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GLOBAL GUIDE 2019
CAPITAL MARKETS (EQUITY URL)

Equity capital markets in United States: regulatory overview

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MAIN EQUITY MARKETS/EXCHANGES

1. What are the main equity markets/exchanges in your jurisdiction? Outline the main market activity and deals in the past year.

Main equity markets/exchanges

The primary US public equity markets are the following:

- **New York Stock Exchange Euronext (NYSE) (*https://nyse.nyx.com*).** NYSE operates the:
  - NYSE;
  - NYSE American;
  - NYSE Arca.
- There were 2,462 NYSE-listed companies (excluding NYSE American and NYSE Arca) as of 12 July 2019, with an aggregate market capitalisation of USD29.996 trillion. 19.3% (by number) of the companies listed on the NYSE are foreign and 41 (by market capitalisation) of the largest 100 NYSE-listed companies are non-US entities (*Source: S&P Capital IQ*).
- **Nasdaq Stock Market (Nasdaq) (*www.nasdaqomx.com*).** Nasdaq operates:
  - the Nasdaq Stock Market, which has three markets: Global Select Market; Global Market; and the Capital Market;
  - Additional US and European equity and option markets; and
  - Nasdaq Market Center, which provides market participants with the ability to access, process, display and integrate orders and quotes for stocks listed on Nasdaq and other exchanges.

As of 12 July 2019, the three markets of the Nasdaq Stock Market were home to an aggregate of 3,059 listed companies with a combined market capitalisation of approximately USD13.672 trillion (*Source: S&P Capital IQ*).

Market activity and deals

In 2018, there were 234 IPOs, which raised USD56.3 billion (*Source: IPO Vital Signs*), and 703 follow-on equity offerings, which raised USD115.5 billion (*Source: S&P Capital IQ*). Foreign private issuers (FPIs) completed 60 US-registered IPOs in 2018, accounting for 26% of total IPOs by number of deals (*Source: EY*).

The first two quarters of 2019 saw decreased year-over-year IPO activity. As of 12 July 2019, a total of 110 IPOs have been completed to date, raising USD35.9 billion in proceeds. This represented a 13% decrease in the number of IPOs compared to 2018, but a 6% increase in proceeds. The median year-to-date IPO size for 2019 was USD133 million, with six IPOs over USD1 billion (*Source: IPO Vital Signs*).

Notable IPOs in 2019 included:

- Uber Technologies, Inc, raising USD8.1 billion in proceeds.
- DAvantor, Inc, raising USD2.9 billion in proceeds.
- DDLyft, Inc, raising USD2.3 billion in proceeds.
- Pinterest, Inc, raising USD1.4 billion in proceeds.
- Zoom Video Communications, Inc, raising USD751 million in proceeds.

Of the 110 IPOs year-to-date in 2019, 85 elected to be listed on Nasdaq and 25 on the NYSE (*Source: IPO Vital Signs*).

2. What are the main regulators and legislation that applies to the equity markets/exchanges in your jurisdiction?

Regulatory bodies

The main securities regulator in the United States is the SEC (*www.sec.gov*). It is an independent US government agency that:

- Requires public companies to disclose financial and other information to the public.
- Oversees securities exchanges, securities brokers and dealers, investment advisers, and mutual funds.
- Has civil enforcement authority for violation of the securities laws.

The Financial Industry Regulatory Authority (FINRA) (*www.finra.org*) is the largest non-governmental regulator of securities firms in the United States, and is dedicated to investor protection and market integrity through effective and efficient regulation, particularly of the offering process.

Legislative framework

The SEC has rulemaking and enforcement authority, and administers the federal securities laws, including the primary statutes regulating public offerings:

- Securities Act of 1933, as amended (*15 USC. § 77a et seq.*) (Securities Act).
- Securities Exchange Act of 1934, as amended (*15 USC. § 78a et seq.*) (Exchange Act).

In addition, the following laws also affect the capital markets:

- Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), parts of which are incorporated into the Exchange Act.
- Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).
- Jumpstart Our Business Startups Act (JOBS Act) of 2012.

EQUITY OFFERINGS

3. What are the main requirements for a primary listing on the main markets/exchanges?

Main requirements

To trade on a US exchange, a security must be both:

- Registered with the SEC (*see Question 8*).
- Accepted for listing on an exchange.

The main NYSE and Nasdaq listing requirements are set out below.

NYSE

The NYSE includes:

- **Quantitative listing standards for US companies.** The financial criteria under these standards are less stringent than the alternate listing standards (*see below, NYSE: Alternate listing standards for non-US companies*), but the share distribution criteria are based on US shareholdings only. A US company must satisfy the following criteria:
  - minimum of 400 US shareholders, each holding at least 100 shares, and at least 1.1 million shares must be publicly held in the United States;
  - publicly held shares in the US must have a market value of at least USD40 million;
  - must have a bid price of at least USD4 per share; and
  - one of the following two financial tests with specified US dollar thresholds must be satisfied: the earnings test, or the global market capitalisation test.
- **Alternate quantitative listing standards for non-US companies.** These take into account worldwide share distribution. Consequently, non-US companies often qualify under these standards, though they may also list under the US company standards (*see above, NYSE: Quantitative listing standards for US companies*). FPIs must satisfy the following criteria:
  - minimum of 5,000 shareholders worldwide, each holding at least 100 shares, and at least 2.5 million shares must be publicly held worldwide;
  - publicly held shares worldwide must have a market value of at least USD100 million (or USD60 million for companies qualifying under the affiliated company test (*see above, NYSE: Quantitative listing standards for US companies*));
  - four financial tests: earnings, valuation/revenue with cash flow (based on global market capitalisation, revenues and aggregate adjusted cash flows), pure valuation/revenue (based on global market capitalisation and revenues), and affiliated company (based on global market capitalisation, operating history and whether parent or affiliated company is NYSE-listed).

Nasdaq

There are three markets within the Nasdaq Stock Market:

- Global Select Market.
- Global Market.
- Capital Market.

For each market, the issuer is required to satisfy certain quantitative listing requirements, as follows:

- **Global Select Market quantitative listing requirements.** These are:
  - a minimum of 1.25 million unrestricted (that is, not subject to resale restrictions) publicly held shares with a market value of at least USD45 million (for seasoned companies, either USD110 million market value of unrestricted publicly held shares, or USD100 million market value of publicly held shares and USD110 million market value of unrestricted publicly held shares and stockholders' equity);
  - unrestricted listed shares must be held by at least 450 holders, each holding at least 100 shares or 2,200 total holders (seasoned companies and affiliated companies also may satisfy the requirement with 550 total holders and 1.1 million of average monthly trading volume over the past 12 months), and must have a bid price of at least USD4 per share. At least 50% of the company's required holders must each hold unrestricted securities with a market value of at least USD2,500;
  - for securities that previously traded over-the-counter, a minimum average trading volume over the 30 trading days prior to listing of at 2,000 shares a day (including trading volume of the underlying security on the primary market with respect to an ADR), with trading occurring on at least 16 of those 30 days; and
  - one of the following four financial standards with specified US dollar thresholds must be satisfied: income, capitalisation with cashflow, capitalisation with revenue, and assets with equity.
- **Global Market quantitative listing requirements.** These are:
  - a minimum of 1.1 million unrestricted publicly held shares with a market value of at least USD8 million under the income financial standard, USD18 million under the equity financial standard or USD20 million under the market value financial standard or the total assets/total revenue financial standard;
  - unrestricted listed shares must be held by at least 400 holders, each holding at least 100 shares, and must have a bid price of at least USD4 per share. At least 50% of the company's required holders must each hold unrestricted securities with a market value of at least USD2,500;
  - for securities that previously traded over-the-counter, a minimum average trading volume over the 30 trading days prior to listing of at 2,000 shares a day (including trading volume of the underlying security on the primary market with respect to an ADR), with trading occurring on at least 16 of those 30 days;
  - a minimum of four market makers, unless the company qualifies for listing under the income or equity financial standards, which each require three; and
  - one of the following four financial standards with specified US dollar thresholds must be satisfied: income, equity, market value (not applicable for IPOs), and total assets/total revenue.
- **Capital Market quantitative listing requirements.** These are:
  - a minimum of one million unrestricted publicly held shares with a market value of USD15 million under the equity and market value of listed securities financial standards and USD5 million under the net income financial standard;
  - unrestricted listed shares must have at least 300 holders, each holding at least 100 shares, and must have either: a bid price of at least USD4 per share, or a closing price of at least USD3 per share (if the issuer is satisfying the equity or net income financial standards and certain other revenue, net tangible asset and/or operating history requirements are met) or USD2 per share (if the issuer is satisfying the market value of listed securities financial standard and certain other revenue, net tangible asset and/or operating history

requirements are met). At least 50% of the company's required holders must each hold unrestricted securities with a market value of at least USD2,500;

- for securities that previously traded over-the-counter, a minimum average trading volume over the 30 trading days prior to listing of at 2,000 shares a day (including trading volume of the underlying security on the primary market with respect to an ADR), with trading occurring on at least 16 of those 30 days;
- the issuer must have at least three registered and active market makers; and
- one of the following three financial standards with specified US dollar thresholds must be satisfied: equity, market value of listed securities, and net income.

NYSE and Nasdaq qualitative listing requirements

Both the NYSE and Nasdaq have qualitative requirements for their listed companies relating to, among other things, corporate governance, including:

- Maintenance of audit and compensation committees comprised of independent directors.
- Compliance with ongoing requirements, such as distributing annual and interim reports.

FPIs are exempt from many qualitative requirements if they comply with and disclose their obligations under the law of their home jurisdiction (*see Question 21*).

4. What are the main requirements for a secondary listing on the main markets/exchanges?

See *Question 3*.

5. What are the main ways of structuring an IPO?

An IPO can be structured as an agented or firm-commitment underwritten public offering (*see Question 17*), and as either or both a:

- **Primary offering.** The issuer offers and sells newly issued shares.
- **Secondary offering.** The issuer's shareholders offer and sell already outstanding (unregistered or restricted) shares.

In both cases, as the IPO involves a public offering, the offer and sale must be registered with the SEC.

The enactment of the JOBS Act in 2012 brought about a number of changes to the IPO process. For example, the JOBS Act created a new class of issuer, the "emerging growth company" (EGC), which is defined as an issuer, domestic or foreign, with total gross revenues of less than USD1.07 billion. An issuer remains an EGC until the earliest of:

- The last day of the fiscal year during which the issuer's total gross revenues exceed USD1.07 billion.
- Five years from the date of the IPO.
- The date on which the issuer has sold more than USD1 billion in non-convertible debt.
- The date on which the issuer becomes a large accelerated filer (public float of USD700 million).

Under the JOBS Act, companies that qualify as EGCs are permitted certain accommodations in connection with their IPOs. This is often referred to as the transitional on-ramp to encourage EGCs to pursue IPOs by phasing in certain disclosure requirements and governance requirements over time following their IPOs. The JOBS Act allowed EGCs to submit an IPO registration statement for confidential review by the SEC until the EGC is ready to market the securities. In 2017, the Staff of the Division of Corporation Finance of the SEC extended this ability to submit an IPO registration statement for confidential review to all issuers.

Companies can also go public without an IPO by using a direct listing on an exchange. The NYSE and Nasdaq both have recently revised their listing rules to allow for companies to list directly without raising new capital, subject to listing requirements such as minimum valuation levels and the filing of a registration statement under the Securities Act.

6. What are the main ways of structuring a subsequent equity offering?

A subsequent (or follow-on) public equity offering can be structured in the same way as an IPO (*see Question 5*). Although each public offering must be registered with the SEC, timing concerns are significantly diminished because the issuer is already subject to continuing SEC reporting requirements and its securities may be listed on a securities exchange. The issuer may also be able to use a shorter form of registration statement for registering additional offered securities (*see Question 12*).

7. What are the advantages and disadvantages of rights issues/other types of follow-on equity offerings?

A rights offering, which typically provides an issuer's existing shareholders the opportunity to purchase a pro rata portion of additional shares of the issuer's stock at a specific price per share, is not as common in the US as in other jurisdictions, although its popularity has increased in recent years. Because the rights are granted to existing shareholders for no consideration, the rights do not need to be registered with the SEC. However, the issuer must register the shares that will be allocated to the shareholders who elect to participate in the rights offering. Not all issuers can benefit from rights offerings, particularly if there is no backstop commitment from a third party. Large, well-capitalised issuers who are looking to raise capital but do not have a specific capital-raising goal or who are established enough to expect many shareholders to exercise their rights may benefit from a direct rights offering. Also, issuers that have identified interest from an existing shareholder, or shareholders, may benefit from a direct rights offering.

In recent years, there has also been an increase in confidentially marketed follow-on offerings and at-the-market offerings (*see Question 14*). A confidentially marketed follow-on offering is intended to provide additional certainty relating to deal execution. An at-the-market offering permits larger issuers to raise small (relative to their market capitalisation) amounts of capital over time through registered transactions.

8. What are the main steps for a company applying for a primary listing of its shares? Is the procedure different for a foreign company, and is a foreign company likely to seek a listing for shares or depositary receipts?

Procedure for a primary listing

To trade on a US exchange, a security must be both:

- Registered with the SEC.
- Accepted for listing on an exchange.

A company can also make a public offering in the United States without listing its securities on an exchange. A company can also list its securities on an exchange without making a public offering, by using a direct listing (*see Question 5*). However, without a listing, companies cannot benefit fully from the advantages of being a US public company.

Public securities offerings are accomplished using a registration statement (*section 5, Securities Act*), which is filed with, and declared effective by, the SEC. Private companies undergoing direct listings on the NYSE or Nasdaq must file a resale registration statement, which registers the resale of securities previously sold in private placements. A registration statement contains two parts:

- A prospectus, which is the main marketing and disclosure document (*see Question 12 and Question 13*).
- Other information filed with the SEC but not distributed to investors, including exhibits to the registration statement.

The registration statement usually becomes effective on the pricing date for the offering. The issuer is then subject to all of the following (*see Question 2, Question 3 and Question 21*):

- The continuing public reporting requirements of the Exchange Act.
- Other SEC rules.
- The rules of the exchange on which its shares are listed.

Procedure for a foreign company

The procedures for SEC registration and listing on an exchange are substantially the same for FPIs and US issuers, although the specific disclosure and corporate governance requirements differ, and an FPI may have the ability to file its registration statement with the SEC initially on a confidential basis, either as an EGC or under the rules for FPIs.

FPIs' equity securities are often listed and traded as ADRs. An ADR represents a fractional interest in the underlying security issued by the FPIs. An ADR is:

- A negotiable certificate issued by a US commercial bank acting as depository.
- Transferable on the books maintained by the depository.
- Treated as a US security for settlement and other purposes.

An FPI bases its decision whether to list shares or ADRs on a number of factors, including:

- A comparison of the pricing levels in its home jurisdiction to the typical pricing levels in the US markets.
- The perceived benefit of having its shares listed directly (not through ADRs).
- Research coverage.

ADVISERS: EQUITY OFFERING

9. Outline the role of advisers used and main documents produced in an equity offering. Does it differ for an IPO?

The advisers for IPOs and subsequent offerings are generally the same. However, the adviser's role in an IPO is significantly more extensive and time intensive than for a subsequent follow-on offering. The IPO prospectus needs to be newly drafted by the issuer's adviser with a detailed description of the issuer's business, risk factors and financial operations and reviewed collectively by the IPO's working group and the SEC. In a subsequent follow-on offering, the shelf registration statement containing the prospectus to be used in the offering has typically already been declared effective by the SEC. As a result, the prospectus supplement is generally limited to describing the terms of the particular offering, the securities offered, recent market developments, and the recent financial results and condition of the issuer.

Underwriters

The lead underwriters:

- Offer financial advice to the issuer, including valuation advice. This is more critical in an IPO, where there is no independent market valuation but underwriters often recommend that an issuer sell its shares at a discount.
- Manage the marketing of the securities to prospective investors (*see Question 14*).

A broader syndicate of underwriters usually assists with marketing and distribution. Underwriters typically provide aftermarket support by repurchasing shares at the offer price in the secondary market to stabilise the price after the IPO (*see Question 19*). Underwriters also seek to maintain a long-term relationship with the issuer, so as to continue to underwrite future offerings.

Lawyers

The issuer's lawyers draft the registration statement and manage the legal aspects of the offering. The underwriters' lawyers participate in drafting the registration statement and lead the due diligence process (*see Question 13*). As part of the due diligence process, lawyers for the underwriters and the issuer usually prepare letters stating that, based on specific inquiries (and subject to exclusions for financial and other information provided by experts), they are unaware of anything that may indicate that the prospectus contains any material misstatement or omission (*Rule 10b-5, Exchange Act*). For companies in highly regulated industries or with non-US operations, the issuer and underwriters may retain lawyers that specialise in these matters. While preparation of the registration statement is most intense and time-consuming for an IPO, the process is generally similar for subsequent offerings.

The issuer's lawyers will review the issuer's SEC filings on an ongoing basis. The lawyers will then be prepared when a subsequent offering is proposed.

Independent registered public accounting firm

The registration statement includes annual financial statements, which must be audited by an independent public accounting firm registered with the Public Company Accounting Oversight Board. The public accounting firm:

- Must consent to the use of its audit opinion in the registration statement.
- Reviews any unaudited interim financial statements included in the registration statement.
- Reviews the financial information in the registration statement as part of the due diligence process.
- Issues a comfort letter at the pricing of the IPO, addressed to the underwriters and the issuer's board of directors, relating to:
  - financial statements; and
  - other financial information included in the registration statement.

The public accounting firm will continue to audit and review the issuer's financial statements included in the issuer's SEC reports and will have the same responsibilities for any financial statements filed in, or incorporated by reference in, registration statements for subsequent offerings.

Others

At the IPO, an issuer appoints a transfer agent to facilitate the increased trading of the shares. The transfer agent:

- Co-ordinates the issuance and tracking of the issuer's securities.

- Maintains a list of the names of record shareholders.

An issuer may also retain outside investor-relations firms and other professionals. For subsequent offerings, these advisers are already in place.

EQUITY PROSPECTUS/MAIN OFFERING DOCUMENT

10. When is a prospectus (or other main offering document) required? What are the main publication, regulatory filing or delivery requirements?

Prospectus (or other main offering document) required

In an SEC-registered public offering (*see Question 8, Question 12 and Question 13*), the issuer must deliver (or, under certain circumstances, make available electronically) a written prospectus meeting the requirements of the Securities Act to investors. During marketing of an IPO, written offers may not be made unless a preliminary prospectus meeting the requirements of section 10 of the Securities Act, including setting forth the expected price range of the shares, has been delivered.

Main publication, regulatory filing and delivery requirements

All documents filed with the SEC (which excludes confidentially submitted registration statements until they are publicly filed), including prospectuses, are available on the SEC's website.

11. What are the main exemptions from the requirements for publication or delivery of a prospectus (or other main offering document)?

There are exemptions from the registration requirements of section 5 of the Securities Act, based on the type of security or the type of transaction. Generally, any issuer, including an FPI, can make a limited offer of securities (without registration) in a private placement to sophisticated or institutional investors, subject to a number of conditions (*see Regulation D, 17 CFR § 230.501*). Those securities are then subject to transfer restrictions. There is also a limited exemption for offerings of the issuer's securities to employees (*see Rule 701 of the Securities Act, 17 CFR § 230.701*).

A non-registered (exempt) offering does not require a statutory prospectus but is usually made using an offering memorandum that is often closely based on a statutory prospectus in form and content.

12. What are the main content or disclosure requirements for a prospectus (or other main offering document)? What main categories of information are included?

The prospectus is the primary disclosure document in a public offering. The contents of a prospectus depend on the applicable SEC registration statement form. The disclosure must include all material information (that is, matters that a reasonable investor would likely deem important in determining whether to purchase the security).

In an IPO, the issuer typically uses:

- Form S-1, if it is a US company.
- Form F-1, if it qualifies as an FPI.

Canadian FPIs may be able to use other forms.

Once the issuer has been a public company for at least 12 months and has filed its periodic reports on a timely basis, it may be eligible to use Form S-3 (or Form F-3 for an FPI) to make subsequent public offerings. Form S-3 is a short-form registration statement that allows the issuer to refer in the prospectus to information from its SEC reports filed under the Exchange Act (*see Question 21*) that would otherwise be required to be stated in full.

A typical IPO prospectus contains the following sections:

- Summary of prospectus, including business and financial information and key offering terms;
- Risk factors.
- Use of proceeds.
- Dividend policy.
- Issuer capitalisation (not required but usually provided).
- Dilution, setting out calculations of the public contribution under the public offering and the effective cash contribution of insiders (officers, directors, promoters and affiliates).
- Selected financial data.
- Management's discussion and analysis of financial condition and results of operations.
- Material aspects of the issuer's business.
- Management, providing a five-year employment history of directors and executive officers, and including disclosure about board committees, corporate governance guidelines and codes of ethics. Smaller reporting companies can provide more limited information.
- Compensation discussion and analysis and executive compensation. FPIs and smaller reporting companies may provide more limited information.
- Related party transactions.
- Principal and selling shareholders.
- Description of capital stock.
- Shares eligible for future sale and contractual and legal restrictions on certain resales, such as lock-up agreements.
- Tax issues.
- Underwriting.
- Legal matters.
- Identification of the independent public accounting firm and any other experts that may be required to give an opinion on the prospectus.
- Financial statements, typically three years of audited financial statements and unaudited financial statements for any required interim periods. Under the JOBS Act, an EGC may include only two years of audited financial statements and the unaudited financial statements for the related interim periods. In addition, an issuer that is filing a registration statement or submitting a registration statement for confidential review may omit financial information for historical periods that otherwise would be required at the time of filing or submission, provided that the omitted financial information will not be required to be included in the Form S-1 or F-1 at the time of the consummation of the offering, and that prior to distribution of a preliminary prospectus to investors, the registration statement includes all required financial statements. If an FPI prepares its financial statements according to the International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB), it need not reconcile its financial information to US Generally Accepted Accounting Principles (US GAAP).

An FPI must include certain additional information in the prospectus (for example, information on the enforcement of judgments against

the issuer and on any exchange controls and taxation of shareholders in the issuer's home jurisdiction).

The registration statement also contains additional information and required exhibits, including organisational documents, material contracts and consents of experts. The issuer can request confidential treatment of sensitive information.

For a subsequent offering using a short-form registration statement, the issuer can include the information set out above or incorporate such information by reference to its SEC reports.

13. How is the prospectus (or other main offering document) prepared? Who is responsible and/or may be liable for its contents?

Preparation

The issuer and its lawyers prepare the prospectus working with the underwriters and their lawyers, and the auditors. The underwriters and their lawyers conduct due diligence on the issuer and verify the information in the prospectus. The diligence process includes:

- A review of organisational and corporate documents, shareholder lists, material contracts, litigation, intellectual property and other legal, regulatory and business matters material to the issuer.
- Detailed discussions with management about the contents of the prospectus, business plan and road show presentation.
- Interviews with the issuer's auditors, main customers, suppliers and distributors.

The SEC comments on the prospectus as part of the registration process. The comments are intended to clarify issuer disclosure, as well as verify compliance with SEC requirements. The SEC does not independently verify any information contained in the registration statement.

For a subsequent offering, most of the disclosure is taken from the issuer's ongoing SEC filings, so the prospectus drafting process is typically shorter. In most cases, the SEC does not comment on the prospectus for a subsequent offering, although it may have commented on the issuer's ongoing public filings.

Liability

The issuer is strictly liable for the content of the prospectus. The issuer's directors, officers, underwriters and accountants have potential defences to liability (*see below, Defences*). Liability arises primarily under sections 11, 12 and 15 of the Securities Act, and section 10(b) and Rule 10b-5 under the Exchange Act, as follows:

- **Section 11 liability.** If the registration statement contains an untrue statement of a material fact, or omits to state a material fact required to be stated in it (or that is necessary to make the statements not misleading), any buyer of a security under a registration statement can sue the issuer and the following persons:
  - anyone who signed the registration statement (a registration statement is signed by the issuer's chief executive, principal financial and accounting officers, and at least a majority of the issuer's directors);
  - any director (or person who consented to be named as a director) at the time the registration statement was filed;
  - every accountant, engineer, appraiser or other expert who consented to be named as having prepared or certified the accuracy of any part of the registration statement, or any report or valuation used in the registration statement (but liability is limited to that information); and
  - every underwriter.
- **Section 12 liability.** A buyer of a security can sue any person who both:
  - offered or sold the security to that buyer in violation of section 5 of the Securities Act; or
  - offered or sold the security to that buyer by means of a prospectus or oral communication that included an untrue statement of a material fact (or omitted to state a material fact necessary to make a statement, in light of the circumstances under which it was made, not misleading).
- **Section 15 liability.** Every person who controls (through share ownership, agreement or otherwise) any other person that is liable under sections 11 or 12 of the Securities Act is jointly and severally liable with the other person, unless the controlling person had no knowledge of, or reasonable grounds to believe in, the existence of the facts that resulted in the alleged liability.
- **Section 10(b) and Rule 10b-5 liability.** It is unlawful for any person to do any of the following in connection with the purchase or sale of any security:
  - employ any fraudulent scheme;
  - make any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading; or
  - engage in fraud or deceit.
- To succeed in a Rule 10b-5 claim, the claimant must show that the person selling the security intended to deceive or had a reckless disregard of the truth. This scienter requirement does not apply under sections 11 and 12 of the Securities Act.

Defences

A person other than the issuer (such as an underwriter) against whom a claim is made may have defences, including a due diligence defence.

MARKETING EQUITY OFFERINGS

14. How are offered equity securities marketed?

IPOs are marketed through road shows. In recent years, it has become less common to market follow-on offerings through road shows. Use of electronic road shows has become common, particularly for follow-on offerings. Underwriters, accompanied by the issuer's management, make presentations to prospective investors, using slide shows and a preliminary prospectus. After the road show, the underwriters:

- Obtain indications of interest from prospective investors.
- Build a book of demand for the securities offered, based on the number of securities that investors indicate they would be willing to purchase at particular price points.

In addition, the JOBS Act permits an EGC, both prior to and after filing its IPO registration statement with the SEC, to engage in test-the-waters communications with qualified institutional buyers and institutional accredited investors. The SEC currently has a proposed rule to extend the ability to engage in test-the-waters communications to non-EGCs.

Issuers who are already public can use a variety of approaches to market their equity securities to minimise execution risk, including the potentially adverse impact on an issuer's stock price associated with an announced or marketed failed deal. Also, in recent years, the mere announcement of a follow-on offering may lead to significant short selling in that issuer's securities in advance of pricing. If an issuer has an effective shelf registration statement (*see Question 18, Subsequent offerings*), underwriters may engage in pre-marketing

activities before public announcement of a transaction, by contacting institutional investors on a confidential basis to gauge their potential interest. These offerings are referred to as confidentially marketed public offerings or wall-crossed deals.

Following a successful pre-marketing phase, the issuer may publicly announce the transaction and have the underwriters market the securities to a broader group of investors with the expectation of very quickly (usually, in a matter of hours) pricing the offering.

There are also other methods of sale, including:

- An at-the-market offering, which is an offering of securities into an existing trading market for outstanding shares of the same class at other than a fixed price on, or through the facilities of, a national securities exchange, or to or through a market maker otherwise than on an exchange, and typically does not involve a broad distribution of securities.
- A direct listing (*see Question 5*).
- Exempt offerings (*see Question 11*), such as a Private Investment in Public Equity (PIPE) transaction, which is a private placement of a public issuer's equity or equity-linked securities to investors, conditioned upon the filing of a resale registration statement with the SEC subsequent to closing.

15. Outline any potential liability for publishing research reports by participating brokers/dealers and ways used to avoid such liability.

Generally, broker-dealers registered with FINRA can participate in public offerings in the United States. Foreign broker-dealers are exempt from FINRA registration if they engage in certain permitted activities, including effecting unsolicited securities transactions, furnishing research reports to major US institutional investors, soliciting securities transactions from US institutional investors that are effected by US broker-dealers, and effecting securities transactions with foreign persons in the US (*see Rule 15a-6 of the Securities Act, 15 § 17 C.F.R. 240.15a-6*).

Underwriters participating in an IPO cannot issue research reports until the quiet period following completion of the IPO has elapsed. If a distribution participant issues a research report, this may violate section 5 of the Securities Act (*see Question 13*), which may create a rescission right for buyers. Additionally, the issuer and the underwriters may be liable for the information contained in the research report. However, the JOBS Act permits research reports before, during and after the IPO offering period for EGCs, although market practice has not changed as a result of this more permissive regulation.

Once the issuer is public, an underwriter is subject to different rules regarding publication of research reports. Permissible research activities depend on a number of factors, including whether the:

- Underwriter is an offering participant.
- Research report relates to the offered securities.
- Issuer meets the requirements for use of a short-form registration statement (which can indicate that the issuer has a larger capitalisation and greater market following).
- Underwriter regularly publishes reports of the kind being proposed.

Underwriters typically consult counsel on deal-specific concerns.

FINRA also prohibits managers and co-managers of an offering from publishing research:

- Ten days after the offering (for an IPO).
- Three days after offering (for a follow-on offering).

None of these quiet periods apply to offerings by EGCs under the JOBS Act and rule revisions by FINRA in response to that Act. In addition, there is no quiet period in relation to the expiration, waiver or termination of a lock-up agreement entered into in connection with a public offering.

BOOKBUILDING

16. Is the bookbuilding procedure used and in what circumstances? How is any related retail offer dealt with? How are orders confirmed?

The bookbuilding procedure is used (*see Question 14*). Most IPOs include a retail component (about 10% to 30% of the shares are marketed to retail investors (*see Question 14*)). Issuers often use investment banks with significant retail distribution networks as co-managers or syndicate members to assist with this. The same process can apply in subsequent offerings.

UNDERWRITING: EQUITY OFFERING

17. How is the underwriting for an equity offering typically structured? What are the key terms of the underwriting agreement and what is a typical underwriting fee and/or commission?

In an IPO, underwriters usually commit, at pricing, to purchase the offered securities for resale to investors (firm commitment basis). This is distinguished from conditional arrangements, such as best efforts (or agency) commitments. Follow-on offerings may be completed on a firm commitment basis or agency basis. The structure of the underwriting agreement is generally similar. FINRA reviews underwriting arrangements for all IPOs and some follow-on offerings.

Purchase and sale

The underwriters either:

- Commit to purchase the securities from the issuer at pricing and pay for the securities on settlement (subject to satisfaction of the closing conditions (*see below, Closing conditions*).
- Agree to use best efforts to solicit buyers, but the contractual purchase obligation is between the issuer and the investor.

In most firm commitment equity offerings, the issuer grants the underwriters an option to purchase up to an additional 15% of the number of offered securities to cover over-allotments.

The underwriting fee for firm commitment IPOs ranges from 5% to 7% of the gross proceeds. The range for subsequent firm commitment offerings is somewhat lower. Underwriting fees for best efforts offerings are variable, ranging from 3% to 8%.

Representations and warranties

The issuer represents and warrants both:

- The completeness and accuracy of the prospectus.
- A variety of other matters relating to its organisation and operations.

Lock-up agreement

The underwriting agreement usually specifies a lock-up period (typically 180 days for IPOs and 30 to 90 days for subsequent offerings) during which the issuer and its directors, officers and, for IPOs, most shareholders, agree not to sell securities of the same class as the offered securities, subject to certain negotiated exceptions.

Closing conditions

The underwriters are only obliged to purchase the securities if the underwriters receive a bring-down comfort letter from the auditor and legal opinions from the issuer's and underwriters' lawyers.

Underwriting agreements also usually limit the underwriters' obligation to purchase the securities if a material adverse change in the issuer's business occurs after the underwriting agreement is signed but before the offering closes. For both firm commitment and best efforts offerings, settlement usually occurs two or three business days after pricing.

Indemnification

The issuer agrees to indemnify the underwriters for any loss or liability resulting from an untrue statement of a material fact or a material omission in the registration statement or prospectus. Any selling shareholders will also indemnify the underwriters but usually only as to the information related solely to the selling shareholders, and their liability will be capped at their net proceeds.

Termination

The underwriters can terminate the underwriting agreement if a significant external event occurs, such as suspension of trading on the relevant exchange.

TIMETABLE: EQUITY OFFERINGS

18. What is the timetable for a typical equity offering? Does it differ for an IPO?

IPO timetable

An IPO process can be a three- to six-month process, depending mainly on the time necessary to prepare the registration statement, which varies based on:

- The time needed to prepare SEC-compliant financial statements. FPIs can prepare financial statements according to IFRS as issued by the IASB, or with US GAAP. Financial statements of FPIs can also be prepared according to other accounting principles, as long as they are reconciled to US GAAP.
- The SEC comment process (*see Question 13, Preparation*).
- Market conditions.
- The time needed to prepare and file a listing application (*see Question 3*).

There are three periods in the SEC registration process:

- **Pre-filing period.** During this quiet period, the registration statement and prospectus are prepared and due diligence is conducted. No offers, whether oral or written, are permitted. However, EGCs may engage in test-the-waters communications with qualified institutional buyers and institutional accredited investors. The SEC currently has a proposed rule to extend the ability to engage in test-the-waters communications to non-EGCs (*see Question 14*).
- **Period between filing the registration statement and effectiveness.** During this waiting period, the SEC comments on the registration statement (generally within 30 days of filing) and the road show and other marketing efforts are undertaken. Oral offers are permitted, but written offers cannot be made (apart from under a statutory prospectus) until the registration statement is declared effective.
- **Period after effectiveness.** During this period, the securities are priced, sales are confirmed and the securities are delivered to investors, typically within three business days of pricing.

Subsequent offerings

The timeline for a subsequent offering is typically much faster because most of the required disclosure will already be included in the issuer's ongoing SEC reports. If the issuer meets the requirements to use a short-form registration statement on Form S-3 (or Form F-3 for FPIs), the issuer can prepare the prospectus and registration statement up to three years in advance of any proposed use, and may be able to conduct an offering virtually overnight. This is referred to as a shelf registration statement. Very large issuers, known as well-known seasoned issuers (WKSIs), can file a Form S-3 that will be effective immediately, allowing the WKSI to move quickly to take advantage of market opportunities.

STABILISATION

19. Are there rules on price stabilisation and market manipulation in connection with an equity offering?

The rules governing stabilisation (*Regulation M, Exchange Act*) are complex. It is generally unlawful for any person to stabilise, effect any syndicate covering transaction, or impose a penalty bid in connection with the offering of a security, unless certain conditions are met. Stabilising activities are permitted only to prevent or slow a decline in the market price of the security. The key conditions for stabilisation relate to notice, pricing parameters, timing and priority for independent bids.

TAX: EQUITY ISSUES

20. What are the main tax issues when issuing and listing equity securities?

Domestic investors

Domestic investors that purchase shares in a US IPO must pay US federal income tax on dividends, if any, and capital gains. Corporate purchasers may be eligible for a deduction on dividends received.

Non-US investors

For non-US investors, the following applies:

- **Dividends.** Non-US holders of shares in a US corporation are generally subject to a 30% US federal withholding tax on dividends. A tax treaty between the United States and the shareholder's tax jurisdiction may provide relief from or reduction in the withholding requirement.
- **Capital gains.** A non-US holder is generally not subject to US federal income tax on capital gains unless:
  - the non-US holder is an individual, is present in the US for at least 183 days of the taxable year and certain other requirements are met;
  - the gain is effectively connected with a US trade or business (or, if certain income tax treaties apply, the gain is attributable to a US permanent establishment maintained by the non-US holder); or
  - the company is a US real property holding corporation (generally, if 50% or more of the company's assets by value are US real property related assets) and the non-US holder generally holds more than 5% of the shares.

The Foreign Account Tax Compliance Act (FATCA) imposes a 30% US withholding tax on dividends paid by US issuers and to a foreign financial institution, unless the foreign financial institution enters into an agreement with the Internal Revenue Service (IRS) to collect and provide to the IRS substantial information regarding US account holders with the foreign financial institution (including certain account holders that are foreign entities with US owners).

The legislation also generally imposes a withholding tax of 30% on dividends paid by US issuers to a non-financial foreign entity, unless the entity provides the withholding agent with a certification that either:

- It does not have any substantial US owners.
- Identifies the direct and indirect substantial US owners of the entity.

The US Treasury has entered into several intergovernmental agreements with governments of various countries that allow a foreign financial institution to satisfy its reporting requirements if both:

- The foreign financial institution collects the information required and provides this information to the government of its country of residence.
- The government of its country of residence enters into an agreement to report such information annually to the IRS under an income tax treaty, tax information exchange agreement, or other agreement with the US.

Other tax issues

Additional tax issues may arise in certain circumstances.

CONTINUING OBLIGATIONS

21. What are the main areas of continuing obligations applicable to listed companies and the legislation that applies?

Key areas

The key areas of continuing obligations for public companies are:

- Periodic reporting.
- Compliance with the Sarbanes-Oxley Act and the Dodd-Frank Act.
- Continued qualitative and quantitative listing requirements of the relevant exchange, including relating to corporate governance.
- Beneficial ownership reporting for acquirers of 5% or more of a company's equity securities.
- Rules relating to the conduct of tender offers and other securities-related transactions.

For US domestic issuers:

- Disclosure and timing requirements related to shareholder meetings.
- Share ownership and transaction reporting by the company's officers, directors and 10% shareholders.

Periodic reporting

A US company must file with the SEC:

- An annual report on Form 10-K after the end of each fiscal year, with audited annual financial statements.
- Quarterly reports on Form 10-Q after the end of its first three fiscal quarters, with reviewed interim financial statements.
- Current reports on Form 8-K when certain specified events occur.
- A proxy statement for any shareholders' meeting, including the annual meeting.

The reporting requirements are less onerous for an FPI. An FPI must:

- File an annual report on Form 20-F within four months after the fiscal year end. The annual report on Form 20-F must also contain a summary of differences between the US and home jurisdiction's corporate governance requirements. An FPI is not required to file quarterly reports on Form 10-Q or current reports on Form 8-K. However, if an FPI is listed on the NYSE, it must submit semi-annual unaudited financial information on Form 6-K no later than six months following the end of its second fiscal quarter.
- Include on Form 6-K any material information that it either:
  - makes public under its home jurisdiction's laws or stock exchange requirements; or
  - is required to distribute to its shareholders, such as bi-annual or quarterly reports.

The Sarbanes-Oxley Act, the Dodd Frank Act and related regulations impose numerous additional requirements on listed issuers, including:

- Certification of SEC periodic filings.
- Submission of reports on internal control over financial reporting.
- Independence of the issuer's audit and compensation committees.

Each annual and, in the case of a US issuer, quarterly report filed with the SEC must be accompanied by certifications signed by the company's principal executive and financial officers and cover, among other things:

- Completeness and accuracy of the disclosure.
- Fairness of the presentation of the issuer's financial condition and results of operations in its financial statements.
- Effectiveness of the issuer's disclosure controls and procedures, and internal control over financial reporting.

In addition, each annual report must include a management report and auditor's report on the company's internal control over financial reporting. Newly public companies are not required to file either report until their second annual report after their IPO. Smaller public companies and EGCs, whether domestic or foreign, are not required to provide the auditor's report on the company's internal control over financial reporting. The JOBS Act also provides relief from certain ongoing disclosure obligations for EGCs.

NYSE and Nasdaq corporate governance requirements

The NYSE and Nasdaq both have ongoing corporate governance requirements, such as director independence, formation of certain board committees and regular meetings of non-management directors. They also require annual management attestations of compliance with corporate governance requirements. In many areas, the NYSE and Nasdaq permit FPIs to follow home jurisdiction governance practices, provided they disclose publicly the significant differences caused by following these practices.

There are no significant shareholder voting restrictions. US federal securities laws, including the Dodd-Frank Act, and the NYSE and Nasdaq corporate governance requirements for domestic issuers, encourage shareholder voting and involvement.

22. Do the continuing obligations apply to listed foreign companies and to issuers of depositary receipts?

The continuing obligations are similar to those that apply to listed companies (*see Question 21*).

23. What are the penalties for breaching the continuing obligations?

Failure to file required Exchange Act reports can result in the SEC bringing an enforcement action against the issuer seeking injunctive relief. In addition, any officer of the company who knowingly makes a false certification in connection with an Exchange Act report can potentially be subject to both:

- Monetary fines and criminal sanctions for violating sections 13(a) or 15(d) of the Exchange Act.
- SEC and private actions for violating section 10(b) of the Exchange Act and Rule 10b-5.

Failure to comply with an exchange's continued listing requirements can result in a suspension of trading or de-listing.

MARKET ABUSE AND INSIDER DEALING

24. What are the restrictions on market abuse and insider dealing?

Restrictions on market abuse/insider dealing

See *Question 13, Liability*, for a discussion of liability for misleading statements.

An individual can be liable for insider trading if he or she buys or sells a security while in possession of material non-public information that was obtained in breach of a fiduciary duty or relationship of trust. There is extensive US judicial guidance on what constitutes insider trading and who may be liable, including traditional corporate insiders, such as directors or officers, as well as market traders and other people involved in the securities market.

Penalties for market abuse/insider dealing

There can be both criminal and civil penalties for insider trading, including:

- Prison sentences.
- Financial fines and penalties.
- Injunctions.
- Cease and desist orders.
- Bars from participating in the securities industry in any capacity, including being a director or officer of any securities firm or SEC-registered issuer.
- Other civil remedies.

DE-LISTING

25. When can a company be de-listed?

Voluntary de-listing

A company can seek to de-list its shares from the NYSE or Nasdaq voluntarily because, among other reasons, it believes it cannot continue to satisfy a continuing listing requirement. However, the company may still be required to maintain its SEC registration if it meets the SEC's registration requirements.

Suspension of registration

All companies registered with the SEC, whether US or foreign, can suspend their obligation to file SEC reports and other public company obligations if either:

- There are fewer than 300 record holders of the common equity or 1,200 record holders in the case of banks, bank holding companies and savings and loan holding companies.
- The number of holders of the common equity falls below 500 and the company's total assets have been no more than USD10 million at the end of each of its last three fiscal years.

However, if the company ever exceeds these levels, the obligations are reinstated.

Termination of registration

An FPI can terminate (rather than merely suspend) its listing and deregister (*Rule 12g3-2(b), Exchange Act*) (because, for example, the US market for its shares is thinner than anticipated, or declines over time, such that the additional compliance expenses associated with US registration are not justified), if either:

- The US average daily trading volume (ADTV) of the securities has been no greater than 5% of the worldwide ADTV for a recent 12-month period.
- The securities are held by fewer than 300 persons worldwide or fewer than 300 persons resident in the US, and certain other conditions are met.

De-listing by the exchange

The NYSE and Nasdaq can de-list an issuer that fails to comply with its continuing listing requirements, whether qualitative or quantitative, including minimum share price. There is a notice and hearing process, and the issuer has the opportunity to demonstrate its plan to regain compliance with the applicable requirement. If the NYSE or Nasdaq does not accept the issuer's plan or the company fails to regain compliance, the exchange makes appropriate SEC filings. This process can take months or even years, depending on the applicable requirement. A de-listed company may still be required to maintain its registration with the SEC if it meets the SEC's registration requirements.

Recent de-listings

In 2017, a total of 57 companies (without distinguishing FPIs who voluntarily de-list) were de-listed from the NYSE or NASDAQ markets for failure to comply with listing requirements, followed by 58 companies in 2018 (*Source: Morningstar*).

REFORM

26. Are there any proposals for reform of equity capital markets/exchanges? Are these proposals likely to come into force and, if so, when?

The 2019 SEC agenda, announced on 6 December 2018, contains a full summary of proposals for reforms.

As of 12 July 2019, notable SEC rules that are in the Proposed Rule stage include:

- Extension of the ability to engage in test-the-waters communications (*see Question 14 and Question 18*) to non-EGCs.
- Amendments to the registration, communications, and offering processes for business development companies and registered closed-end investment companies.
- Amendments to Regulation S-X financial statement disclosures for business acquisitions and dispositions.

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