

DUAL-LISTING SECURITIES IN EUROPE AND THE UNITED STATES*

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I. INTRODUCTION

A company might have many reasons for having its securities traded on both the London Stock Exchange (“LSE”) and the Nasdaq Stock Market (“Nasdaq”).¹ For example, a dual-listing increases the pool of potential investors, which allows the company to raise more capital or obtain a better price for its securities. A dual-listing also enlarges the trading market for the company’s securities, thereby increasing liquidity. In addition, a dual-listing increases the company’s visibility in both

¹ For a more detailed discussion of reasons why companies pursue dual-listings, see Howell E. Jackson & Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe in 1999 — Part 2*, 57 BUSINESS LAWYER (2001).

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Europe and the United States, which can have a positive impact on sales and other aspects of its business. An additional listing will increase the amount of analyst coverage that the company receives in each market. Finally, a dual-listing provides the company with acquisition currency that can be used for merger and acquisition activity.

There are also a variety of scenarios under which a dual-listing might be accomplished. For example, listing on the LSE might be undertaken prior to, simultaneously with, or subsequent to, listing on Nasdaq. By the same token, it might be undertaken as a part of, or apart from, a public offering of securities in the United States. If it has sufficient assets and a sufficient number of shareholders in the United States, a company may be required to register with the U.S. Securities and Exchange Commission (“SEC”), even if its securities are not traded on a U.S. market.

This chapter addresses one of the most common dual-listing scenarios: an initial public offering (“IPO”) in both Europe and the United States of securities of a company, simultaneously with a listing both on Nasdaq and the LSE (hereinafter a “Dual-Listing” or a “Dual-Listing Transaction”). Although the basic rules governing a Dual-Listing Transaction apply to other dual-listing scenarios, there are differences, some of which may be significant depending on the circumstances.²

The following discussion is intended to provide only a broad overview of the relevant rules, and many important details are omitted. Moreover, there are a number of “gray” areas, where the applicable rules

² For example, the statutory regime is technically different if the security is traded in the United States on the New York Stock Exchange (“NYSE”) or another exchange. Legally, Nasdaq is not an “exchange”; it is an “automated quotation” system, which is one form of an “over-the-counter” market. The obligation to register under the Securities Exchange Act of 1934 arises under Section 12(b) if the security is traded on the NYSE or the another exchange, while this obligation arises under Section 12(g) if the security is traded on Nasdaq. In most respects, however, this legal distinction makes little practical difference and will soon disappear altogether assuming that Nasdaq succeeds in becoming registered as an exchange as part of the major restructuring it is currently undergoing.

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are vague. In all cases, there is no substitute for the advice of experienced legal counsel.

II. BASIC FRAMEWORK OF THE U.S. SECURITIES LAWS

Contrary to the practice in many European jurisdictions, the SEC, as opposed to the National Association of Securities Dealers, Inc. (“NASD”) or one of the stock exchanges, is the regulator that has the most significant role in connection with a Dual-Listing Transaction.³ Thus, the rules concerning the content of the offering prospectus, and most of the rules governing the conduct of the offering itself, are formulated and administered by the SEC, making them uniform in the United States, regardless of the secondary market in which the securities are traded. The NASD rules relate to relatively narrow aspects of the Dual-Listing Transaction, including arrangements with underwriters and the criteria for listing on Nasdaq.

There are three basic sets of U.S. statutes and regulations applicable to a Dual-Listing Transaction:

- The Securities Act of 1933 (the “Securities Act”) and the regulations thereunder, which govern the public offering of securities.
- The Securities Exchange Act of 1934 (the “Exchange Act”) and the regulations thereunder, which govern the continuing obligations of the company following a public offering.
- The Rules of the National Association of Securities Dealers (the “NASD Rules”), which set forth requirements a company must meet in order to have its securities traded on Nasdaq.

³ The United Kingdom recently completed a reorganization of its securities regulatory system that more closely resembles the U.S. system. Traditionally, the LSE was the primary regulator of disclosure for public offerings. In May 2000, responsibility for listing rules shifted to the newly created U.K. Listing Authority under the auspices of the Financial Services Authority.

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These requirements apply to all companies, U.S. and non-U.S. alike, although important accommodations have been made in favor of non-U.S. companies, in order to conform to the laws or practices of the home country and to ease their access to the U.S. market.

Most non-U.S. companies that engage in a Dual-Listing Transaction will qualify as “foreign private issuers.” A company is considered a “foreign private issuer,” if it is

“any foreign issuer other than a foreign government except an issuer meeting the following conditions:

(1) More than 50 percent of the issuer’s outstanding voting securities are directly or indirectly held of record by residents of the United States; and

(2) Any of the following:

(i) The majority of the executive officers or directors are United States citizens or residents;

(ii) More than 50 percent of the assets of the issuer are located in the United States; or

(iii) The business of the issuer is administered principally in the United States.”

For purposes of this definition, the term “resident” means “any person whose address appears on the records of the issuer, the voting trustee, or the depository as being located in the United States.” If a company is not a “foreign private issuer,” it will be considered a U.S. domestic company, and it must use the forms and comply with all the requirements applicable to U.S. companies.

Underlying the U.S. securities laws is the concept of full disclosure: investors are best protected by receiving complete and accurate

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information at the time they make investment decisions.⁴ The federal securities laws are neither intended to act as a “gatekeeper,” setting a standard of quality as a condition to the sale of securities to the public, nor are they intended to provide a remedy against corporate mismanagement.⁵

This fundamental concept of full disclosure is phrased in several places in the statutes in slightly different ways, but the basic formulation is as follows: no prospectus or other communication may contain “an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements [therein], in light of the circumstances under which they were made, not misleading . . .”

The U.S. Supreme Court has provided the following definition of materiality:

“An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in [making his investment decision] Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”

This definition of materiality is broad. Therefore, with the advice of experienced legal counsel, the company should consider disclosing information about itself even if this information is not specifically required under U.S. securities law.

⁴ The U.S. federal securities laws have a number of other purposes, as well, including the fairness and orderliness of the U.S. securities markets. These other goals, however, are not directly relevant to a Dual-Listing Transaction and therefore will not be discussed herein.

⁵ Many of the corporate and securities laws of the states within the United States do have these additional goals. With a few exceptions, however, these laws are not relevant to non-U.S. companies engaging in Dual-Listing Transactions.

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III. PUBLIC OFFERINGS UNDER THE SECURITIES ACT

The Securities Act prohibits the public sale of a company's securities in the United States unless the securities have been registered with the SEC. Registration is accomplished by filing a registration statement, the main component of which is a prospectus. The prospectus must contain a large amount of required information and must provide full and fair disclosure about the issuer, its securities and the offering.

The Securities Act also controls the offering process. Once a company has decided to make a public offering of its securities, there commences what is known as the "Pre-Filing" Period, during which the company may not make any statement that would "condition the market" for its securities. When a preliminary registration statement, known as a "red herring," has been filed with the SEC, a second period, known as the "Pre-Effective" or "Waiting" Period, begins. At this point, the company may offer its securities, but only subject to important constraints. When the registration statement is declared effective, the "Post-Effective" Period begins, and the company may undertake a broader range of activities leading up to the consummation of the transaction. The requirements applicable to the activities of the company and its underwriters during each of these three periods are discussed in more detail below.

A Dual-Listing Transaction is an offering made simultaneously in more than one country in such a way that compliance is achieved with the offering requirements and practices in each jurisdiction. In the United States, only a portion of the total offering typically is registered with the SEC, and the remaining portions are offered in "offshore transactions" exempt from SEC registration pursuant to Regulation S. There are several reasons for structuring a Dual-Listing Transaction in this fashion, including saving SEC filing fees and limiting exposure to liability under the U.S. securities laws. The coordination between the U.S. and the non-U.S. tranches of the offering must be carefully worked out, however, with enough shares registered in the United States to cover the U.S. offering, as well as any "flow-back" into the United States of shares sold initially to investors outside of the United States.

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Accordingly, two prospectuses are typically prepared, one for use in the United States and the other for use in the non-U.S. portion of the offering. The differences between the two prospectuses typically involve certain technical aspects of the cover page and inside-cover page, including: the legends required by the SEC and those states in which the offering is being made; the “underwriting” or “plan of distribution” section; and sections dealing with taxes or other matters of relevance only to U.S. investors.

In September 1999, the SEC revised its disclosure requirements for “foreign private issuers” to conform with the international disclosure standards endorsed by the International Organization of Securities Commissions (“IOSCO”). These revisions began coming into effect on September 30, 2000 and are designed to make it easier for foreign private issuers to make an international offering in the United States.

Finally, it should be noted that the Securities Act creates the potential of civil or criminal liability for failure to comply with its requirements. Sections 11 and 12(a)(2) of the Securities Act impose liability on the company, its underwriters and “controlling persons” for material misstatements in registration statements and prospectuses, and Section 17 contains a general prohibition against fraud. Since a complete discussion of the liability provisions is beyond the scope of this chapter, companies are urged to seek the advice of experienced legal counsel regarding their exposure to liability under the U.S. securities laws.

IV. THE OFFERING PROSPECTUS

The Securities Act authorizes the SEC to prescribe criteria for the content of public-offering registration statements and prospectuses. Pursuant to this authority, the SEC requires non-U.S. issuers in a typical Dual-Listing Transaction to utilize Form F-1.

Ultimately, the task of drafting a prospectus involves balancing several competing considerations, including the need to tell the company’s story effectively to investors, the need to comply with specific SEC requirements and the need to make “full and fair material disclosure.”

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A. Form F-1

Form F-1 has a number of specific content requirements. As they relate to the company itself, these requirements are actually found in Form 20-F, which is the form utilized for the annual reports that must be filed under the Exchange Act once the public offering is completed. As of September 30, 2000, Form 20-F has been completely reorganized and revised to incorporate the IOSCO standards. The requirements relating to the specific securities being offered and the way in which they will be distributed are found largely in Regulation S-K under the Securities Act.

Beyond the specific requirements, however, is the general requirement that a prospectus set forth all the material information about the company. This general requirement of “material accuracy and completeness” is of particular relevance to the sections of the prospectus where the requirements are phrased in broad terms and thus require the exercise of judgment. Three examples of this last type are the description of the company’s business, management’s discussion and analysis of financial condition and results of operations (“MD&A”) and risk factors.

1. Selected Disclosure Items

Without describing in detail all of the requirements of Form F-1, there are several areas where a Form F-1 prospectus prepared by a non-U.S. company for a Dual-Listing Transaction would contain information different from a prospectus prepared by a U.S. company.

Compensation and Stock Ownership of Directors and Management. Form F-1, through reference to Form 20-F, requires that the company disclose the aggregate compensation (including the value of any bonus or profit-sharing plan or stock options) paid to its directors and members of its administrative, supervisory or management bodies as a group as well as amounts set aside for retirement benefits during the last fiscal year. This compensation information must be disclosed for individual directors and members of senior management unless individual disclosure is not required in the company’s home country and is not otherwise publicly disclosed by the company. Form F-1 also requires the disclosure of the amount of shares held by individual directors and members of senior management or a statement that the individual

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beneficially owns less than one percent of the outstanding securities if the specific amount of shares owned by the individual is not disclosed or required to be disclosed in a non-U.S. jurisdiction. U.S. companies are required to make much more extensive disclosure, including detailed descriptions of all compensation, stock appreciation rights and long-term incentives provided to each executive officer.

Description of Principal Non-U.S. Market for Issuer's Securities.

The prospectus of a non-U.S. company must describe the nature and extent of the principal non-U.S. trading market for the securities being offered, as well as any trading market in the United States. In the typical Dual-Listing Transaction, the company will be going public for the first time, and this information will not be relevant. If the securities being registered will trade in the United States in the form of American Depositary Receipts ("ADRs"), the prospectus must describe the ADRs, including the name of the depository issuing such receipts and the number of shares or other units of the underlying security representing the trading unit in such receipts.

Governmental Restrictions on Export/Import of Capital or Distributions. The prospectus must describe any foreign exchange controls or other governmental laws, decrees or regulations in the company's home country that restrict the export or import of capital or that affect the remittance of dividends, interest or other payments to nonresident holders of the company's securities.

Limitations on Right to Hold or Vote Securities. The prospectus must describe any limitations on the right of nonresident or foreign owners to hold or vote the securities that are imposed by foreign law or by the charter or other constituent document of the company.

Taxes Applicable to U.S. Security Holder. The prospectus must describe all withholding and other taxes to which U.S. security holders are subject under the laws of the company's home country. The discussion must describe the pertinent provisions of any reciprocal tax treaty between that country and the United States.

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2. Signatures

The registration statement must be signed by the company itself and by “its principal executive officer or officers,” its “principal financial officer,” its “controller or principal accounting officer,” “at least a majority of the board of directors or persons performing similar functions,” and its “authorized representative in the United States.”

B. Financial Statements

The SEC requires the company to include in its prospectus and registration statement consolidated financial statements, audited by an independent auditor and accompanied by an audit report. These financial statements must include: a balance sheet; a statement showing either (i) changes in equity other than those arising from capital transactions with owners and distribution to owners or (ii) all changes in equity; a cash flow statement; related notes and schedules required by the comprehensive body of accounting standards pursuant to which the financial statements are prepared; and a note analyzing the changes in each caption of shareholders’ equity presented in the balance sheet. Comparative financial statements must be provided for the last three years (a balance sheet need be prepared only for the past two years if the earliest balance sheet is not required by a non-U.S. jurisdiction), and the last year of audited financial statements may not be older than 12 months if the company is making an IPO. These statements must be audited by an independent auditor in accordance with U.S. generally accepted auditing standards. Interim unaudited financial statements are required for registration statements declared effective more than 9 months after the close of the fiscal year. Finally, if the company makes public financial statements more current than those otherwise required, these statements must be included in the registration statement as well.

The required financial statements may be stated in the currency of the company’s choice. The company has a choice to prepare its financial statements in accordance with U.S. Generally Accepted Accounting Principles (“U.S. GAAP”) (including applicable SEC regulations), the accounting principles applicable in the company’s home country or

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international accounting standards.⁶ In the last two instances, the statements must be accompanied by a discussion of the material differences between the principles used and U.S. GAAP and by a reconciliation with U.S. GAAP.

In addition to the financial statements, certain “selected financial data” must be provided for the most recent five financial years and any additional fiscal years “necessary to keep the information from being misleading.” This information includes net operating revenues, income from continuing operations, total assets, long-term obligations and dividends per share. This information is typically presented near the front of the prospectus.

C. State Securities (“Blue Sky”) Laws

In addition to the federal securities laws, each of the states and other jurisdictions (such as the District of Columbia and Puerto Rico) within the United States has its own set of securities laws, which are often referred to as the “Blue Sky” laws and which are potentially relevant to Dual-Listing Transactions.⁷ These statutes have many similarities, including registration requirements applicable to publicly offered securities. However, the rules of each state have their own idiosyncrasies, making it important that participants in Dual-Listing Transactions designate one member of the financing team (usually the lead underwriter) to assure compliance with the Blue Sky laws of every state in which the securities will be offered.

The task of complying with the various Blue Sky laws became measurably easier with the passage of the National Securities Markets Improvement Act of 1996 (“NSMIA”), which in effect pre-empted all but

⁶ The U.K. Listing Authority will accept financial statements prepared in accordance to U.K. GAAP, U.S. GAAP or international accounting standards and audited in accordance with U.K., U.S. or international auditing standards.

⁷ The term, “blue sky” has its origins in the fact that these laws were originally enacted to prevent the offering and sale of worthless securities, securities that were, in the opinion of some legislators, worth no more than a piece of the “blue sky.”

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the most formalistic requirements of these statutes with respect to securities quoted or to be quoted on the Nasdaq National Market. This pre-emption does not extend to securities quoted or to be quoted on the Nasdaq Small Cap Market.

V. THE CONDUCT OF THE OFFERING

A. *SEC Rules*

As mentioned above, the Securities Act regulates the “offer” as well as the “sale” of securities. The term “offer” is defined very broadly. As early as 1957, the SEC issued a release in which it described a situation where an issuer and its underwriter arranged for the issuance of a series of press releases about the company and its future prospects. The SEC stated that disseminating information “through the device of the press release and the press interview is an evasion of the requirements of the [Securities Act] governing selling procedures.” The SEC’s concern over issuers “conditioning the market” for their securities is often referred to as “jumping the gun” or “gun-jumping.” Basically, companies are not permitted to take any action to promote their securities offering without having gone through the appropriate regulatory processes, at the core of which is the preparation, filing and distribution of a prospectus.⁸

The offering rules apply during the entire time the company is “in registration,” which is divided into three separate periods: (i) the Pre-Filing Period, (ii) the Pre-Effective or Waiting Period and (iii) the Post-Effective Period.

1. Pre-Filing Period

The first stage of being in registration begins when a company first decides to make a public offering of its securities. The SEC has defined

⁸ This is one of the many “gray” areas of the U.S. securities laws, because, while the SEC prohibits actions that amount to “conditioning the market” prior to the filing of a registration statement, the SEC has also stated that it does not want to interfere with the normal flow of information about a company or with a company’s normal business activities.

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this time as “at least” when the company “reaches an understanding with the broker-dealer which is to act as managing underwriter.” At this point a company seeking to do a Dual-Listing Transaction must begin paying special attention to complying fully with U.S. securities laws.

The general principle applicable during the Pre-Filing Period is that the company must proceed in a “business as usual” fashion and should do nothing that might be considered as “conditioning the market” for, or “arousing public interest” in, its securities. Thus, activities such as issuing forecasts or projections or publishing opinions concerning values may be interpreted as unlawful, depending on the circumstances. It is often difficult to draw the distinction between what is permissible during this period and what is not permissible. One applicable principle is that communications should be limited to customary, factual matters and that dealings with the press should be limited as much as possible.

The SEC does permit a company to notify the public about its intention to conduct a securities offering. Rule 135 states that a notice may be published, but that it may contain only limited information, including the name of the issuer, the basic terms of the securities to be offered, the timing of the offering, the manner and purpose of the offering and certain other specified information. Identification of any underwriter for the offering is specifically prohibited.

2. Pre-Effective or Waiting Period

During the Pre-Filing Period, the company will have been preparing a prospectus meeting all the applicable requirements, exclusive of price-related information. Once a registration statement containing this preliminary (or “red herring”) prospectus is filed with the SEC, the Pre-Effective Period begins.

Although the SEC is not authorized to pass on the relative merits of any particular offering, the SEC staff typically will become involved in a Dual-Listing Transaction. The SEC staff will review the registration statement as initially filed to assure compliance with applicable “legal” and “accounting” requirements, and it will then provide written comments to the company. When the comments have been satisfactorily resolved (usually through the filing of one or more amendments to the registration

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statement), the registration statement is declared effective, and the securities may be sold.

While the company waits for the SEC to review the initial filing and to issue its comments, marketing can begin. However, there are important restrictions on this process. In particular, the SEC has stated that “no written offer may be made except by means of a statutory prospectus,” which is a preliminary prospectus that contains all the required information and meets all the other applicable requirements. Thus, writings concerning the offering other than the preliminary prospectus generally may not be used during the Pre-Effective Period.

There is one exception. Rule 134 permits the publication of a “tombstone” advertisement, which contains certain limited information, such as the name of the issuer, the title of the securities, the name of the managing underwriters and the approximate date of the proposed sale to the public. It must also contain the “tombstone legend,” stating that the registration statement for the securities is not effective and that the advertisement does not constitute an offer to sell or the solicitation of an offer to buy the securities. The use of any other written communication during the Pre-Effective Period is unlawful.

Oral communications (which do not include radio or television) are allowed during this period. Therefore, brokers are permitted to place calls to prospective investors, and the underwriters are permitted to invite selected prospective investors to meetings (generally referred to as “roadshows”) during which company officials are available to tell their story and answer questions. In order to comply with SEC rules, however, no written information other than the preliminary prospectuses may be distributed, although slides and videotaped materials may be shown.

The SEC staff typically transmits to the company its initial written comments within approximately 30 days. The length of these comments can be quite extensive, depending on the extent to which the SEC staff perceives that the initial filing complied with all the applicable requirements. It is not uncommon, however, for the SEC staff to request additional disclosure on a number of specific matters or to raise questions concerning the financial statements and footnotes.

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Receipt of these comments is a major event in the progress of the transaction. At this point, the focus of activity shifts from marketing the offering to preparing an amendment to the registration statement that responds to the comments and includes any needed updates. If the comments are brief, the amendment can be prepared with minor difficulty, and the transaction can proceed with little delay. If, on the other hand, the comments are extensive, the job of preparing the amendment may take a substantial amount of time and possibly delay the initial offering schedule. In situations where the SEC staff and the company initially disagree on the proper way to handle a matter raised in the comments, it is not uncommon for conferences to be held with the SEC staff and for multiple amendments to be filed.

Non-U.S. companies enjoy one key advantage over U.S. companies during the SEC review process. The SEC staff will provide comments to non-U.S. companies on a confidential basis. This confidentiality makes the process of seeking SEC approval less risky for non-U.S. companies since a lengthy review process will not prevent the company from announcing and marketing its Dual-Transaction in both the United States and Europe simultaneously.

3. Post-Effective Period

When the text of the prospectus and the other parts of the registration statement have been worked out to the satisfaction of all concerned, the SEC will cooperate with the company and the underwriters so that the registration statement is declared “effective” at a time convenient for the financing schedule.

Once the registration statement is effective, indications of investor interest may be confirmed, and sales of securities may be consummated. Typically, confirmations are sent promptly to investors who have expressed an interest in making an investment, and the transaction is closed with the formalities of issuing the securities and delivering them to the underwriters in exchange for payment of the sales price.

There are several important rules that must be followed during the Post-Effective Period. First, it is unlawful to deliver a security to an investor unless it is “accompanied or preceded by a prospectus.” A

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preliminary (“red herring”) prospectus does not satisfy this requirement. Accordingly, a final prospectus is typically sent to the investor along with the confirmation.

Second, written communications, often referred to as “free writing,” may now be distributed, as long as “prior to or at the same time with such communication a written prospectus . . . [is] sent or given to the person to whom the communication [is] made.” Accordingly, written sales material specifically designed to tell the company’s story may be used to communicate with prospective investors. Of course, this material must be consistent with the prospectus, and each recipient must receive the prospectus “at or prior” to receiving this additional information.

Third, the requirement that a prospectus be delivered along with a security continues to apply to dealers and underwriters (but not to transactions effected on a secondary market such as Nasdaq) for a period of 25 days. Thus, if the company experiences any material developments before the termination of this period, it may have to amend its prospectus and file a post-effective amendment to its registration statement.

4. The Role of the Underwriter — “Due Diligence”

The Securities Act places important responsibilities on the shoulders of the underwriters. In the 1930s, underwriters played an important role in bringing each publicly offered issue to market, and the U.S. Congress thought that imposing specific duties and liabilities upon underwriters would be an effective way to assure the accuracy and completeness of the information that the public would receive.

Thus, underwriters, as well as the company, are liable for misstatements or omissions in the registration statement (under Section 11 of the Securities Act) and for misstatements or omissions in the sale of securities generally (under Section 12(a)(2) of the Securities Act). Both these provisions create defenses to liability, if the underwriters can demonstrate that they “did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.” To make this defense under Section 11, the underwriter must demonstrate that it “had, after reasonable investigation, reasonable ground to believe and did believe” that the registration statement was true and complete.

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Typically, underwriters play an important role in helping the company prepare the prospectus. Moreover, in order to permit them to make these defenses, underwriters typically conduct a due diligence review of the company's affairs and records, including major contracts, existing debt instruments, patents and whatever other documents they deem important to the company's business. In addition, a due diligence meeting is often held, during which the underwriters have the opportunity to pose questions to members of the company's management.

5. Marketing

As stated above, the marketing of a Dual-Listing Transaction cannot begin until a registration statement has been filed with the SEC; any publicity concerning the offering prior to this time may be considered conditioning the market and is impermissible under the gun-jumping rules. However, once the filing has been accomplished, offers may be made using the preliminary ("red herring") prospectus, and oral communications (including telephone calls from brokers to their customers) may be made. Even then, however, the restrictions against general publicity and "free writing" limit the permitted means of publicizing the offering.

The basic concept is that, until the registration statement becomes effective, there are only three vehicles through which the offering can be publicized: (i) the preliminary prospectus, (ii) oral communications and (iii) tombstone advertisements. Forms of writing other than the prospectus (and for this purpose radio and television are considered to be writing) are not permitted. The restrictions imposed by U.S. law are inconsistent with standard practices in many other countries, where it is customary to publicize the offering widely through a broad range of media.

Press Conferences. For example, stories in the press based on communications made by the company or the underwriters have been interpreted by the SEC to constitute impermissible written publicity. Thus, while it is standard practice in many countries to hold press conferences and to distribute briefing materials to publicize an offering, these activities are not permitted in the United States. As a result, until recently non-U.S. companies excluded American journalists from their press conferences outside the United States. In October 1997, the SEC

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recognized the inconsistency between this practice and the practicalities of modern communications and adopted Rule 135e, which lays out conditions under which U.S. journalists may be invited to offshore press conferences. Press conferences in the United States, however, remain inconsistent with SEC rules.

Roadshows. While general publicity is not permitted prior to the effectiveness of the registration statement, events at which company executives meet with a select group of potential (usually institutional) investors have become a standard part of a securities offering. These meetings are known as “roadshows” because the company and its representatives typically take their presentation “on the road” and schedule meetings in several cities. These meetings are carefully controlled so as to qualify as “oral communications” within the meaning of the SEC rules. Thus, while slides, video tapes and other visual aids are often used in these meetings, the only written material distributed is the preliminary prospectus itself.

Research Reports. Another difficult problem that arises under the U.S. securities laws is the use of research reports in connection with public offerings. The SEC has recognized the positive contribution that research reports can make in synthesizing complex information and presenting it in ways that investors can understand more readily than from prospectuses themselves. On the other hand, the SEC is concerned about abuse, since documents that appear to be objective analyses can, and often are, prepared by persons associated with the financing itself and used for marketing purposes. The problem is complicated by the fact that practices in many non-U.S. jurisdictions permit the regular use of research reports in connection with public offerings to generate investor interest. The SEC has taken several steps to alleviate these problems by establishing three safe harbors, permitting the use of research reports under certain conditions. Unfortunately, as in each case the issuer must already be filing reports with the SEC, none of these safe harbors is applicable to a Dual-Listing Transaction. As a result, procedures must be established to assure that any research reports distributed in Europe do not indirectly find their way into the United States.

Internet Web Sites. The maintenance and use of web sites to disseminate information about the company must be carefully controlled

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to avoid violating any of the SEC prohibitions on marketing. These issues are discussed in the final section of this chapter.

B. NASD Rules

The NASD is a regulatory agency that will have a significant impact on a Dual-Listing Transaction. Although it is separate from the SEC, its rules are subject to SEC approval, and it operates under SEC oversight. In a Dual-Listing Transaction, it plays several distinct roles. First, as the association to which every licensed broker-dealer in the United States must belong, it regulates the conduct of the offering and distribution of securities. Second, its rules impose limitations on the underwriting arrangement between the company and its underwriters. Finally, its rules determine whether securities of a particular company may be traded on the Nasdaq National Market, the Nasdaq Small Cap Market or the “Over-the-Counter Bulletin Board.”

1. Listing Standards

In order to be admitted to trading on Nasdaq, a company must meet a number of conditions; some relate to the size of the company and the number of outstanding securities, while others are qualitative, relating primarily to matters of corporate governance.

Quantitative Standards. For non-Canadian foreign issuers, the initial inclusion requirements are: (1) at least 1,000,000 publicly-held shares worldwide; (2) 300 (round lot) holders of record; and (3) three market makers. In addition, the Issuer must have either (i) market capitalization of \$50 million; (ii) net tangible assets of \$4 million; or (iii) net income of \$750,000, in its most recent fiscal year (or two of the three most recent fiscal years). In addition, a company must comply with certain maintenance standards in order to retain its quotation.

Qualitative Standards — Corporate Governance. NASD Rules contain a number of requirements relating to the operation of a company that fall within the category usually referred to as “corporate governance.” Thus, arrangements that provide for “disparate reductions” in voting rights are prohibited, and there are specific requirements relating to provision of information to shareholders, independent directors, audit committees,

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distribution of proxy statements, conduct of shareholders meetings, shareholders' approval right for certain transactions and conflicts of interest. However, NASD Rules specifically provide that these corporate governance rules do not apply if they would "require any foreign issuer to do any act that is contrary to a law, rule or regulation of any public authority exercising jurisdiction over such issuer or that is contrary to generally accepted business practices in the issuer's country of domicile."

2. NASD Business Conduct Rules

NASD Rules contain many provisions designed to assure that each NASD member observes "high standards of commercial honor and just and equitable principles of trade." Several of these rules have direct bearing on a Dual-Listing Transaction.

Free-Riding and Withholding. The NASD rule requiring "high standards of commercial honor" has been interpreted to obligate each member to make a "bona fide public distribution at the public offering price" of securities that "trade at a premium in the secondary market." In other words, in the case of a "hot issue," an NASD member is not permitted to hold securities for its own account, but to sell them and to allow the public to participate in their appreciation in the secondary market. In the case of a global offering, the agreement among underwriters must obligate non-U.S. financial institutions to comply with this basic principle. There are also specific provisions addressing issues such as issuer-directed securities, investment partnerships, hedge funds and persons deemed to have a beneficial interest in an "investment entity."

Corporate Financing Rule. NASD Rules set forth a number of specific requirements with which the underwriting arrangement must comply. In this connection, there are a number of filing requirements, as well as rules that establish limits on the amount of underwriting compensation. "Unreasonable" terms are not permitted.

VI. AMERICAN DEPOSITARY RECEIPTS

Non-U.S. issuers often choose to raise capital in the United States in the form of ADRs. ADRs are negotiable instruments issued by a U.S. bank or other financial institution that represent a certain number of

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securities issued by the company and deposited with the depository. Trading in the United States is effected through trading the ADRs themselves.

ADRs alleviate many technical problems that would be encountered by U.S. investors who have invested in the securities of non-U.S. companies. These problems include:

Transferability. An ADR is transferable on the books of the depository institution. Thus, in order to effect a transfer, it is not necessary to register the transaction on the books of the company's registrar in the home country.

Transfer Taxes. For the same reason, any transfer taxes that would be payable in the home country are avoided.

Bearer Shares. Problems associated with bearer shares are alleviated, including requirements relating to the voting of such shares.

Dividends and Notices. The depository institution acts as the agent for the ADR holders in matters involving the receipt of dividends and notices and the voting of the underlying shares, thereby significantly facilitating each of these types of transactions.

VII. POST-OFFERING CONCERNS

Each class of securities that are listed on a national stock exchange, or traded on Nasdaq, must be registered under the Exchange Act. Such registration triggers important on-going reporting requirements, including, in the case of a foreign private issuer, the requirement that an annual report be filed (on Form 20-F) and that periodic reports be filed (on Form 6-K).

A. *Annual Reports (Form 20-F)*

The SEC rules require reporting companies to file annual reports providing comprehensive disclosure and audited financial statements. For U.S. companies, these reports are filed on Form 10-K and are due within 90 days after the end of each fiscal year. Non-U.S. companies, however,

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are permitted 6 months within which to file annual reports, and the appropriate form is Form 20-F. As discussed above, the Form 20-F requires the reporting of the same types of information as the Form F-1 that the company filed in connection with its Dual-Listing, updated of course to reflect intervening developments.

B. Periodic Reporting (Form 6-K)

Public companies in the United States are required to file quarterly reports and unaudited financial statements on Form 10-Q and interim reports describing certain important events on Form 8-K. Foreign private issuers are not required to file these reports; they are, however, subject to an abbreviated set of periodic reporting rules that, in essence, require the company to file with the SEC and with the NASD information that it makes public, or is required to make public, otherwise.

In the interim between filing its annual reports, the company is obligated to furnish on Form 6-K the following information if such information is material to the company and its subsidiaries:

“ . . . changes in business; changes in management or control; acquisitions or dispositions of assets; bankruptcy or receivership; changes in registrant’s certifying accountants; the financial condition and results of operations; material legal proceedings; changes in securities or in the security for registered securities; defaults upon senior securities; material increases or decreases in the amount outstanding of securities or indebtedness; the results of the submission of matters to a vote of securityholders; transactions with directors, officers or principal securityholders; the granting of options or payment of other compensation to directors or officers; and any other information which the registrant deems of material importance to securityholders.”

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This information must be furnished by the company “promptly” after

“ . . . such issuer (i) makes or is required to make public pursuant to the law of the jurisdiction of its domicile or in which it is incorporated or organized, or (ii) files or is required to file with a stock exchange on which its securities are traded and which was made public by that exchange, or (iii) distributes or is required to distribute to its securityholders.”

Form 6-K deals specifically with the situation where the company has issued a press release or other document in a language other than English. The SEC does not require that English translations be prepared:

“If no such English translations, versions or summary have been prepared, it will be sufficient to provide a brief description in English of any such documents or reports. In no event are copies of original language documents or reports required to be furnished.”

It is of considerable practical importance that the financial statements called for by Form 6-K are interim statements that are filed with a stock exchange or otherwise made public by the company. These statements may be prepared in accordance with the company’s home-country accounting statements and need not include a discussion of “material variations” from, or reconciliations with, U.S. GAAP. It is also important that Form 6-K is not considered to be “filed” for purposes of Section 18 of the Exchange Act, which creates liability for material misstatements or omissions contained in any report filed under the Exchange Act.

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C. Reports of Beneficial Ownership — Schedules 13D and 13G

The Williams Act amended the Exchange Act in 1968 to provide a comprehensive set of rules regulating tender offers. This entire regime, set forth in Sections 13(d)-(e) and 14(d)-(f) of the Exchange Act and the regulations thereunder, is applicable to foreign private issuers and imposes important reporting requirements applicable to beneficial owners of more than 5 percent of a company's stock.

Section 13(d) is intended to give advance warning to a company that a third party is beginning to acquire a substantial shareholding. Under Section 13(d), any person (including a group of people acting together) who, upon the acquisition of an equity security of a class that is registered under the Exchange Act, directly or indirectly, is the beneficial owner of more than 5 percent of that class is required to disclose that fact by filing Schedule 13D within 10 days after the acquisition.

Schedule 13D requires rather extensive disclosure relating to the stockholder's identity and background, the source and amount of funds or other consideration used in the acquisition, the purpose of the acquisition, the stockholder's total equity interest in the company and other information. Schedule 13D must be amended "promptly" if material changes occur in the disclosed information. The SEC has taken the position that "promptly" for purposes of such amendments may, in appropriate circumstances, mean within one business day.

Section 13(g), which was added in 1977, closes some gaps in this regime. It requires any person who is the beneficial owner, directly or indirectly, of more than 5 percent of a class of an equity security to disclose that fact by filing a Schedule 13G. Schedule 13G may also be filed in lieu of Schedule 13D by persons who acquire more than 5 percent but less than 20 percent of a class of securities and who are "passive" investors, *i.e.*, who did not acquire those securities "for the purpose of or with the effect of changing or influencing control of the issuer."

Schedule 13G is much shorter and easier to complete than Schedule 13D. Schedule 13G must be amended within 45 days after the last day of any calendar year in which material changes have occurred in

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the disclosed information (such as a change in the number of securities beneficially owned), and it must be amended more frequently under certain circumstances. Examples of situations in which a stockholder is entitled to file a Schedule 13G rather than a Schedule 13D are: (i) such stockholder's total acquisitions of securities, including the triggering acquisition, within the 12 months preceding the triggering acquisition did not exceed 2 percent of the outstanding securities; (ii) the stockholder falls into one of several enumerated categories of investor; and (iii) the triggering acquisition was made in the ordinary course of business and not with the purpose or effect of changing or influencing the control of the company.

D. NASD Reporting Requirements

Companies with securities traded on Nasdaq are subject to the NASD periodic reporting rules, as well. For the most part, these rules mirror those imposed by the SEC, but all non-U.S. issuers should be aware that these rules are derived from separate authority; that they are separately enforced by the NASD; and that they contain important obligations that are in addition to those reflected in the SEC rules. Generally speaking, these rules are not applicable to foreign private issuers to the extent that they are "contrary to a law, rule or regulation of any public authority exercising jurisdiction over such issuer or that is contrary to generally accepted business practices in the issuer's country of domicile."

However, NASD Rules do establish a number of important obligations that are applicable specifically to foreign private issuers. Thus, for example, foreign private issuers are required:

“Except in unusual circumstances, [to] make prompt disclosure to the public in the United States through international wire services or similar disclosure media of any material information that would reasonably be expected to affect the value of its securities or influence investors' decisions and shall, prior to the release of the information,

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provide notice of such disclosure to Nasdaq.”

In addition, foreign private issuers are required to report certain corporate developments directly to the NASD, including, for example, the adoption of a stock option plan, the change of registrar or transfer agent and “any change in the general character or nature of its business.”

E. Requirements Not Applicable to Foreign Private Issuers

There are several important provisions of the Exchange Act from which foreign private issuers have been exempted by the SEC. These include the proxy solicitation provisions (Section 14 of the Exchange Act) and the short-swing and other insider trading provisions (Section 16 of the Exchange Act).

1. Proxy Solicitation

The U.S. securities laws contain a series of detailed rules relating to the disclosure that public companies must make to their shareholders at the time that they solicit proxies in connection with an annual or a special meeting of shareholders. These rules require, for example, the delivery of an annual report and a proxy statement, each of which must contain certain specified information. Foreign private issuers are exempt from these requirements.

2. Short-Swing and Other Trading Rules

The U.S. securities laws also contain two separate regimes designed to protect the general public against the trading advantages of people who have access to inside information. The first regime is contained in Section 16 of the Exchange Act, which establishes, among other protections, a “crude rule of thumb” that prevents officers, directors and “10 percent stockholders” from realizing profits from short-swing trading, *i.e.*, both a purchase and a sale of the company’s securities within a 6-month period. This regime contains significant reporting requirements, permitting the SEC to keep track of investments made by these “insiders,” and often requires complex analyses of beneficial

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ownership. This Section 16 regime is not applicable to foreign private issuers.

The second insider-trading regime, has been developed principally through judicial interpretations of the anti-fraud provisions of the Exchange Act, including Rule 10b-5. This regime is applicable to foreign private issuers.

F. The Long Arm of Rule 10b-5

In addition to the matters discussed above, there are several other important concerns that arise for publicly traded companies under the U.S. securities laws. Rule 10b-5 makes it unlawful for any person, in connection with the purchase or sale of any security: (i) to employ any device, scheme or artifice to defraud; (ii) to make any untrue statement of a material fact or to omit to state a material fact necessary to make any statement made not misleading; or (iii) to engage in any act, practice or course of business that would operate as a fraud or deceit upon any person.

Through interpretations by the U.S. courts, Rule 10b-5 has come to apply to many situations that most people would not normally associate with “fraud,” but that do involve the dissemination of corporate information or the trading in securities based on an information imbalance: (i) insider trading; and (ii) day-to-day dissemination of information on corporate developments. Because these two subjects relate directly to the day-to-day concerns of officers and directors of U.S. companies, they typically are the impetus for operational guidelines that many U.S. companies establish to keep themselves and their officers and directors out of harm’s way.

1. Insider Trading

The effect of Rule 10b-5 is to make it illegal for anyone with “awareness” of material non-public information about the company to buy or sell any of the company’s securities.⁹ Generally, anyone in possession

⁹ The SEC articulated the “awareness” standard in Rule 10b5-1 in response to uncertainty as to whether trading “on the basis of” material non-public information meant actually (continued...)

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of such material inside information must either disclose it to the investing public (so that all potential buyers or sellers of the company's securities have equal access to this information) or abstain from trading in the company's securities until full disclosure has been made. Because of their obligations to the company concerning non-disclosure of confidential information and corporate policies on who is authorized to make public disclosures, the practical effect of Rule 10b-5 is to prohibit any insider with material inside information from trading in the company's securities.

Furthermore, under Rule 10b-5 an insider may not "tip," *i.e.*, disclose material non-public information about the company or another company to any third party, if it is likely that such third party will trade in the securities of such company. Tipping subjects the insider, and in some cases the recipient of the information, to liability under Rule 10b-5.¹⁰

Virtually any person with access to material non-public information about the company (or another company with which it does business) is considered a corporate insider for this purpose. Examples of such persons are the company's directors, officers, employees, major stockholders, lawyers, accountants, investment bankers, public relations advisors and consultants. In addition, the company itself is an insider and is prohibited from purchasing or selling its own securities if the company has material corporate information which it has not yet publicly disclosed.

Corporate Policies Relating to Insider Trading. To help prevent Rule 10b-5 violations and to help avoid the appearance of impropriety,

"using" inside information or merely "knowing" inside information at the time of the trade. Rule 10b5-1 states that a trade is on the basis of material nonpublic information if the trader was "aware" of the information when the person made the purchase or sale. This rule reflects the view that a trader who is aware of inside information when making a trade inevitably uses such information. Rule 10b5-1 also includes three affirmative defenses which cover situations in which the person can demonstrate that the material nonpublic information was not a factor in her trading decision.

¹⁰ Sections 20A and 21A of the Exchange Act create additional sanctions against insider trading.

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many U.S. companies adopt policies that prohibit trading in the company's securities by all directors, officers and other employees with access to confidential information during (i) the period beginning a substantial time before the last day of each fiscal quarter and ending after quarterly (or annual) earnings have been announced; (ii) any other period when the release of information concerning an important development of the company is expected; and (iii) whenever the company has material information that it chooses — for valid business reasons — not to release.

In this connection, release of material information to the media does not immediately free corporate insiders with knowledge of material non-public information about the company to trade in the company's securities. Insiders are typically advised to refrain from trading until the market has had an opportunity to absorb and evaluate the information.

2. Disclosure of Corporate Developments

As described above, the rules and policies of the NASD establish the basic principle that any material development concerning the company, *i.e.*, a development that is likely to be considered significant by a reasonable investor, should be promptly disclosed to the public.

However, the SEC, the NASD and the courts have recognized that there may be valid business reasons for keeping certain information confidential. Accordingly, many U.S. companies start with the assumption that any material development should be publicly disclosed, but then they carefully evaluate each situation to determine the impact of disclosure. They also analyze issues of timing and how to craft the appropriate language, if and when disclosure is made.

Because the investing public is likely to rely on statements by the company in deciding whether to purchase or sell the company's securities, virtually every public statement by the company or its representatives meets the criterion of being made "in connection with the purchase or sale" of the company's securities, regardless of whether the company is a party to the transaction. As a result, almost any statement made by or on behalf of the company can subject the company to liability under Rule 10b-5.

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As Rule 10b-5 has been interpreted by the courts, there are several “duties” that are relevant to corporate disclosure decisions.

Duty of Material Completeness and Accuracy. If the company elects to issue any public statements or press releases, such statements or releases must be accurate and complete in all material respects. In the case of a possible merger or similar transaction, the test of materiality is the anticipated magnitude of the event, discounted by the likelihood of its occurrence. Such statements or releases may not contain any hyperbole of a nature that may be acceptable in advertising, and they may not unduly emphasize either positive or negative facts or issues to the exclusion of countervailing factors.

Duty to Correct. Under most circumstances, the company has a duty to correct its own disclosure of material information that was inaccurate at the time made. Under the relevant judicial decisions, it is not exactly clear when this duty ends, although there is support for the proposition that it ends when the company’s statement is so remote in time as to have no further effect on the market.

Duty to Update. It is not uncommon for a company to make a public statement containing information that is correct at the time made but that subsequently becomes inaccurate or misleading. In such an event, the company may have an obligation to update the prior disclosure. This is likely to be the case where it is reasonable to expect that investors are continuing to rely on the prior disclosure, *e.g.*, an earlier earnings projection. If the prior disclosure was very recent or if the information is still “live” in the marketplace, the company may have an obligation to update the earlier disclosure. In other circumstances, *e.g.*, where substantial time has passed since the prior disclosure and the prior disclosure was not predictive of future developments, updating the disclosure may not be required.

Corporate Developments. Some of the most difficult disclosure issues relate to whether (and if so, when) public disclosure should be made concerning a prospective corporate development (such as an acquisition of or by the company, or the signing of a large contract) during the discussion or negotiation stage, but prior to the time a binding agreement is actually signed. On the one hand, the news that there is a significant

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possibility or likelihood of such an event would almost certainly be considered significant information by public investors, which argues in favor of public disclosure. However, public disclosure before the transaction is finally agreed upon could jeopardize the negotiations, could result in the company looking foolish if the event does not occur and could prove misleading to investors. Many U.S. companies adopt a policy of not commenting on corporate developments until an agreement in principle has been reached.

A “no comment” policy with regard to prospective developments has several advantages for the company. First, it allows the company to respond to inquiries and rumors in a manner that avoids premature disclosure of a prospective development. Second, it reduces the opportunity for the company to make an inaccurate or misleading public disclosure. Finally, it helps avoid the need to update prior disclosures that could be required where the prior disclosures have become misleading or incomplete as a result of subsequent developments.

The SEC and the NASD generally acquiesce in a company’s practice of not commenting on prospective corporate developments. However, if there is a substantial amount of trading or price movement in the company’s securities as a result of rumors or expectations, the NASD may request that the company make a public announcement concerning the subject of the rumors, and it may even halt quotations of the company’s securities until that announcement is made.

3. Dealing with Analysts and the Media

Members of the financial community and the media contact publicly-traded companies from time to time to obtain various types of information. U.S. companies often talk and meet with such persons, either alone or in groups, and many consider these discussions to be an important part of investor relations. These communications involve some degree of risk, however, because if the company reveals information that it has not made publicly available, it may violate the insider trading rules under the

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duty to correct and duty to update theories.¹¹ Also, the company risks “entangling” itself in the analyst’s report, thereby becoming responsible legally for its entire content. This risk is especially great, if the company comments on, or edits, a draft of a report. There is no clear guidance under the U.S. securities laws on these issues of selective disclosure and entanglement, and dealing with these matters has become something of an “art form.” Here, as with other “gray” areas, it is particularly advisable for a company to seek advice from experienced legal counsel.

VIII. THE IMPACT OF TECHNOLOGICAL DEVELOPMENTS

The internet is an efficient way to communicate with customers and potential investors, to deliver annual reports, proxy material and press releases, and to provide customer service.

The increased use of the internet has created a number of serious problems for securities regulators, who, in the words of former SEC Chairman Arthur Levitt, “lag behind in the race to keep up.” First, the internet knows no physical boundaries, which creates problems for legal regimes founded on geographic concepts of jurisdiction. Second, the internet cannot identify the individual using a particular computer, which creates problems for regulatory principles based on the relative sophistication of investors. Third, the internet provides another medium through which unscrupulous individuals can entice the unsuspecting to part with their hard-earned savings, creating problems for law enforcement officials. Fourth, many current regulations were drafted with paper-based communications in mind and do not translate very well into the electronic world.

¹¹ Selective disclosure of nonpublic information may also violate Regulation FD. Regulation FD provides that when a company, or person acting on its behalf, discloses material nonpublic information to certain enumerated persons (in general, securities market professionals and holders of the company’s securities who may well trade on the basis of the information) it must make public disclosure of that information either simultaneously (if the disclosure is intentional) or “promptly” (if the disclosure is non-intentional). Violation of Regulation FD, however, will not in itself expose the company to Rule 10b-5 liability. Rule 102 provides that no failure to make a public disclosure required solely by Regulation FD shall be deemed to be a violation of Rule 10b-5.

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To its credit, the SEC has attempted to promote the advantages of electronic communications. For example, it has instituted the “EDGAR” system, through which many documents filed with the SEC are available quickly and inexpensively to anyone with internet access.¹² Moreover, it has modified its paper-based regulations in many important respects to permit electronic equivalents to be used. Realizing that any rigid set of rules is likely to become rapidly obsolete, it has substituted a goal-oriented set of general concepts in place of the rather precise paper-based requirements. The SEC has, in essence, told the securities community, “we will be flexible as long as you comply with the basic purposes of the securities laws.”

Unfortunately, the result is a lack of clear regulatory guidance in many areas, which increases the importance of applying sound judgment to the myriad issues raised by this new medium. For Dual-Listing Transactions, in particular, the internet presents many intriguing possibilities, but it also raises significant problems. The paragraphs that follow will discuss some of the more important issues that arise under the U.S. securities laws in connection with the use of electronic media in Dual-Listing Transactions.¹³ Because the SEC has not provided guidance on many of these issues, this discussion is often based on what many U.S. securities lawyers would consider good, conservative advice under the circumstances.

¹² Although electronic filing is now required for most U.S. issuers, foreign private issuers are not subject to the mandatory EDGAR requirements.

¹³ This chapter will not address the myriad issues that are created by electronic media for transactions other than Dual-Listing Transactions. These issues include: use of electronic communications in transactions that are not registered with the SEC, impact of web sites in jurisdictions where specific authorization for a securities offering has not been obtained, proper functioning of bulletin-board based trading systems, and use of electronic communications by broker-dealers.

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A. Advantages of Electronic Communications

There are many advantages to using electronic communications in connection with a Dual-Listing Transaction. For example, creating a prospectus in HTML or PDF and making the prospectus “user-friendly” with more pictures, charts and visual aids can help potential investors better understand the company’s story. The possibilities also include communicating with potential investors by e-mail, reducing the cost of complying with applicable document-distribution requirements and expanding the audience for roadshows by making them available electronically.

B. SEC Interpretative Releases on the Use of Electronic Media

In October 1995 and May 2000, the SEC issued two interpretative releases on the use of electronic media for delivery of prospectuses, annual reports to security holders and other communications required under the Securities Act. The October 1995 release established the principle that a prospectus in electronic format could be used to comply with the prospectus-delivery obligations, as long as it was transmitted in such a way as to achieve “effective communication to the investors.” The SEC identified three factors that should be considered in this connection, but it emphasized that these were not the only relevant factors and that “the ultimate responsibility for satisfying the applicable statutory requirements remains with the issuer . . .” The three factors are (i) notice of delivery; (ii) access to electronic documents; and (iii) evidence of delivery.

To comply with the notice requirement, the electronic medium chosen should provide “timely and adequate notice to investors that information for them is available,” and it should be “equivalent to the notice that would be provided by paper delivery.” As far as access is concerned, the SEC stated that use of a particular electronic medium “should not be so burdensome that intended recipients cannot effectively access the information provided.” Concerning delivery, the SEC said that “informed consent” from the investor to receive the information in a particular format (coupled with the other two factors) would be sufficient, but that other ways would be adequate, such as an electronic “receipt” or a confirmation that the investor had actually downloaded or printed the

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information or consent by telephone. Also, evidence that the investor had access to the document through a “hyperlink” could be used to satisfy the delivery requirement.

Hyperlinks create a special problem in this context. In the October 1995 release, the SEC stated:

“The hyperlink function enables the final prospectus to be viewed directly as if it were packaged in the same envelope as [other material]. Therefore, the final prospectus would be considered to have accompanied [that material], . . . provided that a hyperlink that provides direct access to the final prospectus is included.”

The SEC’s concept that documents linked by electronic hyperlinks are “in the same envelope” eases some problems, but it creates others. On the one hand, this recognition of the effectiveness of hyperlinks eases the delivery problem, because if an investor has received some information, he can be presumed to have received other information connected by a hyperlink. On the other hand, the investor may be deemed to have received information that the company does not intend for potential investors, at least not at all times. In its May 2000 release, the SEC stated that the factors it will consider in determining whether the company is responsible for hyperlinked information are, *inter alia*, the context in which the hyperlink appears (*e.g.*, whether the hyperlink appears in a place, such as embedded in the text, that makes it a close part of the company’s communication), the risk of confusion created by the hyperlink (*e.g.*, whether the company makes clear that the hyperlinked information is provided by itself or a third-party) and presentation of the hyperlinked information (*e.g.*, whether the company’s inclusion of certain hyperlinks serves to provide specific information to the viewer). This problem will re-emerge in connection with electronic communications during the three stages of the securities offering process, discussed below.

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C. Constructing an “Electronic” Prospectus

One of the benefits of creating a prospectus in an electronic format such as HTML or PDF is that pictures, graphs, charts and other visual elements can be added efficiently, permitting the company to communicate more effectively with prospective investors. Moreover, links can be included within the document so that the reader can move easily from one section to another depending on his own preferences.

The prospectus must be available in paper format to satisfy the prospectus-delivery requirements for those investors who do not have electronic access or who simply request a paper version. If the electronic version has many photographs, it may be expensive to print the prospectus in paper form. SEC rules permit the creation and filing of a prospectus that contains a short description of any photograph, thereby permitting the company to save on printing costs, if a paper version with all the photographs is not needed for marketing purposes or otherwise.

D. Use of the Company’s Web Site

Prior to the time it is “in registration,” the company can use its own web site in any way that is otherwise lawful. The SEC has given no guidance on the use of electronic communications by issuers outside of the offering documents themselves. Even if a company has no immediate plans to “go public,” however, it may do so some day, at which point its web site may be subject to close scrutiny. Thus, a company should adopt procedures that will assure that it will not be deemed to have been “conditioning the market”¹⁴ and that the information that it does post on the site is accurate and updated frequently.

¹⁴ In March 1998, the SEC issued a release that addressed the use of internet web sites and securities offerings offshore. In the release, the SEC specifically cautioned against “premature posting of offering information.”

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1. During the Pre-Filing Period

When the company does make a determination to proceed seriously with a Dual-Listing Transaction, it should increase its vigilance against any action that might be deemed to be “conditioning the market.” The SEC stated in its May 2000 release that communications are limited to ordinary-course business and financial information, which may include advertisements concerning the issuer’s products and services, proxy statements, annual reports and dividend notices, press announcements concerning business and financial developments, answers to unsolicited inquiries concerning business matters from analysts and other individuals who have a legitimate interest in the company’s affairs, and responses to security holder inquiries. Any documents containing optimistic or enthusiastic statements about the company should be avoided; the scope and content of the site should be maintained as in the past; and special care should be taken to assure that all information is current and fully accurate. Posting analysts’ reports, or creating hyperlinks to such reports, should be avoided. Finally, any statements mentioning the forth-coming offering should contain no more information than specifically permitted by SEC rules.

2. During the Pre-Effective Period

Once a preliminary prospectus is filed with the SEC, it is permissible to post it on the company’s web site, and there are many advantages in so doing, including making the document readily available to potential investors. However, the web site should be constructed in such a way so as to separate clearly the prospectus (and any other permitted offering information) from the other information on the site. For example, hyperlinks from the prospectus to the other portions of the site should be avoided. Otherwise, an implication may be created that the prospectus incorporates some or all of this information.

The SEC has encouraged issuers to include their corporate web site address in their offering documents, and it has given assurances that information posted on the general corporate site will be not incorporated by reference into the prospectus (as long as it is maintained separate from the offering documents). However, there remains a general concern that any such information may provide a basis for potential liability; therefore,

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it should be reviewed with particular care before being made public in this fashion.

3. During the Post-Effective Period

Once the registration statement has become effective, written information other than the prospectus (“free writing”) may be used, as long as it is “preceded or accompanied by” the final prospectus. Thus, care must be taken in posting any sales literature on the web site to assure that the prospectus itself is clearly accessible, that this literature is in close proximity to the prospectus, and that sufficient hyperlinks are created to permit potential investors to access both with no difficulty. Again, special care should be taken before hyperlinks to research reports are created; otherwise, the company may be held responsible for their contents. Also, dissemination of e-mail may create problems; in one recent case, an internal e-mail message was leaked outside the company, causing a planned IPO to be cancelled.

E. Specific Marketing Issues

In the context of a Dual-Listing Transaction, the internet poses some particularly difficult issues because of the differences in the laws and practices in Europe and those in the United States.

1. Publicity

It is standard practice for participants in a public offering of securities in Europe to disseminate much broader publicity during the “book-building” phase of the transaction (the Pre-Effective Period) than is permitted in the United States. Since information posted on a web site of a European company in connection with such a publicity campaign can be accessed easily by any potential investor in the United States, there is a troublesome conflict between the two legal systems.

In its March 1998 release, the SEC adopted the basic principle that information on a web site maintained outside the United States would be deemed to be communications outside the United States, if they were not targeted at the United States. This release clarifies the applicability of the U.S. securities laws to a number of transactions, including Europe-only

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offers by non-U.S. companies and global offers by non-U.S. companies where the offer in the United States is strictly private. However, the SEC offered little guidance as to how to resolve the conflict between U.S. laws and European practices in the context of a Dual-Listing Transaction. Thus, the ways in which European web-based publicity can be isolated from the U.S. audience, so as to be considered “not targeted” at the United States, will depend on the specific facts of each offering. For example, if the publicity were in a language other than English and if the site were constructed with a screen that asked each visitor for a country of residence and refused access to U.S. residents, a reasonably strong case could be made that the publicity should be considered not targeted at the United States. On the other hand, any publicity that contains information of particular relevance to U.S. residents, such as U.S. tax information or the identification of U.S. underwriters, might easily be deemed to be communications targeted at the United States.

2. Roadshows

Another consequence of the strict U.S. rules concerning publicity during the book-building period is the restrictions put on the electronic transmission of roadshows. As was explained above, these meetings during which company officials make presentations and answer questions from potential investors are required to be “by invitation only” in order to avoid being considered general solicitations. A number of companies have expressed an interest in making video tapes of these meetings available electronically in order to increase the efficiency of reaching potential investors with this information. However, use of this medium creates a risk that the communication would be converted from “oral” (which is permissible) to either “written” or “radio or television” (which are not permissible).

In a series of “no-action letters,” each of which dealt with slightly different fact patterns, the SEC staff has delineated the conditions under which electronic versions of roadshows during the Pre-Effective Period may be made available electronically. Among these conditions are: (i) each potential investor must receive a copy of the preliminary prospectus as filed with the SEC prior to viewing the roadshow; (ii) access must be limited to pre-determined potential investors; and (iii) the roadshow may

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not be copied, printed nor re-transmitted. Other conditions apply depending on the circumstances.

3. State Blue Sky Laws

State Blue Sky laws will not pose a significant problem for a Dual-Listing Transaction if the securities are traded (or to be traded) on the Nasdaq National Market, because of the pre-exemption created by NSMIA in 1996. However, if the securities are to be traded on the Nasdaq Small Cap Market, the NSMIA pre-emption does not apply, and the participants in the transaction must assure themselves that the Blue Sky laws are fully complied with. In 1996, the North American Securities Administrators Association (“NASAA”) passed a non-binding resolution encouraging its members to adopt principles pioneered by Pennsylvania, which provided that the Blue Sky laws in a particular state would not apply to information available on the internet, if several conditions were met. These conditions include: (i) the web site indicates directly or indirectly that the securities are not being offered to residents in that state; (ii) the offer is not specifically directed to any person in that state; and (iii) the securities are not sold in that state. The NASAA approach has been adopted in a majority of the states, but not in all of them. Thus, under certain circumstances, the participants in a Dual-Listing Transaction must pay close attention to complying with Blue Sky laws when posting on the internet information related to the offering.

F. Maintaining the Company’s Web Site

Once it has completed its Dual-Listing Transaction, the company must remain particularly vigilant over the material that is available to the public electronically, because every piece of information available on the internet is being constantly re-published, creating the impression that it remains accurate, even though it may be seriously out-of-date. Thus, for example, if it issues a press release to the usual channels, the company is speaking as of the date of release and only as of that date. However, if it posts the release on its web site, as many companies are doing currently, investors can reasonably conclude that the information remains accurate until it is removed, even if the release contains a date prominently displayed.

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Moreover, a company must address problems of selective dissemination. Regulation FD requires a company to make public any material information it reveals “to certain enumerated persons (in general, securities market professionals or holders of the issuer’s securities who may well trade on the basis of the information.” Posting new information on the company’s web site is not a sufficient method of public disclosure for the purpose of Regulation FD. Posting information on a web site in combination with other disclosure methods, such as issuing a press release through traditional channels and holding an open conference call, however, would probably be enough to constitute effective public disclosure. In late 1998, the NASD proposed to amend its rules to assure that each Nasdaq-traded company maintain a “level playing field” concerning access to information about it. While recognizing that the internet [global] is a “valuable disclosure resource,” it emphasized the importance of companies not making information available on the internet before it is received by the “traditional news services,” such as Dow Jones, Reuters and Bloomberg. The SEC rapidly approved this amendment, stating that, while the internet “represents an effective and timely method for issuers to disseminate information to investors and the general public,” issuers “must use Nasdaq-approved traditional news services regardless of whether [they] post the information on the Internet.”

Issues of selective dissemination also arise in the context of internet “chat rooms.” A company faces a serious question as to whether it should participate in these discussions. For example, a company might think that it should correct any inaccurate information (especially negative information) that may be circulated in this context. Any such participation is risky, however, because it might give the impression that any statement that the company does not correct is completely accurate. Moreover, if it does decide to participate, a company must be careful not to reveal information that has not been released widely to the public. Similar issues arise in the context of responding to e-mail inquiries.

IX. CONCLUSION

A company that makes a public offering in both Europe and the United States will enjoy greater liquidity, better pricing and higher visibility for its securities. One of the most effective ways for a company

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to make such an offering is a Dual-Listing Transaction where the company lists its securities simultaneously on Nasdaq and the LSE.

This chapter describes many of the basic laws and regulations associated with making an IPO in the United States and applying for admission to trading on Nasdaq. Experienced legal counsel can help a company successfully navigate these laws and regulations. Therefore, a company contemplating an IPO in either Europe or the United States should consult with experienced legal counsel in evaluating the suitability of a Dual-Listing Transaction and complying with the applicable rules before and after such a transaction is completed.