

FOREIGN PRIVATE ISSUERS

Factors for London-Listed Companies to Consider Before Dual Listing or Relisting in the United States

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There has been increased focus recently among London-listed companies in exploring US listings, whether as a further listing or migrating from London altogether. This is primarily being driven by companies seeking to close the valuation and trading liquidity gaps that they face compared to their US-listed peers, as well as to expand their US investor base and gain greater access to the US capital markets.

For most FTSE 350 companies, the London Stock Exchange (LSE) will likely remain the most logical primary trading venue given the sector, geographical scope, investor base, and market capitalization of these companies. Nonetheless, there may be a select group of UK companies for which a dual listing or even migration to the United States makes sense.

Before London-listed companies explore a US listing, they should carefully consider the rationale and suitability of such a move. Below are some of the key issues.

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1. Key Steps, Documentation, Eligibility, and Timing

Registration

- A UK-listed company undertaking a listing on the New York Stock Exchange (NYSE) or Nasdaq which is not raising new capital must register its securities by preparing and filing with the US Securities and Exchange Commission (SEC) for its review a registration statement on Form 20-F if it qualifies as a “foreign private issuer” (FPI) (*see* below) or a Form 10 if it is deemed or elects to be a US domestic issuer.

The company must address and satisfy all of the SEC’s comments before the registration statement can be declared effective and the listing can take place. Other than financials prepared to the standards of the Public Company Accounting Oversight Board (PCAOB) (*see* below), most of the disclosure required in such a registration statement should be readily available from the company’s existing annual reports.

- The SEC review process can be confidential initially, but a public filing will be required during the later stages of the process. The SEC generally provides its first round of comments within 30 calendar days of the first filing and there are typically two to three subsequent rounds of comments. The SEC’s

comments and the company's responses will become publicly available on the SEC's online filing system.

Listing

- The NYSE and Nasdaq rules require that the company meets certain eligibility criteria that an LSE-listed company should be able to satisfy, including a minimum number of public shareholders, a minimum number of publicly held shares or a minimum market value of publicly held shares.

2. FPI or US Domestic Issuer?

- UK-listed companies should consider whether they would qualify as an FPI or a US domestic issuer. Given the reduced disclosure requirements for FPIs under US securities laws, many companies opt for FPI status. However, a company can elect to be a US domestic issuer by redomiciling in the United States, especially those with larger market capitalizations that are eligible for inclusion in S&P indexes (*see* below).
- If a company qualifies as an FPI, it will be subject to a lighter continuing disclosure and reporting regime under the SEC rules than if it were a domestic issuer. For example, US proxy rules, including a mandatory advisory vote on executive compensation, do not apply to FPIs, and FPIs are not required to file quarterly financial statements with the SEC, with limited exceptions. FPIs also are generally permitted to rely on home country practice and are exempt from stock exchange governance rules, particularly the requirements to have a majority of independent directors and the requirement to seek shareholder approval for equity incentive plans and share issuances of more than 20 percent of the outstanding voting power. FPIs are required to file annual reports on Form 20-F and disclose material events on Form 6-K. An FPI must prepare its financial

statements according to US generally accepted accounting principles (GAAP) or International Financial Reporting Standards (IFRS), pursuant to PCAOB standards.

3. Obtaining US Indexation, FTSE Indexation, and Effects on Share Trading

- In order to be included in S&P indexes, a company must be a US domestic issuer, have a plurality of its fixed assets in the United States, generate a plurality of its revenue from the United States and have its primary listing on a US exchange (for example, NYSE or Nasdaq). The company would also need to have a minimum market capitalization (\$12.7 billion for the S&P 500) and certain trading liquidity thresholds calculated according to a US consolidated volume.
- UK-listed companies should consider their continuing eligibility for FTSE indexation. A UK-incorporated company with a dual listing will no longer be eligible automatically for FTSE indexation unless trading of its shares in the United Kingdom continues to meet certain liquidity thresholds, in addition to other factors that FTSE may consider. If a US holding company structure is adopted when a company lists in the United States, it may no longer be eligible for FTSE indexation.
- Companies, with their financial advisors, should also consider the short-term effect on their share price of (i) selling by institutional investors due to exclusion from a FTSE index and (ii) mandatory buying of their shares following indexation with S&P.

4. US Holding Company Structure?

- Cancellation of a premium listing in London, including moving to a standard listing, requires (i) the preparation of a shareholder circular approved by the UK Financial Conduct

Authority (FCA) and (ii) convening an extraordinary general meeting and obtaining the approval of 75 percent of shareholders voting (including a majority of independent shareholders in the case of a company with a controlling shareholder).

- If a US holding company structure is to be used:
 - The required corporate reorganization would normally be implemented by way of a UK scheme of arrangement that requires, among other things, the approval of 75 percent of shareholders voting at a court-convened meeting.
 - The US holding company would need to list its shares (via depositary interests) in London and prepare an FCA-approved prospectus.
 - If a company is in a regulated sector, it should consider whether any regulatory approvals are required for inserting a new US holding company above the existing company.
- If the UK Takeover Code ceases to apply, then a listed company could consider adopting appropriate takeover defenses.

5. US Securities Law Liability Regime

- The liability regime for false or misleading disclosure under the US Securities Act of 1933 and the US Securities Exchange Act of 1934 is comparable to the UK regime and is enforced by the SEC.
- Although the plaintiff's bar is more active in the United States, it has not proved a significant deterrent for companies choosing to list in the United States.

6. Listing Ordinary Shares versus US Depositary Shares

- A UK-listed company may opt to list its ordinary shares on a US exchange, which must be cleared through the Depository Trust Company (DTC) and transferred into DTC. Also, see the tax considerations below.

- A UK-listed company could also opt to have American depositary shares (ADS) traded, in which case it would need to deposit shares with a depositary bank, which would issue American depositary receipts (ADRs) to shareholders. In this scenario, shareholders would hold ADRs representing shares in the company rather than the shares themselves.

7. Tax Considerations

- For shares of a UK-incorporated company to be transferred or issued into DTC, clearance from HM Revenue and Customs (HMRC), the UK tax authority, is typically sought to confirm there is no stamp duty or stamp duty reserve tax on the transfer or issuance, which typically takes three to six months. An HMRC clearance would usually be sought for depositing shares of a UK-incorporated company with a depositary bank if ADSs are issued.
- If a new US holding company structure is used, relief must be claimed from HMRC to obtain exemption from UK stamp duty on the transfer of the shares of the UK company to the US holding company.
- Careful consideration must be given to any impact of the listing arrangements—especially in the context of the introduction of a new holding company—both on the shareholder base (for example, to ensure that there is no taxable transaction and to mitigate future withholding obligations) and on the new structure of the group (for example, cash repatriation planning, any necessary internal reorganizations, and modeling of incremental costs from various regulatory requirements that may become applicable).

All the factors above should be considered by a UK-listed company evaluating whether a dual listing in the United Kingdom and United States or a full migration to the United States would benefit the company and its shareholders and achieve the company's strategic aims.