Capital Markets Alert

Skadden

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Key Considerations for Non-US Companies Listing in the US

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The United States continues to be the destination of choice for many non-U.S. companies looking to go public. Active trading, superior liquidity, attractive valuations for growth companies and a deep pool of sophisticated investors have made the New York Stock Exchange and Nasdaq desirable listing venues for many international companies in a range of sectors, including technology, consumer goods, education, pharmacology, biotechnology, oil and gas, and shipping.

Though the U.S. Securities and Exchange Commission (SEC) registration and review process can be a daunting prospect, the process is in fact less burdensome than some companies fear. Accordingly, listing in the U.S. can actually be easier than doing so in many other jurisdictions.

However, certain rules and regulations in the U.S. present unique considerations for companies looking to go public. Relatedly, the legal framework administered by the SEC treats certain non-U.S. companies that meet the definition of foreign private issuers (FPIs) differently from their U.S. counterparts. That legal framework provides accommodations to FPIs designed to make the registration and reporting process less burdensome, including through harmonization of U.S. rules and procedures with applicable local law standards.

Advance planning is the foundation to a smooth and successful initial public offering. Here are some of the key issues FPIs should consider at least one year in advance of listing:

Disclosure Concerns

Foreign Private Issuer vs. U.S. Domestic Issuer Disclosure: FPIs have a different disclosure regime to U.S. domestic issuers both before and after listing, though the regime is significantly lighter for FPIs. However, not all non-U.S. companies are FPIs. Whether a non-U.S. company qualifies as an FPI depends on a multifactor test examining the company's shareholder base, place of operation, citizenship and residency of management and directors, and location of assets. Changes in the composition of the board and senior management pre-IPO may impact a company's status as an FPI, which can have a significant impact on SEC disclosure requirements applicable to the company conducting an IPO. Among the different requirements, FPIs can prepare and file financial statements under International Financial Reporting Standards (IFRS) and disclose executive officer compensation in aggregate, while U.S. domestic issuers must use U.S. Generally Accepted

Accounting Principles (GAAP) and disclose individual compensation to its executive officers. Significant differences also exist in SEC requirements post-listing as U.S. domestic companies are required to file quarterly reports on a Form 10-Q, material event reports on a Form 8-K and proxy statements, in connection with annual meetings and shareholder votes. In contrast, FPIs are only required to file an annual report on a Form 20-F and furnish reports on Form 6-Ks to disclose material events of the company. The difference in reporting regimes is generally premised on SEC rules deferring to "home country" practice for FPIs with respect to a range of disclosure requirements.

'SEC Compliant' Audit of Accounts: For FPIs, the SEC accepts IFRS as issued by the International Accounting Standards Board (IASB) and U.S. GAAP accounts; however, local GAAP and IFRS accounts that are not IASB will require reconciliation to U.S. GAAP. In addition, the audited accounts included in an SEC registration statement must be audited under the standards of the U.S. Public Company Accounting Oversight Board (PCAOB). For most non-U.S. issuers, this will require additional procedures to be performed on their financial statements, which will necessitate management attention.

Acquired Company Financials: When a company acquires a "significant" business, SEC rules generally require disclosure of separate audited annual and unaudited interim pre-acquisition financial statements of that business if it is significant to the company (so-called "Rule 3-05" financials). Rule 3-05 financials are required in registration statements for IPOs and follow-on offerings, but U.S. domestic issuers also are required to file such financials on a Form 8-K report within 75 days of closing of the acquisition,[1] which FPIs are not required to do. Whether an acquisition is significant or not is determined by applying investment, asset and income/revenue tests in accordance with SEC rules and regulations. Depending on the significance, companies may be required to provide *pro forma* financial statements and up to two years of audited financial statements for the acquired business, plus any interim period.[2]

Public Filing of Material Contracts: Companies looking to go public in the U.S. are required to file certain exhibits publicly with the registration statement, including material agreements and certain other documents. SEC rules allow for commercially sensitive information to be redacted from the publicly filed exhibit to a limited degree, provided that such redacted information is not material to investors. Pre-IPO companies should include exceptions to confidentiality clauses in important contracts to permit disclosure when required by law, regulation or stock exchange rules, without having to renegotiate with contractual counterparties for such a right.

Hot Topics: The SEC's staff regularly updates disclosure requirements for U.S.-listed issuers and provides guidance on disclosure for IPO registration statements and ongoing disclosure. The staff also spends significant time educating investors, companies and advisers on these issues, and the desired scope and nature for the associated disclosure. The staff currently is focused on the impacts of the COVID-19 pandemic, LIBOR transition, Brexit, cybersecurity, sustainability, and climate change and operational metrics (particularly in emerging industries such as mobility). Additional diligence and thoughtful disclosure in advance of the submission of an IPO registration statement will help companies stay ahead of the SEC's comment process, reducing the time it takes to clear comments.

Listing Process

Technical and Direct Listings: Those considering a U.S. listing have alternatives to the standard initial public offering process. Companies that are already publicly listed elsewhere can apply for a "technical" listing without an offering of shares or the use of underwriters or financial advisors, provided that they meet the listing standards of the New York Stock Exchange or Nasdaq. Direct listings — an initial listing of shares with no offering by the company — also are gaining traction, providing an avenue for companies that do not wish to raise capital to establish a listing and enable existing shareholders looking to sell to create a market for the company's shares. Direct listings must meet the New York Stock Exchange or Nasdaq valuation and minimum number of shareholder standards (typically at least 400 shareholders). The SEC also has recently been in discussions with various parties regarding whether to permit direct listings where companies would be able to raise capital and allow issuers to meet the 400 shareholder test 90 days post-listing instead of at the time of listing.

US Offerings by Public Companies: Companies with existing listings outside the U.S. seeking to do a public offering in the U.S. face an additional set of issues:

- Communication with existing investors should be handled with care as there is tension regarding the U.S. rules' prohibition on publicity relating to an offering and a company's obligation to inform its shareholders of material developments. Carefully drafted press releases and scripted investor communications can avoid uncomfortable conversations or potential delays or penalties from the SEC further down the road.

[1] A Special Purpose Acquisition Company (SPAC or "blank check" company) must file within four business days of acquisition.

[2] The SEC recently adopted a number of changes, including limiting to two years the number of years of acquired company financials registrants are required to provide, as well as adding a revenue test to the pretax income test. The pretax income test has long been the subject of discussion as it has produced anomalous results in a number of cases.

- Typically, underwriters in an offering will seek contractual obligations from the company, its directors and executive officers, selling shareholders, and other significant shareholders regarding selling shares for a fixed period of time following an offering. This practice can prove particularly difficult with respect to shareholders (other than selling shareholders) of an already public company. With little leverage over such shareholders (if they are not selling in the offering), an open dialogue with underwriters together with shareholders, directors, officers and the company will help ensure smooth execution.
- Pricing where a company is already public — often involving shares traded in a different currency than U.S. dollars and with a fluctuating price based on a public market in a different time zone — can prove challenging. Counsel should focus the underwriters and the company on the rules that enable the most flexibility to upsize and downsize the offering based on a changing share price.

Confidential Submission/Public Filing: Following recent rule changes, all companies looking to go public in the U.S. are permitted to submit draft registration statements to the SEC for multiple rounds of review prior to making a public filing. Although some companies choose to put out a press release when the submission is made, most companies choose to keep their offering process confidential, allowing them to go public when the markets are most favorable. However, when the first public filing is made, which must be at least 15 days prior to the start of the roadshow, the company is required to publicly file all the previous confidential submissions. Investors (or journalists) may then pore over the changes made to the prospectus during the interactions with the SEC. Following the offering, the SEC comment letters and the company's responses also will be made public.

Boards of Directors and Related Issues

Corporate Governance: New York Stock Exchange and Nasdaq rules prescribe certain aspects of corporate governance, including having a majority independent board of directors and independent audit committees, nominating or corporate governance committees, and compensation committees. With limited exceptions, FPIs are generally permitted to rely on home country practice with respect to corporate governance under the U.S. stock exchange rules.

Liability and Due Diligence Defense for the Board: The company is strictly liable for damages in connection with material misstatements or omissions in an SEC registration statement. Directors and officers who sign the registration statement also are subject to such liability but they, as with the underwriters, also have an affirmative due diligence defense against such liability. Engaging with management and advisers early in the offering process and properly recording such engagement remains a cornerstone of establishing and proving a due diligence defense.

Independent Directors and Directors' and Officers' Liability (D&O) Insurance: As part of going public, most companies will increase the size of their board, adding public company experience and complying with the corporate governance requirements of the SEC and U.S. stock exchanges. The process of finding and on-boarding new, independent directors should begin at an early stage in the offering process. In addition, companies may or may not already have D&O insurance, but directors will require such insurance if a company is to become public in the U.S. Existing policies will need to be revisited to cover directors and officers of a public company in the U.S. and new policies will need to be tailored to fit the needs of a U.S. public company.

Exaggerated fears of the IPO process in the U.S. used to fill companies, directors and management with dread thinking about the onerous obligations of the Sarbanes-Oxley Act, the rigorous SEC review process and complex rules requiring difficult disclosure. However, the reality is different and, as explained above, listing in the U.S. is often no more burdensome than listing in many other jurisdictions. Relatedly, the SEC has publicly stated that it wants the process to be easier and has been friendlier and more responsive than in the past, proving the agency is ready and willing to welcome non-U.S. companies.

Conducting an initial public offering in the U.S., whether through an initial or secondary listing, is transformative for any company. Seamless execution results from proper long-term planning and active engagement by the company and its advisers. Non-U.S. companies can leverage the privileges available to them to make the journey from kick-off to ringing the bell on a U.S. stock exchange an enjoyable and successful one.

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