



# Welcome!

This is the first webinar presentation within a series of  
Securities & International Transactional Services Practice  
Group Webinars

Today's Presentation will be in 2 parts:



**First:** *U.S. Securities Laws & U.S. Securities Offerings*, June Lin (Niesar & Vestal; San Francisco, CA)

**Second:** *Listing in the U.K.: Options For Overseas Companies*, Michelle Mathers (Ford & Warren; Leeds, England)

*The Webinar will begin shortly. Thank You!*



# Welcome!

A brief introduction by the International Transactional  
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First Presentation:

U.S. Securities Laws  
&  
U.S. Securities Offerings

Presented By: June Lin  
Niesar & Vestal  
San Francisco, CA



# Why do U.S. Securities Laws matter?

- Nature of corporate financings increasingly international – US investors and US capital markets
- Extraterritorial reach of the US securities laws
  - All securities sold anywhere in the world involving any means of interstate commerce require SEC registration unless an exemption is available
  - Interstate commerce includes commerce between US and any foreign country and includes use of post, telephone, fax and email



# Why do U.S. Securities Laws Matter?

- In terrorem remedies of U.S. federal securities laws
  - Shareholders' right to return securities
  - Ability to freeze assets on global basis
  - Fines and imprisonment possible



# Methods of offering securities in the U.S.

- SEC registered offer
- Private placement (Regulation D)
- Private re-sales to institutional investors (Rule 144A)
- Foreign currency denominated shares vs. American Depositary Receipts (ADRs)



# Legal Framework

- Federal securities laws
  - Securities Act of 1933 (“33 Act”)
  - Securities Exchange Act of 1934 (“34 Act”)
  
- State securities laws (“Blue Sky”)
  - 50 different jurisdictions
  - Some pre-emption (listed securities, 144A usually)
  
- Exchange listing criteria and continuing obligations



# Securities Act of 1933

- Full disclosure = full investor protection
  
- Section 5 of the 33 Act prohibits use of US mails or other means of communication
  - to offer a security of any issuer unless a registration statement has been filed with the SEC or
  - to sell a security of any issuer unless a registration statement is in effect, absent an exemption.



# Securities Act of 1933

- Definition of “security” is very broad
  - Includes notes, debentures (long term unsecured debt instruments issued pursuant to an indenture), evidence of indebtedness, investment contracts, options, warrants, some derivative securities
  
- New security doctrine
  
- Treatment of private loan agreements



# Securities Act of 1933 – Exemptions from Registration

- Section 3 lists exempted securities
  - Section 3(a)(3) – any note, draft, bill of exchange or banker's acceptance which arises out of a current transaction and has a maturity not exceeding 9 months
  
- Section 4 lists exempt transactions
  - Section 4(1) – transactions by any person other than an issuer, underwriter or dealer
  
  - Section 4(2) – transactions by an issuer not involving any public offering
  
  - Section 4(3) – transactions by a dealer, under certain conditions



# Securities Act of 1933 – Exemptions from Registration

- Regulations providing exemptions
  - Rule 144A/Regulation S
  - Regulation D
  - Rule 144
  - 4 (1 and ½ )



# Registration Process

- Transactions, not securities, are registered
- Process:
  - File registration statement which consists of the disclosure document (prospectus) plus some additional information
  - Receive SEC comments after a 30 day review period
  - Respond to comments in a revised draft and explanatory comment letter
  - Eventually request effectiveness from the SEC
  - Upon effectiveness, can sell securities
- Result of registration of transaction: become subject to 34 Act (become a filer of periodic reports with the SEC)



# Pros of SEC Registered Offering

- Liquidity
- Distribution
- Wide shareholder base
- Enhance the status and public recognition of the company
- Public status facilitates future cash raising and enables the company to issue shares as consideration for acquisitions



# Cons of SEC Registered Offering

- Expense
- Timetable impact
  - SEC review and comment process minimum 6 weeks
  - Often longer for IPO
  - US GAAP reconciliation of financial statements
- Potential civil liability for misstatements or omissions (strict liability)
- Continuing obligations under US securities laws and exchange rules
- Transparency of US registered companies
- Public pressure and obligation to perform
- Directors' responsibilities and duties
- Risk of public takeover
- Existing investors lose control of company



# Alternatives to US SEC Registered Public Offering

- Private resales to qualified institutional buyers (QIBs)
  - Rule 144A
    - Limits on purchaser type
    - Publicity/research restrictions
  
- Private Placements
  - Section 4(2) and/or Regulation D
    - Limits on purchaser type and quantity
    - Publicity/research restrictions



## Rule 144 A – Detail

- Non-exclusive safe harbor allowing unlimited private resales of “restricted securities” to QIBs
  - “QIBs” – qualified institutional buyers as defined in Rule 144A
    - Institutions who own and invest at least \$100 million of unaffiliated securities, or
    - Dealers who invest \$10 million of such securities
  - Only for resales
    - Issuer will sell to underwriter (Section 4(2)/Regulation D private placement) who will “resell” to QIBs
  - Non-fungible securities
    - Same publicity and communications restrictions as for private placements
  - Placed securities subject to restrictions



# Private Placement Regulation D – Detail

- Non-exclusive safe harbor for making valid private placement under Section 4(2)
  - Issuers only
  
  - Unlimited number of accredited investors and up to 35 other individuals with knowledge and experience (information requirements)
  
  - No general solicitation or general advertising (offshore press conferences excepted); pre-existing relationship
  
  - Placed securities subject to restrictions
  
  - Investor letters usually required



# Ongoing Reporting Requirements under 34 Act

- More onerous than in UK
- Would apply to any non-US issuer who has registered securities under 33 Act or has a class of equity securities held of record by 500 or more persons, 300 or more of whom are resident in the US
  - Where securities are held by brokers, dealers or banks (or their nominees) for the account of US residents, each separate account is counted as a US resident. Issuer may rely in good faith on information supplied by brokers, dealers or banks (or their nominees).
- Periodic reports
  - Annual reports - Form 20-F (like 33 Act prospectus)
  - Quarterly reports replaced by Form 6-K for non-US issuers
  - Subject to Section 18 liability for materially false or misleading statements, unless issuer acted in good faith and had no knowledge that such statement was false or misleading



# Ongoing Reporting Requirements under 34 Act

- Periodic reports

- Annual reports - Form 20-F (like 33 Act prospectus)
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# Ongoing Reporting Requirements under 34 Act

- Non-US issuer exemption from 34 Act reporting requirements:  
Rule 12g3-2(b)

- Old rule

- Furnish to SEC certain information that non-US issuer makes public or distributes to shareholders in its home jurisdiction

- “Furnish” rather than “file” so not subject to Section 18 liability, but may still be subject to 10b-5 disclosure liability



# Ongoing Reporting Requirements under 34 Act

- New rule effective October 10, 2008
  - Automatic exemption from 34 Act reporting requirements if 3 conditions met
    - Non-US jurisdiction constitutes primary trading market of securities
    - Does not currently have 34 Act reporting obligations
    - Publish home country materials in English on website
  - No need to furnish documents to SEC



# NASDAQ Listing

- Over-the-counter market for trading of shares, no physical trading floor
- Previously 2 market tiers: NASDAQ National Market and NASDAQ SmallCap Market
- Since 2006, 3 market tiers: NASDAQ Global Select Market, NASDAQ Global Market and NASDAQ Capital Market



# NASDAQ: Initial Requirements

■ Quantitative listing standards for NASDAQ Global Select Market - companies must meet all requirements under one of 3 listing standards

➤ Standard 1

- \$11M aggregate gross income in 3 prior fiscal years and \$2.2 million gross income in each of 2 most recent fiscal years and positive gross income in each of 3 prior fiscal years
- 1.25M publicly held shares with \$45M market value
- 2,200 beneficial shareholders



# NASDAQ: Initial Requirements

- Standard 2

- \$27.5M aggregate gross income in 3 prior fiscal years and positive gross income in each of 3 prior fiscal years
- Average \$550M market capitalization over prior 12 months
- \$110M revenue in prior fiscal year
- 1.25M publicly held shares with \$45M market value
- 2,200 beneficial shareholders

- Standard 3

- Average \$850M market capitalization over prior 12 months
- \$90M revenue in prior fiscal year
- 1.25M publicly held shares with \$45M market value
- 2,200 beneficial shareholders



# NASDAQ: Initial Requirements

- Quantitative listing standards for NASDAQ Global Market - companies must meet all requirements under one of 3 listing standards
  - Standard 1
    - \$15M shareholders' equity
    - \$1M gross income in latest fiscal year or in 2 of last 3 fiscal years
    - 1.1M publicly held shares with \$8M market value
    - 400 holders of 100 shares or more



# NASDAQ: Initial Requirements

- Standard 2

- \$30M shareholders' equity
- 1.1M publicly held shares with \$18M market value
- 400 holders of 100 shares or more
- 2 years operating history



# NASDAQ: Initial Requirements

- Standard 3

- \$75M market value of listed securities OR \$75M total assets and \$75M total revenue
- 1.1M publicly held shares with \$20M market value
- 400 holders of 100 shares or more



# NASDAQ: Initial Requirements

■ Quantitative listing standards for NASDAQ Capital Market - companies must meet all requirements under one of 3 listing standards

- Standard 1

- \$5M shareholders' equity
- 1M publicly held shares with \$15M market value
- 300 holders of 100 shares or more
- 2 years operating history



# NASDAQ: Initial Requirements

## ■ Standard 2

- \$4M shareholders' equity
- 1M publicly held shares with \$15M market value
- 300 holders of 100 shares or more
- \$50M market value of listed securities

## ■ Standard 3

- \$4M shareholders' equity
- 1M publicly held shares with \$5M market value
- 300 holders of 100 shares or more
- \$750,000 net income from continuing operations (in the latest fiscal year or in 2 of the last 3 fiscal years)



# NASDAQ: Initial Requirements

- Qualitative listing standards - corporate governance requirements such as:
  - Distribution of annual and interim reports
  - Independent directors
  - Audit committees
  - Annual shareholder meetings with standard quorum requirement
  - Solicitation of proxies for shareholder meetings
  - Conflicts of interest
  - Shareholder approval
  - Shareholder voting rights
  - Auditor peer review (post Sarbanes-Oxley Act, replaced by requirement that auditor be registered as a public accounting firm with PCAOB)



# NASDAQ: Initial Requirements and Listing Procedures

- Non-US companies may request exemption from certain corporate governance standards, such as proxy solicitation or quorum. Exemption may be granted if the company can demonstrate that the requirement is contrary to a law, rule, regulation or the generally accepted business practices of the company's home country. The company must provide written certification from independent local counsel describing the basis for the request.



# NASDAQ: Initial Requirements and Listing Procedures

- Listing procedure: Review by NASDAQ's Listing Qualifications Department
  - Signed application and listing agreement
  - SEC Registration Statement (if applicable)
  - Copies of SEC filings for past 2 years (if applicable)



# NASDAQ: Ongoing Compliance Requirements

- Continuing quantitative standards for NASDAQ Global Select Market - companies must meet all requirements under one of 2 listing standards
  - Standard 1
    - \$10M shareholders' equity
    - 750,000 publicly held shares with \$5M market value
    - 400 holders of 100 shares or more
  - Standard 2
    - \$50M market value of listed securities OR \$50M total assets and \$50M total revenue
    - 1.1M publicly held shares with \$15M market value
    - 400 holders of 100 shares or more



# NASDAQ: Ongoing Compliance Requirements

- Continuing quantitative standards for NASDAQ Capital Market - companies must meet all requirements under one of 3 listing standards
  - Standard 1
    - \$2.5M shareholders' equity
    - 500,000 publicly held shares with \$1M market value
    - 300 holders of 100 shares or more
  - Standard 2
    - \$35M market value of listed securities
    - 500,000 publicly held shares with \$1M market value
    - 300 holders of 100 shares or more



# NASDAQ: Ongoing Compliance Requirements

- Standard 3
  - \$500,000 net income from continuing operations (in the latest fiscal year or in 2 of the last 3 fiscal years)
  - 500,000 publicly held shares with \$1M market value
  - 300 holders of 100 shares or more
  
- Continuing corporate governance standards
  
- Compliance with SEC filing requirements
  - If company does not submit filings via EDGAR (Electronic Data Gathering Analysis and Retrieval) system, it is required to submit 3 copies of all documents to NASDAQ



# Sarbanes-Oxley Act of 2002

- Signed by President Bush into US law on July 30, 2002
- Sweeping reforms to corporate accounting practices in response to accounting abuses at large public companies (Enron, WorldCom)
- Requires SEC to make amendments to 34 Act
- Applies to non-US companies subject to 34 Act reporting requirements
- Does NOT apply to non-US companies with 12g3-2(b) exemption



# Scope of Sarbanes-Oxley Act

- Corporate responsibility
- Enhanced disclosure and SEC review
- Audit committees, auditors and analysts
- Enforcement, penalties and liability



# Seek US Securities Law Advice

- When in doubt, seek US securities law advice
- Litigious climate in US with a well-established plaintiffs bar



## Second Presentation:

# Listing in the U.K.: Options For Overseas Companies

Presented By: Michelle Mathers

Ford & Warren Solicitors

Leeds, England



# INTRODUCTION

- There are 2 ways to access the capital market in the UK:
  - through the Main Market (London Stock Exchange – LSE)
  - through the exchange regulated market – e.g. AIM
- A company can be:
  - listed; or
  - quoted.



# WHY “LIST” IN THE UK

Reasons to List:

- to raise profile
- higher levels of regulation increase investor confidence
- eligibility for the FTSE UK Index Series
- raise long term equity capital
- creates a market for shares
- improves management
- encourages employee commitment.



# REASONS TO USE AN ALTERNATIVE MARKET

- Far easier and less onerous regulations
- More appropriate for small to mid-cap companies who have not been trading long
- Less costly to comply with the regulations
- No market capitalisation requirement
- Less onerous accounting standards.



# THE UK LISTING REGIME

- Application to Financial Services Authority (FSA) to join the Official List:
  - Main Market Premium or Standard Listing
  - Plus Listed Market.
- 3 parts to the Listing Regime
  - Listing Rules
  - Prospectus Rules
  - Disclosure Rules.



# PREMIUM/STANDARD LISTING MAIN MARKET

## Admission Criteria

This is set out in Rule 2 of the Listing Rules:

- company must be legally incorporated
- shares must conform with the law of the place of incorporation
- shares must be admitted to trading on a regulated market
- shares must be freely transferable
- market capitalisation must be at least £700,000
- must apply to list the whole class.



# PREMIUM/STANDARD LISTING MAIN MARKET - Continued

## Prospectus

A prospectus must be prepared in accordance with the Prospectus Rules

- approved FSA and published
- could be approved by a Competent Authority and “passport”
- 3 years historical financial information
- IFRS or equivalent accounting standards
- 25% of shares must be distributed by admission to the public.



# PREMIUM & STANDARD - THE DIFFERENCES

Requirements For:	Premium Listing	Standards Listing
<ul style="list-style-type: none"><li>• audited historic financial information</li></ul>	<ul style="list-style-type: none"><li>• 3 years</li></ul>	<ul style="list-style-type: none"><li>•N/A</li></ul>
<ul style="list-style-type: none"><li>• 3 year revenue earning record</li></ul>	<ul style="list-style-type: none"><li>• √ (covering 75% of business)</li></ul>	<ul style="list-style-type: none"><li>•N/A</li></ul>
<ul style="list-style-type: none"><li>• control over majority assets for the prior 3 years</li></ul>	<ul style="list-style-type: none"><li>• √</li></ul>	<ul style="list-style-type: none"><li>•N/A</li></ul>
<ul style="list-style-type: none"><li>• unqualified working capital statement</li></ul>	<ul style="list-style-type: none"><li>• √</li></ul>	<ul style="list-style-type: none"><li>•N/A</li></ul>
<ul style="list-style-type: none"><li>• shares in the public hands</li></ul>	<ul style="list-style-type: none"><li>• √ (25%)</li></ul>	<ul style="list-style-type: none"><li>•√ (25%)</li></ul>
<ul style="list-style-type: none"><li>• a sponsor</li></ul>	<ul style="list-style-type: none"><li>• √</li></ul>	<ul style="list-style-type: none"><li>•X</li></ul>



# CONTINUING OBLIGATIONS & DIFFERENCES

- Continuing obligations and differences premium and standard
  - Subject to the chapter 2 Disclosure and Transparency Rules (DTR)

## Requirement for:

- prospectus for further issue
- annual report and accounts
- half yearly reports

## Premium Listing:

- √ (in certain circumstances)
- √
- √

## Premium Listing:

- √ (in certain circumstances)
- √
- √



# CONTINUING OBLIGATIONS & DIFFERENCES

Requirement For	Premium Listing	Standard Listing
<ul style="list-style-type: none"><li>interim management statements</li></ul>	•√	•√
<ul style="list-style-type: none"><li>a sponsor</li></ul>	•√ (in certain circumstances)	•√
<ul style="list-style-type: none"><li>compliance with listing principles</li></ul>	•√	•X
<ul style="list-style-type: none"><li>compliance with Corporate Governance</li></ul>	•Comply or explain against the UK Corporate Governance Code/Combined Code	•Include corporate governance statement in directors' report



# CONTINUING OBLIGATIONS & DIFFERENCES

Requirement For	Premium Listing	Standard Listing
• Compliance with Model Code	•√	•X
• compliance significant transaction (class test) rules	•√	•X
• related party transaction rules	•√	•X
• Disclosure of inside information as soon as possible	•√	•√



# CONTINUING OBLIGATIONS & DIFFERENCES

Requirement For	Premium Listing	Standard Listing
• maintenance of an insider list	•√	•√
• an annual information update	•√	•√
• application of major shareholding notification regime	•√	•√
• persons discharging managerial responsibilities to disclose deals	•√	•√
• the offer of pre-emption rights	•√	•Not under Listing Rules but Company Law may impose such a requirement



# LISTING OF DEPOSITARY RECEIPTS

## On Admission

- Applicable to standard listings and quotations only
- Chapter 18 sets out rules for company and issuers
- Summary requirements similar to Listing Rules, Rule 2 but also:
  - issuer must be authorised and regulated and acceptable to FSA;
  - prospectus must comply with the minimum disclosure requirements of the GDR Schedule.



# Continuing Obligations

## Issuer must:

- publish annual accounts and maintain sufficient number of securities with the public
- announce inside information
- put a corporate governance statement in annual report
- notify changes in constitution and rights attaching to shares
- comply with LSE's Admission and Disclosure requirements.



# ADMISSION TO AIM CRITERIA

Must comply with the AIM Rules for companies:

- must be “appropriate” for market
- must appoint a nominated Adviser (Nomad)
- must be a public company limited by shares
- must have a broker who is member of the LSE
- shares must be freely transferable and eligible for electronic settlement



# ADMISSION TO AIM CRITERIA - Continued

- all shares of class to be admitted must be admitted
- no requirement for a certain level of market
- capitalisation; trading history or, shares in public hands
- accounts must conform UK GAAP
- transfer of shares must be registered 14 days after receipt
- investing companies must raise £3 million equity on or before admission.



# ADMISSION TO AIM CRITERIA - Continued

## Main Market

- Minimum 25% shares in public hands
- Normally 3 year trading record required
- Prior shareholder approval required for Class 1 acquisitions and disposals
- Pre-vetting of prospectus by FSA
- Minimum market capitalisation for £700,000 for shares

## AIM

- No minimum shares to be in public hands
- No trading record requirement
- No prior shareholder approval for Class 1 transactions. Approval only required for reverse takeovers or disposal resulting in a fundamental change of business
- Admission documents not pre-vetted by the LSE or FSA unless the offering involves an offer to the public
- No minimum market capitalisation



# ADMISSION DOCUMENT

- Is a prospectus required?
- 3 years financial information (if available)
- Details of directors, company, substantial shareholders.
- Lock in
- Details of Nomad and brokers.



# APPLICATION PROCESS

- Pre-admission announcement
  - for quoted companies 20 days before admission
  - for non-quoted companies 10 days before admission
- Application
  - AIM fee
  - Application form
  - Admission document
  - Effective on receipt of “dealing notice”



# VERIFICATION

- Verification of Admission Document
- Company Solicitor prepares questions
- Supported by evidence



# PLACING

- Listing of securities involving the issue of new shares
- Without issue = Introduction
- Sale of new shares to specified persons
- Exemption Financial Services and Markets Act 2000



# CONTINUING OBLIGATIONS

- Similar but less onerous than Main Market
- Notify RIS:
  - new developments
  - financial situation
  - changes to sphere of activity
  - share dealings of directors
  - changes to directors
  - material changes to the trading/financial position
  - performance/projections
- Must maintain a website