Corporate finance briefing

Accessing the US markets

A warmer climate for foreign issuers

For years now, business leaders have argued that the regulatory requirements to be met in order to finance companies in the US, including those imposed by the Sarbanes-Oxley Act and, more recently, by the Dodd-Frank Act, have become overly burdensome. The decline in the number of initial public offerings (IPOs) undertaken by smaller or emerging companies in the US has been particularly dramatic during the last ten years.

The IPO process for foreign issuers

A foreign issuer that is considering accessing the US capital markets must choose between undertaking a public offering in the US, which subjects the issuer to ongoing securities reporting and disclosure requirements, and undertaking a limited offering that will not subject the issuer to US reporting obligations. Despite the regulatory burden described above, a public offering in the US offers distinct advantages for foreign issuers as the US public markets remain among the most active and deepest equity markets in the world.

The Jumpstart Our Business Start Ups Act of 2012 (JOBS Act), which was signed into law in April 2012, liberalises the IPO process in an attempt to encourage (among other things) foreign issuers that qualify as emerging growth companies (EGCs) to pursue IPOs in the US. Broadly, an EGC is an issuer that had total annual gross revenues of less than $1 billion (or the foreign currency equivalent) during its most recently completed fiscal year.

The key measures introduced by the JOBS Act are set out below.

Confidential submission

An EGC may submit a draft IPO registration statement for confidential review by Securities and Exchange Commission (SEC) staff before making a public filing, provided that the initial confidential submission and all amendments are publicly filed with the SEC not later than 21 days before the EGC starts a "road show". This is, in part (as to EGCs), a return to the position that existed before December 2011.

Disclosure

A foreign EGC may elect to provide only two (rather than three) years of audited financial statements and a correspondingly reduced management's discussion and analysis of financial condition and results of operations (MD&A) in a registration statement related to a common equity IPO. Going forward, an EGC may elect to omit selected financial data and MD&A information for any period before the earliest period for which audited financial statements were presented in the IPO registration statement.

Nonetheless, an EGC may choose to provide disclosure for prior periods, for example, for competitive reasons, or to illustrate a trend affecting its business. Also, to the extent that a foreign issuer is already listed and reporting in its home country, information for prior periods may be already published.

Communications

The JOBS Act relaxes certain of the restrictions on communications before and during the offering process. An EGC, or a person acting on its behalf, whether before or after the filing of a registration statement, may gauge market interest in a potential offering by engaging in oral or written communications, on a confidential basis, with certain potential institutional investors.

Research

The JOBS Act relaxes many prohibitions relating to research. In particular, investment banks may publish and distribute research reports about an EGC that may be conducting an IPO either before filing the IPO, during the IPO, or immediately following it. The research report will not be deemed to constitute an "offer", even if the broker-dealer publishing the report is participating, or will participate, in the IPO.

Governance

An EGC will be able to defer its compliance with various governance requirements. A domestic or foreign EGC will not be subject to the requirement for an auditor attestation of internal controls under the Sarbanes-Oxley Act. Also, an EGC will not be required to comply with any new or revised financial accounting standard until the date that such accounting standard becomes broadly applicable to private companies. An EGC will be subject to a transition period for any audit firm rotation required by the Public Companies Accounting Oversight Board, and any supplemental audit report information requirement, unless the SEC determines that such requirement is necessary and appropriate for investor protection.

Exempt offerings

Given the registration requirements that apply to issuers that register their securities with the SEC, many foreign

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issuers choose to access the US capital markets through targeted financings which are exempt from the registration requirements of US securities laws. Likewise, foreign private issuers that are already US reporting companies may choose to rely on exempt offerings to raise additional capital.

The JOBS Act requires that the SEC to make rules to relax the prohibition on general solicitation or general advertising in connection with offerings made under:

- Rule 506 of Regulation D (Rule 506) (*see box "Exemptions for foreign issuers"*), provided that the issuer takes reasonable steps to verify that all purchasers in the offering are accredited investors.

- Rule 144A of the Securities Act of 1933 (Securities Act) (Rule 144A), provided that all purchasers are verified to be qualified institutional buyers for the purposes of Rule 144A.

Cross-border private placements

Many foreign issuers that are not US reporting companies rely on institutional debt placements as a cost-efficient method of financing. The issuers in these institutional debt offerings generally rely on section 4(2) of the Securities Act (section 4(2)), although the offerings may also be conducted in reliance on Rule 144A. The JOBS Act does not amend section 4(2), so the issuer must decide whether the transaction will be conducted in reliance on Rule 506 (to take advantage of the additional flexibility to use general solicitation) or in reliance on section 4(2), in which case, no general advertising or general solicitation may be used.

Rule 144A/Regulation S offerings

The relaxation of the prohibition on general solicitation in the context of a Rule 144A offering may be helpful to foreign issuers. However, many Rule 144A offerings include a contemporaneous Regulation S of the Securities Act (Regulation S) offering component for sales to non-US persons.

Exemptions for foreign issuers

Commonly-used exemptions from the registration requirements of US securities laws include:

- Rule 506 of Regulation D, which permits issuers to sell their securities in a private placement to an unlimited number of accredited investors, provided that issuers comply with the general requirements of Regulation D. (Regulation D is a Securities and Exchange Commission rule which provides issuers with a safe harbour from the registration requirements of the Securities Act of 1933 (Securities Act)).

- Section 4(2) of the Securities Act, which provides a private placement exemption and is available to an issuer even if it fails to satisfy the criteria of Regulation D.

- Rule 144A of the Securities Act, which provides an exemption from the registration requirements for resales of certain securities in the US to certain institutional buyers.

- Regulation S of the Securities Act, which provides a safe harbour from the registration requirements of the Securities Act for offers and sales of securities outside the US where certain conditions are fulfilled.

It is not clear whether the additional flexibility for offering communications applies to combined Rule 144A/Regulation S offerings.

PIPE transactions

US reporting companies often rely on private placement in public equity (PIPE) transactions, to raise additional capital when the public markets are not hospitable. Typically, a PIPE transaction will be structured as a section 4(2)/Regulation D placement of securities. To the extent that the issuer is relying on Rule 506, it may now be able to take advantage of the greater flexibility for communications; however, should the issuer fail to meet the conditions for the Regulation D safe harbour, if it has engaged in general solicitation, it likely will not be able to rely on the section 4(2) private offering exemption.

Generally, an issuer will want to avoid premature public disclosures relating to a proposed PIPE transaction, until the issuer has entered into definitive purchase agreements with investors. As a result, the issuer may not avail itself of the ability to engage in broader communications and will likely choose to enter into confidentiality undertakings with potential PIPE purchasers, and defer a public announcement.

Regulation A

The JOBS Act amends section 3(b) of the Securities Act, which provides an exemption from registration for certain smaller public offerings (up to $50 million in securities within a 12-month period). There are no restrictions on the use of general solicitation or general advertising. The issuer may solicit interest in the offering before filing any offering statement with the SEC, subject to any additional conditions or requirements that may be imposed by the SEC. The SEC may need to revise Regulation A to implement the changes to section 3(b)(2). Existing Regulation A is available only to issuers organised in the US and Canada. It is not clear whether a revised Regulation A would be available to other foreign issuers.

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