” securities without registration under the 1933 Act. Restricted securities generally are securities acquired from the issuer or an “affiliate” of the issuer, such as an executive officer, director, or substantial shareholder who is in a control relationship with the issuer, in unregistered private placements, and “control” securities are securities (whether or not previously registered under the 1933 Act) held by affiliates of the issuer. An affiliate of an issuer is a person or entity that directly or indirectly controls, is controlled by, or is under common control with, the issuer. See also Chapter 1 under “U.S. Private Placement Strategy for Foreign Issuers.” The Rule 144 conditions include applicable holding periods (at least one year for limited resales by non-affiliates of the issuer), the availability of public information about the issuer, certain volume limitations and resales only in unsolicited brokers’ transactions or transactions with a market maker.

In order to rely on Rule 144 for resales of restricted or control securities the following conditions must be met:

- (i) There must be available adequate current public information with respect to the issuer. This condition is usually satisfied by any reporting issuer. Although Rule 144 does contain a provision under which a non-reporting issuer may satisfy this public information requirement, its parameters are not clear and it is unlikely that a non-reporting issuer could be certain that it is in compliance.
- (ii) In the case of restricted securities, at least one year must elapse from the date on which the securities were acquired from the issuer or an affiliate of the issuer (or, if later, the date on which the full purchase price was paid to the issuer or selling affiliate) until the date of the Rule 144 resale.
- (iii) The Rule 144 seller can sell no more than a specified amount of restricted and control securities in any rolling three-month period. Such amount is the greater of (A) 1% of the then outstanding shares or other units of the class of security being resold, and (B) an amount equal to the average weekly volume of trading in such security during a specified recent four-week period.
- (iv) The securities may be resold only through ordinary unsolicited brokers' transactions or in transactions with a market maker. This condition generally requires that the resale take place on an exchange or in the OTC market. Since the securities of a non-reporting issuer will not be publicly traded in the U.S. (unless they are traded in the pink sheets), the brokers' transaction requirement may effectively foreclose the possibility of relying on the Rule 144 safe harbor to resell securities of such issuer in the U.S. However, if a non-reporting issuer could satisfy the Rule 144 information requirement and such issuer's securities were listed on an offshore exchange, the securities could be freely sold under Rule 144 (without a legend) in a broker's transaction on the offshore exchange after a one-year holding period and subject to the volume limitations.²³ Selling security holders of foreign non-reporting issuers who cannot meet these conditions should rely on Rule 144A or Section 4(1½) as the appropriate exemptions for resales of restricted or control securities in the U.S.

²³ See Home Centers (DIY) Ltd., 1998 SEC No-Act. LEXIS 417 (March 17, 1998).

- (v) If the amount of securities being sold under Rule 144 exceeds 500 shares or other units, or has an aggregate sales price of more than \$10,000, a Form 144 must be filed with the SEC and the principal exchange on which the securities trade, disclosing certain information concerning the seller and the sale.

Rule 144 resales by an affiliate (after the one-year holding period if the securities are restricted securities) will be subject to the volume limitations listed in (iii) above for as long as the holder remains an affiliate. However, after a two-year period, calculated as in (ii) above, a non-affiliate of the issuer who has been a non-affiliate for at least three months may resell restricted securities without complying with any of the other Rule 144 conditions.²⁴ Non-affiliate purchasers of securities in a Rule 144 transaction receive nonrestricted securities. Thus, for resales of securities by non-affiliates it is appropriate to remove the restrictive legend on the securities. However, if the purchaser of Rule 144 securities is an affiliate of the issuer, such affiliate may only resell pursuant to a registration statement, Rule 144 or another applicable exemption from registration.

Rule 144 is rather complex, and as the discussion above demonstrates, a number of restrictions will apply to resales of securities pursuant to Rule 144. Officers, directors and substantial shareholders should consult U.S. counsel prior to selling securities pursuant to Rule 144.

²⁴ The SEC has proposed amendments to Rule 144 which would:

- (i) increase the Form 144 filing thresholds from the current 500 shares or \$10,000 aggregate sales price test to a 1,000 shares or \$40,000 sales price test (this generally provides for inflation since Rule 144 was first adopted in 1972);
- (ii) eliminate the manner of sale condition to permit privately negotiated sales without the intermediation of a broker, and to facilitate innovation in the methods used to resell restricted securities, such as the use of electronic bulletin boards; and
- (iii) provide a more objective definition of "affiliate" for purposes of Rule 144 (a person would not be deemed to be an affiliate if the person is not a beneficial owner of more than 10% of a class of the issuer's equity securities, as determined by the SEC's rules under Section 16 of the 1934 Act, or an officer of the issuer as so determined, or a director of the issuer).

CHAPTER 4

SALES AND REALES OF SECURITIES OF A FOREIGN ISSUER OUTSIDE THE UNITED STATES UNDER REGULATION S

Regulation S provides a safe harbor from 1933 Act registration for offshore securities transactions. As discussed in Chapter 1, the 1933 Act requires registration any time U.S. jurisdictional means are directly or indirectly used to offer or sell a security. Since the scope of U.S. jurisdiction is very broad, the registration requirements of the 1933 Act could be construed to apply to securities transactions even where there is only minimal contact with the U.S., such as a telephone call as a part of a marketing effort. Regulation S contains “issuer” and “resale” safe harbor provisions which, if complied with, afford assurances that a transaction will be deemed to have occurred outside U.S. jurisdiction and will not be subject to 1933 Act registration. Sales of securities may also be made outside of the U.S. pursuant to Regulation S without necessarily qualifying for a Regulation S safe harbor.

The Regulation S resale provisions provide instant liquidity to U.S. investors in the securities of a foreign issuer. As discussed in Chapters 2 and 3, the securities acquired by U.S. investors in a private offering or Rule 144A transaction are restricted securities that may only be resold by them in the U.S. pursuant to an effective registration statement or an exemption from registration. Unless such securities are resold pursuant to Rule 144, only certain institutional or financially sophisticated U.S. investors may purchase the securities in a resale transaction. However, such securities may be resold outside the U.S. at any time pursuant to Regulation S without regard to the sophistication of the purchaser. The ability to sell securities offshore pursuant to Regulation S may reduce the pricing discount traditionally applicable to securities placed privately by reason of their illiquidity.

An important point concerning Regulation S is that it only applies to sales and resales outside of the U.S. Regulation S does not provide an exemption for resales back into the U.S., and a separate exemption from 1933 Act registration, such as Rule 144A, Section 4(1) or Rule 144, must be available for any resales made into the U.S.

Scope of Regulation S

The general rule of Regulation S is contained in Rule 901 under the 1933 Act which provides that the registration provisions of the 1933 Act are deemed to include offers and sales of securities that occur within the U.S. and are not deemed to include offers and sales that occur outside the U.S. Regulation S is territorial in nature, generally focusing on residency rather than on citizenship.

Rule 902 provides a number of defined terms used in Regulation S. Rule 903, the “issuer safe harbor,” provides three safe harbors from registration for offers and sales of securities by issuers, “distributors”²⁵ and their affiliates. Rule 904, the “resale safe harbor,” provides a safe harbor for resales of securities outside of the U.S. for offers or sales by any person other than those covered by Rule 903, and by affiliates of the issuer or a distributor who are such solely because they are officers or directors. Because the safe harbors of Rule 903 and Rule 904 are non-exclusive, it is possible to establish that, even though a given transaction does not fall within one of their safe harbors, it may nevertheless qualify for the Rule 901 general rule, or qualify for another exemption from registration. Rule 905 provides that all equity securities placed offshore by domestic issuers under Regulation S are restricted securities within the meaning of Rule 144.

The ability of investors immediately to resell restricted securities outside the U.S. pursuant to Regulation S provides a significant source of liquidity for securities (particularly equity securities of foreign issuers) that are privately placed in the U.S. For example, securities of a foreign issuer privately placed in the U.S. may be resold on or through the facilities of certain offshore exchanges without U.S. registration. Thus, securities that are part of the U.S. tranche of a global private placement may be resold through the same secondary market in which the securities originally sold outside the U.S. trade. This resale potential means that investors in the U.S. tranche of the global offering have essentially the same liquidity as offshore investors in those securities.

Effective April 27, 1998, the SEC adopted amendments to Regulation S with respect to offshore sales of equity securities by domestic issuers. Since the amendments were primarily intended to curb abuses by U.S. domestic issuers involving resales into the U.S. of domestic equity securities sold offshore under Regulation S, the amendments generally do not have an

²⁵ Regulation S defines “distributor” as any underwriter, dealer or other person who participates, pursuant to a contractual arrangement, in the distribution of securities offered or sold in reliance on Regulation S.

impact on the private offerings of foreign private issuers. However, the amendments will significantly impact foreign issuers that do not meet the definition of “foreign private issuer” since they are treated like domestic issuers for purposes of U.S. federal securities laws.

General Conditions Necessary to Use Either the Issuer or Resale Safe Harbor Under Regulation S

All transactions effected in reliance on the issuer safe harbor or the resale safe harbor are subject to the following two general conditions (the “General Conditions”).

“Offshore Transaction” Condition. An offer or sale of securities pursuant to Regulation S must be made in an “offshore transaction,” which is a transaction in which:

(i) the offer is not made to a person in the U.S.;²⁶ and

(ii) either:

(A) at the time the buy order is originated, the buyer is outside the U.S., or the seller and any person acting on its behalf reasonably believe that the buyer is outside the U.S.; or

²⁶ Offers and sales in the U.S. to certain U.S. fiduciaries acting with discretion for offshore investors are deemed to be offshore transactions. Offers and sales of securities specifically targeted at identifiable groups of U.S. citizens abroad, such as members of the U.S. armed forces, are not deemed to be offshore transactions.

(B) for purposes of:

- (1) the issuer safe harbor (Rule 903), the transaction is executed on or through a physical trading floor of an established foreign securities exchange that is located outside the U.S.;²⁷ or
- (2) the resale safe harbor (Rule 904), the transaction is executed on or through the facilities of a “designated offshore securities market”²⁸ and neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged with a buyer in the U.S.

²⁷ Some foreign securities exchanges, e.g., the London Stock Exchange, do not have or make significant use of a physical trading floor.

²⁸ Rule 902(b) defines “designated offshore securities market” to include the following:
The Eurobond market, as regulated by the International Securities Market Association; the Alberta Stock Exchange; the Amsterdam Stock Exchange; the Australian Stock Exchange Limited; the Bermuda Stock Exchange; the Bourse de Bruxelles; the Copenhagen Stock Exchange; the European Association of Securities Dealers Automated Quotation; the Frankfurt Stock Exchange; the Helsinki Stock Exchange; The Stock Exchange of Hong Kong Limited; the Irish Stock Exchange; the Istanbul Stock Exchange; the Johannesburg Stock Exchange; the London Stock Exchange (including SEAQ International); the Bourse de Luxembourg; the Mexico Stock Exchange; the Borsa Valori di Milano; the Montreal Stock Exchange; the Oslo Stock Exchange; the Bourse de Paris; the Stock Exchange of Singapore Ltd.; the Stockholm Stock Exchange; the Tel Aviv Stock Exchange; the Tokyo Stock Exchange; the Toronto Stock Exchange; the Vancouver Stock Exchange; the Warsaw Stock Exchange; and the Zurich Stock Exchange.

Condition That There Be No “Directed Selling Efforts.” The second General Condition applicable to both the issuer and resale safe harbors is that no “directed selling efforts” may be made in connection with an offer or sale of securities. Directed selling efforts are any activities undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the U.S. for any of the securities being offered in reliance upon Regulation S. The following activities are examples of directed selling efforts: mailing printed promotional materials to U.S. investors, conducting promotional seminars in the U.S. or placing advertisements with radio or television stations broadcasting in the U.S. or in “publications with a general circulation” in the U.S.²⁹

For purposes of the issuer safe harbor, no directed selling efforts may be made by the issuer, a distributor, any of their respective affiliates, or any person acting on their behalf. For purposes of the resale safe harbor, this prohibition is limited to directed selling efforts by the seller, its affiliates, and any person acting on their behalf. Directed selling efforts by any other person will not affect the availability of the resale safe harbor.

²⁹ A “publication with a general circulation” in the U.S. is defined as any publication that (i) is printed primarily for distribution in the U.S. or (ii) has had during the preceding 12 months, an average circulation in the U.S. of 15,000 copies or more per issue. If a publication has a separate U.S. edition which meets such requirements, only the U.S. edition will be deemed to be a publication with a general circulation in the U.S.

Regulation S also enumerates specific activities that are deemed not to constitute directed selling efforts. These activities include the following: contacts with persons excluded from the definition of U.S. person;³⁰ certain advertisements required to be published under U.S. or foreign law;³¹ certain tombstone advertisements in any publication with a general circulation in the U.S.;³² bona fide visits to real estate, plants, or other facilities located in the U.S.; certain

³⁰ Under Regulation S, “U.S. person” means:

- (i) Any natural person resident in the U.S.;
- (ii) any partnership or corporation organized or incorporated under the laws of the U.S.;
- (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 foreign entity located in the U.S.;
- (vi) any non-discretionary account 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;
- (vii) any discretionary account 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 U.S.; and
- (viii) any partnership or corporation if it is: (A) organized or incorporated under the laws of any foreign jurisdiction; and (B) formed by a U.S. person principally for the purpose of investing in securities not registered under the 1933 Act, unless it is organized or incorporated, and owned, by accredited investors (as defined in Rule 501(a) of Regulation D) who are not natural persons, estates or trusts.

Additionally, the following are not “U.S. persons”:

- (i) Any discretionary account 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 U.S.;
- (ii) any estate of which any professional fiduciary acting as executor or administrator is a U.S. person if: (A) an executor or administrator of the estate who is not a U.S. person has sole or shared investment discretion with respect to the assets of the estate; and (B) the estate is governed by foreign law;
- (iii) 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 settlor if the trust is revocable) is a U.S. person;
- (iv) an employee benefit plan established and administered in accordance with the law of a country other than the U.S. and customary practices and documentation of such country;
- (v) any agency or branch of a U.S. person located outside the U.S. if: (A) the agency or branch operates for valid business reasons; and (B) the agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where located; and
- (vi) The International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.

³¹ Advertisements “required to be published” by foreign or U.S. law or by a U.S. or foreign regulatory or self-regulatory authority will not be considered directed selling efforts provided that they contain no more information than is legally required and include a statement that the securities have not been registered under the 1933 Act and may not be offered or sold in the U.S. absent registration or an applicable exemption.

³² Tombstone advertisements appearing in a publication with general circulation in the U.S. after the 907843.4

distributions in the U.S. of an offshore broker-dealer's quotations by a third-party system that distributes such quotations primarily in foreign countries; and notices, publications or press releases by an issuer in accordance with Rules 135 or 135c under the 1933 Act.³³ As discussed in Chapter 2 under "Publicity and Advertising," the SEC has adopted rules creating a safe harbor for certain offshore press conferences, offshore meetings with journalists and company representatives and press-related materials released offshore. Accordingly, press conferences, meetings and press releases that meet the conditions of Rule 135e will also not be deemed directed selling efforts. Legitimate selling efforts in the U.S. in connection with a U.S. private placement will generally not constitute directed selling efforts. Thus, offers or sales to U.S. persons made under an exemption from registration, particularly Rule 144A, are permitted in the initial offer and sale and during the distribution compliance period.

Regulation S Safe Harbors

Issuer Safe Harbor: Rule 903. The issuer safe harbor applies to offers and sales by issuers, distributors, their affiliates and persons acting on their behalf. The issuer safe harbor includes three categories of offshore transactions based on criteria such as whether the issuer is foreign or domestic, whether the issuer is a reporting issuer, and the degree of U.S. market interest in the issuer's securities. All three categories are subject to the two General Conditions discussed above, that the offer and sale be in an offshore transaction and that there be no directed selling efforts in the U.S., and are also subject to further restrictions designed to ensure that the securities "come to rest" offshore.

In general, the further restrictions under each category are least onerous for offerings by an issuer whose securities are least likely to flow into the U.S. following their distribution

completion of the distribution and the applicable distribution compliance period will not constitute directed selling efforts.

³³ Rule 135 permits an issuer that proposes to make a public offering to publish a press release or notice without violating the prospectus delivery requirements of the 1933 Act, provided that the notice states that the offering will be made only by prospectus and states no more than the name of the issuer and the purpose and basic terms of the offering (without naming the underwriters). See Chapter 2 under "Publicity and Advertising" for a discussion of Rule 135c.

outside the U.S. (“Category 1”), and most restrictive for offerings by an issuer whose securities are likely to flow into the U.S. and about whom little information is publicly available in the U.S. (“Category 3”). “Category 2” encompasses offerings by issuers whose securities are also likely to flow into the U.S., but about whom sufficient information is deemed to be available. The majority of Regulation S offerings made by foreign private issuers will fall into either Category 1 or 2.

Category 1 Offerings. Category 1 effectively imposes no additional conditions on the offering aside from the General Conditions.

Category 1 is available for an offer or sale of securities if:

- (i) The issuer is a foreign issuer that reasonably believes at the commencement of the offering that there is no “substantial U.S. market interest” (defined below) in: (A) the class of securities to be offered or sold (if equity securities are offered or sold); (B) its debt securities (if debt securities are offered or sold); (C) the securities to be purchased upon exercise (if warrants are offered or sold); and (D) either the convertible securities or the underlying securities (if convertible securities are offered or sold); or
- (ii) The securities are offered and sold in an “overseas directed offering,”³⁴ or
- (iii) The securities are backed by the full faith and credit of a foreign government; or
- (iv) The securities are offered and sold to employees of the issuer or its affiliates under an employee benefit plan established and administered in accordance with the law

³⁴ “An overseas directed offering” includes two classes of securities offerings: (i) offerings of securities of a foreign issuer directed to residents of a single country other than the U.S. and made in accordance with local laws and customary practices and documentation of that country; and (ii) offerings of non-convertible debt securities, asset-backed securities and non-participating preferred stock of domestic issuers directed to residents of a single foreign country, provided the principal and interest of the securities are denominated in a currency other than U.S. dollars and such securities are neither convertible into U.S. dollar-denominated securities nor linked to U.S. dollars (other than through related currency or interest rate swap transactions that are commercial in nature) in a manner effectively converting the securities to U.S. dollar-denominated securities.

of a country other than the U.S. and customary practices and documentation of such country, subject to certain further conditions.

“Substantial U.S. market interest” with respect to a class of an issuer’s equity securities means either: (i) the U.S. market for such security (which includes securities exchanges and inter-dealer quotation systems such as Nasdaq) in the aggregate was the single largest market for such class of securities in the shorter of the issuer’s prior fiscal year or the period since the issuer’s incorporation; or (ii) 20% or more of all trading in such class of securities took place through the facilities of securities exchanges and inter-dealer quotation systems in the U.S. and less than 55% of such trading took place in, on or through the facilities of securities markets of a single foreign country in the shorter of the issuer’s prior fiscal year or the period since the issuer’s incorporation.

“Substantial U.S. market interest” with respect to an issuer’s debt securities means: (i) its debt securities are “held of record” by 300 or more U.S. persons; and (ii) \$1 billion or more of the principal amount of its debt securities, the greater of liquidation or par value of its non-participating preferred stock, and the principal amount of its asset-backed securities, in the aggregate, is held of record by U.S. persons; and (iii) 20% or more of the principal amount of its debt securities, the greater of liquidation preference or par value of its non-participating preferred stock, and the principal amount of its asset-backed securities, in the aggregate, is held of record by U.S. persons. For purposes of the calculation of principal amount, securities issued under the exemption provided by Section 3(a)(3) of the 1933 Act, principally certain offerings of commercial paper, are not counted.

Category 2 Offerings. The Category 2 safe harbor covers securities that are not eligible for Category 1 and that are equity securities of a foreign reporting issuer, or are debt securities of a reporting issuer (domestic or foreign) or of a foreign non-reporting issuer.

Securities that fall into Category 2 are subject to the General Conditions as well as the following additional conditions.

Category 2 is available if:

- (i) Offering restrictions (defined below) are implemented;
- (ii) The offer or sale, if made prior to the expiration of a 40-day “distribution compliance period” (discussed below), 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 to a distributor, a dealer or a person receiving a selling concession, fee or other remuneration in respect of the securities sold, prior to the expiration of the 40-day 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 that apply to a distributor.

The “distribution compliance period” for securities falling under Category 2 or 3 generally commences at the later of closing or the date the securities are first offered to persons other than distributors in reliance upon Regulation S. All offers and sales by a distributor of an unsold allotment are deemed to be made during the distribution compliance period. For a continuous offering of securities, subject to two exceptions, the distribution compliance period commences upon completion of the distribution as certified by the lead manager.³⁵

As used in Regulation S, for foreign issuers, “offering restrictions” means:

- (i) Each distributor agrees in writing that all offers and sales of the securities prior to the expiration of the distribution compliance period specified in Category 2 or 3, as applicable, shall be made only in accordance with the provisions of the issuer or resale safe harbor, pursuant to a registration statement filed under the 1933 Act or pursuant to an available exemption from the 1933 Act registration requirement.
- (ii) All offering materials and documents (other than press releases) used in connection with offers and sales of the securities prior to the expiration of the distribution compliance period specified in Category 2 or 3, as applicable, shall include statements to the effect that the securities have not been registered under the 1933 Act and may not be offered or sold in the U.S. or to U.S. persons (other than distributors) unless the securities are registered under the 1933 Act, or an

³⁵ 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 or person performing similar functions, subject to certain legending and certification requirements. In a continuous offering of non-convertible debt securities offered and sold in identifiable tranches, the distribution compliance period for each identifiable tranche of non-convertible debt securities being offered continuously commences upon completion of the distribution of the tranche as certified by the lead manager.

exemption from the 1933 Act registration requirement is available. Such statements shall appear:

- (A) on the cover or inside cover page of any prospectus or offering circular used in connection with the offer or sale of the securities;
- (B) in the underwriting section of any prospectus or offering circular used in connection with the offer or sale of the securities; and
- (C) in any advertisement made or issued by the issuer, any distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing. Such statements may appear in summary form on prospectus cover pages and in advertisements.

Category 3 Offerings. Category 3 encompasses all offerings not covered by Categories 1 and 2. Included in Category 3 are equity securities of any domestic issuer (reporting or non-reporting) and equity securities of foreign non-reporting issuers of a class for which there is “substantial U.S. market interest.” Very few, if any, offerings by a foreign private issuer will fall into Category 3.

Category 3 is available for foreign issuers provided that:

- (i) Offering restrictions (as defined above) are implemented;
- (ii) For debt securities:
 - (A) the offer or sale, if made prior to the expiration of 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 upon issuance by a temporary global security which is not exchangeable for definitive securities until the expiration of the 40-day distribution compliance period 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 purchased securities in a transaction that did not require registration under the 1933 Act; and
- (iii) For equity securities:

- (A) the offer or sale, if made prior to the expiration of a one-year 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 offer or sale, if made prior to the expiration of a one-year distribution compliance period, is made under the following conditions:
 - (1) the purchaser of the securities (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 1933 Act;
 - (2) the purchaser of the securities agrees to resell such securities only in accordance with the provisions of Regulation S, under registration under the 1933 Act, or under an available exemption from registration, and agrees not to engage in hedging transactions with regard to such securities unless in compliance with the 1933 Act;
 - (3) the issuer 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, under registration under the 1933 Act, or pursuant to an available exemption from registration; provided that if the securities are in bearer form or foreign law prevents the issuer of the securities from refusing to register securities transfers, other reasonable procedures (such as a legend) are implemented to prevent any transfer of the securities not made in accordance with the provisions of Regulation S; and
- (iv) 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 for debt securities or a one-year distribution compliance period for equity securities, sends 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.

Note that Category 1 securities are not subject to a distribution compliance period as are Category 2 and 3 securities. However, any U.S. dealers selling securities issued pursuant to one of the Regulation S issuer safe harbors is subject to the dealer restrictions of Section 4(3)(A) of the 1933 Act, the exemption from 1933 Act registration for transactions by dealers. Section 4(3)(A) in general prohibits a dealer from trading in a security prior to the expiration of 40 days after the first date upon which a security was offered to the public, except under an exemption from registration under the 1933 Act, such as Rule 144A. As a result, dealers, whether or not participating in the offshore offering, may violate the 1933 Act if they resell securities issued pursuant to the issuer safe harbor into the U.S. within 40 days after the offshore offer, unless such resales are made pursuant to Rule 144A.

Offers or sales of warrants under Category 2 or 3 must also comply with the following requirements:

- (i) Each warrant must bear a legend stating that the warrant and the securities to be issued upon its exercise have not been registered under the 1933 Act and that the warrant may not be exercised by or on behalf of any U.S. person unless registered under the 1933 Act or an exemption from registration is available;
- (ii) Each person exercising a warrant is required to give: (A) written certification that it is not a U.S. person and the warrant is not being exercised on behalf of a U.S. person; or (B) a written opinion of counsel to the effect that the warrant and the securities delivered upon its exercise have been registered under the 1933 Act or are exempt from registration; and
- (iii) Procedures are implemented to ensure that the warrant may not be exercised within the U.S., and that the securities may not be delivered within the U.S. upon exercise, other than in offerings deemed to meet the definition of “offshore transaction,” unless registered under the 1933 Act or an exemption from registration is available.

It is important to note that the distribution compliance periods of Categories 2 and 3 are limitations on the Regulation S exemption; their expiration does not mean that the investor is then free to sell into the U.S. Rather, a separate exemption, such as Section 4(1), must be found for the U.S. resale.

Resale Safe Harbor: Rule 904. The resale safe harbor of Regulation S applies to resales by persons other than an issuer, a distributor, their affiliates or persons acting on their behalf. It is also available for officers and directors of issuers and persons who are affiliates of

distributors, in each case where affiliation exists solely by virtue of holding a position as an officer or director. In the case of sales by permitted affiliates, no selling concession, fee or other remuneration may be paid in connection with the offer other than the usual broker's commission.

The resale safe harbor is available for offshore resales of any securities (since there are no categories as under the issuer safe harbor) but does not cover resales back into the U.S. Thus, the resale safe harbor is available whether or not the securities were acquired in an offshore transaction and may be relied upon for offshore resales of restricted securities acquired in a private placement under Section 4(2), Regulation D or Rule 144A. Restricted securities that are equity securities of a domestic issuer will, however, under Rule 905, continue to be restricted notwithstanding their resale offshore pursuant to Regulation S and should be legended accordingly.

Resales made in accordance with the resale safe harbor are subject to the two General Conditions discussed above, so that the offers and sales must be made in offshore transactions with no directed selling efforts. In addition, for an offer or sale of securities prior to the expiration of the applicable distribution compliance period, if any, by a dealer or a person receiving a selling concession, fee or other remuneration in respect of the securities offered or sold, the following two conditions must be met:

- (i) Neither the seller nor any person acting on his behalf knows that the offeree or buyer of the securities is a U.S. person; and
- (ii) If the seller or any person acting on the seller's behalf knows that the purchaser is a dealer, or is a person receiving a selling concession, fee or other remuneration in respect of the securities sold, the seller or a person acting on the seller's behalf sends to the purchaser a confirmation or other notice stating that the securities may be offered and sold during the distribution compliance period only in accordance with the provisions of Regulation S, pursuant to registration of the securities under the 1933 Act, or pursuant to an available exemption from registration. Persons other than dealers and persons receiving a selling concession, fee or other remuneration are subject only to the General Conditions.

Interaction of Regulation S with Rule 144A

The SEC adopted Regulation S concurrently with Rule 144A and, as anticipated by the SEC, Rule 144A and Regulation S are often used in tandem. The Regulation S safe harbor allows QIBs to immediately resell Rule 144A securities on certain designated offshore securities

markets. In addition, securities purchased offshore in reliance upon Regulation S may be resold offshore and in the U.S. in reliance upon Rule 144A, increasing an investor's liquidity in such securities. Note also that Rule 144A increases the liquidity to offshore purchasers of Category 2 or 3 securities, despite the fact that such securities are otherwise subject to distribution compliance periods. If the offshore person making a resale of a Category 2 or 3 security meets the conditions of Rule 144A, such securities may be resold to U.S. QIBs prior to the expiration of the distribution compliance periods.

CHAPTER 5

BLUE SKY AND BROKER-DEALER COMPLIANCE

Exemptions from Registering Securities Under Blue Sky Laws and State Broker-Dealer Compliance

Introduction. The U.S. has a dual federal-state system of securities regulation so that a private placement by a foreign issuer must conform not only to the exemptions from the federal securities registration requirement but must also comply with or be exempt from the securities registration requirements of the various state securities laws also known as “Blue Sky” laws.³⁶ Accordingly, a foreign issuer must qualify for a state law exemption from registration for any offer or sale of a security made to each investor in each state in which securities are offered or sold or else register the securities in that state.

In the past, compliance with Blue Sky laws was burdensome. State legislation lacked uniformity and thus was costly for issuers. Although Blue Sky practice remains complicated, there are currently two exemptions from state securities registration requirements that are uniformly applicable to private placements by foreign issuers: (i) the institutional investor exemption and (ii) the exemption provided under Title I of NSMIA. See Chapter 2 under “Rule 506 and Blue Sky Requirements.” The significant distinction between the two exemptions concerns state regulation of offers or sales to non-institutional purchasers who are accredited investors under Regulation D. See Chapter 2 under “The Regulation D Exemptions from 1933 Act Registration.” In addition, foreign issuers and their selling agents should be aware of issues pertaining to federal and state broker-dealer compliance.

The Institutional Investor Exemption from Blue Sky Registration. The securities laws of each state provide for an exemption from state securities registration for both sales and resales of securities to specified types of institutional investors. The institutional investor exemption in most states is self-executing, which means that no compliance measures, such as filings or fee payments, are needed to qualify for the exemption. Thus, if the investor to which

³⁶ The term “Blue Sky” is said to have originated with a judge who asserted that a particular stock offering had as much value as a patch of blue sky.

the foreign issuer is making an offer or sale qualifies as an “institutional investor,” as defined in that state’s Blue Sky statute, the foreign issuer is not required to pay any fees to, nor make filings with, the state securities regulators except for (where required) the filing of a Form U-2, the Uniform Consent to Service of Process. The Form U-2 is used to designate a state’s Secretary of State or securities commissioner as the foreign issuer’s agent for service of process in one or more states.

The breadth of the institutional investor exemption, however, varies from state to state. Generally, the exemption will cover any offer or sale of the issuer’s securities to a bank, savings institution, trust company, insurance company, registered investment company, pension or profit-sharing trust, “other financial institution or institutional buyer,” or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity. Despite certain similarities between these institutions and “accredited investors” as defined in Regulation D, it should be noted that individuals, regardless of financial sophistication or assets held, are not covered by the exemption.

The NSMIA Exemption from Blue Sky Registration. The second uniform exemption from Blue Sky registration is provided under Title I of NSMIA. NSMIA preempts the authority of the states to require qualification and review of offerings of “covered securities,” which term includes, among other things, securities offered and sold under Rule 506 of Regulation D. As a result, foreign issuers should ensure that their offers and sales comply with the requirements of Rule 506 so that the securities will have “covered security” status. Although Rule 506 is a non-exclusive exemption, foreign issuers should note that reliance upon Section 4(2) of the 1933 Act alone will not result in a security qualifying as a covered security under NSMIA.

As discussed in Chapter 2, Rule 506 provides a safe harbor under federal securities laws for offers and sales of securities without regard to the dollar amount of the offering, and is available for foreign issuers who wish to make a private placement of securities in the U.S. Under NSMIA, if a U.S. private placement qualifies for the Rule 506 exemption from the securities registration requirement, each state may only require the following: (i) a notice filing on SEC Form D (which the issuer will already be required to file for its federal exemption);³⁷ (ii) the payment of filing fees as in effect on September 1, 1996, the amount of which depends on the state of filing as well as the size of the offering, and (iii) the filing of the Form U-2.³⁸ In

³⁷ New York State also requires the filing of a Notification Filing on Form 99 for Covered Securities under NSMIA (“Form 99”). The Form 99 is substantially similar to the SEC Form D, though the Form 99 requires more information than the Form D such as some biographical information concerning the issuer’s officers and directors and, in certain instances, disclosure regarding prior securities offerings.

³⁸ NSMIA also exempts from state registration and qualification requirements offerings of securities listed on the New York Stock Exchange, the American Stock Exchange, the Nasdaq National (but not SmallCap) Market and 907843.4

reaction to the passage of NSMIA, virtually every state has adopted laws or regulations that provide for compliance through the filing of an SEC Form D and the payment of a filing fee. NSMIA preserves state anti-fraud authority in connection with securities offerings.

Issuers should be aware that certain state statutes may contain “bad boy” disqualification provisions that may preclude the issuer from selling securities in the state if the issuer or any of its officers or directors have been found to have violated specified laws. These disqualification provisions are also contemplated by the state section of the Form D. The issuer should always discuss with counsel handling the Blue Sky compliance for the offering any securities law violations or pending proceedings.

Issuers should also note that other Blue Sky exemptions from registration may be available on a state-by-state basis but should be used only as a last resort, as the exemptions are not uniformly provided for in state statutes. Each state generally has one or more limited offering exemptions applicable to offers and sales made to a limited number of persons in the state during a specified period. Some states also have an isolated transaction exemption available when sales are made to only one or two persons in a particular state over a specified period of time.

Resales Under Blue Sky Laws. The institutional investor exemption will typically apply to resales that qualify under Rule 144A. However, the NSMIA exemption does not extend to resale transactions under the Section 4(1½) exemption. Accordingly, resales to non-institutional accredited investors should be examined for Blue Sky compliance.

State Broker-Dealer Compliance. NSMIA does not preempt state regulation of broker-dealers as such regulations apply to the issuer or to a broker-dealer. Thus, notwithstanding that the institutional and NSMIA exemptions from the state securities registration requirements may be available, the foreign issuer still must comply with each state’s laws applicable to the registration of broker-dealers. In general, (i) the foreign issuer may make the offer and sale itself (i.e. through its officers or directors), as most states have an issuer exemption from broker-dealer registration, (ii) the foreign issuer may effect the sale through a broker-dealer registered in that state or (iii) an unregistered broker-dealer may qualify for an exemption from broker-dealer registration that many states provide for offers or sales made to

certain other exchanges, as well as securities of the same issuers which are equal to or senior to such listed securities. Under this exemption, securities listed on such exchanges may be offered and sold in states without having to comply with registration and qualification requirements or make any notice filings or pay any fees (though broker-dealer requirements still apply). However, this exemption does not cover privately placed securities of a foreign issuer which has securities listed on a qualified exchange, but will cover those privately placed securities upon subsequent registration and listing on the exchange.

institutional investors. Most states also exclude from the definition of “broker-dealer” and “agent” the employees of an issuer that sell the issuer’s securities when the employee effects an exempt transaction under that state’s Blue Sky law. Nevertheless, the determination whether an employee of an issuer must register as an agent is often relatively complicated, and U.S. counsel should be consulted if the issuer is contemplating making sales of its own securities without using a registered broker-dealer.

Anti-Fraud Provisions. The anti-fraud and civil liability provisions of Blue Sky statutes generally duplicate the federal structure and prohibit material misstatements or omissions in a securities offering to state residents in a particular state. Therefore, although a foreign issuer may not be required to file a copy of its private placement memorandum with state securities regulators, the foreign issuer is subject to state liability for material misstatements and omissions. All states have provisions which are similar to SEC Rule 10b-5, the federal catch-all anti-fraud rule (discussed in Chapter 6), which may be enforced through administrative action or civil injunction and may be the basis of a criminal action. Investors who make securities purchases based on material misstatements or omissions may bring lawsuits for return of the purchase price and other damages.

Federal Regulation of Broker-Dealers

In addition to broker-dealer compliance under Blue Sky laws, discussed above, foreign issuers should be aware of the requirements for federal broker-dealer compliance. Under the 1934 Act, anyone who effects securities transactions in the U.S. for the account of others must register with the SEC as a broker. If a foreign issuer seeks to sell its own securities in the U.S., the issuer does not fall within the definition of “broker” under the 1934 Act and need not register at the entity level. However, employees of the issuer who offer or sell its securities may fall within the definition of broker depending on several factors such as the employee’s commission structure and the amount of the employee’s time spent on selling activities. Generally an issuer’s employees would not be considered brokers where they are not employed primarily to market the issuer’s securities and their compensation is not linked to the sale of the issuer’s securities.

CHAPTER 6

ENFORCEMENT OF UNITED STATES SECURITIES LAWS

This chapter addresses the enforcement of the U.S. securities laws as such laws relate to foreign issuers that make U.S. private placements. As discussed throughout this Memorandum, the U.S. has a complex system of securities regulation, and foreign issuers are encouraged to consult U.S. counsel early in the planning stages of a U.S. private offering of the issuer's securities. Although a foreign issuer should be aware of the securities law enforcement process, the likelihood of it impacting the issuer, its officers, directors and agents should also be kept in perspective. Foreign issuers may minimize the risks of legal exposure by using reasonable care in planning and effecting the offer and sale of securities. Furthermore, as discussed below, the legal standards to impose liability under U.S. securities laws are higher in the context of a private offering than in registered public offerings. Of course, compared with the potential for liability discussed in this chapter, operating and marketing considerations always provide the greatest incentive for an issuer to comply with all registration requirements and to produce complete and accurate disclosure documents.

The penalties and sanctions for violations of U.S. securities laws may arise through civil litigation, administrative enforcement proceedings or criminal prosecution. Civil litigation may be brought in private actions by the investors in the securities a foreign issuer to recover damages allegedly caused by the issuer or to prevent the issuer from acting in an illegal manner in the future. The SEC may also bring civil actions for disgorgement of illegal profits or for civil monetary penalties. The SEC may bring administrative proceedings against an issuer to impose civil penalties and fines, or to obtain cease and desist orders, which may mandate that the issuer immediately cease any improper conduct. Criminal proceedings may be brought by the U.S. Department of Justice for willful violations of federal securities laws, typically upon referral from the SEC. The breadth of its prosecutorial authority notwithstanding, the vast majority of SEC enforcement actions are settled prior to litigation. Actions for civil and criminal penalties may also be brought by state regulators under the Blue Sky statutes of each state, which generally duplicate the federal enforcement scheme.

Liabilities for Failure to Register and Report

As discussed in detail above, U.S. securities laws require full compliance with the 1933 Act registration requirements, and 1934 Act registration and reporting requirements. The failure to register or report, when required, constitutes a violation for which civil and criminal penalties may be imposed.

Failure to Register Under the 1933 Act. If an issuer fails to comply with the requirement to register securities under the 1933 Act, the SEC may bring a lawsuit for disgorgement of illegal profits and for substantial fines, depending on the egregiousness of the conduct.

The issuer may also be subject to private suits brought by any purchasers of the securities for failure to register. Private actions may be brought under Section 12(a)(1) of the 1933 Act for the remedy of rescission, the refund of the purchase price of the securities plus interest. Under Section 12(a)(1), if the investor-plaintiff can show that the securities offered and sold were subject to registration but unregistered, the issuer will be strictly liable for rescission, notwithstanding that the issuer made no materially misleading disclosures in any offering documentation.

The 1933 Act also establishes control person (joint and several) liability for violations relating to the failure of the issuer to register securities. However, a controlling person may avoid liability by proving that he had no knowledge of, or reasonable grounds to believe in, the existence of the facts by reason of which the liability of the controlled person is alleged to exist, which is essentially a negligence-based standard.

It is also unlawful to sell unregistered securities, absent an exemption, under Blue Sky laws. As discussed in Chapter 5, the institutional investor and NSMIA exemptions should be available to foreign issuers if the relevant criteria of the exemption are satisfied. State securities laws contain similar provisions that duplicate the scheme provided by Section 12(a)(1) of the 1933 Act.

Failure to Register and Report Under the 1934 Act. The SEC may initiate an administrative proceeding for failure to comply with the registration and reporting requirements of the 1934 Act. Section 20(a) of the 1934 Act contains a control person provision, subjecting an issuer's control persons to joint and several liability with the issuer in the event of 1934 Act violations. A willful violation of the 1934 Act registration and reporting requirements is a criminal offense and may subject a violator to substantial fines and imprisonment.

Liabilities Relating to Disclosure in Private Offerings

An exclusion or exemption from 1933 Act registration or the 1934 Act reporting requirements does not exempt a foreign issuer from the anti-fraud provisions of the U.S. securities laws. The two statutory provisions that apply to disclosure violations in private offerings are Rule 10b-5 under the 1934 Act and Section 17 of the 1933 Act.

Additional liability provisions apply to the disclosures made in registered public offerings. Section 11 and 12(a)(2) of 1933 Act provide remedies for improper disclosures in an offering registered under the 1933 Act. Prior to 1995, securities practitioners widely believed that Section 12(a)(2) also applied to private placements. Section 12(a)(2) provides for the remedy of rescission of a sale of securities if the offer or sale of the securities was made by means of a prospectus that contained a materially misleading statement or omission. However, in a 1995 case, the U.S. Supreme Court held that Section 12(a)(2) applies only to public offerings.³⁹ Accordingly, private offerings under Section 4(2), Regulation D and Rule 144A should not be subject to Section 12(a)(2) liability. This is significant because the principal remedy left to investors in a private placement is provided under Rule 10b-5, which requires a showing of fraudulent intent by the seller of the securities (see below). Section 12(a)(2) does not require such a showing of fraudulent intent, only that the prospectus contained a materially misleading statement or omission. Since Regulation S offerings are not registered under the 1933 Act, it has been presumed that such offerings would not be subject to Section 12(a)(2). However, one court held that a Regulation S offering involving the wide distribution of the offering circular made the offering “public” and subject to Section 12(a)(2) liability.⁴⁰

Rule 10b-5. Rule 10b-5, which was promulgated under Section 10(b) of the 1934 Act, is known as the “catch-all” anti-fraud provision of the U.S. securities laws. The SEC and private plaintiffs commonly use this provision to enforce violations of federal securities laws relating to improper disclosures. Nevertheless, the standards to make a Rule 10b-5 case often impose a high burden.

There are several elements that are necessary to make a Rule 10b-5 claim. Rule 10b-5 prohibits the making of material misstatements to investors or omitting information that makes

³⁹ Gustafson v. Alloyd Co., 513 U.S. 561, 584 (1995).

⁴⁰ See Sloane Overseas Fund Ltd. Sapiens Int'l. Corp., Fed. Sec. L. Rep. (CCH) ¶ 99,324 (Sept. 23, 1996).

the information disclosed misleading and is applicable to the purchase as well as the sale of securities (but does not cover offers). Information disclosed to investors is “material” if there is a substantial likelihood that a reasonable investor would consider the information important in deciding whether to purchase or sell a security. A plaintiff must show that the material misstatements were made with “*scienter*,” which means that the seller of the security intended to defraud or deceive the purchaser, although some courts have also held that recklessness (but not mere negligence) in making disclosures is sufficient to satisfy the *scienter* element. An investor-plaintiff in a private action under Rule 10b-5 must also show that he relied on the seller’s wrongful conduct, although proof of materiality may give rise to a presumption of reliance. If there is an active trading market for the issuer’s securities, there is a presumption of reliance if the market price of the security drops after it is disclosed that the issuer sold securities based on material misstatements or omissions.

The Private Securities Litigation Reform Act of 1995 (the “Reform Act”) sought to reduce the number of frivolous class-action lawsuits filed by investors (and the plaintiffs’ securities bar) by making it more difficult for shareholders of nationally traded securities to bring suits based merely on allegations that securities prices dropped significantly. The Reform Act made a number of substantive changes relating to pleading, discovery, liability, and the awarding of fees and expenses in cases brought under the federal securities laws. Although the Reform Act will not necessarily apply to privately placed securities or suits that do not involve a class action, it generally favors issuers as it heightened the standards to plead fraud under federal securities laws. The Securities Litigation Uniform Standards Act of 1998 builds on the protection of the Reform Act by making federal courts the exclusive venue for most securities class actions involving nationally-traded securities as well as securities of an issuer senior to its listed securities, such as debt securities and preferred stock. However, securities sold in private placements remain subject to individual suits in state courts, although certain procedural tactics may allow removal to federal court for suits concerning privately placed securities.

The 1934 Act also imposes control person liability for disclosure violations. Under Section 20(a) of the 1934 Act, if a foreign issuer can be shown to have violated Rule 10b-5, the issuer’s control persons may be liable to the same extent as the issuer, unless the control person shows that he acted in good faith and did not induce the act or acts constituting the violation or cause of action. Thus, as opposed to the 1933 Act negligence standard to avoid control person liability, the 1934 Act requires the defendant, assuming he did not induce the prohibited act, only prove that he acted in good faith.

The SEC is authorized to bring an action for an injunction against persons who “aid and abet” a Rule 10b-5 violation. Aiders and abettors are persons that render substantial assistance to the primary violator of Rule 10b-5, and could include the placement agent and the issuer’s law

and accounting firms. Private plaintiffs, such as the investors in the offering, are precluded from suing aiders and abettors for Rule 10b-5 violations; a plaintiff may nevertheless attempt to bring a suit against such parties as primary violators of Rule 10b-5. Under the Reform Act, the SEC may bring a civil action for injunctive relief based on an aiding and abetting claim. The SEC may refer a criminal action for aiding and abetting to the Department of Justice although the relevant standard requires conduct beyond recklessness.

Private parties who prevail in a Rule 10b-5 action may sue for rescission of the transaction or damages equaling the difference between the purchase price of the security and the value of the security purchased. The SEC may bring suit for an injunction against a violator of Rule 10b-5 or to temporarily or permanently prohibit a violator from acting as an officer or director of a U.S. public company, if the SEC can show that the defendant's conduct demonstrates substantial unfitness to serve as an officer or director. The SEC may bring suit against a Rule 10b-5 violator for substantial civil penalties at both the individual and entity levels, depending on the egregiousness of the conduct. The U.S. Department of Justice may bring criminal actions for willful violations of Rule 10b-5, including fines, and imprisonment for natural persons.

Potential liability under Rule 10b-5 may also arise in connection with the issuing of research reports that contain materially misleading statements or omissions. Projections in a research report (or made orally or in any offering document) regarding the future performance of the issuer's securities, if inaccurate, may give rise to liability under Rule 10b-5. The Reform Act created a safe-harbor for "forward-looking statements," such as projections, such that, in general, a reporting issuer will not be subject to liability for making forward-looking statements if (i) the statements are accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement or (ii) the plaintiff in the action is unable to prove that the statement was made with actual knowledge that the statement was false or misleading. For cautionary statements to be "meaningful," an issuer must enumerate specific risks applicable to the issuer; boilerplate language that could apply to any issuer will generally not be sufficient.

Since the safe harbor is only available to reporting issuers, non-reporting issuers should use caution when making forecasts and projections. Nevertheless, if projections are to be made during the offering, whether written or oral, foreign issuers should seek to comply with the Reform Act safe harbor, since purported compliance by a non-reporting issuer might be persuasive to a court in litigation involving a private placement. Accordingly, forward-looking statements should be identified as such and accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from projected results.

Section 17(a) of the 1933 Act. Section 17(a) of the 1933 Act also contains a broad anti-fraud provision which is similar to Rule 10b-5 under the 1934 Act, but is limited to the sale or offer for sale of securities. Although the focus of the 1933 Act is on the regulation of public offerings, Section 17(a) has been held to apply to private offerings as well. Unlike Rule 10b-5, not all actions under Section 17(a) require *scienter*, and may only require negligence in making disclosures. However, some jurisdictions have limited the impact of this lower standard by holding that Section 17(a) does not allow for private lawsuits, which essentially means that only the SEC may enforce its provisions.

Liabilities Under Blue Sky Laws. State securities laws are another source of liability for foreign issuers for violations relating to disclosure documents used in private placements. Each state's securities laws essentially duplicate the federal scheme discussed above for violations relating to registration and material misstatements or omissions, although a number of states have a lower threshold for liability based on the negligence of the issuer in connection with disclosure (as opposed to recklessness or *scienter*) such that the issuer may be held liable if the issuer fails to use reasonable care in its disclosure to investors.

Liabilities Relating to Disclosure Violations in Secondary Market Transactions. A foreign issuer, and a broker-dealer that executes a secondary market transaction for a purchaser of the issuer's securities, may also be subject to liability for disclosure violations made in connection with secondary market transactions under Rule 10b-5 of the 1934 Act and Section 17(a) of the 1933 Act. The issuer may be liable for material misstatements about the issuer's securities in connection with a secondary market transaction, such as misleading information provided in press releases issued by the issuer. Broker-dealers may be liable for material misstatements or omissions such as misrepresentations relating to the quality of the issuer's securities or false or misleading information contained in a research report.

Additional Enforcement Considerations

Jurisdiction and Extraterritorial Application. For any litigation under the U.S. securities laws to take place in the U.S., the plaintiff will have to establish that the U.S. court has both subject matter and personal jurisdiction over the foreign issuer and/or its officers and directors. U.S. courts generally will have jurisdiction over matters arising under federal securities laws (subject matter jurisdiction) involving U.S. residents, whether or not acts (or failure to act) of material importance occurred in the U.S. (personal jurisdiction). Thus, offers and sales to U.S. resident investors will generally be sufficient to establish jurisdiction over the

issuer and its controlling persons. The doctrine of *forum non conveniens* may arise in litigation involving a foreign issuer, which permits a U.S. court to dismiss an action if it deems that the U.S. forum, i.e., the situs of the litigation, would be unduly burdensome to the offshore defendant. If the plaintiff is a U.S. resident, however, there is a strong presumption in favor of his or her choice of forum.

Foreign issuers should also be aware of the U.S. system of pre-trial discovery, which can be onerous and can apply to foreign as well as domestic defendants in suits involving U.S. securities laws. U.S. plaintiffs' lawyers may request a wide array of information from defendants through expensive and time-consuming procedures such as oral depositions, demands for production of documents and written interrogatories. Defendants' lawyers often claim that plaintiffs' securities lawyers will file a frivolous lawsuit and then make voluminous discovery demands as a means to force defendants to settle rather than incur the costs of litigating, even if there was no credible evidence of wrongdoing by the defendant. Although certain blocking statutes and treaties may serve to restrain over-zealous discovery requests, U.S. jurisdiction over a foreign defendant will typically require full compliance with discovery proceedings.

If, after trial, a plaintiff obtained a judgment in a U.S. court against a foreign issuer or its controlling persons and the issuer or its controlling persons owned assets subject to the jurisdiction of the U.S. courts, which generally means the assets must be present in the U.S., then the plaintiff could seek to execute on the judgment and attach the assets. Assuming the foreign issuer or controlling persons had no assets within U.S. jurisdiction, the plaintiff must then attempt to execute the judgment in a foreign court. Whether a foreign court would recognize a U.S. judgment is often complicated and should be addressed with U.S. and local counsel. A plaintiff could always initiate an original action in a foreign court, but a plaintiff suing to enforce U.S. securities laws has no guarantee that U.S. laws will apply since the forum jurisdiction's choice-of-law rules may preclude the application of the U.S. securities laws.

Enforcement Issues for Broker-Dealers. The 1934 Act gives the SEC broad powers to inspect and investigate broker-dealers. The SEC may also investigate broker-dealers on the request of a foreign securities regulator, even though no violation of U.S. law has been committed. The SEC is also authorized to sanction broker-dealers for any violation of U.S. securities laws or the rules and regulations promulgated thereunder. Foreign branch offices of registered broker-dealers (including any offices where dual employees of a U.S. broker-dealer and a foreign broker-dealer are employed) are subject to examination and must make their records available for inspection by U.S. regulators.

Civil actions for fraud may be brought against broker-dealers under Section 17 of the 1933 Act and Rule 10b-5 of the 1934 Act (among other provisions). The NASD and other self-

regulatory organizations are authorized to discipline member firms and any associated persons with censure, fine, suspension, expulsion from membership and other sanctions. In addition, any contract made in violation of the 1934 Act may be held to be void.

Although state laws applicable to broker-dealers vary from federal law and from state to state, state securities regulators may be quite aggressive in seeking fines or other disciplinary actions against a foreign broker-dealer for egregious conduct. However, the most common issue concerning private placements of foreign issuers is the state registration of foreign broker-dealers. State regulators routinely check the section in the Form D relating to commissions (filed with states in a NSMIA notice filing for a Rule 506 private placement) and compare the entities enumerated to its list of registered broker-dealers. If the name of the person receiving a commission in connection with the sales of the issuer's securities does not appear on its list, a regulator typically sends out a letter of inquiry. These types of inquiries are generally satisfied by claiming an exemption from registration such as the exemption for sales to institutional investors.

**PRIVATE SECURITIES OFFERINGS
IN THE UNITED STATES
BY OFFSHORE INVESTMENT FUNDS**

APPENDIX

1134934.3

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PRIVATE SECURITIES OFFERINGS

IN THE UNITED STATES

BY OFFSHORE INVESTMENT FUNDS

Carter Ledyard & Milburn LLP Model Forms

The model forms included in this Appendix are for illustrative purposes only and should not be relied upon without the advice of U.S. counsel. The provisions in the model forms are intended as a general guide only and will require adaptation to the specific terms of the offering. Accordingly, references herein to “Company” may be substituted with “Fund”, and references to “Shares” may be substituted with “Units” or the applicable interest which is the subject of the offering. The terms “Private Placement Wrap” and “Private Placement Memorandum” are used interchangeably in this Appendix.¹

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¹ These forms do not provide for or take into account investment by “knowledgeable employees” under Rule 3c-5 under the 1940 Act (discussed in Chapter 2 of the CL&M Memorandum). Sponsors wishing to include knowledgeable employees as investors should make appropriate adjustments to the U.S. documentation.

Form 12:	Form of Investment Letter for a Section 3(c)(1) Fund	App-20
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U.S. Private Placement Memorandum: Model Form 1

Cover Page

Memorandum Identification No. _____

**CONFIDENTIAL UNITED STATES
PRIVATE PLACEMENT MEMORANDUM**

[NAME OF COMPANY]

[insert structure of the issuing entity as appropriate, i.e.,
A Contractual Securities Investment Trust, or, A Company Incorporated
With Limited Liability and Registered under the Laws of [•]]

Managed By
[•]

PRIVATE PLACEMENT

of up to [•] [Shares]

at a price of U.S. \$[•] per Share

Minimum subscription: [•] Shares

[Name of Company](the “Company”), acting through [•](the “U.S. Placement Agent”), is making a private placement of shares of the Company (the “Shares”) to certain United States institutional accredited investors [or qualified purchasers], subject to the terms and conditions stated in this Confidential Private Placement Memorandum (the “Memorandum”) and the attached form of Investment Letter. The U.S. Placement Agent does not guarantee the accuracy or completeness of this Memorandum.

THE SHARES OFFERED HEREBY ARE HIGHLY SPECULATIVE AND INVOLVE A HIGH DEGREE OF RISK.

IN MAKING AN INVESTMENT DECISION INVESTORS MUST RELY ON THEIR OWN EXAMINATION OF THE COMPANY AND THE TERMS OF THE OFFERING, INCLUDING THE MERITS AND RISKS INVOLVED. THE SHARES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND

Form 1 (contd.)

EXCHANGE COMMISSION (THE "COMMISSION") OR ANY STATE SECURITIES COMMISSION OR REGULATORY AUTHORITY. THE COMMISSION OR ANY SUCH REGULATORY AUTHORITIES HAVE NOT PASSED UPON OR ENDORSED THE MERITS OF THIS OFFERING OR THE ACCURACY OR ADEQUACY OF THIS MEMORANDUM. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

U.S. Placement Agent:

[•]

[Date]

U.S. Private Placement Memorandum: Model Form 2

Legends Relating to Securities Laws

THE SHARES [AND ANY INTERESTS REPRESENTED THEREBY]² MAY NOT BE OFFERED, SOLD, TRANSFERRED OR DELIVERED, DIRECTLY OR INDIRECTLY, IN THE UNITED STATES OR TO, OR FOR THE ACCOUNT OR BENEFIT OF, U.S. PERSONS EXCEPT IN CERTAIN TRANSACTIONS EXEMPT FROM THE REGISTRATION REQUIREMENTS OF THE 1933 ACT AND STATE OR OTHER SECURITIES LAWS. TERMS USED IN THE PRECEDING SENTENCE HAVE FOR THE PURPOSES OF THIS MEMORANDUM, THE MEANINGS GIVEN TO THEM BY REGULATIONS UNDER THE 1933 ACT. THE SHARES [AND ANY INTERESTS REPRESENTED THEREBY] ARE SUBJECT TO RESTRICTIONS ON TRANSFER AND RESALE. SEE “RESTRICTIONS ON TRANSFER.”

THE COMPANY IS A FOREIGN INVESTMENT COMPANY AND IS NOT REGISTERED UNDER THE U.S. INVESTMENT COMPANY ACT OF 1940, AS AMENDED (THE “1940 ACT”) [if appropriate, insert as applicable, AND THE PLACEMENT AGENT AND THE INVESTMENT ADVISER ARE NOT REGISTERED AS INVESTMENT ADVISERS UNDER THE U.S. INVESTMENT ADVISERS ACT OF 1940, AS AMENDED.] PROSPECTIVE INVESTORS SHOULD BE AWARE THAT THEY DO NOT HAVE THE BENEFITS OF THE PROTECTIONS AFFORDED BY SUCH ACT[S] AND THE RULES PROMULGATED THEREUNDER BY THE COMMISSION.

THIS MEMORANDUM CONTAINS “FORWARD-LOOKING STATEMENTS” WITHIN THE MEANING OF SECTION 27A OF THE 1933 ACT AND SECTION 21E OF THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED. SUCH FORWARD-LOOKING STATEMENTS INVOLVE KNOWN AND UNKNOWN RISKS AND UNCERTAINTIES THAT MAY CAUSE THE ACTUAL RESULTS, PERFORMANCE, LEVELS OF ACTIVITY, OR ACHIEVEMENTS OF THE COMPANY, TO BE MATERIALLY DIFFERENT FROM ANY FUTURE RESULTS, PERFORMANCE, LEVELS OF ACTIVITY, OR ACHIEVEMENTS OF THE COMPANY EXPRESSED OR IMPLIED BY SUCH FORWARD-LOOKING STATEMENTS. FACTORS THAT COULD CAUSE OR CONTRIBUTE TO SUCH DIFFERENCES INCLUDE, BUT ARE NOT LIMITED TO, GENERAL AND ECONOMIC BUSINESS CONDITIONS AND THE ABILITY OF THE COMPANY TO IMPLEMENT ITS BUSINESS STRATEGY.

² This clause should be included where applicable if the offering involves securities with underlying interests, such as units or warrants.

U.S. Private Placement Memorandum: Model Form 3

Restrictive Transfer Legend

[THE ARTICLES OF ASSOCIATION OF THE COMPANY]³ GIVE POWER TO THE COMPANY'S [DIRECTORS] TO REQUIRE THE TRANSFER OR REDEMPTION OF SHARES OWNED OR WHICH APPEAR TO BE OWNED DIRECTLY OR INDIRECTLY BY ANY PERSON WHO, BY VIRTUE OF HIS HOLDING, MAY IN THE OPINION OF THE [DIRECTORS] CAUSE OR BE LIKELY TO CAUSE THE COMPANY OR SHAREHOLDERS OF THE COMPANY SOME [LEGAL, REGULATORY, PECUNIARY, TAX OR MATERIAL ADMINISTRATIVE DISADVANTAGE]⁴ OR CAUSE OR BE LIKELY TO CAUSE THE ASSETS OF THE COMPANY TO BE CONSIDERED "PLAN ASSETS" WITHIN THE MEANING OF THE REGULATIONS ADOPTED UNDER THE U.S. EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED, OR WHICH HOLDING WOULD OR MIGHT RESULT IN [if a Section 3(c)(1) entity, insert: THE COMPANY HAVING MORE THAN [EIGHTY] BENEFICIAL OWNERS OF SHARES (WHETHER DIRECTLY OR BY ATTRIBUTION) WHO ARE U.S. PERSONS] [if a Section 3(c)(7) entity, insert: THE BENEFICIAL OWNERSHIP OF SHARES OF THE COMPANY BY ANY U.S. PERSON WHO IS NOT A "QUALIFIED PURCHASER," AS DEFINED IN SECTION 2(a)(51)(A) OF THE 1940 ACT.] THE RELEVANT PROVISIONS OF THE COMPANY'S [ARTICLES OF ASSOCIATION] ARE SUMMARIZED IN THE MEMORANDUM UNDER THE HEADING "[•]".

³ All references to "Articles of Association" throughout this Appendix may be replaced with the appropriate name of the document containing the restrictions on sale and transfer of the securities which are the subject of the offering.

⁴ The wording of the provision will vary according to the wording actually contained in the Articles of Association. It is recommended that the Articles of Association give the directors the power to require transfer or redemption for each of the above-described situations.

U.S. Private Placement Memorandum: Model Form 4

**Florida Blue Sky Legend
for use in connection with an offering using
the Florida Limited Offering Exemption**

NOTICE TO FLORIDA RESIDENTS:

PURSUANT TO SECTION 517.061(11)(a)(5) OF THE FLORIDA SECURITIES ACT, YOU HAVE THE RIGHT TO RESCIND YOUR SUBSCRIPTION BY GIVING NOTICE OF SUCH RESCISSION BY TELEPHONE, TELEGRAPH OR LETTER, WITHIN THREE DAYS AFTER YOU FIRST TENDER CONSIDERATION TO THE ISSUER. IF NOTICE IS NOT RECEIVED BY SUCH TIME, THE FOREGOING RIGHT OF RESCISSION SHALL BE NULL AND VOID.

U.S. Private Placement Memorandum: Model Form 5

Table of Contents and General Considerations

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GENERAL CONSIDERATIONS

This Memorandum is confidential and has been prepared and submitted for use solely in connection with the offer of the Shares to a limited number of U.S. institutional accredited investors [or U.S. qualified purchasers who are also accredited investors] in a private placement of securities. The use of this Memorandum for any other purpose is not authorized and it may not be reproduced, transferred to any other person, or used for any other purpose without the consent of the Company and the U.S. Placement Agent. Each prospective investor, by accepting delivery of this Memorandum, agrees to return it and all related documents to the U.S. Placement Agent in the event such prospective investor does not purchase any Shares.

No person has been authorized to give any information or to make any representations other than those contained in this Memorandum and the Placement Agent's Agreement in connection with the offering and sale of the Shares, and, if given or made, such information and representations must not be relied upon as having been authorized by the Company or the U.S. Placement Agent. The allotment or issue of the Shares shall not under any circumstances create any implication that there has been no change in the affairs of the Company since the date hereof.

The contents of this Memorandum should not be considered to be legal or tax advice and each prospective investor should consult with its own legal counsel and advisers as to all matters concerning an investment in the Shares. The investor must rely on its own evaluation of the investment and the terms of the offering, including the merits and risks involved, in making an investment decision with respect to the Shares.

This Memorandum does not constitute an offer to sell or the solicitation of an offer to buy the Shares in any jurisdiction to any person to whom it is unlawful to make such offer or solicitation in such jurisdiction. In addition, this Memorandum constitutes an offer only if a Memorandum Identification Number appears in red ink in the appropriate space on the cover hereof.

Neither the delivery of this Memorandum nor the issuance of the Shares shall, under any circumstances, create any implication that any information contained herein or therein is correct as of any time subsequent to the respective dates hereof and thereof.

The Shares are being offered subject to prior sale and to withdrawal, cancellation or modification of the offering. The Company and the U.S. Placement Agent reserve the right to accept or reject any offer to purchase the Shares at any time prior to the termination of the offer.

The investment in Shares should be viewed as a long-term investment, suitable only for sophisticated investors who can fully evaluate the risks involved. Prospective investors' attention is drawn to the discussion of risk factors in the [Prospectus] under the heading ["Risk Factors"].

U.S. Private Placement Memorandum: Model Form 6

Foreign Judgment and Service of Process Disclosures

The Company is a [insert structure of issuing entity] [incorporated] [organized] under the laws of [•]. Its Fund Manager (the “Manager”) is incorporated under the laws of [•] and its Investment Adviser is incorporated under the laws of [•]. [Certain] [All] of the directors of the Company, the Manager and the Investment Adviser, are not U.S. residents. Such entities and persons are located outside of the U.S., and all or a substantial portion of the assets of the Company and such persons are located outside of the U.S. As a result, it may be difficult for purchasers of the Shares offered hereby to effect service of process within the U.S. upon the Company, its directors, the Manager, the Investment Adviser or other associated persons or entities, or to realize civil liabilities against them under U.S. securities laws. Moreover, there is no assurance that courts outside the U.S. would enforce judgments of U.S. courts predicated solely on U.S. securities laws or would entertain actions brought before them in the first instance on the basis of liabilities predicated solely upon such laws.

U.S. Private Placement Memorandum: Model Form 7

1933 and 1940 Act Disclosures

PRIVATE PLACEMENT IN THE UNITED STATES

Securities Act of 1933 and State Securities Laws

The Company, through the U.S. Placement Agent, is making a private placement of the Shares to a limited number of U.S. institutional investors that are (a) “accredited investors” within the meaning of Rule 501(a) of Regulation D under the 1933 Act (an “Accredited Investor”) or (b) reasonably believed by the U.S. Placement Agent to be “qualified institutional buyers” within the meaning of Rule 144A under the 1933 Act (a “QIB”) and are also Accredited Investors, on the terms contained herein and in the Investment Letter (See Appendix I hereto).⁵

[Or, for a 3(c)(7) fund, use the following paragraph:] [The Company, through the U.S. Placement Agent, is making a private placement of Shares to a number of U.S. investors that are (a) “accredited investors” within the meaning of Rule 501(a) of Regulation D under the 1933 Act (an “Accredited Investor”) and (b) that are also “qualified purchasers” within the meaning of Section 2(a)(51)(A) of the 1940 Act (a “Qualified Purchaser”), on the terms contained herein and in the Investment Letter (See Appendix I hereto).]

No sale of the Shares will be made in the U.S. or to any U.S. person (as such terms are defined in Regulation S under the 1933 Act) who does not execute and deliver, for the benefit of the Company and the U.S. Placement Agent, an investment letter in the form attached hereto (the “Investment Letter”) completed in a manner acceptable to the Company and the U.S. Placement Agent.

[The Memorandum refers to an offering which may involve a public offering outside the U.S. to investors who are not U.S. persons.] The offering of the Shares in the U.S. will not be registered under the 1933 Act or under any of the securities laws of any state or other political subdivision of the U.S. and is made in reliance upon applicable exemptions from registration as a private placement. Accordingly, the Shares are being offered only to investors who are believed to have the qualifications necessary to permit the Shares to be sold in reliance on such private placement exemptions. Each purchaser of the Shares together with the purchaser’s representatives, if any, must have such knowledge and experience in business and financial matters as will enable it to evaluate the merits and risks of a proposed investment in the Shares and to bear the economic risk of the investment. Each investor must confirm in the Investment Letter that it is purchasing the

⁵ The first paragraph of this form should be used for an offering made by 3(c)(1) funds to institutional investors only and not individuals or trusts for the benefit of individuals. If individual purchasers are contemplated in a 3(c)(1) offering, adjustments to the form are required.

Form 7 (contd.)

Shares for investment purposes only and not with a view to, or for resale in connection with, any distribution or other disposition of the Shares and must represent that it is [if a 3(c)(1) fund: an Accredited Investor or a QIB that is also an Accredited Investor] [if a 3(c)(7) fund: an Accredited Investor that is also a Qualified Purchaser] and must make certain other representations as to its status.

Transferability of the Shares will be subject to the restrictions contained in the Investment Letter, [if applicable add: and in the Articles of Association of the Company] and certificates representing the Shares, if any, will contain a restrictive legend to such effect. Generally, such provisions state that no sale or other transfer of Shares may be made by an investor unless such sale or other transfer is exempt from registration under the 1933 Act and other applicable laws [and that the consent of the Company will be required for any such sale or other transfer].

Investment Company Act of 1940

[For a 3(c)(1) offering, use the following paragraph:] [The Company is not registered under the 1940 Act. Based on interpretations of the 1940 Act by the Commission staff, if the Company has more than 100 beneficial owners who are U.S. persons, it may become subject to registration under the 1940 Act. The Directors of the Company intend to restrict the number of U.S. persons who may invest in the Shares to [80].] [If applicable add: The relevant provisions of the Company's Articles of Association are summarized in the Prospectus under the heading "[•]".]

[Or, for a 3(c)(7) fund, use the following paragraph:] [The Company is not registered under the 1940 Act. If any Shares are owned by a person who is not a Qualified Purchaser, the Company may become subject to registration under the 1940 Act. The directors of the Company intend to restrict the ownership of Shares to Qualified Purchasers. [If applicable add: The relevant provisions of the Company's Articles of Association are summarized in the Prospectus under the heading "[•]".]

U.S. Private Placement Memorandum: Model Form 8

Restrictions on Transfer Disclosures

RESTRICTIONS ON TRANSFER

The Shares have not been and will not be registered under the 1933 Act or the securities laws of any state, and the Company has not been registered, nor will it be registered, under the 1940 Act. The purchaser must agree in the Investment Letter that it will not re-offer, resell, pledge, hypothecate or otherwise transfer or dispose of any Shares (or any certificates that may be received in replacement thereof or in exchange therefor) except in accordance with the Articles of Association and either: (i) pursuant to an offer and sale outside the U.S. meeting the requirements of Regulation S; or (ii) (A) to an institution that the seller reasonably believes is a “QIB” in a transaction meeting the requirements of Rule 144A; or (B) to an Accredited Investor within the meaning of Rule 501(a) of Regulation D [if a 3(c)(7) fund, add: who is also a Qualified Purchaser within the meaning of Section 2(a)(51)(A) of the 1940 Act], provided that the purchaser shall execute and deliver to the [Manager] of the Company an Investment Letter substantially in the form of the Investment Letter contained in Appendix I attached hereto, and, if requested by the [Manager], shall furnish an opinion of counsel acceptable to the [Manager] to the effect that such offer, sale, pledge, hypothecation, transfer or disposition (x) is in compliance with the registration requirements of the 1933 Act, [if employee benefit plans are excluded as investors:] (y) is not being made to an employee benefit plan or other plan which is subject to, or to any entity the assets of which are considered to be “plan assets” of any employee benefit plan or other plan under, the U.S. Employee Retirement Income Security Act of 1974, as amended, or Section 4975 of the United States Internal Revenue Code of 1986, as amended (the “Code”), and (z) will not result in the Company being required to register as an investment company under the 1940 Act. The [Manager] may restrict transfers or require redemptions of the Shares in order to comply with the 1933 Act, the 1940 Act or other applicable laws. The Share certificates (and any certificates issued in replacement thereof or in exchange therefor), if any, will bear a legend to the foregoing effect.

U.S. Private Placement Memorandum: Model Form 9

Tax Considerations

CERTAIN UNITED STATES TAX CONSIDERATIONS

The following is a summary of certain U.S. federal income tax considerations relating to the acquisition, ownership, and disposition of Shares. For purposes of this summary, a “United States person” generally is any U.S. citizen or resident individual, any corporation or partnership organized under U.S. law, any estate (other than an estate the income of which, from sources outside the U.S. that is not effectively connected with a trade or business within the U.S., is not includible in its gross income for U.S. federal income tax purposes), and any trust if a court within the U.S. is able to exercise primary supervision over the administration of the trust and one or more United States persons have the authority to control all substantial decisions of the trust. The term “U.S. Shareholder” means any Shareholder that is a United States person (and, unless the context otherwise requires, includes any United States person that holds Shares in the Company through one or more partnerships or other entities treated as transparent for U.S. federal income tax purposes), and the term “Non-U.S. Shareholder” means a Shareholder that is not a United States person.

Classification and Taxation of the Company

The Company will [elect to] be treated as an association taxable as a corporation for U.S. federal tax purposes. The Company would be subject to regular U.S. corporate income tax on any income that is effectively connected with the conduct of a U.S. trade or business. It is not expected, however, that the Company will be engaged in a U.S. trade or business. The Company could also be subject to 30% U.S. withholding tax on any U.S. source dividend or interest income, or other “fixed or determinable annual or periodical” income.

U.S. Taxation of Taxable U.S. Shareholders

Taxation of Distributions

Subject to the passive foreign investment company rules discussed below, a U.S. Shareholder will be required to include in gross income as ordinary income the amount of any distribution, to the extent the distribution is paid out of the Company’s current or accumulated earnings and profits as determined for U.S. federal income tax purposes. Such dividends will not be eligible for the dividends-received deduction otherwise allowed to U.S. corporations in respect of dividends received from other U.S. corporations.

To the extent that the amount of any distribution exceeds the Company’s current and accumulated earnings and profits, it will be treated first as a tax-free return of the U.S.

Form 9 (contd.)

Shareholder's tax basis in its Shares to the extent thereof, and then as capital gain. [The Company will not maintain calculations of earnings and profits in accordance with U.S. federal income tax principles.]

Dispositions of the Shares

If a U.S. Shareholder sells or otherwise disposes of the Shares, including on liquidation of the Company, such U.S. Shareholder will recognize gain or loss for U.S. Federal income tax purposes in an amount equal to the difference between the amount realized on the sale or other disposition and their adjusted tax basis in the Shares. Subject to passive foreign investment company rules discussed below, such gain or loss generally will be capital gain or loss and will be long term capital gain or loss if the Shares were held for more than one year at the time of the sale or other disposition. Deduction of capital losses is subject to certain limitations under the Code. If, on liquidation, securities are distributed in kind, U.S. Shareholders would generally recognize gain or loss in an amount equal to the difference between the fair market value of such securities on the date of liquidation, plus any cash distributed, and their adjusted tax basis in the Shares.

Passive Foreign Investment Companies

For U.S. Federal income tax purposes, the Company will be considered a passive foreign investment company ("PFIC") for any taxable year in which either (i) 75% or more of its gross income is passive income, or (ii) at least 50% of the average value of all of its assets for the taxable year produce or are held for the production of passive income. For this purpose, passive income includes dividends, interest, royalties, rents, annuities and the excess of gains over losses from the disposition of assets which produce passive income. **BASED ON THE COMPANY'S PROJECTED INCOME, ASSETS AND ACTIVITIES, IT IS LIKELY THAT THE COMPANY WILL BE TREATED AS A PFIC.**

If the Company is a PFIC for any taxable year, then, unless the U.S. Shareholder elects to treat its Shares as an investment in a "qualified electing fund" (a "QEF election"), as described below,

- such U.S. Shareholder would be required to allocate income recognized upon receiving certain dividends or gain recognized upon the disposition of Shares ratably over the holding period for such Shares,
- the amount allocated to each year during which the Company is considered a PFIC other than the year of the dividend payment or disposition would be subject to tax at the highest individual or corporate tax rate, as the case may be, and an interest charge would be imposed with respect to the resulting tax liability allocated to each such year, and
- gain recognized upon the disposition of the Shares would be taxable as ordinary income.

Form 9 (contd.)

If a U.S. Shareholder made a timely QEF election in respect of its Shares, such U.S. Shareholder would not be subject to the rules described above. Instead, the U.S. Shareholder would be required to include in its income for each taxable year its pro rata share of the Company's ordinary earnings as ordinary income and its pro rata share of the Company's net capital gain as long term capital gain, whether or not such amounts are actually distributed. U.S. Shareholders generally may elect to defer the payment of this tax until distributions are received or the Shares are sold, subject to the imposition of an interest charge on such deferral. [The Company intends to comply with all accounting, recordkeeping and reporting requirements necessary for U.S. Holders to make QEF elections.]

Assuming that the Company is a PFIC, U.S. Shareholders will be required to file IRS Form 8621 with their annual income tax return.

Possible Application of Foreign Personal Holding Company Rules

No assurance can be given that the Company will not become a "foreign personal holding company" within the meaning of Section 552 of the Code. If five or fewer individuals who are citizens or residents of the United States own directly or by attribution more than 50%, by vote or value, of the Company, the Company may become a foreign personal holding company. In such event, each U.S. Shareholder that holds the Shares, directly or indirectly, on the last day of any taxable year in which the Company is a foreign personal holding company, must include in its income for that year such U.S. Shareholder's pro rata share of the Company's "undistributed foreign personal holding company income." In the event that a U.S. Shareholder is required to include amounts in its income under this rule, such amounts will not be required to be included a second time under the PFIC rules as part of an "excess distribution" if subsequently distributed.

Possible Application of Controlled Foreign Corporation Rules

No assurance can be given that the Company will not become a "controlled foreign corporation" within the meaning of Section 957 of the Code. If U.S. Shareholders that own directly or by attribution 10% or more of the voting power of the Company (each treated as a "U.S. Ten-percent Holder") collectively were to own directly or by attribution more than 50%, by vote or value, of the Company's outstanding Shares, the Company would be deemed a controlled foreign corporation.

If the Company became a controlled foreign corporation, each U.S. Shareholder treated as a U.S. Ten-percent Holder would be required to include in income each year such U.S. Ten-percent Holder's pro rata share of the "Subpart F income". For this purpose, Subpart F income generally would include interest, original issue discount, dividends, net gains from the disposition of stocks or securities, net gains on forward and option contracts, receipts with respect to securities loans and net payments received with respect to equity swaps and similar derivatives. To the extent that a U.S. Shareholder were required to include amounts in income under the controlled foreign corporation rules, such amounts generally could be distributed tax-free (and, to the extent not distributed, would be added to the tax basis of the U.S. Ten-percent Holder's Shares) and

Form 9 (contd.)

would not also be included in income currently under the foreign personal holding company or PFIC rules described above.

A U.S. TEO Shareholder (as defined below) should be able to treat its pro rata share of the Subpart F income as a dividend and, provided that the Shares do not constitute debt-financed property, such dividend should not be taxable to the U.S. TEO Shareholder.

U.S. Taxation of U.S. Tax-Exempt Shareholders

The Shares may be sold to U.S. tax-exempt organizations (“U.S. TEO Shareholders”) including employee benefit plans which are exempt from federal income tax under Sections 401(a) and 501(a) of the Code. A U.S. TEO Shareholder generally will not be subject to U.S. income tax on income realized from its investment in the Company, except to the extent such U.S. TEO Shareholder has debt-financed Shares. A U.S. TEO Shareholder whose Shares constitute debt-financed property will to that extent be subject to U.S. federal income taxation under rules summarized above. A U.S. TEO Shareholder is urged to consider with its tax adviser the possible application of these rules.

Certain Reporting Requirements

In general, U.S. Shareholders will be required to report to the Internal Revenue Service transfers of property or cash to the Company. In addition, U.S. Shareholders who acquire a 10% or greater interest in the Company (by vote or value) must report acquisitions or dispositions of, or proportional changes of, their Shares in the Company.

Basis for Description of Tax Consequences

The description of U.S. tax consequences set forth above is based on current U.S. federal income tax law, U.S. income tax regulations, judicial and administrative interpretations of the law and regulations, the provisions of the Company’s [operative documents], the description of proposed activities of the Company set out in the [Prospectus], and certain assumptions. No rulings have been or will be requested from the Internal Revenue Service, and no assurance can be given that the Internal Revenue Services will agree with the description of U.S. federal income tax taxes.

Consultation with Advisors

This description of U.S. tax matters does not address all of the U.S. federal income tax consequences to investors in the Company, and does not address any of the foreign, state or local tax consequences of such investment to any investor. Each prospective investor is advised to consult its own tax counsel as to the U.S. federal income tax consequences of an investment in the Company and as to applicable state, local and foreign taxes. The effect of existing U.S. income tax laws and treaties, the tax laws of other jurisdictions to which an investor may be subject, and possible changes in such laws and treaties (including proposed changes which have not yet been adopted) will vary with the particular circumstances of each investor.

U.S. Private Placement Memorandum: Model Form 10

ERISA Considerations

CERTAIN ERISA CONSIDERATIONS⁶

The U.S. Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and/or Section 4975 of the Internal Revenue Code of 1986, as amended (the “Code”) govern the investment of the assets of employee benefit plans of U.S. employers, certain other plans and arrangements, including individual retirement accounts, and certain collective investment funds or insurance company general or separate accounts in which such plans or arrangements are invested (“U.S. Plans”). Fiduciaries of U.S. Plans are strongly urged to consult their own legal advisors regarding the consequences of any investment in the Company.

The U.S. Department of Labor (the “DOL”) has issued regulations, Section 2510.3-101 (the “Regulations”), defining “plan assets” of a U.S. Plan that is subject to ERISA. The Regulations would generally classify as plan assets of a U.S. Plan the assets of a corporation, partnership or other entity that is a pooled investment vehicle (such as the Company) in which a U.S. Plan invests if (i) the investment is an equity interest that is neither a widely-held security registered in the U.S. nor a security issued by an investment company registered under the 1940 Act, and (ii) equity participation in the entity by “benefit plan investors” is “significant.” Such equity participation would be considered “significant” if 25% or more of the value of any class of equity interests in the entity (excluding any such equity interest held by a person who has discretionary authority or control over such entity’s assets or by an affiliate of such person) is held by “benefit plan investors,” as defined in the Regulations, a term that includes U.S. Plans. As a result of the Regulations, if any U.S. Plan invests in the Company, and if equity participation in the Company by benefit plan investors is significant, the assets of the Company may be deemed to be plan assets.

[The Company has not, and will not, undertake any action to limit the holdings in the Company by U.S. or other Plans, either on initial issuance or by secondary purchases, and such holdings are expected to be substantial. Further, [although the Company may limit the holdings in the Company by U.S. Plans for various reasons (ERISA, tax, or other),] the Company will not specifically review the ownership of interests in the Company by Plans to determine whether such ownership equals or exceeds the 25% threshold, and therefore, there is no assurance that equity participation in the Company by Plans will not be significant.] *alternative* [The Company will endeavor to restrict direct and indirect investments by benefit plan investors and the resale of investment to the extent required to ensure that such investments do not equal or exceed the 25% threshold referred to in

⁶ This section should be included only if the offering contemplates purchases by employee benefit plans subject to ERISA. It is generally recommended that the fund sponsor exclude such investors.

Form 10 (contd.)

the preceding paragraph, but cannot guarantee that participation by benefit plan investors in the Company will not be significant or that the Company's assets will not be deemed to be "plan assets". In this regard, the Company reserves the right to restrict the level of investment in the Company by benefit plan investors at any time.]

If the Company's assets are considered to be plan assets of any U.S. Plan, the Manager would be considered a fiduciary subject to ERISA. Under certain circumstances, the fiduciaries of any U.S. Plans responsible for such Plans' investment in the Company could be liable for any ERISA violations by the Manager, including (i) losses due to imprudent or undiversified investment of Company assets, or holding Company assets outside the U.S. in a manner contrary to the Regulations, or in any other manner which is not solely in the interest of, and for the exclusive purpose of providing benefits to, plan participants, or (ii) the receipt of management fees in excess of those permitted under ERISA and the Regulations.

Any fiduciary of a U.S. Plan should consult with its legal adviser concerning the ERISA considerations discussed above before making an investment in the Company. In addition, the fiduciary of a U.S. Plan who is responsible for making such investment should carefully consider, taking into account the facts and circumstances of the U.S. Plan, whether such investment is consistent with the fiduciary responsibility requirements of ERISA, including, whether (a) such investment is consistent with prudence and diversification requirements of ERISA, taking into account, among other things, the U.S. Plan's need for sufficient liquidity to pay benefits when due given that there may not be a ready market in which to sell or otherwise dispose of holdings in the Company; (b) the fiduciary has authority to make such investment under the appropriate governing instrument; (c) such investment is made solely in the interest of the participants and beneficiaries of the U.S. Plan, and (d) the acquisition and holding of any interest in the Company does not result in a non-exempt "prohibited transaction" under Section 406 of ERISA or Section 4975 of the Internal Revenue Code of 1986, as amended (the "Code").

ERISA and the Code generally prohibit certain transactions involving the assets of a U.S. Plan and persons who have certain specified relationships to the U.S. Plan ("parties in interest" as defined in ERISA or "disqualified persons" as defined in the Code). Regardless of whether the assets of the Company are considered to be "plan assets", the acquisition of an interest in the Company by a U.S. Plan could, depending on the facts and circumstances of such acquisition, be a prohibited transaction if the Company or any of its affiliates is a disqualified person with respect to the U.S. Plan. However, such prohibited transaction may be treated as exempt under ERISA and the Code if the interest in the Company was acquired pursuant to and in accordance with one or more "class exemptions" issued by the DOL, such as Prohibited Transaction Exemption ("PTE") 84-14 (a class exemption for certain transactions determined by independent qualified professional asset managers), PTE 90-1 (a class exemption for certain transactions involving insurance company pooled separate accounts), PTE 91-38 (a class exemption for certain transactions involving bank collective investment funds), PTE 95-60 (a class exemption for certain transactions involving insurance company general accounts), or PTE 96-23 (a class exemption for certain transactions effected by specific in-house asset

Form 10 (contd.)

managers). If the purchase of an interest in the Company were to be a non-exempt prohibited transaction, the purchase might have to be rescinded.

In this regard, any potential investor that is an insurance company investing assets from its general account should consider the United States Supreme Court's decision in John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank, 510 U.S. 86 (1993), which holds that in certain circumstances an insurance company's general account may be deemed to include assets of the U.S. Plan investing in the general account, as through the U.S. Plan's purchase of an annuity contract. Such insurance company could, therefore, be treated as a party in interest with respect to the U.S. Plan by virtue of this investment. Additionally, any insurance company investor should also consider Section 401(c) of ERISA and any applicable regulations issued thereunder.

The Company will require fiduciaries of a U.S. Plan proposing to invest in the Company to represent that they have been informed of and understand the Company's investment objectives, policies and strategies, that the decision to invest U.S. Plan assets in the Company was made with appropriate consideration of relevant investment factors with regard to the U.S. Plan and is consistent with the duties and responsibilities imposed upon fiduciaries with regard to their investment decisions under ERISA, and that the investment in the Company will not constitute or otherwise result in a non-exempt prohibited transaction under ERISA or the Code.

U.S. Private Placement Memorandum: Model Form 11

Red Herring Language and Printing Instructions

The following preliminary legends should appear on the cover page of the Memorandum only on the red herring or pathfinder, and should be deleted when the final Memorandum is printed.

On the top left corner of the cover page:

Preliminary Confidential United States Private Placement Memorandum
Dated [day] [month] [year]
Subject to Completion.

Along the left margin:

This document is a Preliminary Confidential United States Private Placement Memorandum. The information contained herein is subject to completion. This document does not constitute or form part of an offer for, or invitation to acquire, the Shares described herein.

**Model Form 12: Form of Investment Letter
for a Section 3(c)(1) Fund**

FORM OF INVESTMENT LETTER⁷

THE SHARES HAVE NOT BEEN, AND WILL NOT BE, REGISTERED UNDER THE U.S. SECURITIES ACT OF 1933, AS AMENDED (THE “1933 ACT”), OR THE LAWS OF ANY STATE, AND MAY NOT BE OFFERED OR SOLD WITHIN THE UNITED STATES OR TO, OR FOR THE ACCOUNT OR BENEFIT OF, U.S. PERSONS EXCEPT IN CERTAIN TRANSACTIONS EXEMPT FROM THE REGISTRATION REQUIREMENTS OF THE 1933 ACT AND ANY APPLICABLE STATE LAWS.

[Name and address of [Name and Address of
the Company] U.S. Placement Agent]

Re: Private Placement of Shares
of [•] (the “Company”)

Ladies and Gentlemen:

This letter relates to the private placement in the United States (“U.S.”) of Shares of [•] (the “Company”). We hereby confirm our acceptance of your offer of the Shares of the Company on the terms and conditions set out in the Company’s Confidential United States Private Placement Memorandum dated [•] (the “Memorandum”).

In connection therewith, we also confirm that:

1. We understand and acknowledge that neither the Shares nor any interest therein has been or will be registered under the 1933 Act, or the securities laws of any state or other political subdivision of the U.S. and that the Company has not been registered, nor will it be registered, under the U.S. Investment Company Act of 1940, as amended (the “1940 Act”).

2. We confirm also that we are an [institutional] “accredited investor” within the meaning of Rule 501(a) of Regulation D under the 1933 Act (an “[Institutional] Accredited Investor”), and have accurately indicated the basis for such accreditation on Attachment A hereto, (the “Accredited Investor Qualification”), are either purchasing Shares for our own account or for the account of one other [Institutional] Accredited Investor for which we are acting as agent with complete investment discretionary authority and power to bind, and we (and, if applicable, such institution) (A) have sufficient knowledge and experience in financial and business matters to be capable of evaluating the merits and risks

⁷ The form of this letter contemplates that no purchaser will be an individual (or a trust for an individual’s benefit), as is permitted in a 3(c)(7) fund. As discussed in the CL&M Memorandum, it is recommended that 3(c)(1) funds only accept purchasers that are institutional accredited investors. However, it is possible to have individuals or trusts for the benefit of individuals invest in a 3(c)(7) fund. The inclusion of such investors requires additional modifications to the U.S. documentation.

Form 12 (contd.)

of the purchase of the Shares, (B) are prepared to bear the economic risk of investing in and holding such Shares, and (C) are not acquiring the Shares with a view to any public resale or distribution thereof.

3. We further confirm, on behalf of ourselves, and, if applicable, the other Institutional Accredited Investor for which we are acquiring the Shares, that:

(i) We will not re-offer, resell, pledge, hypothecate or otherwise transfer or dispose of any Shares (or the Shares represented by certificates that may be received in replacement thereof or in exchange therefor) except in accordance with the Articles of Association of the Company and either: (A) pursuant to an offer and sale meeting the requirements of Regulation S under the 1933 Act or (B) to an [Institutional] Accredited Investor, provided that the purchaser shall execute and deliver to the [Manager] of the Company an Investment Letter substantially in the form of this letter, and, if requested by the [Manager], shall furnish an opinion of counsel acceptable to the [Manager] to the effect that such offer, sale, pledge, hypothecation, transfer or disposition (x) is in compliance with the registration requirements of the 1933 Act, [if employee benefit plans are excluded as investors] (y) is not being made to an employee benefit plan or other plan which is subject to, or to any entity the assets of which are considered to be “plan assets” of any employee benefit plan or other plan under, the U.S. Employee Retirement Income Security Act of 1974, as amended (“ERISA”), or Section 4975 of the U.S. Internal Revenue Code of 1986, as amended, and (z) will not result in the Company being required to register as an investment company under the 1940 Act. We acknowledge that the [Manager] may restrict transfers or require redemptions of Shares in order to comply with the 1933 Act, the 1940 Act or other applicable laws. We acknowledge that each Share purchased hereunder (and any Shares represented by certificates issued in replacement thereof or in exchange therefor) shall bear restrictive legends in substantially the following form [if a Share offering, insert: and that an appropriate stop transfer order implementing the same shall be lodged with the Registrar for the Shares:]:

THE SHARES REPRESENTED HEREBY AND ANY INTEREST HEREIN OR THEREIN HAVE NOT BEEN AND WILL NOT BE REGISTERED UNDER THE U.S. SECURITIES ACT OF 1933, AS AMENDED (THE “1933 ACT”), OR THE SECURITIES LAWS OF ANY STATE OF THE UNITED STATES. THE ISSUER OF SUCH SHARES HAS NOT BEEN REGISTERED, AND WILL NOT BE REGISTERED, UNDER THE U.S. INVESTMENT COMPANY ACT OF 1940, AS AMENDED (THE “1940 ACT”). AT NO TIME MAY MORE THAN 100 U.S. PERSONS (FOR PURPOSES OF THE 1940 ACT) OWN BENEFICIALLY AN INTEREST IN THE SHARES, AND NO INTEREST HEREIN OR THEREIN MAY BE RE-OFFERED, RE-SOLD, PLEDGED, HYPOTHECATED OR OTHERWISE

Form 12 (contd.)

TRANSFERRED OR DISPOSED OF EXCEPT IN ACCORDANCE WITH THE ARTICLES OF ASSOCIATION OF THE COMPANY AND EITHER: (i) PURSUANT TO AN OFFER AND SALE MEETING THE REQUIREMENTS OF REGULATION S UNDER THE 1933 ACT OR (ii) TO AN [INSTITUTIONAL] “ACCREDITED INVESTOR” WITHIN THE MEANING OF RULE 501(a) OF REGULATION D UNDER THE 1933 ACT, PROVIDED THAT IN CONNECTION WITH ANY SALE REFERRED TO IN CLAUSE (ii) THE PURCHASER SHALL EXECUTE AND DELIVER TO THE [MANAGER] OF THE COMPANY AN INVESTMENT LETTER AND, IF REQUESTED BY THE [MANAGER], SHALL FURNISH AN OPINION OF COUNSEL ACCEPTABLE TO THE [MANAGER] TO THE EFFECT THAT SUCH OFFER, SALE, PLEDGE, HYPOTHECATION, TRANSFER OR DISPOSITION (X) IS IN COMPLIANCE WITH THE REGISTRATION REQUIREMENTS OF THE 1933 ACT, [IF EMPLOYEE BENEFIT PLANS ARE EXCLUDED AS INVESTORS] (Y) IS NOT BEING MADE TO AN EMPLOYEE BENEFIT PLAN OR OTHER PLAN WHICH IS SUBJECT TO, OR TO ANY ENTITY THE ASSETS OF WHICH ARE CONSIDERED TO BE “PLAN ASSETS” OF ANY EMPLOYEE BENEFIT PLAN OR OTHER PLAN UNDER, THE U.S. EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED, OR SECTION 4975 OF THE U.S. INTERNAL REVENUE CODE OF 1986, AS AMENDED, AND (Z) WILL NOT RESULT IN THE ISSUER OF SUCH SHARES BEING REQUIRED TO REGISTER AS AN INVESTMENT COMPANY UNDER THE 1940 ACT.

THE SHARES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO COMPULSORY TRANSFER OR REDEMPTION IN CERTAIN CIRCUMSTANCES PURSUANT TO THE PROVISIONS OF THE ARTICLES OF ASSOCIATION OF THE COMPANY, A COPY OF WHICH MAY BE OBTAINED FROM THE COMPANY UPON REQUEST MADE TO IT AT ITS REGISTERED OFFICE OR TO [ITS MANAGER] [insert name and address of manager]. IN ADDITION, SUCH SHARES MAY NOT BE SOLD OR OTHERWISE TRANSFERRED UNLESS THE PURCHASER OR OTHER TRANSFEREE SHALL FURNISH TO THE REGISTRAR OF SUCH SHARES A CERTIFICATE IN FORM SATISFACTORY TO SUCH MANAGER TO ENABLE THE COMPANY TO DETERMINE THAT IMMEDIATELY FOLLOWING SUCH SALE OR TRANSFER CIRCUMSTANCES WOULD NOT EXIST WHICH WOULD ENABLE THE COMPANY TO REQUIRE THE COMPULSORY TRANSFER OR REDEMPTION OF SUCH SHARES.

(ii) We constitute a single beneficial owner for purposes of Sections 7(d) and 3(c) of the 1940 Act because (A) we are not acquiring beneficially, directly or indirectly, 10% or more of the aggregate amount of outstanding Shares issued by the Company and (B) we are not an

Form 12 (contd.)

investment company registered under the 1940 Act, or a company exempt from registration under the 1940 Act by virtue of Sections 3(c)(1) or 3(c)(7) of the 1940 Act.

(iii) We will not acquire any additional Shares issued by the Company unless (A) after giving effect to such acquisition we (or, if appropriate, such other Qualified Institutional Buyer or [Institutional] Accredited Investor) would beneficially own less than 10% of the aggregate amount of outstanding Shares issued by the Company or (B) at the time of such acquisition, such Shares and any Shares issued by the Company that we own would be deemed to be beneficially owned by not more than one person for purposes of Sections 7(d) and 3(c)(1) of the 1940 Act.

4. We understand that the directors of the Company (the “Directors”) are entitled to require the transfer of the Shares the holding or beneficial ownership of which would (whether on its own or when taken together with any other relevant circumstances, such as, but not limited to, a proposed transfer of the Shares by another holder), in the opinion of the Directors, cause or be likely to cause: (i) the assets of the Company to be considered “plan assets” within the meaning of regulations adopted by the United States Department of Labor under ERISA, (ii) some legal, regulatory pecuniary, tax or material administrative disadvantage to the Company or holders of the Shares, or (iii) the Company to have an aggregate of more than [80] U.S. persons who are beneficial owners of Shares (including beneficial ownership by attribution pursuant to Section 3(c)(1)(A) of the 1940 Act). Until such transfer is effected, the holder of such Shares shall not be entitled to any rights or privileges attaching to such Shares. If the required transfer is not effected within [21] calendar days after service of a notice to do so, the Shares concerned may be compulsorily redeemed by the Company on the terms set out in the Articles of Association of the Company.

5. We have received copies of, and are familiar with, the Memorandum and have had access to such other information concerning the Company as we have deemed necessary for us to make an informed decision to purchase the Shares. We have reviewed the disclosures relating to and consulted our own independent advisers or otherwise have satisfied ourselves concerning (i) U.S. taxation of the Company and our investment in the Company, including the expected status of the Company as a passive foreign investment company, (ii) the fact that the Company has not been and will not be registered as an investment company under the 1940 Act, and (iii) the status of the offering of Shares as a private placement under the 1933 Act. We acknowledge the risk factors involved in an investment in the Company as set forth in the Memorandum.

6. We acknowledge that (i) we are purchasing the Shares as part of an initial offering of the Shares, (ii) we have received a copy of the Memorandum, and (c) we have had access to such financial and other information and have been afforded the opportunity to ask questions and receive satisfactory answers from

Form 12 (contd.)

representatives of the Company regarding the Company, and the terms and conditions relating to investment in the Company, and all such questions have been answered to our full satisfaction. We are relying solely on the information contained in the Memorandum and investigations made by us and acknowledge that we have not relied on the U.S. Placement Agent or any of its affiliates or any person acting on its or their behalf in connection with our investigation of the accuracy of such information or our decision to invest in the Shares.

7. We agree to keep the Memorandum confidential, it being understood that the Memorandum is strictly for our use and is not to be redistributed or duplicated by us.

8. We have such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of an investment in the Shares. We are able to bear the economic risk of the investment with particular reference to the fact that the Shares will be “restricted securities” within the meaning of Rule 144(a)(3) under the 1933 Act and may not be transferred except as set forth in paragraph 3(a) herein. We are acquiring the Shares for investment (i) for our own account or (ii) for not more than one account as to which we exercise sole investment discretion (a “Managed Account”) and not with a view to, or for resale in connection with, any distribution or other disposition of the Shares within the meaning of the 1933 Act. We have no contract, undertaking, arrangement, or agreement with any person to sell or transfer or to have any person sell for us all or any portion of the Shares. We have no present obligation, indebtedness, or commitment, nor is any circumstance in existence, which will compel us to secure funds by the sale of any of the Shares, nor are we a party to any plan or undertaking which would require or contemplate that proceeds from the sale of all or a part of the Shares be utilized in connection therewith, and we do not now have any reason to anticipate any change in circumstances or other particular occasion or event which would cause us to transfer the Shares. In the event that we are acquiring the Shares for a Managed Account, we are familiar with the Managed Account and each of the confirmations, representations and acknowledgments made hereunder are true for the Managed Account and we are duly authorized to make them on behalf of the Managed Account.

9. We have not been formed for the purpose of purchasing the Shares and have substantial assets in addition to the funds to be used to purchase the Shares.

10. We are not purchasing the Shares (i) as a result of or subsequent to becoming aware of any advertisement, article, notice or other communication published in any newspaper, magazine or similar medium or broadcast over television or radio; or (ii) as a result of or subsequent to attendance at a seminar or meeting called by any of the means contained in (i); or (iii) as a result of or subsequent to any solicitation by a person not previously known to us in connection with investments in securities generally.

Form 12 (contd.)

11. Our principal office is as indicated below.

12. We understand that our acceptance of the offer to subscribe for the Shares is irrevocable unless and until rejected by the Company.⁸

13. The information provided herein is true and correct in all respects as of the date hereof. We agree to notify the Company and the U.S. Placement Agent immediately if any of the statements made herein shall become untrue.

As used herein, the terms "United States" and "U.S. person" shall have the meanings ascribed thereto in Rule 902 of Regulation S promulgated under the 1933 Act. Our obligations under this letter shall be governed by and construed in accordance with the laws of the State of New York without regard to its rules as to conflicts of laws.

Yours truly,

Date: _____

By: _____

Name: _____

Title: _____

U.S. Tax ID No.: _____

Number of Shares: _____

Aggregate Purchase Price
(minimum investment U.S. \$[50,000]): _____

Address of Principal Office of Purchaser: _____

Telex No.: _____

Fax No.: _____

Address for delivery of notices, if different from above: _____

Confirmation of the number of Shares allocated to us should be sent to:
Name of Investor [Institution]: _____

⁸ If acceptance of an offer to subscribe for the Shares is conditional on the Shares of the Company being admitted to an offshore securities exchange and on such admission becoming effective on or before a certain date, language to this effect should be added to the representation in this paragraph.

Form 12 (contd.)

Attention: _____

Date: _____

Address: _____

Telex No.: _____

Telephone No.: _____

Form 12 (contd.)

ATTACHMENT A

ACCREDITED INVESTOR QUALIFICATION⁹

Name of Purchaser: _____

Please check the appropriate entries below that accurately describe the Purchaser on whose behalf the Investment Letter is executed:

- Any bank as defined in Section 3(a)(2) of the Securities Act of 1933, as amended (the “1933 Act”), or any savings and loan association or other institution as defined in Section 3(a)(5)(A) of the 1933 Act whether acting in its individual or fiduciary capacity.
- Any broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934, as amended.
- Any insurance company as defined in Section 2(13) of the 1933 Act.
- Any investment company registered under the Investment Company Act of 1940, as amended (the “1940 Act”) or a business development company (as defined in Section 2(a)(48) of the 1940 Act).
- Any Small Business Investment Company licensed by the United States Small Business Administration under Section 301(c) or (d) of the Small Business Investment Act of 1958.
- Any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of \$5,000,000.
- Any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), if the

⁹ This investment letter contemplates the possibility of investment by ERISA plans. However, as discussed in Chapter 10 of the CL&M Memorandum, there are a number of risks associated with permitting investment by ERISA plans and it is recommended that such investors be excluded. Should an issuer choose to exclude ERISA plans, this Attachment A should be modified and the investment letter should contain a representation by the investor that it is not an ERISA plan, such as the following:

We are not (i) an “employee benefit plan” (as defined in Section 3(3) of ERISA) which is subject to ERISA, (ii) a “plan” as defined in Section 4975(e)(1) of the U.S. Internal Revenue Code of 1986, as amended, or (iii) an entity whose underlying assets include “plan assets,” within the meaning of Department of Labor Regulation Section 2510.3-101, or any of the foregoing by reason of investment in such entity.

Although it is recommended that the Company allow only institutional investors to participate, this form may be modified to allow investment by individual accredited investors.

Form 12 (contd.)

investment decision is made by a plan fiduciary, as defined in Section 3(21) of the ERISA, which is either a bank, savings and loan association, insurance company or registered investment adviser, or if the employee benefit plan has total assets in excess of \$5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors.

- A private business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940, as amended.
- Any organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$5,000,000.
- Any trust, with total assets in excess of \$5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in Rule 506(b)(2)(ii) of Regulation D under the 1933 Act.
- Any entity in which all of the equity owners are accredited investors.

**Model Form 13: Form of Investment Letter
for a Section 3(c)(7) Fund**

FORM OF INVESTMENT LETTER

THE SHARES HAVE NOT BEEN, AND WILL NOT BE, REGISTERED UNDER THE U.S. SECURITIES ACT OF 1933, AS AMENDED (THE "1933 ACT"), OR THE LAWS OF ANY STATE, AND MAY NOT BE OFFERED OR SOLD WITHIN THE UNITED STATES OR TO, OR FOR THE ACCOUNT OR BENEFIT OF, U.S. PERSONS EXCEPT IN CERTAIN TRANSACTIONS EXEMPT FROM THE REGISTRATION REQUIREMENTS OF THE 1933 ACT.

[Name and address of [Name and Address of
the Company] U.S. Placement Agent]

Re: Private Placement of Shares
of [•] (the "Company")

Ladies and Gentlemen:

This letter relates to the private placement in the United States of Shares of [•] (the "Company"). We hereby confirm our acceptance of your offer of the Shares of the Company on the terms and conditions set out in the Company's Confidential United States Private Placement Memorandum dated [•].

In connection therewith, we also confirm that:

1. We understand and acknowledge that neither the Shares nor any interest therein has been or will be registered under the 1933 Act, or the securities laws of any state or other political subdivision of the U.S. and that the Company has not been registered, nor will it be registered, under the U.S. Investment Company Act of 1940, as amended (the "1940 Act").

2. We confirm also that we are a "qualified purchaser" within the meaning of Section 2(a)(51)(A) of the 1940 Act (a "Qualified Purchaser") and have accurately indicated the bases for such determination on Attachment A hereto (the "Qualified Purchaser Qualification"), and that we are an "accredited investor" within the meaning of Rule 501(a) of Regulation D under the 1933 Act (an "Accredited Investor"), and have accurately indicated the basis for such accreditation on Attachment B hereto, (the "Accredited Investor Qualification"), are either purchasing Shares for our own account or for the account of an Accredited Investor who is also a Qualified Purchaser for which we are acting as agent with complete investment discretionary authority and power to bind, and we (and, if applicable, such investor) (A) have sufficient knowledge and experience in financial and business matters to be capable of evaluating the merits and risks of the purchase of the Shares, (B) are prepared to bear the economic risk of investing in and holding such Shares, and (C) are not acquiring the Shares with a view to any public resale or distribution thereof.

Form 13 (contd.)

3. We further confirm, on behalf of ourselves, and, if applicable, the other Accredited Investor for which we are acquiring the Shares, that:

(i) We will not re-offer, resell, pledge, hypothecate or otherwise transfer or dispose of any Shares (or certificates that may be received in replacement thereof or in exchange therefor) except in accordance with the Articles of Association of the Company and either: (A) pursuant to an offer and sale meeting the requirement of Regulation S under the 1933 Act or (B) to an Accredited Investor who is also a Qualified Purchaser, provided that the purchaser shall execute and deliver to the [Manager] of the Company an Investment Letter substantially in the form of this letter, and, if requested by the [Manager], shall furnish an opinion of counsel acceptable to the [Manager] to the effect that such offer, sale, pledge, hypothecation, transfer or disposition (x) is in compliance with the registration requirements of the 1933 Act, [if employee benefit plans are excluded as investors] (y) is not being made to an employee benefit plan or other plan which is subject to, or to any entity the assets of which are considered to be “plan assets” of any employee benefit plan or other plan under, the U.S. Employee Retirement Income Security Act of 1974, as amended (“ERISA”), or Section 4975 of the U.S. Internal Revenue Code of 1986, as amended, and (z) will not result in the Company being required to register as an investment company under the 1940 Act. We acknowledge that the [Manager] may restrict transfers or require redemptions of Shares in order to comply with the 1933 Act, the 1940 Act or other applicable laws. We acknowledge that each Share purchased hereunder (and any certificates issued in replacement thereof or in exchange therefor) shall bear restrictive legends in substantially the following form, and that an appropriate stop transfer order implementing the same shall be lodged with the Registrar for the Shares:

THE SHARES REPRESENTED HEREBY AND ANY INTEREST HEREIN OR THEREIN HAVE NOT BEEN AND WILL NOT BE REGISTERED UNDER THE U.S. SECURITIES ACT OF 1933, AS AMENDED (THE “1933 ACT”), OR THE SECURITIES LAWS OF ANY STATE OF THE UNITED STATES. THE COMPANY HAS NOT BEEN REGISTERED AND WILL NOT BE REGISTERED, UNDER THE U.S. INVESTMENT COMPANY ACT OF 1940, AS AMENDED (THE “1940 ACT”). AT NO TIME MAY ANY U.S. PERSON WHO IS NOT A “QUALIFIED PURCHASER” WITHIN THE MEANING OF SECTION 2(A)(51)(A) OF THE 1940 ACT OWN BENEFICIALLY AN INTEREST IN THE SHARES, AND NO INTEREST HEREIN OR THEREIN MAY BE RE-OFFERED, RE-SOLD, PLEDGED, HYPOTHECATED OR OTHERWISE TRANSFERRED OR DISPOSED OF EXCEPT IN ACCORDANCE WITH THE ARTICLES OF ASSOCIATION OF THE COMPANY AND EITHER: (i) PURSUANT TO AN OFFER AND SALE MEETING THE REQUIREMENTS OF REGULATION S UNDER THE 1933 ACT OR (ii) TO AN

Form 13 (contd.)

“ACCREDITED INVESTOR” WITHIN THE MEANING OF RULE 501(a) OF REGULATION D UNDER THE 1933 ACT WHO IS ALSO A “QUALIFIED PURCHASER”, PROVIDED THAT IN CONNECTION WITH ANY SALE REFERRED TO IN CLAUSE (ii) THE PURCHASER SHALL EXECUTE AND DELIVER TO THE [MANAGER] OF THE COMPANY AN INVESTMENT LETTER AND, IF REQUESTED BY THE [MANAGER], SHALL FURNISH AN OPINION OF COUNSEL ACCEPTABLE TO THE [MANAGER] TO THE EFFECT THAT SUCH OFFER, SALE, PLEDGE, HYPOTHECATION, TRANSFER OR DISPOSITION (X) IS IN COMPLIANCE WITH THE REGISTRATION REQUIREMENTS OF THE 1933 ACT, [IF EMPLOYEE BENEFIT PLANS ARE EXCLUDED AS INVESTORS] (Y) IS NOT BEING MADE TO AN EMPLOYEE BENEFIT PLAN OR OTHER PLAN WHICH IS SUBJECT TO, OR TO ANY ENTITY THE ASSETS OF WHICH ARE CONSIDERED TO BE “PLAN ASSETS” OF ANY EMPLOYEE BENEFIT PLAN OR OTHER PLAN UNDER, THE UNITED STATES EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED, OR SECTION 4975 OF THE UNITED STATES INTERNAL REVENUE CODE OF 1986, AS AMENDED, AND (Z) WILL NOT RESULT IN THE COMPANY REFERRED TO ABOVE BEING REQUIRED TO REGISTER AS AN INVESTMENT COMPANY UNDER THE 1940 ACT.

THE SHARES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO COMPULSORY TRANSFER OR REDEMPTION IN CERTAIN CIRCUMSTANCES PURSUANT TO THE PROVISIONS OF THE ARTICLES OF ASSOCIATION OF THE COMPANY, A COPY OF WHICH MAY BE OBTAINED FROM THE COMPANY UPON REQUEST MADE TO IT AT ITS REGISTERED OFFICE OR TO [ITS MANAGER] [insert name and address of manager]. IN ADDITION, SUCH SHARES MAY NOT BE SOLD OR OTHERWISE TRANSFERRED UNLESS THE PURCHASER OR OTHER TRANSFEREE SHALL FURNISH TO THE REGISTRAR OF SUCH SHARES A CERTIFICATE IN FORM SATISFACTORY TO SUCH MANAGER TO ENABLE THE COMPANY TO DETERMINE THAT IMMEDIATELY FOLLOWING SUCH SALE OR TRANSFER CIRCUMSTANCES WOULD NOT EXIST WHICH WOULD ENABLE THE COMPANY TO REQUIRE THE COMPULSORY TRANSFER OR REDEMPTION OF SUCH SHARES.

4. We understand that the directors of the Company (the “Directors”) are entitled to require the transfer of Shares the holding or beneficial ownership of which would (whether on its own or when taken together with any other relevant circumstances, such as, but not limited to, a proposed transfer of Shares by another holder), in the opinion of the Directors cause or be likely to cause; (i) the assets of the Company to be considered “plan assets” within the meaning of regulations adopted by the United States Department of Labor under ERISA, (ii)

Form 13 (contd.)

some legal, regulatory pecuniary, tax or material administrative disadvantage to the Company or its shareholders, or (iii) any shares of the Company to be owned by a U.S. person who is not a Qualified Purchaser. Until such transfer is effected, the holder of such Shares shall not be entitled to any rights or privileges attaching to such Shares. If the required transfer is not effected within [21] calendar days after service of a notice to do so, the Shares concerned may be compulsorily redeemed by the Company on the terms set out in the Articles of Association of the Company.

5. We have received copies of, and are familiar with, the Memorandum and have had access to such other information concerning the Company as we have deemed necessary for us to make an informed decision to purchase the Shares. We have reviewed the disclosures relating to and consulted our own independent advisers or otherwise have satisfied ourselves concerning (i) U.S. taxation of the Company and our investment in the Company, including the expected status of the Company as a passive foreign investment company, (ii) the fact that the Company has not been and will not be registered as an investment company under the 1940 Act, and (iii) the status of the offering of Shares as a private placement under the 1933 Act. We acknowledge the risk factors involved in an investment in the Company as set forth in the Memorandum.

6. We acknowledge that (i) we are purchasing the Shares as part of an initial distribution of the Shares, (ii) we have received a copy of the Memorandum relating to the Shares, and (iii) we have had access to such financial and other information and have been afforded the opportunity to ask questions and receive satisfactory answers from representatives of the Company regarding the Company, and the terms and conditions relating to investment in the Company, and all such questions have been answered to our full satisfaction. We are relying solely on the information contained in the Memorandum and investigations made by us and acknowledge that we have not relied on the U.S. Placement Agent or any of its affiliates or any person acting on its or their behalf in connection with our investigation of the accuracy of such information or our decision to invest in the Shares.

7. We agree to keep the Memorandum confidential, it being understood that the Memorandum is strictly for our use and is not to be redistributed or duplicated by us.

8. We have such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of an investment in the Shares. We are able to bear the economic risk of the investment with particular reference to the fact that the Shares will be “restricted securities” within the meaning of Rule 144(a) under the 1933 Act and may not be transferred except as contained in paragraph 3(a) herein. We are acquiring the Shares for investment (i) for our own account or (ii) for not more than one account as to which we exercise sole investment discretion (a “Managed Account”) and not with a view to, or for resale in connection with, any distribution or other disposition of the

Form 13 (contd.)

Shares within the meaning of the 1933 Act. We have no contract, undertaking, arrangement, or agreement with any person to sell or transfer or to have any person sell for us all or any portion of the Shares. We have no present obligation, indebtedness, or commitment, nor is any circumstance in existence, which will compel us to secure funds by the sale of any of the Shares, nor are we a party to any plan or undertaking which would require or contemplate that proceeds from the sale of all or a part of the Shares be utilized in connection therewith, and we do not now have any reason to anticipate any change in circumstances or other particular occasion or event which would cause us to transfer the Shares. In the event that we are acquiring the Shares for a Managed Account, we are familiar with the Managed Account and each of the confirmations, representations and acknowledgments made hereunder are true for the Managed Account and we are duly authorized to make them on behalf of the Managed Account.

9. We have not been formed for the purpose of purchasing the Shares and have substantial assets in addition to the funds to be used to purchase the Shares.

10. We are not purchasing the Shares (i) as a result of or subsequent to becoming aware of any advertisement, article, notice or other communication published in any newspaper, magazine or similar medium or broadcast over television or radio; or (ii) as a result of or subsequent to attendance at a seminar or meeting called by any of the means contained in (i); or (iii) as a result of or subsequent to any solicitation by a person not previously known to us in connection with investments in securities generally.

11. Our principal office is as indicated below.

12. We understand that our acceptance of the offer to subscribe for Shares is irrevocable unless and until rejected by the Company.¹⁰

13. The information provided herein is true and correct in all respects as of the date hereof. We agree to notify the Company and the U.S. Placement Agent immediately if any of the statements made herein shall become untrue.

As used herein, the terms "United States" and "U.S. person" shall have the meanings ascribed thereto in Rule 902 of Regulation S promulgated under the 1933 Act.

Our obligations under this letter shall be governed by and construed in accordance with the laws of the State of New York without regard to its rules as to conflicts of laws.

Yours truly,

Date: _____

¹⁰ If acceptance of an offer to subscribe for Shares is conditional on the Shares of the Company or Fund being admitted to a offshore securities exchange and on such admission becoming effective on or before a certain date, language to this effect should be added to the representation in this paragraph.

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By: _____

Name: _____

Title: _____

U.S. Tax ID No.: _____

Number of Shares: _____

Aggregate Purchase Price

(minimum investment U.S. \$[50,000]): _____

Address of Principal Office of Purchaser: _____

Telex No: _____

Fax No.: _____

Address for delivery of notices, if different from above: _____

Confirmation of the number of Shares allocated to us should be sent to:

Name of Investor [Institution]: _____

Attention: _____

Date: _____

Address: _____

Telex No.: _____

Telephone No.: _____

Form 13 (contd.)

ATTACHMENT A

QUALIFIED PURCHASER QUALIFICATION

Name of Purchaser: _____

Please check the appropriate entries below that accurately describe the Purchaser on whose behalf the Investment Letter is executed:

- A natural person who, along or with his or her spouse, owns not less than U.S. \$5 million in investments.
- A company that owns not less than U.S. \$5 million in investments and that is owned, directly or indirectly by or for two or more natural persons who are related as siblings or spouses (including former spouses), or direct lineal descendants by birth or adoption, spouses of such persons, the estates of such persons, or foundations, charitable organizations, or trusts established by or for the benefit of such persons.
- Any trust not covered by the immediately preceding category and that was not formed for the specific purpose of acquiring the Shares, as to which the trustee or other person authorized to make decisions with respect to the trust, and each settler or other person who has contributed assets to the trust, is a qualified purchaser within one of the categories set forth in this Qualified Purchaser Qualification.
- A person, acting for its own account or the accounts of other qualified purchasers, who in the aggregate owns and invests on a discretionary basis, not less than U.S. \$25 million in investments.

Form 13 (contd.)

ATTACHMENT B

ACCREDITED INVESTOR QUALIFICATION¹¹

Name of Purchaser: _____

Please check the appropriate entries below that accurately describe the Purchaser on whose behalf the Investment Letter is executed. The Purchaser is a Qualified Purchaser as set forth in Attachment A hereto and:

- Any bank as defined in Section 3(a)(2) of the Securities Act of 1933, as amended (the “1933 Act”), or any savings and loan association or other institution as defined in Section 3(a)(5)(A) of the 1933 Act whether acting in its individual or fiduciary capacity.
- Any broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934, as amended.
- Any insurance company as defined in Section 2(13) of the 1933 Act.
- Any investment company registered under the Investment Company Act of 1940, as amended (the “1940 Act”) or a business development company (as defined in Section 2(a)(48) of the 1940 Act).
- Any Small Business Investment Company licensed by the United States Small Business Administration under Section 301(c) or (d) of the Small Business Investment Act of 1958.
- Any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions for the benefit of its employees, if such plan has total assets in excess of \$5,000,000.
- Any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), if the investment decision is made by a plan fiduciary, as defined in Section 3(21) of the ERISA, which is either a bank, savings and loan association, insurance company or registered investment adviser, or if the employee benefit plan has total assets in excess of \$5,000,000 or, if a self-directed

¹¹ This investment letter contemplates the possibility of investment by ERISA plans. However, as discussed in Chapter 10 of the CL&M Memorandum, there are a number of risks associated with permitting investment by ERISA plans and we generally recommend that such investors be excluded. Should a fund choose to exclude ERISA plans, the investment letter should contain a representation by the investor that it is not an ERISA plan and this Attachment B should be modified. Although it is recommended that the Company allow only institutional investors, this form may be modified to allow investment by individual accredited investors.

Form 13 (contd.)

plan, with investment decisions made solely by persons that are accredited investors.

- A private business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940, as amended.
- Any organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$5,000,000.
- Any trust, with total assets in excess of \$5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in Rule 506(b)(2)(ii) of Regulation D under the 1933 Act.
- Any entity in which all of the equity owners are accredited investors.

**Model Form 14: Suggested Provisions for Certificate of Incorporation
or other Organizational Documents of the Company**

TRANSFER OF SHARES

[For a closed-end fund]: The Shares in the Company are in registered form. The transfer of the Shares shall be effected by transfer in writing in any usual or common form in use in the [Cayman Islands] or in any other form approved by the directors of the Company (the “Directors”) but need not be under seal. The instrument of transfer of the Shares shall state the full name and address (and, if required by the Directors, the nationality) of the transferor and shall be signed by or on behalf of the transferor and (for partly paid shares) by the transferee also. The transferor shall be deemed to remain the owner in respect of such Shares until the name of the transferee is entered in the Register in respect thereof. The Directors may in their absolute discretion decline to register any transfer of the Shares in respect of which the nominal value or premium payable in respect of such Shares has not been received by the Company or on which the Company has a lien. The Directors may also decline to register a transfer: (i) unless the instrument of transfer has been deposited at the registered office of the Company or the office of the Registrar or such other place as the Directors may reasonably require, accompanied by the certificate for the Shares to which it relates, and such other evidence as the Directors may reasonably require to show the right of the transferor to make the transfer; and (ii) if the instrument of transfer is in favor of more than [four] transferees.

COMPULSORY TRANSFER AND REDEMPTION OF SHARES

(i) If it shall come to the attention of the Directors that (A) any Share or Shares are or may be owned or held directly or beneficially by any person or persons whose holding or continued holding of those Shares (whether on its own or in conjunction with any other circumstance appearing to the Directors to be relevant) might in the sole and conclusive determination of the Directors cause or be likely to cause some legal, regulatory, pecuniary, tax or material administrative disadvantage to the Company or Shareholders or cause or be likely to cause the assets of the Company to be considered “plan assets” within the meaning of regulations adopted under the United States Employee Retirement Income Security Act of 1974, as amended, or Section 4975 of the United States Internal Revenue Code of 1986, as amended; or (B) [if a 3(c)(1) fund, insert the following: the aggregate number of U.S. persons who are beneficial owners of Shares (which for the purposes of the Articles shall include beneficial ownership by attribution under Section 3(c)(1)(A) of the U.S. Investment Company Act of 1940, as amended (the “1940 Act”)) is or may be more than [80]] [or, if a 3(c)(7) fund, insert the following: any U.S. person who is not a “qualified purchaser” as defined in Section 2(a)(51)(A) of the 1940 Act beneficially owns any Shares of the Company], the Directors may serve a notice (hereinafter called a “Transfer Notice”) upon the person (or any one of such persons where Shares are

Form 14 (contd.)

registered in joint names) appearing in the Register of members as the holder (the “Vendor”) of the Share, the Shares or any of the Shares concerned (the “Relevant Shares”) requiring the Vendor within 21 calendar days (or such extended time as in all the circumstances the Directors shall consider reasonable) to transfer (and/or procure the disposal of interests in) the Relevant Shares to another person whose holding of such Relevant Shares, in the sole and conclusive determination of the Directors, would not fall within (a) above and would not result in [if a 3(c)(1) fund, insert the following: the aggregate number of U.S. persons who are beneficial owners of Shares being [80] or more] [or, if a 3(c)(7) fund, insert the following: the beneficial ownership of Shares of the Company being held by any U.S. person who is not a qualified purchaser] (such person being hereinafter called an “Eligible Transferee”). On and after the date of such Transfer Notice, and until registration of a transfer of the Relevant Shares to which it relates pursuant to the provisions of this sub-paragraph (i) or sub-paragraph (ii) below, the rights and privileges attaching to the Relevant Shares shall be suspended and not capable of exercise.

(ii) If within [21] calendar days after the giving of a Transfer Notice (or such extended time as in all the circumstances the Directors shall consider reasonable) the Transfer Notice has not been complied with to the satisfaction of the Directors, the Directors may arrange for the Company to sell the Relevant Shares at the best price reasonably obtainable to any Eligible Transferee or Transferees or the Directors may arrange for the Company to redeem the Shares in accordance with the provisions of the Articles. For this purpose the Directors may authorize in writing any officer or employee of the Company to execute on behalf of the holder or holders of the Relevant Shares a transfer of the Relevant Shares to the purchaser or purchasers, or, as the case may be, a redemption notice in respect of the Shares. The net proceeds of the sale or redemption (as the case may be) of the Relevant Shares shall be received by the Company whose receipt shall be a good discharge for the purchase money or the redemption money and shall be paid over by the Company to the former holder or holders (together with interest at such rate as the Directors consider appropriate) upon surrender by him or them of the certificate for the Relevant Shares, which the Vendor shall forthwith be obliged to deliver to the Company. In the case of a transfer, the Company may register the transferee or transferees as holder or holders of the Relevant Shares and issue to him or them a certificate for the same and thereupon the transferee or transferees shall become absolutely entitled thereto.

(iii) A person who becomes aware that his holding, directly or beneficially, of the Shares will, or is likely to, fall within sub-paragraph (i)(A) above or, being a U.S. person and a beneficial owner of Shares, becomes aware that [if a 3(c)(1) fund, insert the following: the aggregate

Form 14 (contd.)

number of U.S. persons who are beneficial owners of the Shares is more than [80]] [or, if a 3(c)(7) fund, insert the following: Shares of the Company are beneficially owned by a U.S. person who is not a qualified purchaser], shall forthwith, unless he has already received a Transfer Notice pursuant to sub-paragraph (i) above, either transfer the Shares to an Eligible Transferee or Transferees or give a request in writing to the Directors for the issue or a Transfer Notice in accordance with sub-paragraph (i) above. Every such request shall be accompanied by the certificate or certificates for the Shares to which it relates.

(iv) Subject to the provisions of the Articles, the Directors shall, unless any Director has reason to believe otherwise, be entitled to assume without inquiry that none of the Shares are held in such a way as to entitle the Directors to serve a Transfer Notice in respect thereof. The Directors may, however, at any time and from time to time call upon any holder (or any one of joint holders) of the Shares by notice in writing to provide such information and evidence as they shall require upon any matter connected with or in relation to such holder or joint holders of the Shares. In the event of such information and evidence not being so provided within such reasonable period (being not less than 21 calendar days after service of the notice requiring the same) as may be specified by the Directors in the said notice, the Directors may, in their absolute discretion, treat any Share held by such a holder or joint holders as being held in such a way as to entitle them to serve a Transfer Notice in respect thereof.

(v) The Directors shall not be required to give any reasons for any decision, determination or declaration taken or made in accordance with this Article. The exercise of the powers conferred by sub-paragraph (i) and/or (ii) and/or (iv) above shall not be questioned or invalidated in any case on the ground that there was insufficient evidence of direct or beneficial ownership of the Shares by any person or that the true direct or beneficial owner of any Shares was otherwise than appeared to the Directors at the relevant date provided that the said powers shall have been exercised in good faith.

Model Form 15

Form of Provisions for Placement Agent's Agreement

1. **Definitions.** For the purpose hereof, the following terms shall have the meanings indicated:

(a) "Directed Selling Efforts" means "directed selling efforts" as defined in Rule 902(b) under Regulation S;

(b) "Institutional Accredited Investor" means an accredited investor under Rule 501(a)(1), (2) or (3) of Regulation D;

(c) "Qualified Institutional Buyer" means a "qualified institutional buyer" as defined in Rule 144A;

(d) "Regulation D" means Regulation D adopted by the Commission under the 1933 Act;

(e) "Regulation S" means Regulation S adopted by the Commission under the 1933 Act;

(f) "Rule 144A" means Rule 144A adopted by the Commission under the 1933 Act;

(g) "Commission" means the United States Securities and Exchange Commission;

(h) "United States" means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia;

(i) "1933 Act" means the U.S. Securities Act of 1933, as amended; and

(j) "1934 Act" means the U.S. Securities Exchange Act of 1934, as amended.

2. **Representations and Commitments of the Company.** The Company hereby represents and agrees to the following:

(a) The Company is a "foreign issuer" as defined in Rule 902 of Regulation S under the 1933 Act and reasonably believes that as of the date hereof there is and as of the date of issuance of the Shares there will be no "substantial U.S. market interest" (as defined in Rule 902 under Regulation S) in the Shares of the Company.

Form 15 (contd.)

(b) The Company (i) is not an open-end investment company, closed-end investment company, unit investment trust or face-amount certificate company that is registered or required to be registered under the United States Investment Company Act of 1940, as amended; and (ii) has not during the past six months offered or sold any securities issued by it in the U.S.

(c) As of the date hereof and as of the date of issuance of the Shares: (i) the Shares are not and will not be, (ii) no securities of the same class as the Shares are or will be, and (iii) no American Depositary Share representing any securities of the same class as the Shares are or will be,

(A) listed on a national securities exchange that is registered under Section 6 of the 1934 Act, (B) quoted in any “U.S. automated inter-dealer quotation system” (as such term is used in the 1934 Act), or (C) convertible or exchangeable at an effective exercise premium (calculated as specified in paragraph (a)(6) or (a)(7) of Rule 144A, as appropriate) of less than ten percent (10%) for securities so listed or quoted.

(d) Neither the Company nor any of its affiliates has taken or will take any action which would cause the safe harbor provision afforded by Regulation S and the exemptions afforded by Section 4(2) and Rule 144A under the 1933 Act to be unavailable for the offer and sale of the Shares under the Placement Agent’s Agreement or which would constitute a violation of Regulation M under the 1934 Act.

(e) For so long as any of the Shares are outstanding and may not be resold to the public in the U.S. without restrictions unless registered under the 1933 Act, if the Company is not exempt under Rule 12g3-2(b) under the 1934 Act from the reporting requirements of Sections 13 or Section 15(d) of the 1934 Act, and is not otherwise subject to such requirements, it will provide to any holder of Shares and any prospective purchaser of Shares designated by such holder, upon the request of such holder or prospective purchaser, the information required to be provided to such holder or prospective purchaser by paragraph (d)(4) of Rule 144A.

(f) None of the Company, its affiliates or any person acting on its or their behalf (other than the U.S. Placement Agent and its affiliates as to which the Company makes no representation) has offered or will offer to sell the Shares by means of any form of general solicitation or general advertising (as those terms are used in Regulation D) or in any manner involving a public offering within the meaning of Section 4(2) of the 1933 Act.

(g) Neither the Company, its affiliates nor any person acting on its or their behalf (other than the U.S. Placement Agent and its affiliates as to which the Company makes no representation) has offered or will offer any of the Shares or has made or will make any Directed Selling Efforts with respect to the Shares, to the extent that any such action would cause the safe harbor afforded by Regulation S to be unavailable for offers and sales of the Shares.

Form 15 (contd.)

(h) The Shares may be offered and sold in the U.S. only in accordance with applicable state securities laws and in accordance with the provisions of Section 3(c).

3. Representations and Commitments of the Placement Agent. The Placement Agent hereby represents and agrees to the following:

(a) The Placement Agent acknowledges that the Shares have not been and will not be registered with the Commission under the 1933 Act and that the Shares are being offered and sold in reliance upon an exemption from registration and under Regulation S (and, for offers and sales to persons in the U.S. in exempt transactions in the manner contemplated in Section 3(c) of this Schedule).

(b) The Placement Agent agrees that neither it nor any of its respective affiliates nor any person acting on its behalf or their respective affiliates (i) has engaged or will engage in any Directed Selling Efforts with respect to the Shares, (ii) except to the extent permitted by Section 3(c), has made or will make (A) any offer to sell or solicitation of any offer to buy any of the Shares to any person or (B) any sale of the Shares to any person unless (x) the seller of such Shares and any person acting on its behalf reasonably believe that at the time such person placed the order to purchase Shares such person was outside the U.S. and (y) such sale is otherwise in compliance with the applicable requirements of Regulation S, (iii) has taken or will take any action which would constitute a violation of Regulation M under the 1934 Act; or (iv) has solicited or will solicit offers for, or offers to sell, the Shares by means of any form of general solicitation or general advertising (as those terms are used in Regulation D) or in any manner involving a public offering within the meaning of Section 4(2) of the 1933 Act or which would otherwise cause the safe harbor afforded by Regulation S to be unavailable for offers and sales of the Shares.

(c) Offers and sales of the Shares in the U.S. may be made only (i) by the Company in accordance with the requirements of Rule 506 of Regulation D or (ii) by the U.S. Placement Agent or its affiliates either (A) to Qualified Institutional Buyers (or persons reasonably believed to be Qualified [Institutional] Buyers) in resale transactions in reliance on and accordance with the requirements of Rule 144A or (B) to Institutional Accredited Investors in reliance on and in accordance with another exemption from the registration requirements of the 1933 Act, provided that all offers and sales under this Section 3(c) shall be made in accordance with applicable state securities laws and provided, further, that each purchaser shall, prior to the sale of Shares to it under this Section 3(c), have received a copy of the Memorandum in form acceptable to the Company and the U.S. Placement Agent and have executed and delivered to the Company an Investment Letter in the form attached hereto as Exhibit ___.

(d) The Placement Agent agrees that offers to sell, solicitations of offers to buy and sales contemplated by this Agreement shall be made only in

Form 15 (contd.)

compliance with any applicable U.S. federal or state laws relating to broker-dealer registration.

(e) The Placement Agent has not entered into, and will not, without the prior written consent of the Company, enter into, any contractual arrangement with respect to the distribution of the Shares in the U.S., except with its affiliates.

Model Form 16

Provisions Regarding Company's Obligations to Provide Information for QEF Election

It is recommended that the Company formalize its commitment to provide U.S. shareholders with any information and representations necessary for them to make a qualified electing fund election. This formal commitment may be inserted in the Private Placement Memorandum or delivered by the Company as a closing document. *See also* the statement in the tax section of the Private Placement Memorandum (*see* Form 10) that the fund will provide such information upon request. The formal commitment by the Company may include the following language:

The Company shall provide upon request such information and representations as are required under the United States Internal Revenue Code of 1986, as amended (the "Code"), the Treasury Regulations thereunder and administrative guidance with respect thereto, as shall enable a shareholder to make a "qualified electing fund" election with respect to the Company, or any similar provision of subsequent law. Under current law, such information and representations include:

- (i) The year to which the information applies.
- (ii) The shareholder's pro rata share of the ordinary earnings and net capital gains of the Company (computed in accordance with U.S. income tax principles), or sufficient information to enable the shareholder to calculate the same.
- (iii) The amount of cash and fair market value of property distributed or deemed distributed to the shareholder during the year.
- (iv) A statement that the passive foreign investment company will permit the shareholder to inspect and copy the Company's books of account, records, and such other documents as may be maintained by the Company that are necessary to establish that the Company's ordinary earnings and net capital gain, as provided in section 1293(e) of the Code, are computed in accordance with U.S. income tax principles.