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A COLLECTION OF COMMENTARIES ON THE CRITICAL LEGAL ISSUES IN THE YEAR AHEAD

Will 2014 Be the 'Year of the Foreign Private Issuer'?

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Experience in 2013 has shown that U.S. securities exchanges are once again becoming increasingly popular venues for listings by non-U.S. companies. The number of non-U.S. companies that conducted initial listings in the U.S. in 2013 nearly tripled the number of such listings in 2012, and was 18 percent higher than 2007, the previous high in recent history. The surge has been driven by both traditional initial public offerings by foreign private issuers (FPIs) and initial U.S. offerings and listings by companies already trading in other markets, as well as by M&A transactions.

We expect this trend to continue in 2014 as a result of substantial available investor capital in the U.S., the potential for higher valuations for companies in some industry sectors than may be available on other exchanges, the more permissive U.S. regulations applicable to certain issuers available under the JOBS Act, and increased investor confidence due to the number of successful deals. Less stringent governance and disclosure obligations (as compared to the requirements applicable to domestic U.S. SEC registrants) will also continue to be attractive to FPIs.

Liquidity. The NYSE and NASDAQ remain the two most liquid exchanges in the world, with market capitalization (as of November 30, 2013) of $17.4 trillion and $6.0 trillion, respectively, compared to $4.5 trillion for the Tokyo Stock Exchange and $4.2 trillion for the London Stock Exchange, the world's third- and fourth-largest exchanges, respectively. In addition to making it easier to access the U.S. capital markets, U.S. exchanges provide access to a broader shareholder and investor base and wider research and analyst coverage in many industries, which may enhance an issuer's corporate reputation and potentially result in a higher valuation of its shares.

Acquisition Currency. There is a continuing interest in consolidation across several sectors (such as telecommunications and pharmaceuticals) with increased strategic opportunities for companies to use their shares as acquisition consideration. With the Dow Jones Industrial Average continuing to rise to all-time highs at the end of 2013, U.S.-listed equity securities of FPIs may be a more attractive acquisition currency than non-U.S. listed shares or alternative sources of financing.

In order to consummate an acquisition of a U.S. public company using shares of the acquirer, the offer of the share consideration needs to be registered with the SEC. However, deregistration rule changes that came into effect in 2007 allow FPIs to consummate such an acquisition through an SEC registered offering and then deregister with relative ease 12 months following the completion of a transaction, provided that U.S. trading levels remain low (less than 5 percent of worldwide volume). Following the initial registration, the acquirer only needs to file one annual report with the SEC and then may deregister upon meeting certain conditions and be free from SEC reporting requirements. Since the rules' inception, however, only a handful of acquirers have taken advantage of the opportunity to do an SEC registered acquisition and then subsequently deregister. It is interesting to note that while there was a surge in deregistrations immediately following effectiveness of the rules on deregistration (58 companies deregistered in 2007 and 32 in 2008), the number of FPIs seeking to exit U.S. markets decreased significantly, with only five deregistrations in 2012 and 11 in 2013.

The JOBS Act. The JOBS Act simplified the SEC registration process for emerging growth companies (EGCs). Companies, including FPIs, seeking to conduct an initial public offering that have annual revenue for the most recent fiscal year of less than $1 billion qualify as EGCs. EGCs enjoy reduced regulatory burdens in connection with SEC registrations for an initial public offering and may submit their initial registration statement for confidential, nonpublic SEC review. However, such confidential review is not available in secondary listings that are not offerings. EGCs also are entitled to delay auditor attestation of internal controls (see below). While EGCs can conduct the SEC review process confidentially, the initial confidential submission and all amendments are required to be publicly filed at least 21 days prior to the start of the roadshow. In addition, the JOBS Act allows EGCs to "test the waters" in the U.S. markets prior to committing to a U.S. listing, akin to the "pilot fishing" practice in Europe (see "The JOBS Act: The Resurgent IPO Market and What We Learned in Year Two").

FPIs that do not qualify as EGCs but are listed or are concurrently listing outside the U.S. may still have their registration statement confidentiality reviewed by the SEC, provided they file the initial confidential submission and all amendments when they publicly file the registration statement (which may be later than 21 days prior to the roadshow).

The Dodd-Frank Act. Dodd-Frank has limited application to FPIs that are not financial institutions. Provisions from which they are exempt include mandatory say-on-pay shareholder votes and independent compensation committee requirements. Other provisions of the act, including disclosure of the issuer's use of conflict minerals, are mandatory for FPIs and the application of other Dodd-Frank provisions, including executive compensation clawbacks and disclosure of hedging activities of directors and officers, remains unclear and is subject to SEC rulemaking. Overall, Dodd-Frank provisions that have come into force to date do not seem to have been a deterrent for FPI listings in the U.S. as FPIs are exempt from provisions that are viewed to be most burdensome by issuers (*i.e.*, the say-on-pay shareholder votes).

Disclosure Requirements and Governance Provisions. As a general matter, U.S. public companies must file annual and quarterly reports with the SEC, and must file 8-K reports upon the occurrence of specified material events. However, SEC rules permit FPIs to file only an annual report (within longer a timeframe than U.S. companies) — and to furnish to the SEC certain information that they make or are required to make public in another jurisdiction on Form 6-K.[1] In addition, FPIs are not subject to other rules including the U.S. proxy solicitation, "short-swing" profit, executive compensation disclosure or "fair disclosure" of material information rules that apply to U.S. domestic SEC registrants.

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FPIs also may follow their home-country practices instead of numerous corporate governance requirements of NYSE and NASDAQ. In effect, many FPIs are exempt from all NYSE and NASDAQ corporate governance requirements other than the requirement to have an independent audit committee.

Non-U.S. companies registered with the SEC that maintain primary market share outside the U.S. may benefit from the cross-border U.S. tender offer regulations, which simplify the disclosure and procedural requirements for acquiring such companies.

[1] NASDAQ requires an FPI to submit on a Form 6-K an interim balance sheet and income statement as of the end of its second quarter.

Lingering Deterrents. Despite the many advantages FPIs receive from listing on a U.S. exchange, the Sarbanes-Oxley Act and litigation exposure may continue to give certain issuers pause.

Sarbanes-Oxley Act. Non-U.S. companies considering registration in the U.S. continue to regard the Sarbanes-Oxley Act with some scepticism and hesitation, expressing concern about the costs and liability it imposes on directors and officers. In practice, however, many Sarbanes-Oxley disclosure provisions that apply to FPIs are similar to regulations already applicable under foreign national law or stock exchange rules and are a part of the existing governance practices of sophisticated multinational corporations. In addition, FPIs that qualify as EGCs may delay for up to five years one of Sarbanes-Oxley's most burdensome and costly provisions, the requirement to obtain an audit opinion on internal controls.

Litigation. The U.S. remains a litigious environment with an active plaintiffs' bar. The 2010 U.S. Supreme Court decision in *Morrison vs. National Australia Bank* drew a bright line around the U.S. borders for securities fraud litigation, making it harder to sue foreign companies that are not listed in the U.S., but stopped short of applying such limitation to U.S.-listed FPIs. However, recent studies suggest that FPIs experience class action lawsuits at about half the rate of U.S. companies with similar levels of litigation risk. This statistic, coupled with the recent increase in listings on U.S. exchanges, may be enough to encourage other FPIs to take advantage of the U.S. securities market.

Non-U.S. companies nonetheless continue to view the benefits of pursuing a U.S. listing and the allowances given to FPIs as outweighing the lingering deterrents. We expect the trend of tapping into the U.S. equity markets for capital raises and M&A transactions to continue in 2014.