

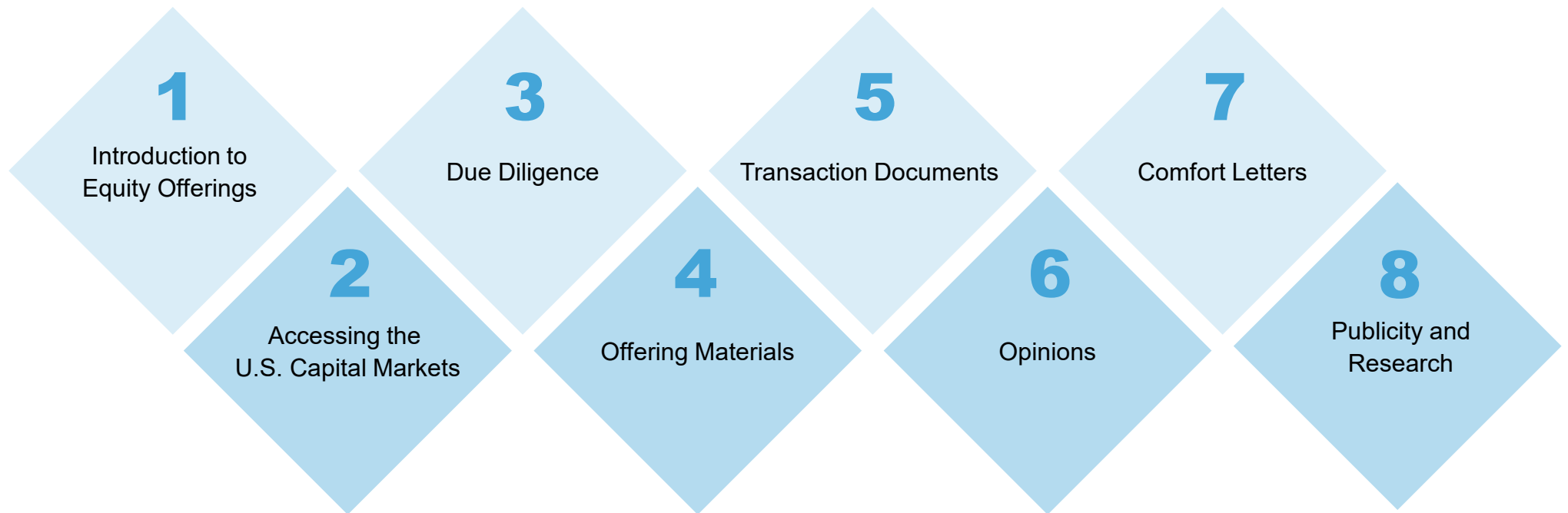
C L I F F O R D  
C H A N C E



**FUNDAMENTALS OF FINANCIAL MARKETS**  
INTRODUCTION TO EQUITY CAPITAL MARKETS TRANSACTIONS

STEPHANIE LIMAN AND CHARLOTTE TAN  
SEPTEMBER 2023

# CONTENTS



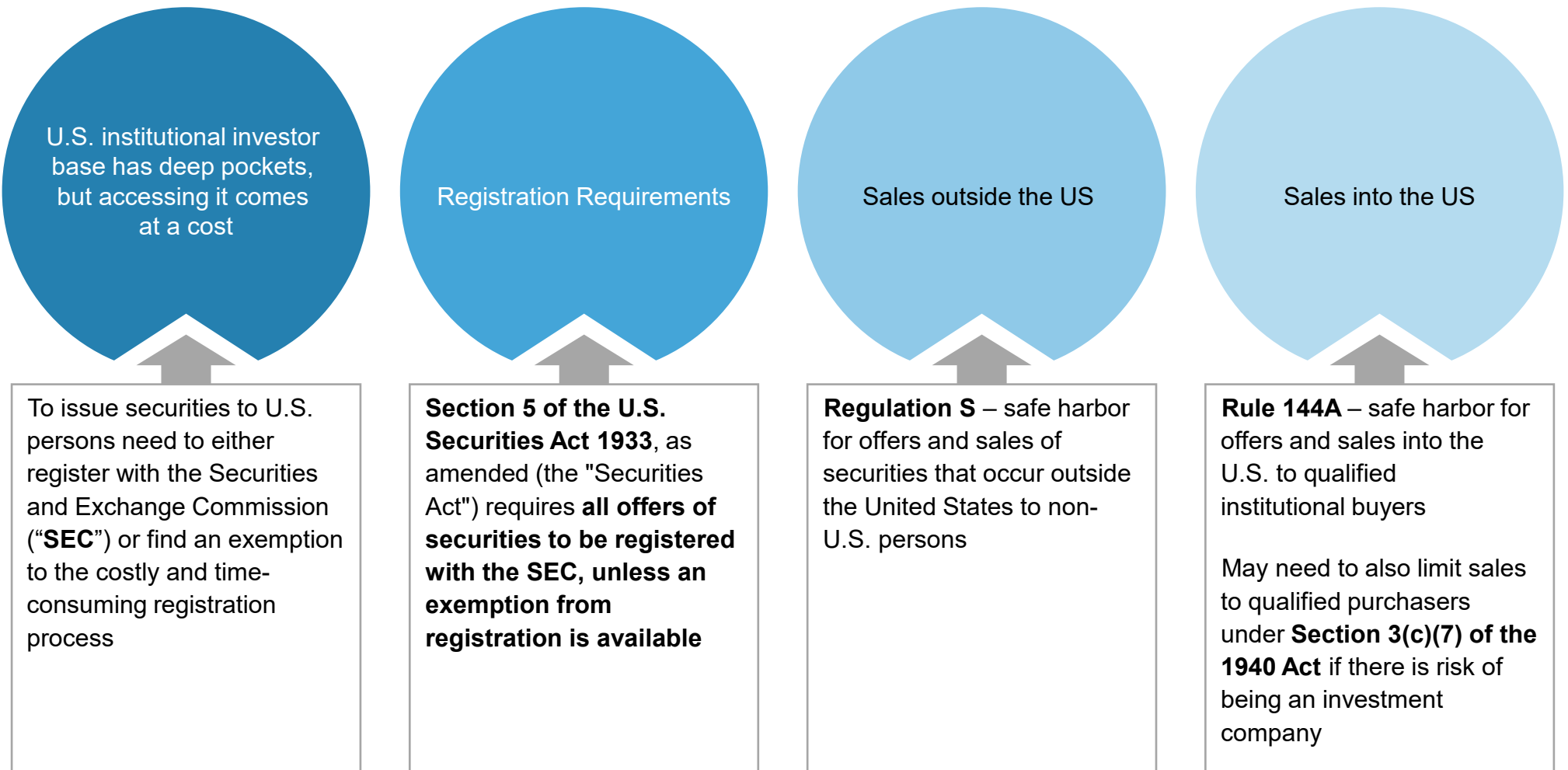
# INTRODUCTION TO EQUITY OFFERINGS

## KEY STAGES AND GENERAL TIMELINE FOR IPOs



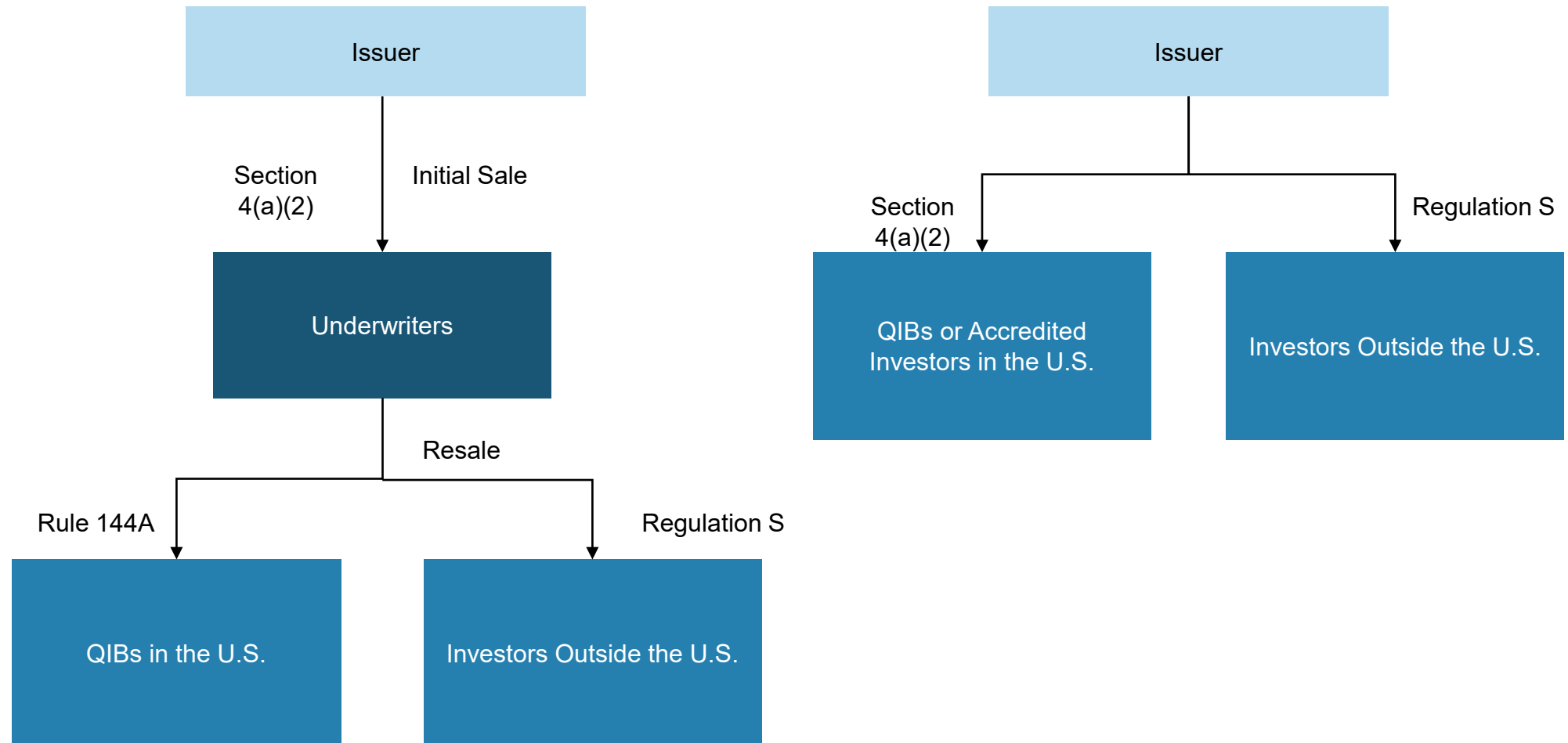
# ACCESSING THE U.S. CAPITAL MARKETS

## WHY ACCESS THE U.S. CAPITAL MARKETS



# ACCESSING THE U.S. CAPITAL MARKETS

## Common Global Offering Structure and U.S. Securities Law Exemptions



# ACCESSING THE U.S. CAPITAL MARKETS

## REGULATIONS

### Basic Requirements

#### No “directed selling efforts”

- Encompass any activities undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the U.S. market for the offered securities
- Sending non-U.S. offering materials to U.S. investors
- Conducting promotional seminars in the U.S.
  - Radio or TV
  - U.S. Publications, e.g., Wall Street Journal
  - International publications e.g., Financial Times with U.S. circulation > 15,000 copies

#### “All offers and sales must be made in an offshore transaction”

- Other restrictions within one of three categories depending on nature of security and issuer and the risk of the security flowing back into the U.S.
- These conditions are determined by the “category” of transactions which is broadly keyed off the presence of a substantial U.S. market interest (“**SUSMI**”) in the security, type of security (equity or debt) and type of issuer (foreign or domestic)



# **ACCESSING THE U.S. CAPITAL MARKETS**

## REGULATION S – SUSMI TEST (EQUITY)

### SUSMI Test:

- (i) the U.S. markets in the aggregate are the largest single market for such securities in the prior fiscal year; or
- (ii) more than 20% of trading in that class of securities took place on U.S. exchanges, and less than 55% took place in home country exchanges.

**Most non-US issuers would not have SUSMI in their equity securities**

# ACCESSING THE U.S. CAPITAL MARKETS

## REGULATION S – SUMMARY OF RULE 903 SAFE HARBOR

<ul style="list-style-type: none"> <li>Offshore transaction</li> <li>No directed selling efforts</li> </ul>	<p>During a 40-day distribution compliance period:</p> <ul style="list-style-type: none"> <li>The securities may not be offered or sold to U.S. persons</li> <li>Distributors provide notice of resale restrictions for sales to other distributors</li> </ul> <ul style="list-style-type: none"> <li>Offshore transaction</li> <li>No directed selling efforts</li> </ul>	<p>During a 40-day distribution compliance period:</p> <ul style="list-style-type: none"> <li>The securities may not offered or sold to U.S. persons</li> <li>Securities represented by temporary global securities requiring certification upon exchange after 40-day period</li> <li>Distributors provide notice of resale restrictions for sales to other distributors</li> </ul> <ul style="list-style-type: none"> <li>Offshore transaction</li> <li>No directed selling efforts</li> </ul>	<p>During a one-year* distribution compliance period:</p> <ul style="list-style-type: none"> <li>The securities may not offered or sold to U.S. persons</li> <li>Purchasers must certify compliance and agree to resale restrictions</li> <li>Issuers required to refuse to register non-compliant transfers</li> <li>U.S. issuer's securities must contain a transfer restrictions legend</li> <li>Distributors provide notice of resale restrictions for sales to other distributors</li> </ul> <ul style="list-style-type: none"> <li>Offshore transaction</li> <li>No directed selling efforts</li> </ul>
<p><b>Category 1</b></p> <ul style="list-style-type: none"> <li>Securities of a foreign issuer in which there is no SUSMI</li> <li>Securities of a foreign issuer in an overseas directed offering</li> <li>Securities backed by the full faith and credit of a foreign government</li> <li>Securities issued pursuant to a qualified offshore plan</li> </ul>	<p><b>Category 2</b></p> <ul style="list-style-type: none"> <li>Equity securities of a reporting foreign issuer; or</li> <li>Debt securities of a reporting U.S. or foreign issuer; or</li> <li>Debt securities of a non-reporting foreign issuer</li> </ul>	<p><b>Category 3 – Debt</b></p> <ul style="list-style-type: none"> <li>All securities not in Categories 1 or 2, including:</li> <li>Debt or equity securities of a non-reporting U.S. issuer</li> <li>Equity securities of a non-reporting foreign issuer in which there is SUSMI</li> <li>Equity securities of reporting U.S. issuers</li> </ul>	<p><b>Category 3 – Equity</b></p>

\* This period is six months for reporting issuers  
 FUNDAMENTALS OF FINANCIAL MARKETS



# ACCESSING THE U.S. CAPITAL MARKETS

## RULE 144A

### Basic Requirements



- Rule 144A provides a non-exclusive safe harbor from Section 5 liability for resales of certain securities to “qualified institutional buyers,” or “QIBs”
- To qualify for the Rule 144A exemption from registration, an offer or sale must meet the following conditions:
  - the securities are sold only to QIBs or to an offeree or purchaser that the seller and any person acting on behalf of the seller reasonably believe is a QIB
  - the seller and any person acting on its behalf must take reasonable steps to ensure that the purchaser is aware that the seller may be relying on Rule 144A
  - the securities offered or sold may not be of a class then listed on a U.S. exchange or quoted on Nasdaq (this issue usually only arises with equity offerings)
  - issuer must agree to provide reasonably current information to shareholders upon request
- No general solicitation or general advertising
  - Relates to activities undertaken, or intended to influence persons, in the United States:
    - Any advertisement, article, notice or other communication published in any newspaper, magazine or similar media or broadcast over television or radio
    - Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising

# ACCESSING THE U.S. CAPITAL MARKETS

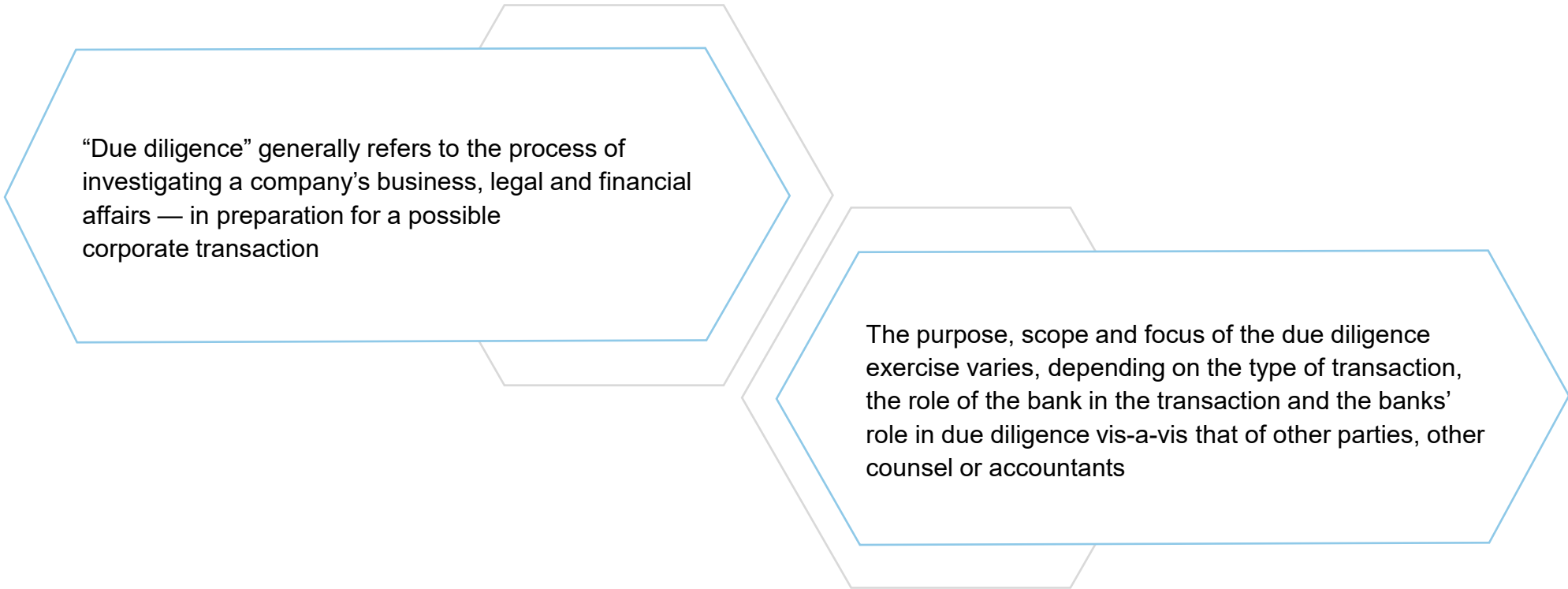
## Rule 144A – QIB

- Who is a QIB?
  - A QIB must be acting for its own account or the accounts of other QIBs that in the aggregate owns and invests on a discretionary basis at least U.S.\$100 million (or U.S.\$10 million in the case of a registered broker-dealer) of securities of issuers that are not affiliates of the buyer
  - There are more than 3,000 QIBs in the U.S. – generally largest mutual funds, pension funds, insurance companies and professional asset managers

## Rule 144A – Information requirements

- At a minimum, the offering memorandum for an IPO or other securities offering, must be current and include:
  - a brief description of the Issuer's business, products and services;
  - the Issuer's two most recent balance sheets;
  - the Issuer's most recent profit and loss statement, and retained earnings statement, audited, if available; and
  - similar income statements for the three preceding fiscal years
- However, because the anti-fraud provisions of the securities laws (Rule 10b-5) apply to Rule 144A transactions, a Rule 144A offering memorandum typically contains disclosure comparable to a prospectus in a U.S. registered offering

# DUE DILIGENCE

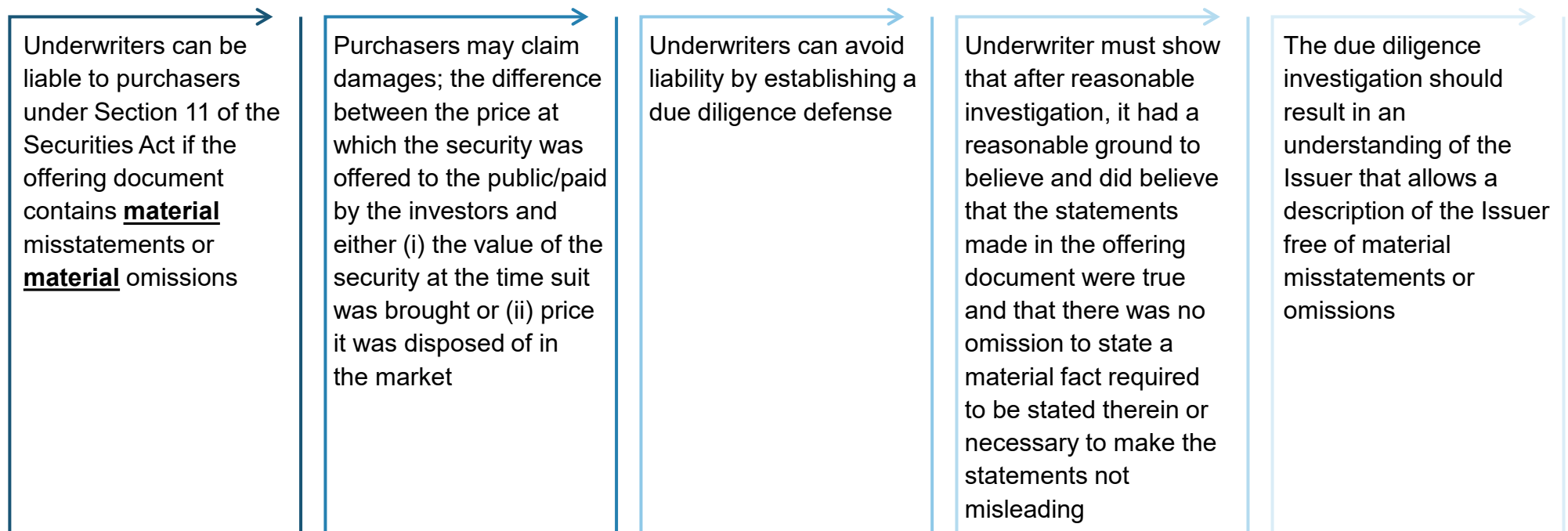


“Due diligence” generally refers to the process of investigating a company’s business, legal and financial affairs — in preparation for a possible corporate transaction

The purpose, scope and focus of the due diligence exercise varies, depending on the type of transaction, the role of the bank in the transaction and the banks’ role in due diligence vis-a-vis that of other parties, other counsel or accountants

# DUE DILIGENCE

## WHY DO DUE DILIGENCE



# DUE DILIGENCE

## WHAT IS MATERIAL



Materiality is not a bright-line rule; it is a fact-specific inquiry

Information is deemed material if:

- “there is a substantial likelihood that a **reasonable investor** would have viewed its disclosure as significantly **altering the ‘total mix’ of available information** and would consider it **important in deciding whether to purchase or sell the [security]**”.
- When reviewing the information as part of the due diligence process ask yourself – if I was about to buy securities issued by this company, would I find this important?
  - If yes, then needs to be disclosed in the company’s offering documents

# DUE DILIGENCE

## TYPES OF DUE DILIGENCE

### *Business/management due diligence*

- Questions prepared by Underwriters and their counsel
- Tailored to industry sector/ company

### *Financial due diligence*

- What do the company's financial statements say? How does the company's business result in these financial statements?
- Can be addressed in drafting sessions
- Comfort letter

### *Documentary due diligence*

- Generally, goes back 3-5 years with a materiality threshold
- Lawyers review documents for any prohibitions on an offering and for disclosure

### *Auditor due diligence*

- What work have the auditors done? What have they found?

### *Sanctions/ABCML due diligence*

- Look for any red flags and escalate to legal/ compliance if there are any

### *Press reports*

- Follow current news on the company, especially important in context of confidentiality around potential offering

### *Supplier/customers/industry expert/technical expert/competitors related information (third parties)*

- Competitor benchmarking

### *Back-up diligence*

- Confirm that statements in the offering documents are verifiable and true

# DUE DILIGENCE

## EVIDENCE OF DUE DILIGENCE DEFENSE

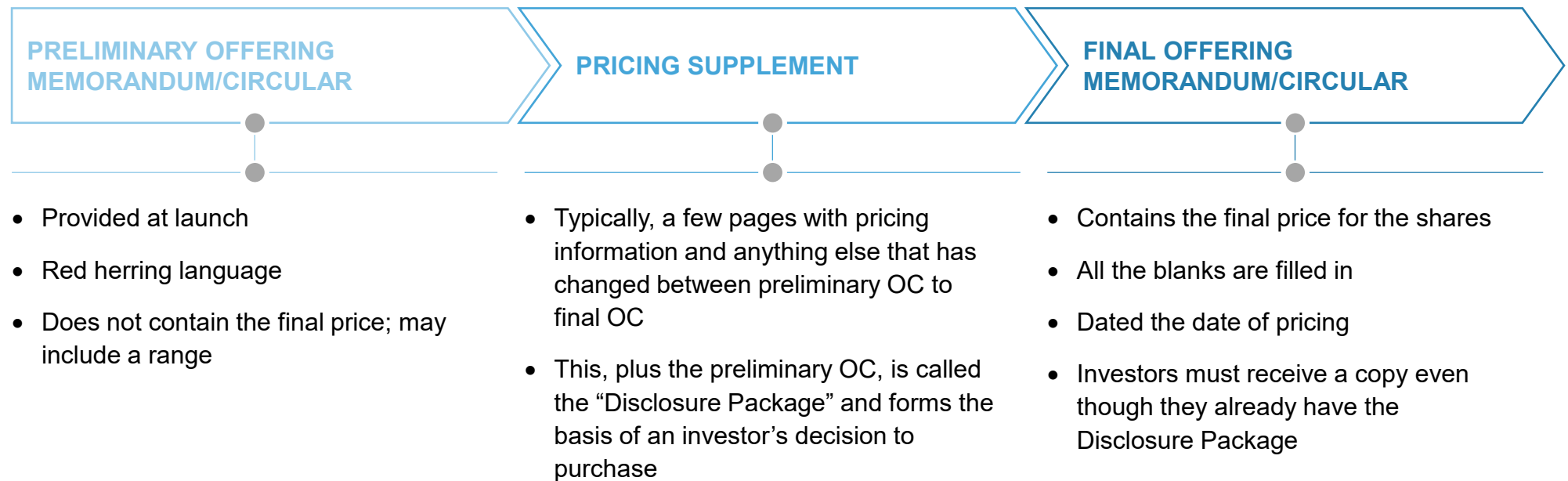
10b-5 letter from Issuer's counsel and Underwriters' counsel, typical for Rule 144A transactions

Comfort letter and audit reports from the auditors

"Negative Assurance" – nothing has come to their attention that has caused them to believe any untrue statement or material fact or omission of material fact to make statements not misleading

Additional letters/reports for other expertised portions of the document (e.g. industry data)


# OFFERING MATERIALS





# OFFERING MATERIALS

## OFFERING DOCUMENTS – CONTENTS\*

Strengths and Strategies	Risk Factors	Use of Proceeds	Business	MD&A
Board and Management	Description of the Offering	Related Party Transactions	Industry / Industry Report	
Description of Material Contracts	Tax Matters (Local / US)	Underwriting / Selling Restrictions	Financial Statements	

\* Note that contents are also subject to (local) regulatory disclosure requirements.

# OFFERING MATERIALS

## FINANCIAL STATEMENTS

### Basic Requirements

#### Audited Financial Statements (3 Years)

- Balance Sheet
- Statement of Comprehensive Income
- Statement of Changes in Equity
- Cash Flow Statement
- Related Notes
- Clean Audit Opinion

#### Interim Financial Statements

- May be unaudited
- Statement of Comprehensive Income
- Statement of Changes in Equity
- Cash Flow Statement
- Related Notes
- Comparison to prior year

#### Pro Forma Financial Statements

- Depends on the size of the acquisition and the significance to the Issuer

# TRANSACTION DOCUMENTS

## UNDERWRITING AGREEMENT\*

An agreement between the Issuer (and/or Selling Shareholder) and the Underwriters (also called Initial Purchasers) that governs the purchase and sale of the securities offered.

Introduction

Agreement to sell and purchase securities

Payment and delivery

Reps and warranties

Covenants

Conditions precedent to closing

Termination/defaulting underwriter\*

Indemnity and contribution

Miscellaneous, including governing law, dispute resolution, forms of certificates

\* For a number of jurisdictions in Asia (e.g. Singapore, Malaysia, Indonesia, Hong Kong, there will be an “International” and “Local” Underwriting Agreement which governs the domestic/retail offering versus the international offering, respectively.

# TRANSACTION DOCUMENTS

## UNDERWRITING AGREEMENT

### Representations and Warranties of the Issuer

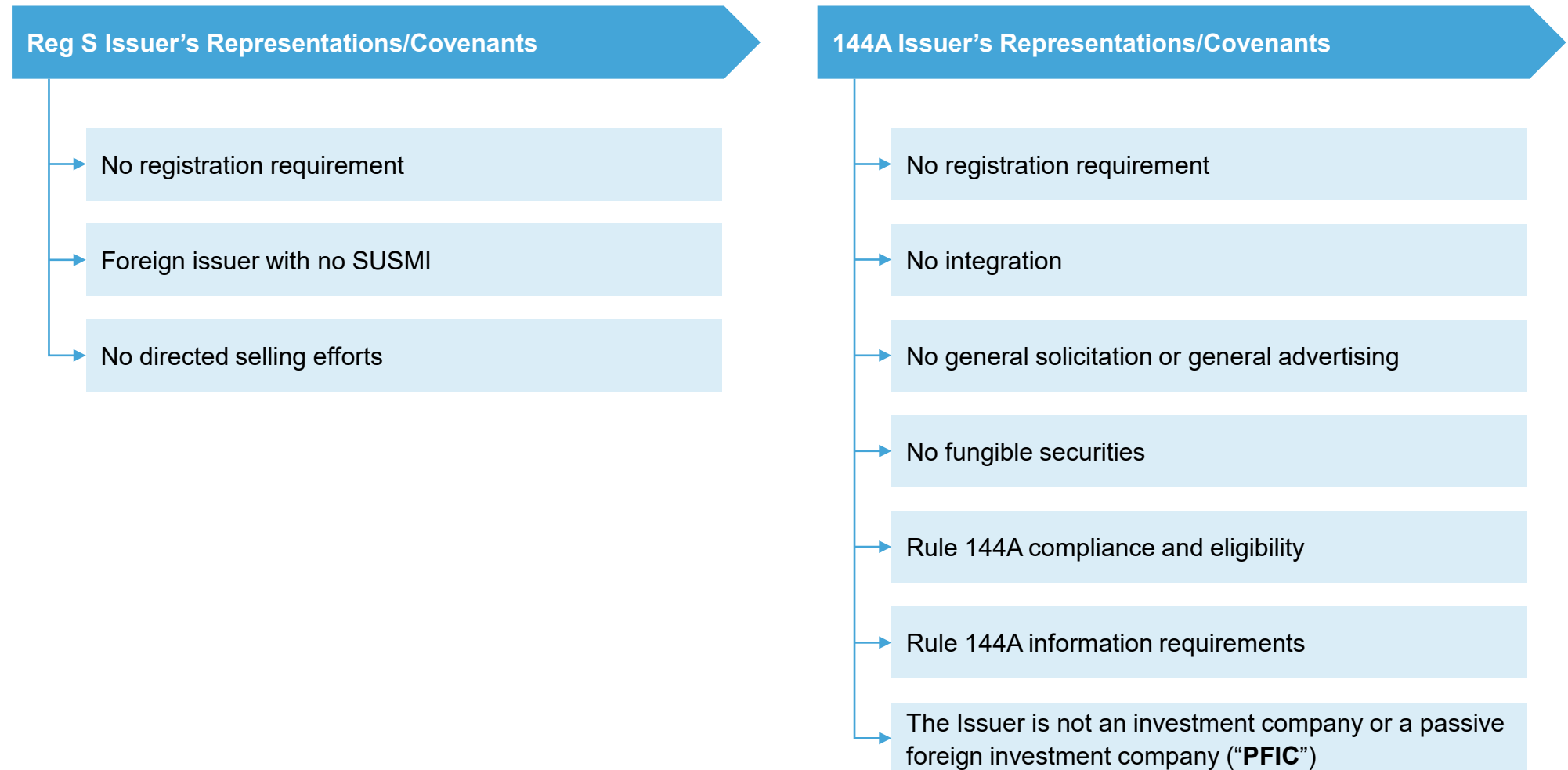


- Corporate organization
- Due authorization, execution and delivery of the securities offered and various offering agreements
- Compliance with laws and contracts
- No material adverse change (“**MAC**”) / material adverse effect (“**MAE**”)
  - Underwriters will want this drafted as broadly as possible
- Financial-related
- Business-related (may be specific to deal, driven by due diligence)
- U.S. securities law reps and warranties
- Sanctions/Anti-Bribery and Corruption/Anti-Money Laundering compliance

# TRANSACTION DOCUMENTS

## UNDERWRITING AGREEMENT

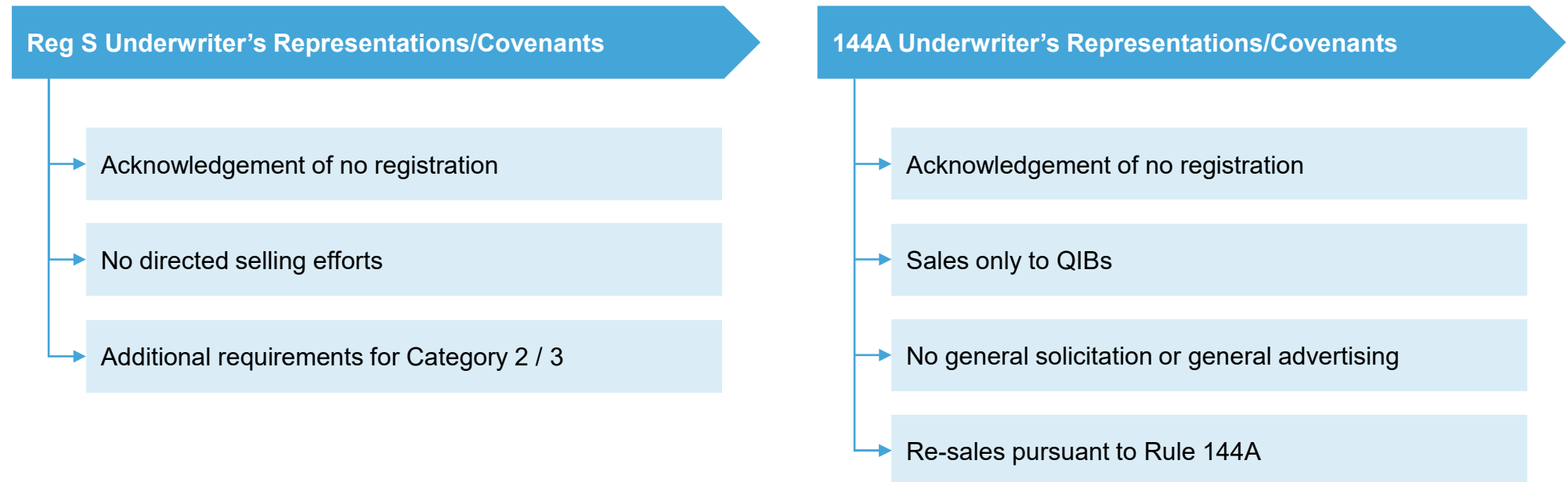
### U.S. Securities Law Representations and Covenants in Underwriting Agreements



# TRANSACTION DOCUMENTS

## UNDERWRITING AGREEMENT

### U.S. Securities Law Representations and Covenants in Underwriting Agreements



# TRANSACTION DOCUMENTS

## UNDERWRITING AGREEMENT

### Covenants of the Issuer

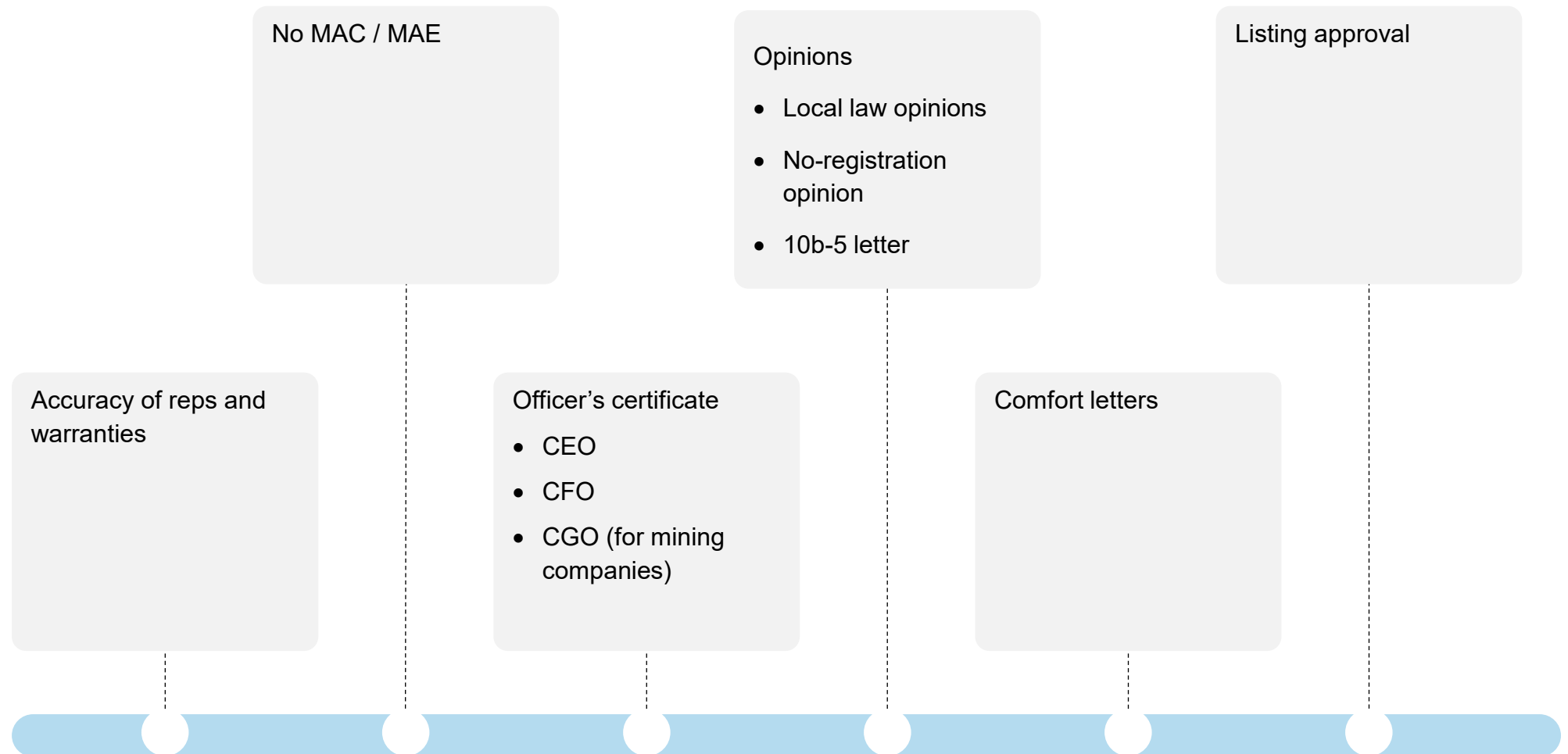


A covenant is a promise to take an action (an affirmative covenant) or to refrain from taking an action (a negative covenant) in the future.

- Pay expenses
- Notice of material misstatement or omissions
- No amendments to OC
- Notice of and consent to certain other announcements and regulatory filings
- Use of proceeds
- Qualification under other jurisdictions
- US securities laws covenants (no action requiring registration, no general solicitation and advertising, no directed selling efforts)
- Lock-up
- No stabilization or manipulation

# TRANSACTION DOCUMENTS

## CONDITIONS TO CLOSING





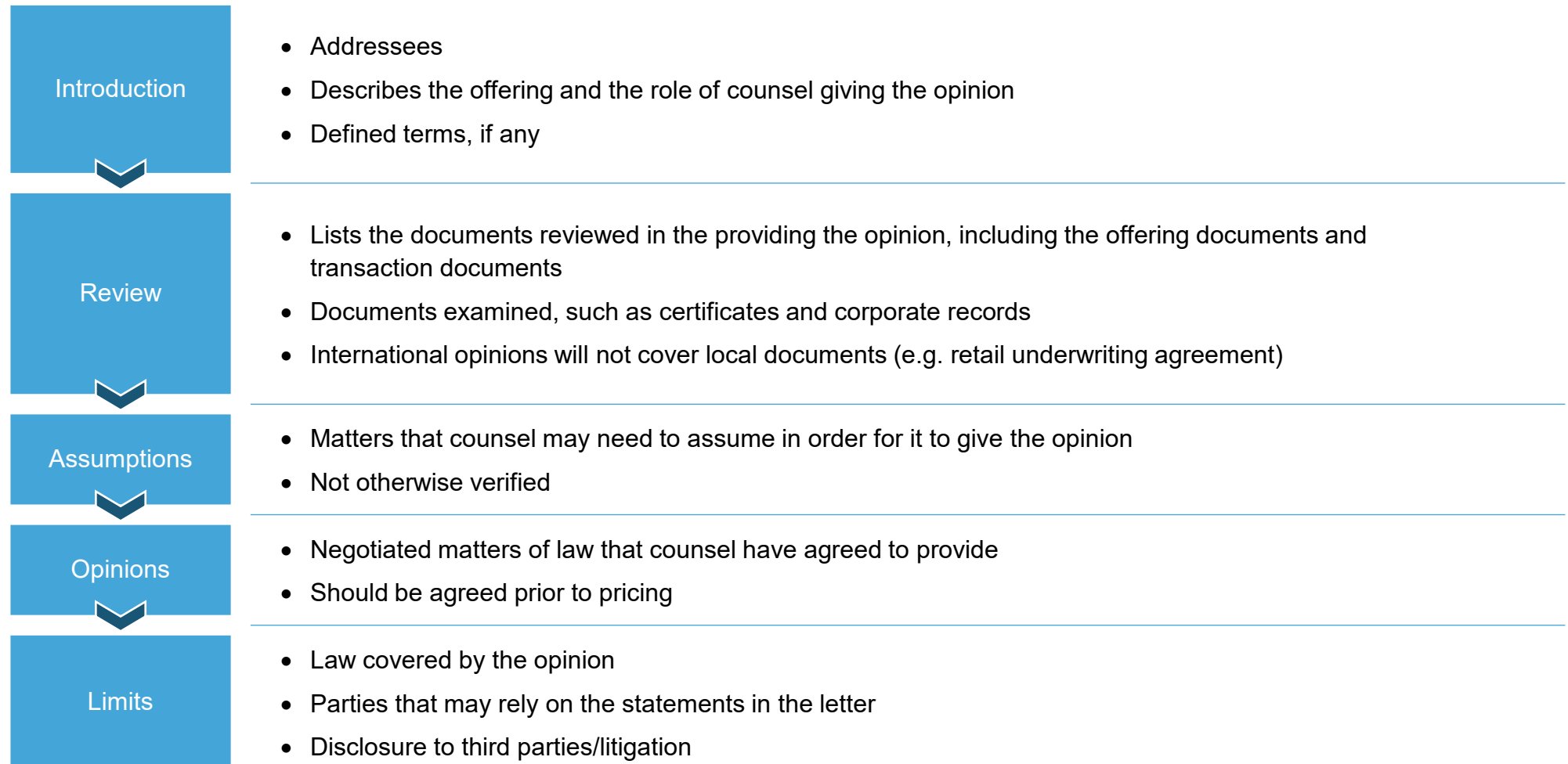
# OPINIONS

- Dated and delivered as of the closing date (and the over-allotment date, if applicable)
- Speaks as of the date of the issuance of the opinion
- Always a condition precedent to closing
- Not a substitute for due diligence
- Types of opinions to expect in an IPO:
  - Local counsel opinion (Issuer's/Underwriters' counsel)
  - US No registration opinion (Issuer's/Underwriters' counsel)
  - 10b-5 letter (for Rule 144A offerings only, certain Reg S offerings)
  - Opinion from governing law jurisdiction (e.g. Singapore law, English law)
  - Tax opinion



# OPINIONS

## STRUCTURE



# OPINIONS

## OPINION STATEMENTS

(SUBJECT TO LOCAL LAW REQUIREMENTS/MARKET PRACTICE)



### Core opinion statements

- Corporate existence
- Capacity and authorisation
- Due execution\*
- No conflict
- Legal, valid, binding and enforceable
- Valid securities
- No further acts
- No registration (Reg S/ Rule 144A)\*
- No stamp/documentary taxes
- Statements in OC and Prospectus
- No proceedings/bankruptcy
- Submission to jurisdiction
- Governing law
- Enforcement of foreign judgement

### Optional opinion statements

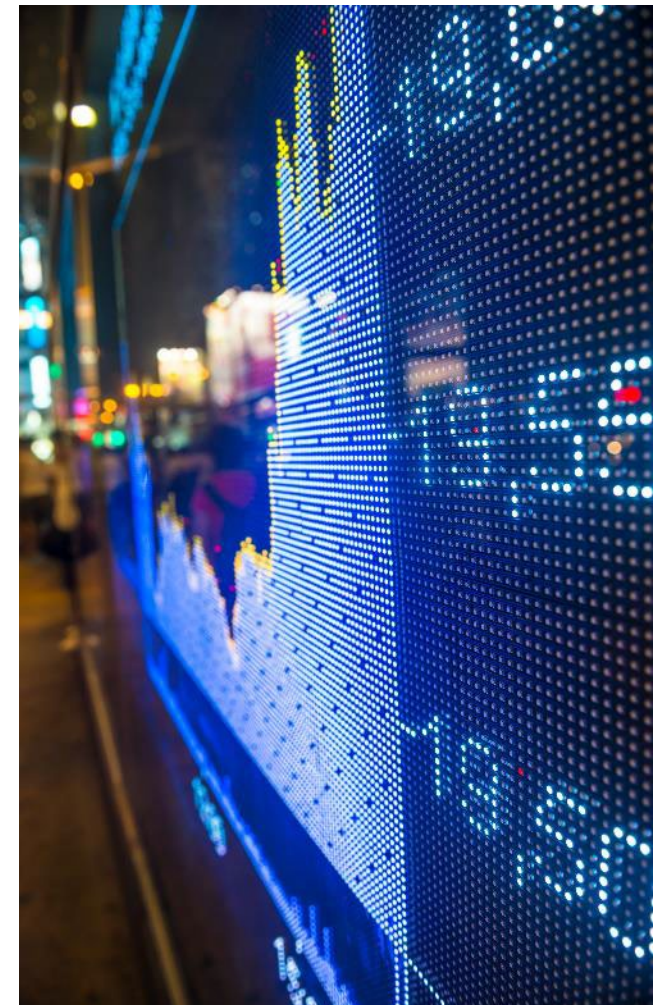
- Investment Company Act (Rule 144A)\*
- Fair summaries (U.S. tax and U.S selling restrictions) (Rule 144A)\*

\* Covered in a U.S. No Registration opinion.

# OPINIONS

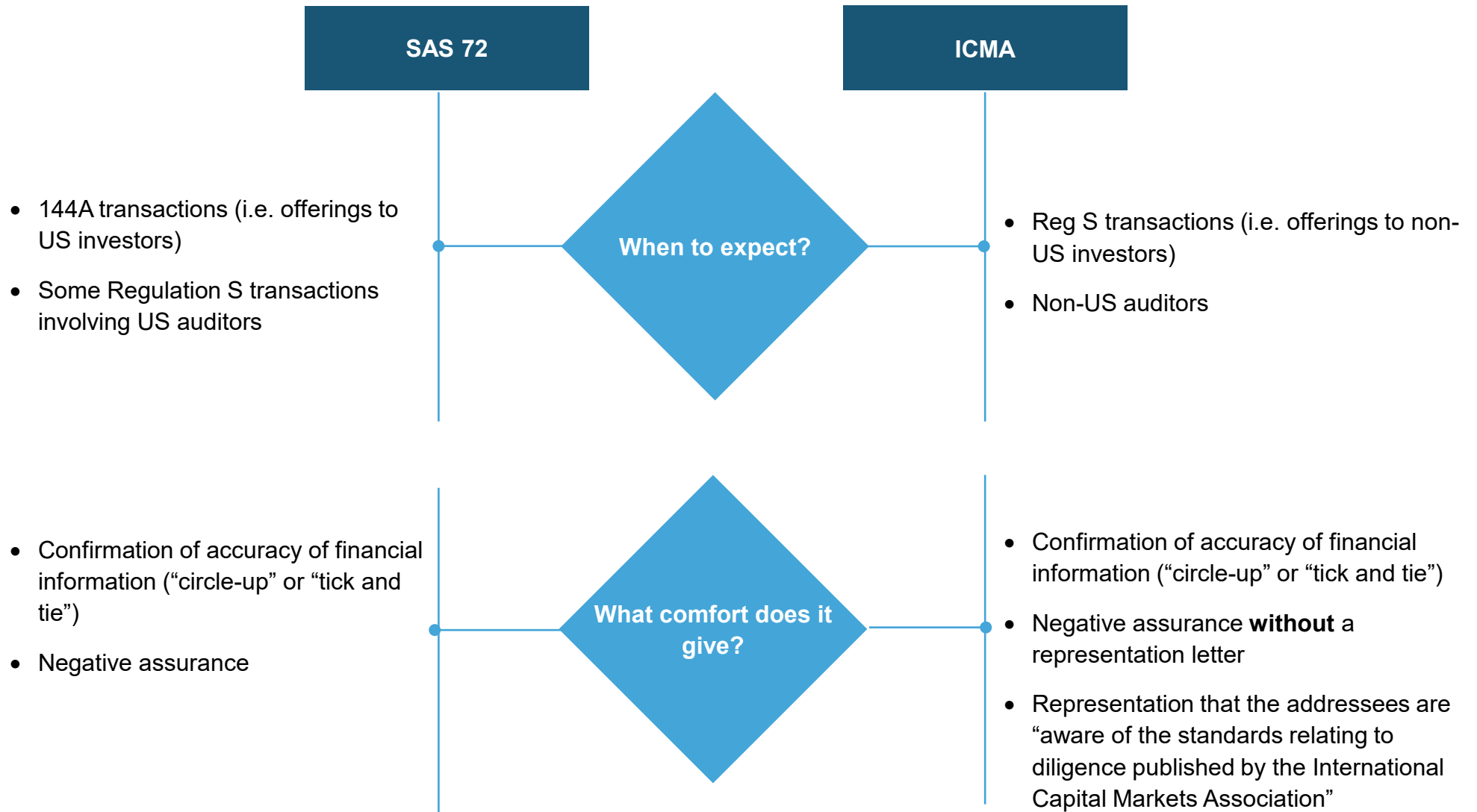
## DISCLOSURE LETTERS / 10B-5 LETTERS

- Rule 10b-5 of the Exchange Act provides that liability in connection with a securities offering document may arise if there is a material misstatement or omission made in connection with the purchase or sale of any security
- 10b-5 letter is confirmation that parties have undertaken certain due diligence procedures and that, on the basis of such procedures, nothing has come to their attention that leads them to believe that an offering document contains an **“untrue statement of a material fact or omitted to or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading”**
- Normally given on the Disclosure Package as the Time of Sale and the Final Offering Documents as of its date and as of the closing date
  - not to be confused with **when** this is to be delivered, which is only at the closing date
- Time of Sale is the time that liability attaches and considered to be when investors have the information they need to make an investment decision
- The 10b-5 is **not** a legal opinion but an integral part of the diligence defence for the Underwriters



# COMFORT LETTERS

## DIFFERENCE BETWEEN ICMA AND SAS72 COMFORT LETTERS



# COMFORT LETTERS

## What is negative assurance?

“...nothing came to our attention as a result of the foregoing procedures that caused us to believe that.....

...*any* modifications need to be made to the interim financial statements for them to conform to, e.g. IFRS

...as at [date] there was *any* increase or decrease in specified balance sheet items as against the audited or interim financials

...for the period from [date] to [date] there was *any* increase or decrease in specified income statement items as against the corresponding period in the previous financial year”

## What is NOT negative assurance?

“...those officials stated that

...*no* modifications need to be made to the interim financial statements for them to conform to, e.g. IFRS

...as at [date] there was *no* increase or decrease in specified balance sheet items as against the audited or interim financials

...for the period from [date] to [date] there was *no* increase or decrease in specified income statement items as against the corresponding period in the previous financial year”

**This is NOT a conclusion of the auditor**

# COMFORT LETTERS

## The 135-day rule in SAS 72

SAS 72 limits the time period for which negative assurance as to changes in key financial statement line items during the “change period” may be given:

**“ IF THE UNDERWRITER REQUESTS NEGATIVE ASSURANCE AS TO SUBSEQUENT CHANGES IN SPECIFIED FINANCIAL STATEMENT ITEMS AS OF A DATE LESS THAN 135 DAYS FROM THE END OF THE MOST RECENT PERIOD FOR WHICH THE ACCOUNTANTS HAVE PERFORMED AN AUDIT OR A REVIEW, THE ACCOUNTANTS MAY PROVIDE SUCH NEGATIVE ASSURANCE IN THE COMFORT LETTER.”**

Where accountants have audited year-end financial statements but have NOT performed a SAS 100 review of interim financials, they may provide negative assurance as of any date up to **May 13/14 (depending on leap year)**.

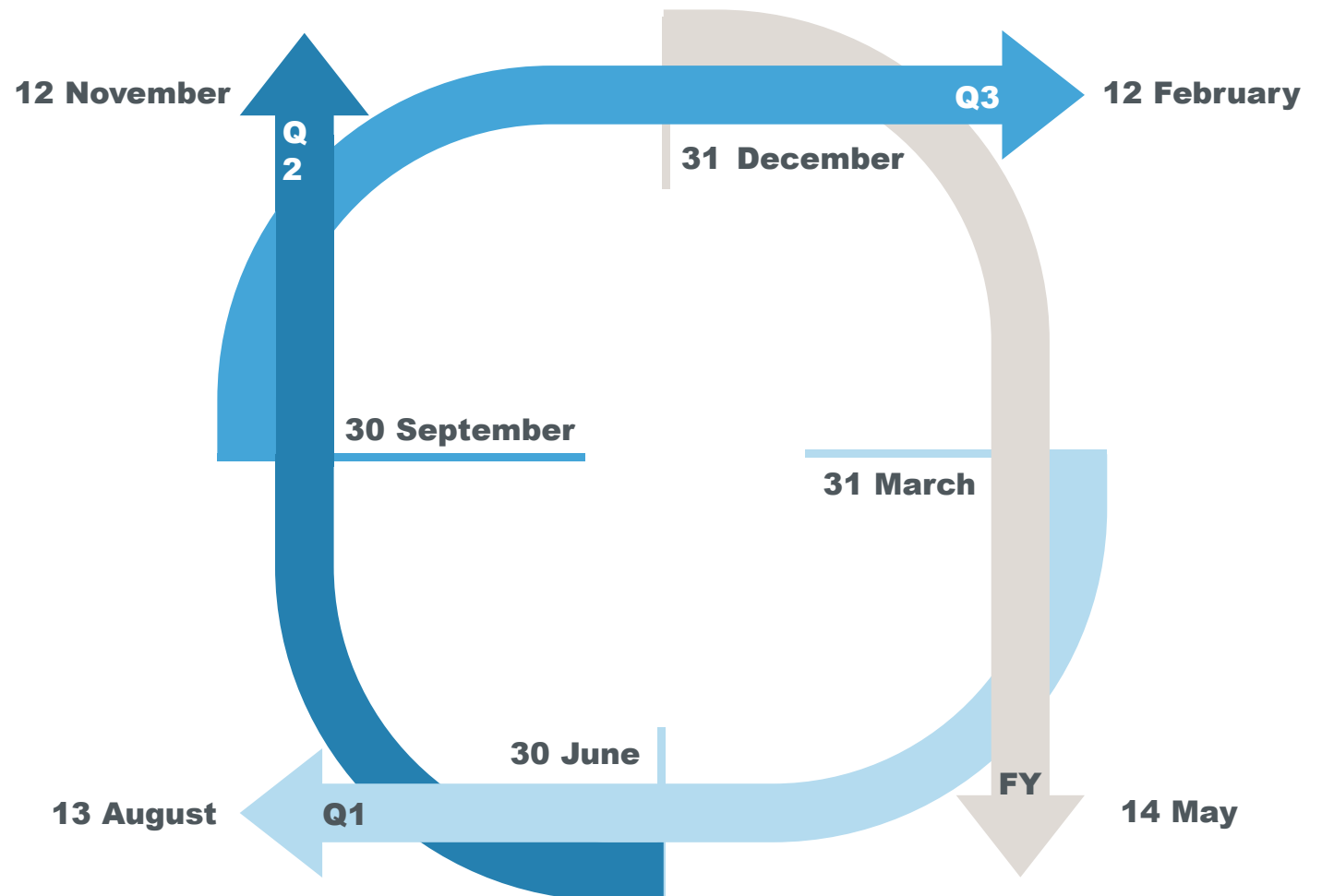
Where accountants have audited year-end financial statements and also performed a SAS 100 review of first quarter interim financials, they may provide negative assurance as of any date up to **August 12.\***

\*135-day period starts on the last date of the last audit or limited review period, whichever is latest.

# COMFORT LETTERS

When will auditors provide comfort on each period's financial statements?

- Financial statements that are 135 days or older are referred to as stale.
- For unregistered offerings, banks and issuers will avoid issuances when financials have gone stale due to liability and marketing concerns





# PUBLICITY AND RESEARCH

Publicity and research during an offering can have serious effects on an offering, such as compromising an exemption or liability issues with respect to disclosure

Timing, content and audience of each are the key considerations



# PUBLICITY AND RESEARCH

## PUBLICITY GUIDELINES

- Policy Behind: Publicity relating to the offering disseminated into the United States could be viewed an “offer” to the U.S. public, thus triggering registration requirements under the Securities Act
- Guidelines ensure that any publicity constitutes neither a “**general solicitation**” nor a “**directed selling effort**”, because these would prevent the Issuer from relying on the exemptions from registration under the Securities Act under Rule 144A and Regulation S, respectively
- Rule 135(e) disclaimer:

*This announcement is not an offer of securities for sale in the United States. The securities will not be registered under the U.S. Securities Act of 1933, as amended, and securities may not be offered or sold in the United States absent registration or an exemption from registration. Any offering of securities to be made in the United States will be made by means of an offering memorandum that may be obtained from the Issuer and that will contain detailed information about the Issuer and management, as well as financial statements.*
- Effective immediately after the kick-off meeting until 40 days after closing
- Ordinary course publicity by the Issuer is okay
- Local rules apply
- Issuer counsel responsibility

# PUBLICITY AND RESEARCH

## ROADSHOW - CONTENT GUIDELINES



### Roadshow discussions carry antifraud liability

- Statements should be materially complete and not misleading
  - Should not conflict with what is (or will likely be) in the OC
  - Management can elaborate and answer audience questions, provided that do not discuss material information not reflected in the prospectus.
  - Providing more granular detail in response to a question is generally fine, so long as the extra information is not material.
  - Should not discuss information that is not also discussed in the OC
  - Projections and forecasts should not be made (unless in the OC)
- No comment should be made regarding the merit of investing

# **PUBLICITY AND RESEARCH**

## NON-DEAL/ANCHOR ROADSHOWS

- Approached at an early stage in the IPO process
- Targeting specific potential investors without a specific offering being planned (ordinary course investor education)
- Should not contain any material non-public information or include any details about any offerings
- Generally OK for investors to have copy of slides since not connected with an offering but safer not to
- Documents prepared as part of this process:
  - Anchor guidelines
  - Information Memorandum (Business Risks, MD&A of the OC, Financial Statements, Industry Report)
  - Anchor Presentation
  - Form of NDA/script
- If Issuer considering to launch shortly after a non-deal roadshow, need to carefully consider:
  - Will meetings be arranged in a manner that might tip-off investors?
  - Are there meetings in the US that can run afoul of the US securities laws?
  - Will information be disclosed in meetings that will be inconsistent with an offering document?

# PUBLICITY AND RESEARCH

## RESEARCH REPORT GUIDELINES



- Ensures that any research constitutes neither a “**general solicitation**” nor a “**directed selling effort**”
- Effective immediately after the kick-off meeting until 40 days after closing (“**Restricted Period**”)
- Rule 138 (about securities other than those being distributed) and Rule 139 (ordinary course) research is allowed
- Subject to local rules, research reports may be sent during the Restricted Period to persons located outside the U.S. (and Japan) by non-U.S. syndicate members
- Research reports may **not** be sent into the United States (or Japan) during the Restricted Period
- Blackout period begins on the 15th day prior to the commencement of any distribution of the Preliminary OC until the end of the Restricted Period
- Research reports may **not** be sent to anyone during the Blackout Period
- Content guidelines:
  - Should not conflict with what is (or will likely be) in the OC
  - Should not contain information that is not also discussed in the OC. Information should not be included even if it is “publicly available information”

## KEY CONTACTS



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C L I F F O R D  
C H A N C E

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