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:

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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!
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Welcome!

A brief introduction by the International Transactional Services Practice Group Chair,

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First Presentation:

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

Presented By: June Lin
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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 terrorum 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

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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 “passported”
- 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
• audited historic financial information	• 3 years	•N/A
• 3 year revenue earning record	• √ (covering 75% of business)	•N/A
• control over majority assets for the prior 3 years	• √	•N/A
• unqualified working capital statement	• √	•N/A
• shares in the public hands	• √ (25%)	•√ (25%)
• a sponsor	• √	•X

CONTINUING OBLIGATIONS & DIFFERENCES

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

Requirement for:	**Premium Listing:**	**Premium Listing:**
• prospectus for further issue	•√ (in certain circumstances)	•√ (in certain circumstances)
• annual report and accounts	•√	•√
• half yearly reports	•√	•√

CONTINUING OBLIGATIONS & DIFFERENCES

Requirement For	Premium Listing	Standard Listing
• interim management statements	•√	•√
• a sponsor	•√ (in certain circumstances)	•√
• compliance with listing principles	•√	•Χ
• compliance with Corporate Governance	•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