Toronto Stock Exchange | TSX Venture Exchange

Cross-Border Legal and Tax Considerations for U.S. Issuers

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This guide was prepared, in part, with assistance from Dorsey & Whitney LLP and is intended to provide a general overview to U.S. companies considering listing on Toronto Stock Exchange or TSX Venture Exchange. The information includes a variety of complex legal and tax matters and is not intended to provide definitive legal or tax advice. No legal, tax or business decisions should be based solely on this content. Companies are advised to consult cross-border legal and tax professionals for more information and guidance. None of Dorsey & Whitney LLP, TMX Group Inc. or any of their affiliates guarantees the completeness of the information in the guide, and we are not responsible for any errors or omissions in, or your use of, or reliance on, the information.

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Introduction

More and more U.S. companies are considering Toronto Stock Exchange and TSX Venture Exchange as a source of growth capital. Through unique listing vehicles and corporate structures, emerging U.S. companies can list on either exchange and access interested investors. Through a well-charted growth strategy, a U.S. company can list on TSX Venture Exchange and once it has reached its business milestones, graduate to the senior Toronto Stock Exchange and also consider an interlisting with a senior U.S. exchange. This can be an effective strategy for managed growth, leveraging the liquidity of both the Canadian and U.S. marketplaces.

As a U.S. Company, you may be asking...

Q. Does my company need to be incorporated in Canada or have Canadian operations?

A. No. Quite a few corporations incorporated in the United States, Europe, Asia, Australia and many tax favorable jurisdictions are listed on Toronto Stock Exchange and TSX Venture Exchange. A company is not required to have Canadian operations or management or to list on Toronto Stock Exchange or TSX Venture Exchange, however the board must have North American public experience.

Q. Will my company incur Canadian corporate taxes for the capital raised on Toronto Stock Exchange or TSX Venture Exchange?

A. No. There are no Canadian corporate taxes applicable to capital raised in Canada.

Q. Will listing on Toronto Stock Exchange or TSX Venture Exchange prevent me from raising capital in the United States?

A. No. Companies listed in Canada can still raise capital in the United States through either public registered offerings under the United States Securities Act of 1933, as amended (U.S. Securities Act), and in accordance with applicable state securities laws or pursuant to several exemptions from the general registration requirements of the U.S. Securities Act and state securities laws, which may be available in connection with private capital raising transactions.

Q. Will my company automatically be subject to reporting requirements in the United States and compliance with Sarbanes-Oxley if my company goes public in Canada?

A. No. There are exemptions available from the registration and reporting requirements of the United States Securities Exchange Act of 1934, as amended (U.S. Exchange Act) and, therefore, the reporting requirements of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley). Your company may qualify for these exemptions through careful planning and ongoing monitoring of your company's listing and investor base.

There is not a 'one size fits all' solution for going public and listing on Toronto Stock Exchange or TSX Venture Exchange. Companies may take a number of routes to complete a successful listing in Canada depending on legal, tax and business considerations. This guide is intended to provide general information related to planning a listing in Canada. Several U.S. companies have successfully completed such a listing and their case studies should be reviewed.

U.S. companies considering their growth and financing options should consider a listing on Toronto Stock Exchange or TSX Venture Exchange. Depending on the size of company, stage of development and industry sector, the company's best option may be a listing on one of these Canadian exchanges and should be compared to other public and private options, such as a listing on Nasdaq or quotation on the OTC Bulletin Board.

Corporate Structure and Jurisdiction

Corporate structure and jurisdiction of formation are important considerations for a U.S.-based company that is considering going public in Canada. Early planning can maximize a company's valuation, minimize regulatory compliance costs and offer an efficient capital-raising structure in the future.

U.S. incorporated companies may elect to list directly on Toronto Stock Exchange or TSX Venture Exchange without changing their jurisdiction of incorporation. However, many U.S. incorporated companies decide to reincorporate in Canada or another non-U.S. jurisdiction prior to going public. With careful planning and under certain circumstances, the reincorporated company may qualify as a "Foreign Private Issuer"[1] under the rules of the Securities and Exchange Commission (SEC). Being a Foreign Private Issuer provides certain exemptions and accommodations from the stricter reporting and compliance requirements and rules applicable to U.S. domestic companies.

While Toronto Stock Exchange and TSX Venture Exchange do not require listed companies to be incorporated in Canada, certain minimum corporate protections for shareholders, similar to those that exist under Canadian law or the laws of the State of Delaware, are required. Toronto Stock Exchange or TSX Venture Exchange may require that the issuer's by-laws and articles be modified to ensure protection of shareholder rights.

Note: Toronto Stock Exchange does not require that a business be organized as a corporation. In some cases a limited partnership, trust or other structure appropriate for tax purposes may be the listing vehicle. These structures are reviewed on a case-by-case basis and should be pre-cleared by Toronto Stock Exchange.

One of the most important decisions management will make early in the listing process is determining the public company's corporate structure. Management should evaluate the following considerations in determining what corporate structure will best achieve the company's and its shareholders' objectives:

- Jurisdiction of Incorporation
- Foreign Private Issuer versus U.S. Domestic Issuer
- SEC Registration and Reporting Considerations
- U.S. Tax Considerations
- Access to U.S. Capital
- Future Cross-Border Interlistings

Each of these considerations require thoughtful analysis by management to determine the best corporate structure to match a company's business, operations, industry sector, management, shareholder base, assets and long term objectives. There is no single solution that is right for every company. These decisions are inter-related and may have legal and tax implications for the company and its shareholders.

1 A description of the requirements to qualify as a "foreign private issuer" and the initial structural considerations to meet such requirements is provided under the section heading "Foreign Private Issuer vs. U.S. Domestic Issuer" below.

1. Jurisdiction of Incorporation

A company does not need to be incorporated in Canada to go public on Toronto Stock Exchange or TSX Venture Exchange. Many U.S. domestic corporations have gone public in Canada and are listed on Toronto Stock Exchange and TSX Venture Exchange. However, based on the considerations discussed below including the benefits of becoming a Foreign Private Issuer, U.S. corporations may want to consider reincorporation (or a change in the jurisdiction of incorporation) into a foreign jurisdiction, such as Canada or tax favorable jurisdictions (e.g. Bermuda, British Virgin Islands, Cayman Islands), prior to going public on Toronto Stock Exchange or TSX Venture Exchange.

There may be good reasons for a U.S. company that is incorporated in a U.S. jurisdiction to go public in Canada and list on Toronto Stock Exchange or TSX Venture Exchange without changing its jurisdiction of incorporation. Typically these considerations center on the company's ability to otherwise qualify as a Foreign Private Issuer (as described below). If the company has a majority of its assets in the U.S., is principally governed in the U.S., or has the holders of a majority of its shares located in the U.S., the cost (tax, legal and otherwise) and complication of restructuring the company to qualify as a Foreign Private Issuer may be prohibitive. In other situations, the company may have substantial U.S. government contracts or other regulatory concerns that would complicate the process of becoming incorporated in a foreign jurisdiction.

In other circumstances, reincorporating into a foreign jurisdiction and qualifying as a Foreign Private Issuer may have significant advantages including more favorable tax planning, business and operational considerations, favorable exemptions under U.S. securities laws, single jurisdiction financial reporting, shareholder base considerations, and future fundraising and M&A considerations.

2. Foreign Private Issuer vs. U.S. Domestic Issuer

A primary reason to become a Foreign Private Issuer is to go public without an SEC registration and the application of Sarbanes Oxley[2]. This can be especially important for small cap public companies wanting to reduce the time and cost of compliance. While companies listed on Toronto Stock Exchange and TSX Venture Exchange may not be subject to Sarbanes Oxley (particularly SOX 404), Canadian issuers are still required to comply with corporate governance requirements proportionate to company size. For a company to qualify as a **Foreign Private Issuer**, it must be incorporated outside the United States and have a majority of its voting stock held by persons resident outside the United States. However, if a majority of a Foreign Company's voting stock is held by persons resident in the United States, a company (incorporated outside the United States) may still qualify as a Foreign Private Issuer so long as none of the following exist:

- the business is principally administered in the United States,
- a majority of the issuer's assets are in the United States, or
- a majority of the directors or executive officers are United States citizens or residents.

2 The Sarbanes-Oxley Act of 2002 (Pub.L. 107-204, 116 Stat. 745, enacted July 30, 2002), also known as the Public Company Accounting Reform and Investor Protection Act of 2002 and commonly called Sarbanes-Oxley, Sarbox or SOX, is a United States federal law enacted on July 30, 2002, as a reaction to a number of major corporate and accounting scandals. The legislation set new or enhanced standards for all U.S. public company boards, management and public accounting firms. It does not apply to privately held companies.

Consequently, even foreign incorporated companies may not qualify as a Foreign Private Issuer if a majority of its voting stock is held in the U.S. and the company has a significant nexus to the U.S. Companies that do not qualify as Foreign Private Issuers are treated as U.S. Domestic Issuers by the SEC.

The U.S. securities laws and rules of the SEC provide several accommodations to Foreign Private Issuers, including:

- Ability to issue unrestricted "free trading" securities in off-shore transactions outside the United States without SEC registration under Regulation S of U.S. Securities Act (Regulation S)
- Exemption from reporting obligations under the U.S. Exchange Act in accordance with Rule 12g3-2(b) and requirements of Sarbanes Oxley
- Simplified resale of "restricted securities" by U.S. investors through the facilities of Toronto Stock Exchange and TSX Venture Exchange under Regulation S
- Availability of special forms for SEC registration and reporting
- Qualified Canadian corporations may use the Multi-Jurisdictional Disclosure System (MJDS), which simplifies public offerings of securities into the United States
- Foreign Private Issuers reporting with the SEC can report on a simplified basis and are exempt from the United States 14A proxy rules, certain tender offer rules and Section 16 insider trading and reporting requirements

A. Restructuring to Meet Foreign Private Issuer Status

Many U.S. companies have a majority of their voting shares held by U.S. persons and a business that is principally administered in the U.S., a majority of its assets in the U.S. or a majority of its directors or executive officers are U.S. citizens or residents. These companies may still reincorporate to a foreign jurisdiction and qualify as a Foreign Private Issuer by restructuring the company's share capital to include non-voting stock or securities. In order to facilitate the non-U.S. ownership requirements and to qualify as Foreign Private Issuer, some transactions are structured so that U.S. shareholders receive a portion of their securities in the public foreign corporation in the form of non-voting stock (or non voting securities) that is exchangeable into voting stock upon satisfaction of predetermined conditions or holding periods. Due to the nature of public companies, often shareholders holding less than 50% of a public company's voting securities maintain sufficient control of the entity.

Any U.S. company that considers reincorporating to qualify as a Foreign Private Issuer should analyze the U.S. tax consequences of the transaction. See "U.S. Tax Considerations" below.

B. Remaining a U.S. Domestic Issuer

When a company plans to list in the U.S. concurrently or relatively soon after listing in Canada on Toronto Stock Exchange or TSX Venture Exchange, the company may conclude that the effort to reincorporate outside the U.S. outweigh the benefits and may choose to remain a U.S. Domestic Issuer. It is important to weigh the pros and cons against the ability to raise capital in Canada and the company's long term growth strategy.

See Appendix A for more information on the considerations of Foreign Private Issuer versus U.S. Domestic Issuer status.

3. SEC Registration and Reporting Considerations[3]

A company, whether a U.S. Domestic Issuer or a Foreign Private Issuer, can generally raise capital in a Canadian IPO offering without filing a registration statement with the SEC. The U.S. Securities Act requires that all offers and sales of securities be registered with the SEC or exempt from such registration requirements. A traditional IPO offering in the United States requires filing of a registration statement with the SEC. However, a company may or may not file an SEC registration in connection with a Canadian IPO offering and listing solely on a non-U.S. exchange such as Toronto Stock Exchange or TSX Venture Exchange. The options are based on the company's status as a U.S. Domestic Issuer or a Foreign Private Issuer.

A. U.S. Domestic Issuer

Option 1: SEC Registration and SEC Reporting

A company may file a registration statement under the U.S. Securities Act on Form S-1 to register the offer and sale of securities to the public with the SEC[4]. The registered securities may be offered and sold in the United States and outside the United States and will be unrestricted securities under U.S. securities laws.

Once a registration statement is declared effective, the company will be subject to the ongoing reporting requirements of the U.S. Exchange Act pursuant to Section 15(d) of the U.S. Exchange Act[5] which requires a company to file annual reports on Form 10-K, quarterly reports on Form 10-Q and current reports on Form 8-K. If the company elects to register the class of securities under Section 12 of the Exchange Act and become a U.S. reporting issuer, the company will become subject to the SEC 14A proxy rules and tender offer rules, and certain of its shareholders will be required to file beneficial ownership reports on Schedule 13D/G and Section 16 reports.

Finally, SEC reporting issuers are subject to the requirements of Sarbanes-Oxley, including Section 404, requiring auditor certification of internal controls over financial reporting.

3 In addition to the U.S. requirements described in this section, a company must also comply with Canadian securities laws and prospectus offering requirements.

4 A company may register a public offering of securities with the SEC by filing a long form registration statement. The registration statement must comply with the requirements of Form S-1, including financial statements audited by a member in good standing with the Public Company Accounting Oversight Board. The registration statement is subject to review by the SEC.

5 A company may terminate filing SEC reports AFTER filing its first annual report if the company has fewer than 300 shareholders of record (based on record ownership). Nominees or depositaries such as the Canadian Depositary for Securities or CDS, that hold securities for the benefit of investors are counted as the record owner of all shares held for such investors.

Option 2: Exempt Offering and No SEC Reporting

A U.S. Domestic Issuer may offer and sale securities outside the U.S. to non-U.S. Persons in reliance upon exclusions from the registration requirements of the U.S. Securities Act available under Regulation S.[6] The securities issued would be restricted securities and the company will need to comply with Regulation S Resale Restrictions[7] by adding a ".s" designation to its Toronto Stock Exchange or TSX Venture trading symbol. The ability of U.S. investors to trade in these securities is limited, so the availability of trading support in the aftermath is a key consideration.

The securities may be concurrently offered in the U.S. to:

- Accredited Investors[8] under Regulation D of the U.S. Securities Act (Regulation D) or
- Qualified Institutional Buyers (QIB)[9] under Rule 144A of the U.S. Securities Act (Rule 144A).[10]

A company may qualify for exclusions from U.S. Exchange Act reporting obligations based on the number of its shareholder of record and other factors[11]. Non-SEC reporting issuers are not subject to the requirements of Sarbanes-Oxley.

6 Alternatively, for certain offers and sales of securities in an aggregate amount less than US$5 million, a U.S. Domestic Issuer may offer and sale securities under Regulation A and such securities will be unrestricted securities. A Form 1-A is required to be filed with the SEC.

7 **Regulation S Resale Restrictions -** Regulation S is available to U.S. incorporated companies for sales of securities outside the U.S. to non-U.S. persons. Regulation S requires a one-year distribution compliance period during which securities issued under Regulation S by U.S. Domestic Issuers may not be sold in the U.S. or to, or for the account or benefit of, a U.S. person. Regulation S can be used in conjunction with other exemptions available for offers and sales in the U.S., including private placements under Regulation D to accredited investors or under Rule 144A to qualified institutional buyers.

8 **Accredited Investor -** Defined in Rule 501(a) of Regulation D and includes banks, insurance companies, registered investment companies, certain employee benefit plans, entities with total assets in excess of US$5 million and wealthy individuals (based on income or net worth).

9 **Qualified Institutional Buyers (QIB) -** Generally, institutions holding at least US$100 million in securities and registered broker-dealers holding at least US$10 million in securities.

10 **Rule 144A -** Another safe harbor provision, exempts resales of securities to QIBs.

11 **Shareholders of Record -** Calculation of **shareholders of record** is based on record ownership. Companies with fewer than 300 shareholders of record, or 500 shareholders of record, where the total assets of the company have not exceeded US$10 million on the last day of each of the company's three most recent fiscal years, are exempt from U.S. Exchange Act reporting obligations. U.S. Companies listed outside the U.S. where ownership is held through nominees or depositories, such as the Canadian Depository for Securities, or CDS, have less risk of crossing the 500 owners of record threshold. Nonetheless, record ownership should be closely monitored.

B. Foreign Private Issuer

Option 1: Exempt Offering and No SEC Reporting

A Foreign Private Issuer can rely upon exemptions from the registration requirements of the U.S. Securities Act and issue securities in off-shore transactions outside the U.S. in reliance upon Regulation S. The securities issued in accordance with Regulation S are unrestricted "free trading" securities and bear no restrictive U.S. legend.

A Foreign Private Issuer may offer securities concurrently in the U.S. to Accredited Investors under Regulation D or QIBs under Rule 144A. Securities issued in the U.S. are "restricted securities" and will bear a U.S. restrictive legend. A holder of restricted securities of a Foreign Private Issuer may resell the securities on Toronto Stock Exchange or TSX Venture Exchange pursuant to exclusions available under Regulation S.

Foreign Private Issuers may be exempt from U.S. Exchange Act reporting obligations under Section 12g3-2(b), subject to certain disclosure requirements. Non-SEC reporting issuers are not subject to the requirements of Sarbanes-Oxley.

Option 2: SEC Registration and SEC Reporting

A Foreign Private Issuer may file a registration statement under the U.S. Securities Act on Form F-1 or Form S-1 to register the offer and sale of securities to the public[12] with the SEC. The registered securities may be offered and sold in the U.S. and outside the U.S. and will be unrestricted securities.

Once a registration statement is declared effective, the company will be subject to ongoing reporting requirements of the U.S. Exchange Act pursuant to Section 15(d) of the U.S. Exchange Act.[13] A Foreign Private Issuer may file annual reports on Form 20-F (or Form 40-F, if eligible) and current reports on Form 6-K. Certain shareholders are required to file beneficial ownership reports on Schedule 13D/G if the company elects to register the class of securities under Section 12 of the Exchange Act and becomes a reporting issuer. A Foreign Private Issuer is generally exempt from the SEC proxy rules, Section 16 and SEC tender offer rules.

All SEC reporting issuers are subject to the requirements of Sarbanes-Oxley, including Section 404, requiring auditor attestation of internal control over financial reporting.

12 A Foreign Private Issuer may register a public offering of securities with the SEC by filing a long form registration statement . The registration statement must comply with the requirements of Form F-1 or Form S-1, including financial statements reconciled to U.S. GAAP and audited by a member in good standing with the Public Company Accounting Oversight Board. The registration statement is subject to review by the SEC.

13 A Foreign Private Issuer may terminate filing SEC reports AFTER filing its first annual report by filing a termination statement in accordance with Form 15-F.

4. Corporate Structure Benefit Analysis

U.S. Domestic Issuer

Advantages

- No need to reorganize
- Fewer U.S. tax implications related to reorganization
- U.S. law applies to corporate matters
- Well established corporate/SEC reporting
- U.S. shareholder familiarity with U.S. corporations
- U.S. SEC filings can serve as basis for Canadian reporting
- Ease of eventual dual listing with a U.S. exchange

Disadvantages

- May require SEC registration or ".S" restrictions on Toronto Stock Exchange or TSX Venture Exchange
- No exemptions from SEC Exchange Act registration
- All unregistered securities are subject to one year regulation s distribution compliance period
- Cannot rely on exemptions and accommodations for Foreign Private Issuers
- Sarbanes-Oxley requirements for SEC reporting issuers, including SOX 404 (requirement for internal controls and audit)

Foreign Private Issuer (FPI)

Advantages

- FPI exemptions for issuance of securities outside U.S. which can equal faster market access
- FPI exemption from SEC Exchange Act reporting under 12g3-2(b)
- No Sarbanes-Oxley requirements for non-SEC reporting issuers
- Well established Canadian reporting requirements
- FPI exemptions for M&A transactions
- Possible MJDS[14] availability for Canadian corporations

Disadvantages

- Potential tax complications in reorganizing to off-shore jurisdiction
- Potential securities law complications in reorganizing to off-shore jurisdiction
- May require complicated capital structure (non-voting equity) to maintain FPI status
- Reorganizing requires shareholder approval
- Some industries may require compliance with U.S. export controls and regulation
- Requires monitoring of number of shareholders so as not to trigger SEC registration

U.S. companies that have established investor appetite warrants a going public event or financing in Canada will need to plan the most ideal structure that balances the needs of the corporation and its existing investors. See Appendix B for sample cross-border structures that include 'suitability' based on a company's:

- Size and stage of development
- Existing corporate structure
- Assets
- Future growth plans
- Number of existing U.S. shareholders
- Size of financing to accompany the 'going public' event

14 Multi-Jurisdictional Disclosure System (MJDS) permits qualified issuers to register securities under the U.S. Exchange Act on Form 40-F and to satisfy ongoing U.S. filing requirements using Canadian disclosure materials.

U.S. Tax Considerations

A company, whether a U.S. Domestic Issuer or a Foreign Private Issuer, can generally raise capital by issuing shares or other securities without adverse tax consequences. However, a U.S. Domestic Issuer that elects to reincorporate into a foreign jurisdiction may subject itself and its shareholders to significant and adverse U.S. federal income tax consequences. Generally, the exchange of a U.S. corporation's securities for securities of a foreign corporation will be a taxable transaction for U.S. taxpayers. However, such tax consequences can be mitigated or avoided in some cases.

Cross-Border Acquisition Rules of Section 367 - Under Section 367 of the U.S. Internal Revenue Code (the "Code") a reincorporation of a U.S. corporation or partnership may trigger a taxable event for U.S. holders and potentially trigger a taxable event for the U.S. corporation or partnership. Certain exceptions may apply to avoid tax under Section 367 if a U.S. corporation is acquired by a larger Canadian company that has had an active trade or business in Canada for three years prior to the acquisition. A transaction that satisfies the requirements of Section 367 may provide tax-free "roll-over" for a U.S. corporation and its U.S. shareholders.

The "Anti-Inversion" Rules of Section 7874 - If a U.S. corporation or partnership reincorporates in a foreign jurisdiction, or is acquired by a foreign corporation, it may trigger the "anti-inversion" rules of Section 7874 of the Code. If these rules apply, it would result in adverse tax consequences, including the loss of tax attributes or the newly reincorporated foreign corporation (or the acquiring foreign corporation) being treated by the U.S. Internal Revenue Service as a U.S. corporation. An inversion transaction is generally deemed to occur when the following three conditions are met:

1) a foreign corporation makes a "direct or indirect" acquisition of substantially all of the assets held directly or indirectly by a U.S. corporation;

2) after the acquisition, the former shareholders of the U.S. corporation own at least 60% of the acquiring foreign corporation "by reason of" their previous interest in the U.S. corporation; and

3) after the acquisition the affiliated group to which the acquiring foreign corporation belongs does not conduct "substantial business activities" in the foreign country under which the acquiring corporation was organized, when compared to the total business activities of the "expanded affiliated group."

Where these conditions are satisfied, the taxable income of the domestic target for the year of the transaction and for the ten subsequent years attributable to corporate transfers associated with the inversion (the "inversion gain") may not be offset by current losses or loss carryovers and the resulting tax may not be offset by credits (including foreign tax credits). Where former target shareholders own at least 80% (instead of just 60%) of the acquiring foreign corporation after the transaction (and the other two conditions are satisfied), Section 7874 goes further by simply treating the acquiring foreign corporation as a U.S. domestic corporation.

Stock offered in a public offering or private placement made in connection with the acquisition may be disregarded in determining the percentage owned by the former shareholders, if certain requirements are met. An exception to the "anti-inversion" rules exists where the acquiring corporation has a substantial trade or business in the foreign country.

Tax-free Roll-over Structure - Under certain circumstances, a reincorporation transaction may not satisfy the requirements of Section 367, which could result in a taxable transaction for a U.S. corporation and its U.S. shareholders. Because the exchange of a U.S. corporation's securities for securities of a foreign corporation is generally a taxable transaction for U.S. taxpayers the application of the "anti-inversion" rules to the successor corporation may have the effect of treating the transaction as among two U.S. corporations. This permits the transaction to be structured as a tax-free "roll-over" for the U.S. Corporation and its U.S. shareholders under the requirements of Section 368.

In order to facilitate the 80% or more of the stock (by vote or value) ownership requirements under Section 7874 and to qualify as a Foreign Private Issuer, some transactions are structured so that U.S. shareholders receive a portion of their securities in the surviving public foreign corporation in the form of non-voting stock that is exchangeable into voting stock upon satisfaction of predetermined conditions or holding periods. Due to the nature of public companies, often shareholders holding less than 50% of a public company's voting securities is sufficient to maintain control of the entity.

Tax consequences to the company and its shareholders should be considered when determining the method of going public (e.g. Initial Public Offering versus a reverse merger transaction such as through a Capital Pool Company.

On-Going Tax Filing Obligations - If the inversion rules are triggered, and the reincorporated company or the acquiring parent is treated as a U.S. corporation, such corporation will be required to file U.S. tax returns and pay U.S. income tax on its world-wide income, regardless of source. In addition, distributions to non-U.S. shareholders would be subject to U.S. withholding tax.

Additional Rules Concerning U.S. Investors in a Foreign Corporation - There are additional U.S. federal income tax rules which may impact U.S. investors in certain foreign corporations. For example, if a foreign corporation does not have significant active business operations, and its primary sources of income are passive investment assets, the corporation may be considered a "passive foreign investment corporation," (PFIC). Or, if a foreign corporation has a small group of U.S. shareholders that own at least 50% of the stock of the company, the corporation may be considered a "controlled foreign corporation" (CFC). There are significant and adverse tax consequences for U.S. investors owning shares in a PFIC or a CFC, and the corporation and its investors should consult their tax advisors regarding the PFIC and CFC rules before reincorporating into Canada or investing in a foreign corporation. Foreign corporations that are subject to the "anti-inversion" rules and are treated as U.S. corporations for tax purposes would not be subject to the PFIC or CFC rules.

In addition to PFIC and CFC rules, a U.S. corporation that holds U.S. real property (such as mining properties) may be considered a U.S. Real Property Holding Company and reincorporation to a foreign jurisdiction may trigger consequences under the Foreign Investment Real Property Tax Act (FIRPTA). FIRPTA was adopted to impose a tax on gains derived by foreign persons from the sale of U.S. real property. Under Section 897(a)(1) of the U.S. Internal Revenue Code of 1986, as amended (Code), gain or loss recognized by a foreign person on the disposition of a U.S. real property interest (a USRPI) is generally taxable in the U.S. as gain or loss effectively connected with a U.S. trade or business. Foreign corporations that are subject to the "anti-inversion" rules and are treated as U.S. corporations for tax purposes would not be subject to FIRPTA.

This is only a brief summary of these highlighted tax rules, and numerous exceptions and additional requirements may apply. The tax consequences of Section 367 and the anti-inversion rules of Section 7874 are significant, and should be well considered by the corporation and its tax advisors.

Access to U.S. Capital

Companies listing on Toronto Stock Exchange and TSX Venture Exchange ideally want access to U.S. capital, particularly if they are a U.S. company. Companies listed solely on a Canadian exchange, can still raise money and attract trading from U.S. sources.

Company Financings - Qualified Investors in the U.S. may invest in Toronto Stock Exchange or TSX Venture Exchange listed companies, particularly through a private placement (often referred to as a Private Investment in Public Equity or PIPE in the U.S.). A company may offer and sale securities in the U.S. without registration under the U.S. Securities Act to Accredited Investors under Regulation D or QIBs under Rule 144A. Securities issued in the U.S. without registration are "restricted securities" and will bear a U.S. restrictive legend. There is no limitation on the amount that can be raised in the U.S. pursuant to exemptions under Regulation D or Rule 144A.

Trading Toronto Stock Exchange or TSX Venture Exchange Stocks - A holder of restricted securities of a Foreign Private Issuer may resale the securities on Toronto Stock Exchange or TSX Venture Exchange pursuant to exclusions available under Regulation S or after one year under Rule 144 of the U.S. Securities Act. If the company is a Foreign Private Issuer, restricted securities may generally be resold through the facilities of Toronto Stock Exchange or TSX Venture Exchange under Regulation S, subject only to applicable Canadian hold periods and resale restrictions. Many major U.S. broker-dealers can facilitate trading through the facilities of Toronto Stock Exchange and TSX Venture Exchange, subject to U.S. securities laws. Despite Toronto Stock Exchange being a Canadian exchange, a significant portion (approximately 40%) of the trading of Toronto Stock Exchange securities originates in the U.S.

Secondary Trading on U.S. Over-the-Counter Markets - Toronto Stock Exchange or TSX Venture Exchange issuers can access U.S. investors by being quoted on a U.S. over-the-counter (OTC) market such as the OTC Bulletin Board or Pink Sheets (including its new tier OTCQX). A secondary market may develop on Pink Sheets or OTCQX without SEC registration. Issuers may facilitate development of a U.S. secondary market through qualifying for certain exemptions under state blue sky laws such as manual listing with S&P Market Access[15].

Interlisting on a U.S. Market - Companies listed on Toronto Stock Exchange or TSX Venture Exchange can also access U.S. capital by interlisting on a U.S. Exchange, subject to satisfying the listing requirements of the exchange. The primary benefit of a second listing is access to another pool of growth capital and exposure to new analysts and institutional and retail investors. See the next section for more information on interlisting.

15 Learn more about S&P Market Access by visiting www.tmx.com and refer to the Information for Issuers / Product and Services section.

Cross-Border Interlisting

Many Toronto Stock Exchange and TSX Venture Exchange companies seek secondary listings on a U.S. exchange (e.g., NYSE, NASDAQ, NYSE Amex) based in part on trading and pricing histories in Canada. A company must register its securities under the U.S. Exchange Act to qualify for a listing on a U.S. exchange and the issuer must satisfy the listing requirements of the exchange.

An issuer that has filed a registration statement to register an offering of securities under the U.S. Securities Act can register the class of securities under the U.S. Exchange Act by filing a Form 8-A with the SEC.

An issuer that has not filed a registration statement to register an offering of securities under the U.S. Securities Act can register the class of securities under the U.S. Exchange Act by filing a Form 10 with the SEC or, in the case of a Foreign Private Issuer, a Form 20-F. Form 10 and Form 20-F are long form registration statements requiring prospectus level disclosure and are subject to an SEC review and comment process.

Foreign Private Issuers that are incorporated in Canada may be able to take advantage of the SEC's multi-jurisdictional disclosure system (MJDS), which permits qualified issuers to register securities under the U.S. Exchange Act on Form 40-F and to satisfy ongoing U.S. filing requirements using Canadian disclosure materials. Form 40-F is a short form registration statement that incorporates a Canadian issuer's Canadian disclosure materials into the filing and is not normally subject to extensive review by the SEC.

Companies that are required to file reports under the U.S. Exchange Act are subject to the requirements of Sarbanes-Oxley, including Section 404 reporting requirements related to internal control over financial reporting.

Appendix A

At A Glance Considerations for U.S. Companies

Considerations	U.S. Domestic Issuer	Foreign Private Issuer (FPI)
Canadian Prospectus	A Canadian prospectus or Information Statement (in a qualifying transaction with a CPC) is required regardless of jurisdiction of incorporation when listing on a Canadian exchange.	
Canadian Reporting	All Canadian public companies are subject to reporting requirements in Canada.	
U.S. Registration of Offering	A U.S. Domestic Issuer that does not file a registration statement with the SEC in connection with its IPO (or other financing) must qualify for an exemption under the U.S. Securities Act. In most cases, the securities issued will be "restricted securities" for U.S. securities law purposes and are traded with a special ".s" designation on Toronto Stock Exchange and TSX Venture Exchange.	A FPI will not generally file a registration statement with the SEC in connection with its IPO. Instead, a FPI normally relies on exclusions available under Regulation S to issue unrestricted shares outside the United States. A FPI may issue shares, which are "restricted securities", to qualified investors in the United States in private placements. Holders of restricted securities may resale the shares on Toronto Stock Exchange or TSX Venture Exchange, subject to the requirements of Regulation S.
U.S. Reporting	A U.S. Domestic Issuer that does not file a registration statement with the SEC to register securities offered in the IPO and has fewer than 300 shareholders of record or 500 shareholders of record (if its assets are less than $10 million on the last day of each of the last 3 fiscal years) would qualify for an exemption from the reporting obligations under the U.S. Exchange Act.	A FPI that does not file a registration statement with the SEC to register securities offered in the IPO and has fewer than 500 shareholders of record world wide or fewer than 300 beneficial U.S. shareholders would qualify for an exemption from the reporting obligation under the U.S. Exchange Act. Alternatively, a FPI may qualify for an exemption from registration available under Rule 12g3-2(b).
	A U.S. Domestic Issuer that files a registration statement on Form S-1 to register securities offered in the IPO will become a reporting issuer and be required to file periodic reports with the SEC on Form 10-K, Form 10-Q and Form 8-K. If the company elects to register the class of securities under Section 12 of the Exchange Act and become a reporting issuer, the company will become subject to the SEC 14A proxy rules and tender offer rules, and certain of its shareholders will be required to file beneficial ownership reports on Schedule 13D/G and Section 16 reports.	A FPI that files a registration statement on Form S-1 or Form F-1 to register securities offered in the IPO will become a reporting issuer and be required to file periodic reports with the SEC reports on Form 20-F (or 40-F, if eligible) and Form 6-K. Shareholders are subject to beneficial ownership reporting on Schedule 13G/13D if the company elects to register a class of securities under Section 12 of the Exchange Act.

Considerations	U.S. Domestic Issuer	Foreign Private Issuer (FPI)
Sarbanes Oxley	Non-SEC reporting issuers are not subject to the requirements of Sarbanes-Oxley. Issuers that are required to file reports under the U.S. Exchange Act are subject to the requirements of Sarbanes Oxley, including Section 404 reporting requirements related to internal control over financial reporting.	
U.S. GAAP Financial Statements	A U.S. Domestic Issuer that is a reporting issuer is required to prepare financial statements in accordance with U.S. GAAP. Annual financial statements are required to be audited by a member in good standing with the Public Company Accounting Oversight Board. Interim financial statements are required to be reviewed by the issuer's auditor.	FPI that is a reporting issuer with the SEC is permitted to prepare financial statements in accordance with home country GAAP. Annual financial statements must be reconciled to U.S. GAAP and audited by a member in good standing with the Public Company Accounting Oversight Board. Interim financial statements are not required to be reviewed by the issuer's auditor or reconciled to U.S. GAAP unless included in a U.S. Securities Act registration statement.
U.S. Resale Restrictions	Unless registered under the U.S. Securities Act, all securities issued in the IPO are restricted securities and subject to a one year distribution compliance period or hold period.[1] Restricted Securities are identified by adding a ".s" designation to a U.S. Domestic Issuer's Toronto Stock Exchange or TSX Venture Exchange trading symbol.	Securities issued by a FPI outside the United States in accordance with Regulation S are unrestricted securities and may be freely transferred on Toronto Stock Exchange or TSX Venture Exchange. Securities issued in the United States to qualified investors in the U.S. in private placements are "restricted securities" and may be resold on Toronto Stock Exchange or TSX Venture Exchange in accordance with the requirements of Regulation S.
Subsequent Financings	A U.S. Domestic Issuer must register securities with the SEC under the U.S. Securities Act (by filing a registration statement on Form S-1 or, if available Form S-3) or an exemption from such registration requirements must be available. Exempt financings are completed on a "private placement" or offshore financings outside the U.S. under Regulation S, and involve, in either case, the sale of restricted securities and subject to a one-year distribution compliance period or hold period.[2]	Securities issued by a FPI outside the U.S. in accordance with Regulation S are unrestricted securities and may be freely transferred on Toronto Stock Exchange or TSX Venture Exchange. Securities issued by a FPI in the United States to qualified investors in private placements are "restricted securities" and may be resold on Toronto Stock Exchange or TSX Venture Exchange in accordance with the requirements of Regulation S. A public offering of securities into the U.S. may be made by filing a registration statement under the U.S. Securities Act with the SEC on Forms F-1 or S-1 or, if available, Forms F-3 or S-3. Additionally, certain FPIs may qualify for the Multi-Jurisdictional Disclosure System, which permits the FPI to register securities under the U.S. Securities Act pursuant to a Canadian prospectus filed under cover of Form F-10. Filing a registration statement with the SEC will subject the FPI to the ongoing reporting requirements under the U.S. Exchange Act pursuant to Section 15(d).

1 Regulation A provides a limited exception from the registration requirements of the U.S. Securities Act for offers and sales during a 12 month period of up to $5 million. The issuer would be required to file a Form 1-A with the SEC and the securities would be free trading securities.

2 Regulation S requires a one-year distribution compliance period during which securities issued under Regulation S by U.S. Domestic Issuers may not be sold in the U.S. or to, or for the account or benefit of, a U.S. person. The distribution compliance period is six months for U.S. Domestic Issuers that file reports under the U.S. Exchange Act and are current in their filings.

Appendix B

Sample Cross-Border Structures

For U.S. companies that establish that a Canadian listing meets their growth and financings needs, the following examples demonstrate structures that have been used to accommodate different company scenarios in successful transactions.

Structure	**U.S. Domestic Issuer** U.S. Registered Offering and Canadian Prospectus Offering			
Issuer	**SEC Requirements**	**Audit Requirements**	**SEC Reporting Status**	**Other Requirements**
U.S. company incorporated in Delaware and headquartered in U.S. with U.S. Management, U.S. Directors and U.S. Operations	Common Stock registered with the SEC on Form S-1 and qualified in Canada with long form prospectus. Common Stock may be sold to the public in the United States and Canada.	Financial statements are required to be audited by a member in good standing with the Public Company Accounting Oversight Board.	Subject to the ongoing reporting requirements of the U.S. Exchange Act pursuant to Section 15(d) of the U.S. Exchange Act (Form 10-K, quarterly reports on Form 10-Q and current reports on Form 8-K). If the company elects to register the class of securities under Section 12 of the Exchange Act and become a reporting issuer, the company will become subject to the SEC 14A proxy rules, tender offer rules, and certain of its shareholders are required to file beneficial ownership reports on Schedule 13D/G and Section 16 reports. Reporting issuers are subject to SOX.	Offers and sales into the U.S. require compliance with state blue sky securities laws. In addition, if securities are offered by FINRA members, a FINRA filing will be required pursuant to FINRA Rules.
Tax Treatment	The Company will continue to be subject to on-going U.S. tax requirements. No U.S. tax consequences in connection with the IPO.			
Suitability	This structure is suitable for U.S. companies that contemplate a concurrent or near-term U.S. listing or with significant U.S. operations that may have difficulties structuring as a Foreign Private Issuer or qualifying for a tax-free rollover and U.S. companies that cannot reincorporate outside of the U.S. due to regulatory or contractual restrictions.			

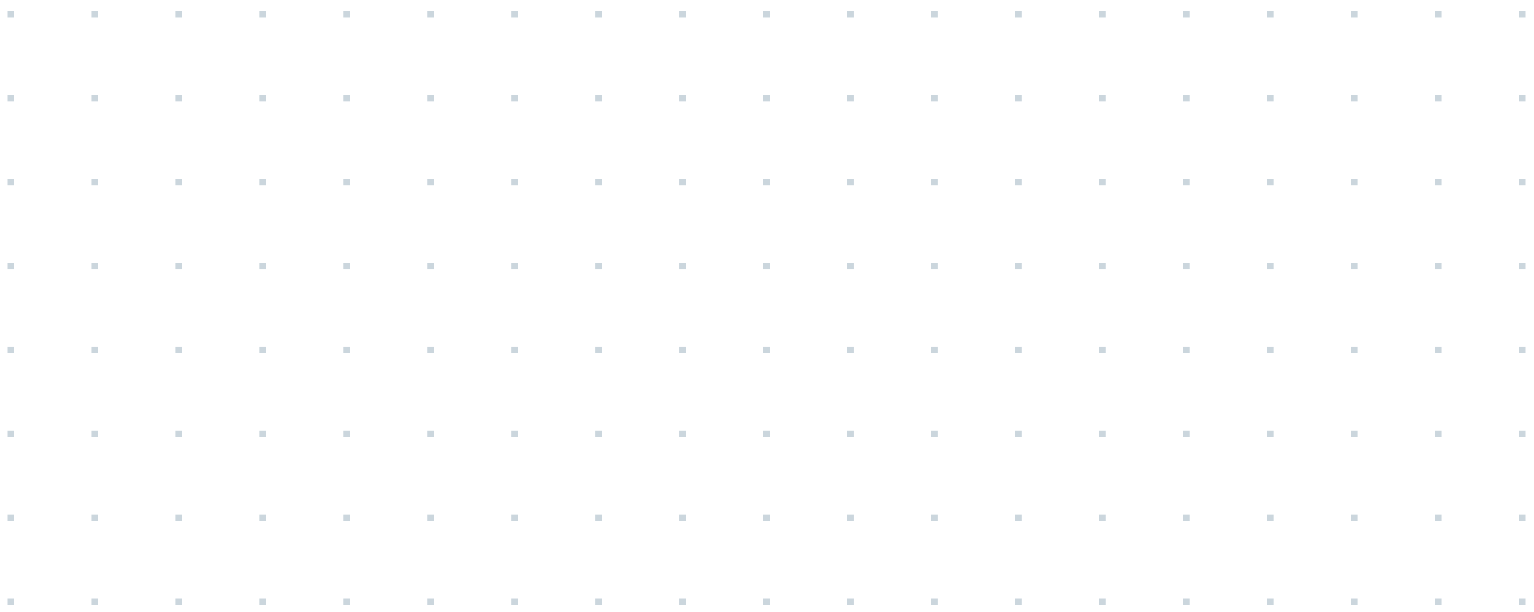
Structure	U.S. Domestic Issuer Registered with SEC and Qualifying for Toronto Stock Exchange or TSX Venture Exchange Listing			
Issuer	**SEC Requirements**	**Audit Requirements**	**SEC Reporting Status**	**Other Requirements**
U.S. company incorporated in Delaware and headquartered in U.S. with U.S. Management, U.S. Directors and U.S. Operations. Common Stock registered with the SEC and established trading market in the United States.	Common Stock registered with the SEC under the Securities Exchange Act and qualified for trading on a U.S. exchange. Offers and sales of securities may be made on a registered basis by filing a registration statement on Form S-1 or Form S-3 or private placement basis.	Financial statements are required to be audited by a member in good standing with the Public Company Accounting Oversight Board. Canadian GAAP reconciliation may be required. Auditor must be qualified in Canada.	Subject to the ongoing reporting requirements of the U.S. Exchange Act pursuant to Section 12(b) of the U.S. Exchange Act (Form 10-K, quarterly reports on Form 10-Q and current reports on Form 8-K), SEC 14A proxy rules, tender offer rules, and certain of its shareholders are required to file beneficial ownership reports on Schedule 13D/G and Section 16 reports. Reporting issuers are subject to SOX. Unregistered common stock offered and sold outside the United States to non-U.S. persons pursuant to Regulation S and in the United States pursuant to private placement exemptions (to Accredited Investors under Regulation D or QIBs under Rule 144A). All unregistered securities are deemed “restricted securities” and safeguards must be put in place to prevent distribution into the U.S. Must become reporting issuer in Canada. SEC reports may be filed to satisfy annual and quarterly reporting obligations.	Issuer is required to meet the listing requirements to qualify for listing on Toronto Stock Exchange or TSX Venture Exchange. Issuer will continue to file reports with the SEC and comply with the obligations of SOX. Qualified issuers may qualify under the Canadian MJDS rules in connection with the listing and Canadian offering requirements.
Tax Treatment	The Company will continue to be subject to on-going U.S. tax requirements. No U.S. tax consequences in connection with the listing.			
Suitability	This structure is suitable for U.S. companies that are currently public in the United States and seeking additional liquidity through listing on Toronto Stock Exchange or TSX Venture Exchange.			

Structure	U.S. Domestic Issuer No U.S. Registration and Canadian Prospectus Offering - ".s" Designation		
Issuer	**SEC Requirements**	**SEC Reporting Status**	**Other Requirements**
U.S. company incorporated in Delaware and headquartered in U.S. with U.S. Management, U.S. Directors and U.S. Operations	Common Stock offered and sold outside the United States to non-U.S. persons pursuant to Regulation S and in the United States pursuant to private placement exemptions (to Accredited Investors under Regulation D or QIBs under Rule 144A). All securities are deemed "restricted securities" and safeguards must be put in place to prevent distribution into the U.S. Common Stock trade on a restricted basis on Toronto Stock Exchange or TSX Venture Exchange under a ".s" designation and may not be sold to U.S. persons or in the United States.	A company with fewer than 300 or 500 shareholders of record qualifies for exclusions from U.S. Exchange Act reporting obligations. Non-reporting issuers are not subject to the requirements of Sarbanes-Oxley.	Offers and sales into the U.S. require compliance with state blue sky securities laws.
Tax Treatment	The Company will continue to be subject to on-going U.S. tax requirements. No U.S. tax consequences in connection with the IPO.		
Suitability	This structure is suitable for U.S. companies that contemplate a concurrent or near-term U.S. listing or with significant U.S. operations that may have difficulties structuring as a Foreign Private Issuer or qualifying for a tax-free rollover and U.S. companies that cannot reincorporate outside of the U.S. due to regulatory or contractual restrictions.		

Structure	U.S. Company Redomiciles and Becomes Foreign Private Issuer No U.S. Registration Statement and Canadian Prospectus Offering		
Issuer	**FPI Status & Structure**	**SEC Requirements and SEC Reporting Status**	**Other Requirements**
U.S. company incorporated in Delaware and headquartered in U.S. with U.S. Management, U.S. Directors and U.S. Operations. Issuer redomiciles into Canada and becomes a Canadian corporation.	U.S. Shareholders are issued common shares and non-voting shares to maintain less than 50% of voting shares of the issuer. Non-voting shares are convertible into voting shares under certain conditions, including change of control transactions, release from escrow, passage of time, etc. Common shares issued to the public in Canada under long form Canadian prospectus and are unrestricted "free-trading" securities. Offering in the United States pursuant to private placement exemptions are restricted securities.	Securities issued outside the United States are unrestricted "free-trading" securities. Offering in the United States pursuant to private placement exemptions (to Accredited Investors under Regulation D or QIBs under Rule 144A) are restricted securities, which may be resold on Toronto Stock Exchange or TSX Venture Exchange, subject to certain limitations. Issuer is not subject to the ongoing reporting requirements of the U.S. Exchange Act or SOX. Issuer is subject to on-going Canadian reporting obligations.	Reincorporation requires compliance with corporate law (i.e., shareholder approval) and exemptions from U.S. Securities Act and state securities law registration requirements. Offers and sales into the U.S. require compliance with state blue sky securities laws.
Tax Treatment	Transaction may be structured as a taxable transaction to U.S. taxpayers where the tax basis in the securities is less than or close to the fair value of the securities received in the redomicile transaction. Alternatively, where the anti-inversion rules apply, the taxable income of the domestic target for the year of the transaction and for the ten subsequent years attributable to corporate transfers associated with the inversion (the "inversion gain") may not be offset by current losses or loss carryovers and the resulting tax may not be offset by credits (including foreign tax credits). Where former target shareholders own at least 80% (instead of just 60%) of the acquiring foreign corporation after the transaction (and the other two conditions are satisfied), Section 7874 goes further by simply treating the acquiring foreign corporation as a U.S. domestic corporation.		
Suitability	This structure is suitable for U.S. companies that desire to become Foreign Private Issuers or have a significant percentage of its voting securities held by non-U.S. taxpayers. This structure may also be suitable for companies with significant non-U.S. assets, management and directors.		

Structure	Asset Acquisition by Canadian Capital Pool Company (Foreign Private Issuer) CPC Qualifying Transaction, No U.S. Registration Statement and Private Placement Offering		
Issuer	**FPI Status & Structure**	**SEC Requirements and SEC Reporting Status**	**Other Requirements**
Holders of U.S. assets (Promoters) agree to transfer assets to U.S. subsidiary of a Canadian Capital Pool Company (CPC) in exchange for securities of CPC (i.e., voting, non-voting, exchangeable shares) as a Qualifying Transaction (QT). Post QT a majority of voting stock held by non-U.S. shareholders. U.S. operations held by company incorporated in Delaware and headquartered in U.S. with U.S. Management, U.S. Directors and U.S. Operations.	CPC begins as a foreign private issuer and raises capital outside the United States in private placements to fund capital requirements post QT. U.S. Shareholders are issued a combination of common shares and non-voting securities (non-voting shares, exchangeable shares, special warrants, etc.) to maintain less than 50% of voting shares of the issuer. Common shares issued in private placement outside the United States are subject to Canadian hold periods (4 months). Offering in the United States pursuant to private placement exemptions are restricted securities and may be resold through the facilities of Toronto Stock Exchange or TSX Venture Exchange under Regulation S.	Securities issued to Promoters in the United States are deemed restricted securities under U.S. securities law, which may be resold on Toronto Stock Exchange or TSX Venture Exchange, subject to certain limitations. Securities issued outside the United States are deemed unrestricted "free-trading" securities under U.S. securities law. Offering in the United States pursuant to private placement exemptions (to Accredited Investors under Regulation D or QIBs under Rule 144A) are restricted securities, which may be resold on Toronto Stock Exchange or TSX Venture Exchange, subject to certain limitations. Issuer is not subject to the ongoing reporting requirements of the U.S. Exchange Act or SOX. Issuer is subject to on-going Canadian reporting obligations.	Securities issued in QT require exemption from U.S. registration requirements. Offers and sales into the U.S. require compliance with state blue sky securities laws.
Tax Treatment	The Company will continue to be subject to Canadian tax requirements and U.S. operating companies will be subject to U.S. tax requirements. Promoters that are U.S. taxpayers will likely realize gain on the disposition of the assets in QT.		
Suitability	This structure is suitable for companies that are in early formation stages or entities or small groups that have assets (in or outside the United States) with relatively high tax basis. These transactions are likely taxable to U.S. taxpayers.		

Structure	Organization as Foreign Private Issuer with U.S. Operations No U.S. Registration Statement and Canadian Prospectus Offering		
Issuer	**FPI Status & Structure**	**SEC Requirements and SEC Reporting Status**	**Other Requirements**
Founders organize Canadian corporation with a majority of voting stock held by non-U.S. shareholders. U.S. operations held by company incorporated in Delaware and headquartered in U.S. with U.S. Management, U.S. Directors and U.S. Operations.	Public vehicle begins as a foreign private issuer and raises capital outside the United States during pre-IPO phase. U.S. Shareholders are issued common shares and non-voting shares to maintain less than 50% of voting shares of the issuer. Common shares issued to the public in Canada IPO under long form Canadian prospectus and are unrestricted "free-trading" securities. Offering in the United States pursuant to private placement exemptions are restricted securities.	Securities issued outside the United States are unrestricted "free-trading" securities. Offering in the United States pursuant to private placement exemptions (to Accredited Investors under Regulation D or QIBs under Rule 144A) are restricted securities, which may be resold on Toronto Stock Exchange or TSX Venture Exchange, subject to certain limitations. Issuer is not subject to the ongoing reporting requirements of the U.S. Exchange Act or SOX. Issuer is subject to on-going Canadian reporting obligations.	Offers and sales into the U.S. require compliance with state blue sky securities laws.
Tax Treatment	The Company will continue to be subject to Canadian tax requirements and U.S. operating companies will be subject to U.S. tax requirements. No U.S. tax consequences in connection with the IPO		
Suitability	This structure is suitable for companies that are in early formation stages and can be formed outside the United States or are being formed by acquisition of non-U.S. assets.		



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