

Morgan Lewis

GLOBAL PUBLIC COMPANY ACADEMY

FOREIGN PRIVATE ISSUERS: LISTING IN THE U.S.

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Foreign Private Issuers: Listing in the U.S.

- What is a foreign private issuer ("FPI")
- FPI U.S. Listings and Offerings
- Life as a U.S. public company
- Mergers and acquisitions
- Deregistration and delisting

Definition of "Foreign Private Issuer"

- Any company incorporated/organized outside the U.S.
- Unless:
 - 50% of outstanding voting securities are directly or indirectly owned of record by U.S. residents, **and one of the following:**
 - majority of directors or executive officers are U.S. citizens or residents;
 - 50% of assets are located in U.S.; **or**
 - business is principally administered in the U.S. (primarily directed or controlled)
- If under 50% U.S. ownership, location of assets or management irrelevant.
- When determining ownership must "look through" nominee accounts held in U.S., home jurisdiction, and jurisdiction of principal trading market
- New registrants must test their status as of a date within 30 days of initial filing of a registration statement with the SEC and thereafter registrants must test annually on the last business day of the second fiscal quarter

What Does Being a Foreign Private Issuer Get You?

- More flexible Securities Act registration process and ongoing Exchange Act reporting requirements
 - Ability to Use U.S. GAAP, IFRS (as issued by IASB) or local GAAP (reconciled to U.S. GAAP)
 - More time to file Annual Report; Quarterly Reporting and Current Reporting on Form 8-K are Not Required
 - Financial Information Goes “Stale” More Slowly
 - Exempt From Proxy Rules, Reg. FD and Section 16 (D&Os; 10% holders) reporting and short swing profit liability
- Accommodations deferring to “home country” corporate governance
- Rationale for different treatment than U.S. “domestic” issuer:
 - Encourage listing on a U.S. market
 - Facilitate investment by U.S. investors into foreign companies
 - Reduce regulatory arbitrage
 - Reduce cost of raising capital across borders and encourage free flows of capital across borders
 - Provide for comity with “home” country
 - U.S. investors could invest directly abroad (e.g., on the LSE), so U.S. regulators consider it preferable to provide some added U.S. investor protection rather than none

U.S. Securities Regulatory Regime

- The U.S. has two principal securities laws that relate to the issuance, distribution and exchange listing of equity and debt securities.
- Securities that are going to be offered or sold (including, re-offers and resales) in the U.S. must be registered under the Securities Act of 1933 (the "Securities Act"), unless an exemption from registration is available.
- Any class of securities that is to be listed on a U.S. national securities exchange (such as the NYSE or Nasdaq) or is widely held in the U.S., in addition, must be registered under the Securities Exchange Act of 1934 (the "Exchange Act").
- Even without a U.S. listing, registration under the Exchange Act is required if a company has \$10m or more in assets and 2,000 or more shareholders worldwide (or more than 500 non-accredited holders)
 - Exemption for foreign issuers with fewer than 300 shareholders in U.S. (Rule 12g3-2(a))
 - "Information-supplying" exemption (Rule 12g3-2(b))
- Note that a company can be subject to regulation in (a) home country, (b) country where primary trading market is located and (c) United States.

FPIs Listing in U.S.

- FPI alternatives for trading in the U.S.:
 - Securities are listed on a U.S. exchange such as NYSE/Nasdaq (often as ADSs)
 - Must be registered under the Exchange Act pursuant to Section 12(b), and file reports with SEC
 - Subject to Sarbanes-Oxley
 - Securities traded on OTCBB
 - Must be registered under Exchange Act, and file reports with SEC
 - Subject to certain sections of Sarbanes-Oxley, excluding those specific to listed companies
 - Exempt from registration under Exchange Act (Rule 12g3-2(b))
 - Not required to file reports with SEC and not subject to Sarbanes-Oxley; ADS, if any, registered on F-6
 - Likely trade on Pink Sheets
- If securities are not listed on exchange, trading volume and liquidity very limited

FPIs Listing in U.S. (con't)

- U.S. Exchange listing for FPI (or U.S. domestic issuer) requires satisfaction of certain criteria
 - Financial performance (possible to list without if meet certain other standards largely related to size), market cap, public float, minimum number of holders, minimum share price
 - Corporate governance structure, including the make-up of its board of directors, the composition and responsibilities of board committees, and various practices and policies
 - FPI entitled to exemptions from many of the corporate governance standards
- U.S. Exchange listing can be effected in variety of different ways
 - Dual/additional listing (already listed outside the U.S.)
 - Spin-off from U.S.-listed company
 - Capital raise (U.S. IPO)
 - Direct listing (Spotify)
 - Reverse merger with U.S. listed company
- Depending on method of listing, initial registration with SEC is required to be made either on Exchange Act form (20-F) or Securities Act form (F-1) together with an abbreviated Exchange Act form (8-A)
 - Content largely similar, format differs; subject to SEC review - typically several months; confidential process in most instances (last 15 days)

American Depositary Shares (ADSs)

- Shares of foreign companies traded in the U.S. often traded in the form of ADSs
 - ADSs represent the underlying shares of the foreign company
 - American Depositary Receipts (ADRs) are negotiable certificates that represent ADSs
 - ADSs registered on Form F-6; underlying shares registered on Form F-1
 - ADSs are usually issued by a U.S. commercial bank (the "Depositary")
 - "Sponsored" vs. "unsponsored" ADS facilities
 - SEC allows Depositary to set up an ADS facility if issuer is eligible to use Rule 12g3-2(b)
 - Increase in number of unsponsored facilities following changes to Rule 12g3-2(b)
- ADSs less common than in past, but for issuers from certain jurisdictions can be necessary
 - Easier for U.S. investors to hold, trade and receive U.S. dollar dividends
 - Dividend withholding taxes
 - Cross-border share transfers

U.S. Public Offerings

- The Securities Act requires registration with the SEC of any offering, unless the transaction is structured to satisfy an available exemption from registration
 - Certain offerings cannot be structured so as to satisfy an exemption: for instance, to list securities being offered on a U.S. exchange or offer securities to the public (i.e., retail investors) in the U.S.
 - Register on Form F-1 registration statement or, if have been an SEC reporting company for over a year and meet certain reporting and public float requirements, on a shorter Form F-3 registration statement (incorporate Exchange Act filings)
 - Detailed line item disclosure requirements; no omissions or misstatements of material information (likely to be considered significant by a reasonable investor)
 - Subject to SEC review – several months for U.S. IPO; often no review or much shorter review for subsequent offerings
- Sarbanes-Oxley compliance and potential liability, including for materially deficient disclosure and anti-fraud provisions, considerations for registered and unregistered offerings
- Emerging Growth Company (“EGC”) accommodations

Global Offerings With a U.S. Tranche/Dual Listings

- Coordinating review by multiple authorities
 - e.g.: UKLA (U.K. Listing Authority)
 - "Forward looking statements" vs. "profit forecasts"
 - Presentation of "pro forma" information
 - Analyst research pre-closing
 - Publicity outside of the U.S.: Non-U.S. market practice and Rule 135(e)
 - Underwriting mechanics / marketing practices
 - Reg M anti-manipulation rules

Corporate Governance Considerations

- NYSE/Nasdaq Listed Companies are subject to various corporate governance requirements
- NYSE and NASDAQ waive some rules that differ from FPI's home-country law or practice
 - Majority independent Board of Directors
 - Fully independent Board committees (e.g., Compensation Committee, but not Audit Committee)
 - Shareholder approval for share issuances, change of control transactions
- Most Sarbanes-Oxley requirements apply equally to FPIs; SEC rules mandatory
- Disclosure in Form 20-F of any significant ways in which corporate governance practices differ from those required of non-FPIs by NYSE/Nasdaq
- Consider investor perception
- Fiduciary duties of Board and officers are those of jurisdiction of incorporation

Problematic Requirements

- Audit committee provisions
 - All members independent (under SEC and exchange rules) and financially literate
- Board composition / independence issues
- CEO/CFO certifications with Annual Report
- Non-GAAP financial measures
- Internal controls
 - Audited by second annual report on Form 20-F unless qualify as EGC
- Personal loans to officers and directors prohibited

Life As a Public Company

- General disclosure regime
 - Separate "integrated disclosure system" for FPIs: Forms F-1 & F-3, Form 20-F, Form 6-K, etc.
 - Confidential review is permitted for initial SEC registration (as now is the case for all initial registrants)
 - FPIs are exempt from Section 16 "short swing" profit liability and reporting rules and the proxy rules
- Regulation FD: Fair Disclosure –
 - FPIs exempt, but general selective disclosure considerations remain
- Regulation G: Non "GAAP" Financial Measures
- Insider Trading
- Internal Controls; Disclosure Controls
- FCPA and the Exchange Act Section 13(b) requirement to make and keep accurate books and records

Ongoing SEC Reporting/Disclosure Requirements

- Form 20-F – serves as:
 - Annual report (counterpart to 10-K)
 - Due four months after fiscal year end
 - General Exchange Act registration statement (counterpart to Form 10)
 - Source of integrated disclosure (counterpart to Regulation S-K)
- Description of Business, including Industry and Regulatory Environment; Risk Factors; Biographies of Board/Management; Principal Shareholders; Related Party Transactions; MD&A; Audited Financial Statements; Selected Financial Data
- File Material Contracts publicly
- SOX Certifications

FPIs Generally Less Demanding Disclosure With Respect To:

- Management compensation
- Age of financial statements
- Longer timeframes; less frequent disclosure
 - Form 20-F annual report due 4 months after year-end
 - No specific quarterly reporting requirements (exchanges usually require filing of six month financials; comfort letter considerations for capital raises)
 - Exchanges also generally require prompt announcement of material information that may reasonably be expected to affect the market in its securities
- Foreign language documents: summaries allowed in some cases

Some Additional Disclosure

- Convenience U.S. dollar currency translations
- Foreign exchange or export controls
- Limitations on rights of foreign securityholders
- Non-U.S. taxation
- Difficulties enforcing liabilities under federal securities laws outside the U.S.

Form 6-K

- FPIs not required to file quarterly and current reports on Forms 10-Q and 8-K
- Form 6-K: FPIs are required to provide to the SEC and U.S. exchange on which securities are listed significant information:
 - Made public in home country pursuant to the law of that country
 - Filed on foreign exchanges and made public
 - Distributed to shareholders

Financial Statements

- FPIs may prepare financial statements in accordance with (1) US GAAP, (2) IFRS as reported by IASB or (3) local GAAP reconciled to U.S. GAAP
- Audit of last three fiscal years (can initially be last two years for an EGC)
- Item 17 vs. Item 18
 - Effective for fiscal years beginning on or after December 15, 2009, FPIs have been required to include Item 18 financial statements in SEC reports. Item 17 is still available for pro formas and significant investee financial statements
 - Item 18 is more comprehensive: segment reporting, plus "all other" information required by U.S. GAAP
- Audit must be in accordance with auditing standards of U.S. PCAOB

Mergers and Acquisitions

- Potential acquirers of FPIs can rely on exemptions from SEC rules for certain tender and exchange offers and business combinations
 - 2 tiers of exemptions:
 - Tier I (10% or less U.S. holders): exemption from most U.S. tender offer rules
 - Tier II (40% or less U.S. holders): exemption from certain mainly procedural provisions that may be inconsistent with non-U.S. rules or practices. Remain subject to most filing, dissemination and procedural requirements of the U.S. rules.
- Business Combinations
 - **Rule 802** — exemption from registration of securities issued in cross-border exchange offers or business combinations (e.g., mergers) to holders of securities in FPIs with limited U.S. ownership
 - 10% or less of target securities are owned by U.S. resident holders
 - Inquiry of banks, brokers dealers, etc. in relevant jurisdictions
 - U.S. holders must receive same documentation (in English) as non-U.S. holders

Deregistration and Delisting

- Delisting from an Exchange
 - Form 25
 - Delisting is effective 10 days after filing
 - Withdrawal from registration under Section 12(b) effective 90 days after filing
 - Public notice and comply with requirements of exchange
- Termination and Suspension of Periodic Reporting Requirements
 - Termination under Rule 12h-6
 - Suspension under Section 15(d)
- Requirements
 - Trading volume in U.S. = <5%, or
 - Holders threshold: less than 300 record holders worldwide or in U.S.
 - “Home country” listing
 - 12 month waiting period if delisted in advance of Form 15 filing or terminated an ADR facility to minimize U.S. trading volume.

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QUESTIONS?

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Almaty	Chicago	Houston	Orange County	Shanghai*
Astana	Dallas	London	Paris	Silicon Valley
Beijing*	Dubai	Los Angeles	Philadelphia	Singapore
Boston	Frankfurt	Miami	Pittsburgh	Tokyo
Brussels	Hartford	Moscow	Princeton	Washington, DC
Century City	Hong Kong*	New York	San Francisco	Wilmington



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