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ENTERING THE U.S. SECURITIES MARKETS: REGULATION OF NON-U.S. ISSUERS

Introduction

The U.S. securities markets offer the greatest opportunities for businesses that wish to raise additional capital or expand their shareholder base. Large non-U.S. corporations regularly tap the U.S. market for infusions of capital, and the securities of many non-U.S. corporations are listed on the New York Stock Exchange or traded on NASDAQ.[1] Smaller non-U.S. entities, however, may be deterred from entering the U.S. markets because of concerns about the burdens of U.S. securities regulation. These concerns are legitimate: a decision to enter the highly-regulated U.S. securities markets should not be made lightly. For non-U.S. private issuers, perhaps the greatest difficulty in registering securities is compliance with the disclosure requirements with respect to both financial and non-financial information. This article outlines the methods by which non-U.S. entities can enter in the U.S. markets on a limited basis, as an initial step to assess whether there is a sufficient U.S. interest in their securities to warrant a more significant presence in the U.S. market.

I. Regulation of Public Offerings of Securities in the U.S.

Any public offering of securities in the United States must be registered with the Securities and Exchange Commission (SEC) under the Securities Act of 1933

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[1] Between 1986 and 1996, the number of non-U.S. firms listed on the New York Stock Exchange increased from 8 to 59, and the number of non-U.S. firms traded on NASDAQ increased from 11 to 93. Loss and Seligman, Securities Regulation 813 (3d ed.)

(the 1933 Act).[2] The definitions of "security"[3] and "public"[4] are broadly defined, consistent with the statutory purpose of preventing fraud and providing investors with material information about the nature of the investment. Therefore, all securities publicly offered in the United States, both by non-U.S. governments[5] and by private non-U.S. issuers, must be registered.

The SEC has adopted special disclosure requirements for non-U.S. private issuers.[6] Because many large corporations are increasingly becoming truly international, the SEC defines "foreign private issuer" to exclude those corporations that, although incorporated or organized under the laws of a foreign country, nevertheless have so many U.S. connections that they should be considered as U.S. companies.[7] A non-U.S. corporation is not, therefore, treated as a "foreign private issuer" if more than 50% of its outstanding voting securities are directly or indirectly owned by residents of the United States (share ownership test) and any one of the following is applicable: the majority of its executive officers or directors are U.S. citizens or residents; more than 50% of its assets are located in the United States; or its business is administered principally in the United States (location test).[8] In determining the share ownership test, the issuer is required to "look through" the record ownership of brokers, dealers, banks or nominees holding securities for the accounts of their customers to determine the residency of those customers and to take into account information regarding U.S. ownership derived from beneficial ownership reports or other available information.[9]

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[2] Section 5, 15 U.S.C. §77e.

[3] Section 2(1), 15 U.S.C. §77b(1). See SEC v. W.J. Howey Co., 328 U.S. 293 (1946) (offering of units of citrus grove development coupled with a contract for cultivating, marketing and remitting the net proceeds to investors required registration).

[4] Section 4(2), 15 U.S.C. §77d(2), discussed infra at notes 26-27 and accompanying text, exempts from registration offerings by an issuer not involving the public.

[5] See, e.g., SEC v. Chinese Consolidated Benevolent Assn., 120 F.2d 738 (2d Cir.), cert. denied, 314 U.S. 618 (1941) (offering of Chinese bonds to Chinese citizens resident in United States requires registration). Section 6(a), 15 U.S.C. § 77f(a), specifically refers to registration statements filed by a foreign country. Schedule B of the act sets forth the information that must be contained in registration statements filed by foreign governments.

[6] The basic registration forms under the 1933 Act for non-U.S. private issuers are F-1, F-2, and F-3. The latter two are available only for companies reporting under the Securities Exchange Act of 1934 Act (the 1934 Act) and permit incorporation by reference of information contained in the issuer's Form 20-F, the basic form used by non-U.S. private issuers for registration and annual reports under the the 1934 Act. See notes 14-18 and accompanying text for discussion of the circumstances that require a company to file reports under the 1934 Act.

[7] 17 CFR 230.405.

[8] Id.

[9] Id. In order to reduce the burden on companies that trade in many different markets, the issuer only need "look through" the record ownership of securities held of record in the United States, in the issuer's home jurisdiction, and in the primary trading market for the issuer's securities if different from the home jurisdiction. If, after reasonable inquiry, the issuer cannot obtain information about the amount of securities represented by accounts of customers resident in the United States, the issuer may assume that the customers are

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The SEC believes that how much information should be disclosed in the registration statement when the issuer is making a public offering of securities depends, to a great extent, on how much information is already known about the issuer in the marketplace.[10] Thus, just as the SEC adopted an Integrated Disclosure System for U.S. issuers, so too it has adopted a three-tier Integrated Disclosure System for Foreign Private Issuers, in which the disclosure requirements for public offerings by non-U.S. private issuers vary, depending on the status of the issuer
(principally whether the issuer is a reporting company under the Securities Exchange Act of 1934 [11]) and the type of offering.

For a non-U.S. company that is not yet subject to the 1934 Act's reporting requirements and is contemplating an registered public offering in the United States, preparation of a registration statement is a time-consuming and expensive undertaking. The SEC has recently sought to facilitate cross-border flow of securities and capital by adopting the international disclosure standards for the non-financial statement portions of disclosure documents endorsed by the International Organization of Securities Commissions, thus becoming the first securities regulatory body to do so.[12] The SEC adopted the international disclosure standards to promote uniformly high disclosure standards across borders, not to ease the disclosure requirements for issuers entering the U.S. capital market. Moreover, the requirements that present the greatest difficulties for non-U.S. issuers remain, in particular the requirement that financial statements be presented in accordance with U.S. Generally Accepted Accounting Principles (GAAP) or reconciled to U.S. GAAP.[13]

II. Reporting Requirements under the Securities Exchange Act of 1934

If a non-U.S. company decides to list its securities on a national securities exchange, such as the New York Stock Exchange,[14] or to register its securities on NASDAQ, [15] or on the electronic bulletin board of the National Association of Securities Dealers (NASD),[16] it becomes a reporting company under the 1934 Act and must file an annual report on Form 20-F. If a non-U.S. corporation makes a registered public offering of its securities in the United States, it also becomes subject to the annual reporting requirements.[17] In these instances, the company has made a decision to participate in the U.S. markets.[18]

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residents of the jurisdiction in which the nominee has its principal place of business.

[10] For the SEC's rationale and objectives in adopting an integrated disclosure system for foreign private issuers, see its proposing release, Rel. No. 33-6360 (Nov. 20, 1981).

[11] See infra notes 14-18 and accompanying text for circumstances in which non-U.S. companies become subject to the 1934 Act's reporting requirements.

[12] International Disclosure Standards, Rel. No. 33-7745 (Sept. 28, 1999).

[13] Items 17 and 18, Form 20-F.

[14] Sec. 12(b), 15 U.S.C. § 78l(b).

[15] Sec. 12(g), 15 U.S.C. § 78l(g). Securities of foreign issuers listed on NASDAQ prior to Oct. 5, 1983 have an exemption. 17 CFR § 240.12g3-2(d)(3).

[16] Rel. No. 34-38456 (Mar. 31, 1997).

[17] Sec. 15(d), 15 U.S.C. § 78o(d).

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Even if a non-U.S. company has not taken any of these actions, it is subject to the reporting requirements under section 12(g) of the 1934 Act if it has $10,000,000 in total assets and a class of equity securities held of record by 500 persons worldwide, of whom 300 are resident in the United States.[19] However, non-U.S. companies may apply for an exemption from section 12 (g), and the requirements for obtaining an exemption are not burdensome. The issuer must furnish annually to the SEC information material to an investment decision[20] it (a) has made or is required to make public under the law of the country of its domicile or in which it is organized, (b) has filed or is required to file with a stock exchange on which its securities are traded and which was made public by the exchange, or
(c) has distributed or is required to distribute to its shareholders.[21] Press releases and all other communications distributed directly to shareholders must be in English; English versions or adequate summaries in English may be furnished in lieu of original English translations. No other document need be furnished unless the company has prepared an English translation or summary; in other cases, a brief description of the document in English is sufficient.[22] The issuer must also furnish to the SEC, to the extent known or which can be obtained without unreasonable effort or expense, the number of holders of each class of equity securities resident in the United States, the amount and percentage of each class of outstanding equity securities held by residents in the United States, the circumstances in which the securities were acquired, and the date and circumstances of the most recent public distribution of securities by the issuer or an affiliate.[23]

Non-U.S. companies can obtain the exemption from section 12(g) even if they are automatically exempt because they have fewer than 300 shareholders in the United States. Companies may elect to do this so that they will not have to comply with the information requirement in Rule 144A offerings[24] or so that they can sponsor an ADR program.[25]

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[18] As of December 31, 1998, there were 1,116 non-U.S. reporting companies. Greene et al., U.S. Regulation of the International Securities and Derivatives Markets § 2.01 (5th ed.).

[19] 17 CFR § 240.12g-1; 17 CFR § 240.12g3-2(a). Securities held of record by a bank, broker or other nominee for the accounts of customers resident in the United States shall be counted as held in the United States by the number of separate accounts for which the securities are held.

[20] 17 CFR § 240.12g3-2(b)(3). Examples given are: the financial condition or results of operations; changes in business; acquisitions or dispositions or assets; issuance, redemption or acquisitions of their securities; changes in management or control; the granting of options or the payment of other remuneration to directors or officers; and transactions with directors, officers or principal security holders.

[21] 17 CFR § 240.12g3-2(b)(1).

[22] 17 CFR § 240.12g3-2(b)(4). The information is not considered "filed" with the SEC for purposes of imposing civil liability under section 18 of the 1934 Act (misstatements in filed documents).

[23] 17 CFR § 240.12g3-2(b)(5).

[24] See infra notes 35-37 and accompanying text.

[25] See infra note 53 and accompanying text.

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III. Raising Capital: Private Offerings and Liquidity

Because registering securities is an expensive and lengthy process that subjects the issuer to ongoing reporting requirements, a company may decide to raise capital in the United States through a private placement. Section 4(2) of the 1933 Act[26] provides an exemption from registration for "transactions by an issuer not involving any public offering." The Act contains no definition of "public"; SEC v. Ralston Purina [27] is the seminal case setting forth the distinction between public and private offerings. An offering is public if the offerees need the protection of the Act and, conversely, an offering is private if made only to those who can fend for themselves. The distinction does not, therefore, turn on the number of offerees or purchasers. Since SEC v. Ralston Purina, there has been substantial uncertainty about what constitutes a private placement. To help alleviate the uncertainty, the SEC adopted Regulation D,[28] which provides three non-exclusive exemptions ("safe harbors") for private placements, which impose conditions on the manner of offering, the number of purchasers, the information made available to the purchasers, and, in two instances, limitations on the dollar amount of the offering. Apart from Regulation D, however, since the statutory basis for the exemption is that there are persons who do not need the protections of the act, it is recognized that an offering made exclusively to large institutional investors is exempt, no matter the size of the offering, the number of purchasers, or the information provided to the purchasers.

An issuer wishing to use the § 4(2) exemption must also be concerned about subsequent resales of the unregistered securities. Section 4(1) of the 1933 Act[29] exempts from registration "transactions by any person other than an issuer, underwriter, or dealer," in order to permit routine trading transactions. The initial purchasers of securities in a private placement may be deemed "underwriters"[30] if the securities are subsequently distributed to the public, thus destroying the issuer's private placement exemption. Uncertainties also exist about how long the initial purchaser must hold the security to avoid "underwriter" status. As a result, the amount for which the issuer can sell its securities may well reflect a discount because of the illiquidity of the investment.

Here too the SEC has adopted regulation to provide certainty. Rule 144[31] sets forth conditions which, if met, ensure that purchasers of unregistered securities can resell the securities without being deemed underwriters. The rule focuses on the availability of information about the issuer, a minimum period of time that the initial purchaser has held the securities, and limitations on the amount of securities. Here again, apart from Rule 144, it is recognized that resales made to large institutional investors are not sales to the public and therefore should not jeopardize the private placement.

The SEC has recognized this in its adoption of Rule 144A,[32] an exemption for resales of unregistered securities made to "qualified institutional buyers" or QIBs.

[26] 15 U.S.C. § 77d(2).
[27] 346 U.S. 119 (1953).
[28] 17 CFR § 230.501-230.508.
[29] 15 U.S.C. § 77d(1).
[30] Sec. 2(11), 15 U.S.C. § 77b(11).
[31] 17 CFR § 230.144.

The definition of QIB includes entities, such as insurance companies, investment companies, employee benefit plans, investment advisers, dealers, and banks, that own and invest at least $100 million.[33] The SEC does not want these unregistered securities freely trading on the exchanges or on NASDAQ; therefore, Rule 144A contains a significant limitation on its use by corporations that have securities listed on an exchange or on NASDAQ. In those instances, the unregistered securities, when issued, cannot be of the same class as the securities listed on the exchange or traded on NASDAQ.[34]

If there is no publicly available information about the company, because the company is not a reporting company and has not applied for the exemption under section 12(g),[35] the holder of the securities and a prospective purchaser must have the right to obtain from the issuer, and the prospective purchaser must receive at his request, certain "reasonably current"[36]information: a very brief statement of the nature of the business and the products and services it offers and the company's most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for the past two fiscal years. The financial statements should be audited "to the extent reasonably available."[37] The SEC permits non-U.S. companies to apply for the section 12(g) exemption even if they are automatically exempt, so that they are not subject to this iinformation requirement.

Rule 144A is a very important exemption for non-U.S. companies who wish to raise capital in the United States without making a public offering. If the offering is made solely to QIBs, the offering will be exempt as a private placement, and the QIBs can purchase the securities with the knowledge that the securities can be resold to other QIBs at any time, without the danger that they will be deemed underwriters. The Preliminary Notes to the Rule state explicitly that the fact that the initial purchasers may purchase the securities with a view toward reselling them under Rule 144A does not affect the availability to the issuer of an exemption under section 4(2).[38]

Rule 904 of Regulation S[39] provides an exemption from registration under the 1933 Act for offers and sales[40] of securities made outside the United States,

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[32] 17 CFR § 230.144A. The seller must take reasonable steps to make sure that the purchaser knows that the seller may rely on this exemption. Rule 144A(d)(2).

[33] Rule 144A(a)(1). In the case of dealers, the investment portfolio is only $10 million. Banks have an additional requirement of an audited net worth of $25 million.

[34] The unregistered securities also cannot be "fungible" with the listed or NASDAQ-trade d securities. See Rule 144A(3)(i).

[35] See supra notes 20-23 and accompanying text.

[36] The requirement of "reasonably current" information is presumed to be satisfied, under Rule 144A(4)(ii), if the foreign private issuer meets the timing requirements of the issuer's home country or principal trading markets.

[37] Rule 144A(d)(4)(i).

[38] Comment 7, Preliminary Notes, Rule 144A.

[39] 17 CFR 230.901-230.905.

[40] The exemption is not available to the issuer or a distributor or any of their affiliates (except any officer or director who is an affiliate solely by virtue of holding such position), or

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including resales made by purchasers of non-U.S. securities in a Rule 144A offering. Thus, the initial purchasers can purchase the securities with the certainty that the securities can be resold at any time in the home market. The offer or sale must be made in an "off-shore transaction." An offer or sale is made in an "off- shore transaction" if the offer is not made to a person in the United States; and either at the time the buy order is originated, the buyer is outside the United States, or the seller and any person acting on its behalf reasonably believe that the seller is outside the United States, or the transaction is executed through the facilities of a designated offshore securities market, [41] and neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged in the United States.[42] In addition, no "directed selling efforts" are made in the United States by the seller, an affiliate, or anyone acting on their behalf.[43] "Directed selling efforts"[44] means any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities. There are also additional restrictions if there are resales by dealers receiving selling concessions[45] or resales by certain affiliates.[46]

IV. Developing a Trading Market: American Depositary Receipts

Non-U.S. companies can establish American Depositary Receipts (ADR) [47] programs to establish a trading market in their securities and to explore whether there is sufficient investor interest in their securities to make a public offering in the United States.[48] U.S. investors wishing to invest in non-U.S. companies may encounter difficulties in purchasing and selling the securities because of differences in currency and clearing and settlement procedures. It may be difficult to collect dividends paid on non-U.S. securities.[49] Establishment of American Depositary Receipt (ADR) programs can eliminate these difficulties. Through an ADR program, securities of non-U.S. issuers are purchased in the home country and deposited with a custodian, usually in the home country. A depositary bank in the United

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anyone acting on their behalf. 17 CFR 230.904(a).

[41] See Rule 904(b).

[42] Rule 904(h).

[43] Rule 904(a)(2).

[44] Rule 902(c).

[45] Rule 904(b)(1).

[46] Rule 904(b)(2).

[47] Also referred to as American Depositary Shares or Global Depositary Shares. The SEC defines a "depositary share" as a security, evidenced by an American Depositary Receipt, that represents a foreign security, or a multiple or fraction thereof, deposited with a depositary, 17 CFR 230.405. The SEC previously attempted to draw a distinction between the depositary share and the receipt that evidenced the share, but largely has abandoned the effort. See American Depositary Receipts, Rel. No. 33-6894 (May 30, 1991).

[48] Between 1986 and 1996, the number of ADR programs increased from 700 to 1301. Loss and Seligman, Securities Regulation 813 (3d ed.).

[49] Note of the chief editor International Journal of Baltic Law: Additionally the smaller investor who wishes to invest in non-U.S. securities will incur a significant cost: the cost (both in cash and effort) of calculating income tax payable on returns from such an investment directly in a non-U.S. security may well make the investment unattractive.

States then issues ADRs, representing ownership interest in the underlying non- U.S. securities that can trade freely in the United States. Investors can purchase and sell the ADRs in U.S. dollars, and the ADRs will be subject to U.S. clearing and settlement procedures. The depositary assumes responsibility for collecting any dividends paid and distributing them in U.S. dollars. When the investor wishes to liquidate his investment, he can either sell the ADRs to another investor or cancel the ADR[50], in which the depositary sells the underlying securities in the home market.[51]

Most ADR programs today are sponsored programs, established jointly by the non-U.S. company and the depositary bank. They enter into a deposit agreement that sets forth the rights and responsibilities of the issuer, the depositary and the ADR holders. Allocation of costs is dealt with in the agreement, and the depositary usually agrees to distribute notices of shareholders' meetings and voting instructions, as well as other shareholder communications provided by the company. Previously there were many unsponsored programs established without the participation of the company. SEC staff took the view that duplication of ADR facilities could create market disorder and confusion and that an unsponsored ADR program could not co-exist with a sponsored ADR program for the same deposited securities.[52] Since then, few unsponsored programs have been established.

There are three categories of sponsored ADR programs, depending upon the level of the non-U.S. issuer's involvement in the U.S. securities markets.[53] A Level I ADR program means that the company's ADRs are trading in the over-the-counter
"pink sheets" only. Because the company can obtain the section 12(g) exemption from the 1934 Act's reporting requirements, the non-U.S. issuer can establish a Level I program as a first step in developing interest in its securities among U.S. investors. If investor interest warrants, the issuer can consider listing the securities on an exchange or on NASDAQ (Level II program) or using ADRs to raise capital through a public offering in the United States (Level III program).

Since the ADRs are considered securities separate and distinct from the underlying securities, they must be registered with the SEC. If an ADR program is being established to facilitate trading in already outstanding securities,[54] and not to

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[50] Holders of ADRs must be entitled to withdraw the deposited securities at any time, subject to temporary delays caused by closing transfer books of the depositary or the issuer of the deposited securities or the deposit of shares in connection with voting at a shareholders' meeting, or the payment of dividends; the payment of fees, taxes and similar charges; and compliance with any laws or governmental regulations relating to ADRs or to the withdrawal of deposited securities. General Instructions to Form F-6, I.A.

[51] Note of the chief editor of International Journal of Baltic Law: U.S. income taxes will treat trading in ADRs just like trading in any (other) U.S. security. Additionally, ADRs allow non- U.S. securities to be bought and sold in all essential respects just like regular U.S. securities. This in turn makes it much easier for a U.S. person to invest in them, which also increases the likelihood of him doing so.

[52] Rel. No. 33-6894 (May 30, 1991).

[53] Joseph Velli, American Depositary Receipts: An Overview, 17 Fordham Int'l L.J. 38 (1993).

[54] The purchase or sale of the underlying securities are therefore exempt under sec. 4(1) of the 1933 Act, 15 U.S.C. § 77d(1), as ordinary trading transactions ("transactions not

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raise capital, then registration is a relatively simple process. So long as the ADRs are not listed on a national securities exchange, traded on NASDAQ or on the NASD's electronic bulletin board, and so long as the non-U.S. issuer maintains its Rule 12g3-2(b) exemption from section 12(g) of the 1934 Act,[55] a sponsored ADR program will not result in the non-U.S. issuer having to comply with the 1934 reporting requirements.

The ADRs are registered on Form F-6. The legal entity created by the agreement for the issuance of the ADRs is the registrant, and, while the depositary bank may sign on behalf of the entity, it has no liability as the "issuer."[56] The non- U.S. issuer also signs the registration statement in the case of sponsored programs. The registration statement requires a description of the ADRs,[57] information about fees and charges, and a statement that the non-U.S. issuer furnishes the SEC with certain information under Rule 12g3-2(b) that is available for inspection and copying at the SEC.[58] In addition, copies of the deposit agreement with the depositary bank and any other material contracts relating to the deposited securities between the issuer and the depositary within the past five years must be filed with the SEC as exhibits to the registration statement.[59] The depositary must also undertake to make available at its principal office in the United States, for inspection by holders of the ADRs, any reports and communications from the issuer that the depositary receives as holder of the deposited securities and that are made generally available to the holders of the underlying securities by the issuer.[60]

If a non-U.S. issuer, however, decides to raise capital by making a public offering of ADRs in the United States, then both the deposited securities and the ADRs must be registered under the 1933 Act, and the issuer will become subject to the reporting requirements under section 15(d) of the 1934 Act. A non-U.S. issuer can also use ADRs in a private offering such as a Rule 144A offering.

Conclussion

Many large non-U.S. businesses have taken advantage of the U.S. securities markets by making registered public offerings in the United States or by listing their securities on a national securities exchange or on NASDAQ. Smaller non-U.S. businesses who are not yet ready for this level of involvement in the U.S. securities regulatory system may also have opportunities for raising capital or developing a trading market in their securities, as outlined in this article.

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involving an issuer, underwriter or dealer").

[55] See supra notes 20-23 and accompanying text.

[56] Section 11 of the 1933 Act, 15 U.S.C. § 77k, imposes liability on the issuer for negligent material misstatements in a registration statement.

[57] Item 1, Form F-6.

[58] Item 2, Form F-6.

[59] Item 3, Form F-6.

[60] Item 4(a), Form F-6.

Abstract in English

Barbara Black
ENTERING THE U.S. SECURITIES MARKETS: REGULATION OF NON- U.S. ISSUERS

Author of the article outlines the methods by which non-U.S. entities can enter in the U.S. markets. The article also focuses on the possibilities of this kind of entrance by the smaller non-U.S. entities, as they may be deterred in this respect because of concerns about the burdens of U.S. securities regulation.

Firstly, author provides general information about the regulation of public offerings of securities in the U.S., covering legislative, institutional and judicial regulation of the matter. It includes definitions of such concepts as "security", "public", and "foreign private issuer", also Integrated Disclosure System for U.S. issuers, and the international disclosure standards for the non-financial statement portions of disclosure documents endorsed by the International Organization of Securities Commission, both being adopted by the SEC.

Specifically, author provides for an analysis of the reporting requirements under the Securities Exchange Act of 1934 and their exemtions. One of the exemptions being concentrated on is a situation then a company decides to raise capital in the United States through a private placement. Author touches upon and analyses the possible concerns of the subsequent resales in the case of the private placement, especially on the resales without being deemed underwriters, the resales of the "qualified institutional buyers" or QIBs, and the offers and sales of securities made outside the United States.

Also author presents and provides an analysis of American Depositary Receipts (ADR) programs as a possibility for the non-U.S. companies to establish a trading market in their securities, to explore whether there is sufficient investor interest in their securities to make a public offering in the United States, and to eliminate various difficulties for the U.S. investors wishing to invest in the non-U.S. companies.

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