Tapping the US Capital Markets through American Depositary Receipt Programs

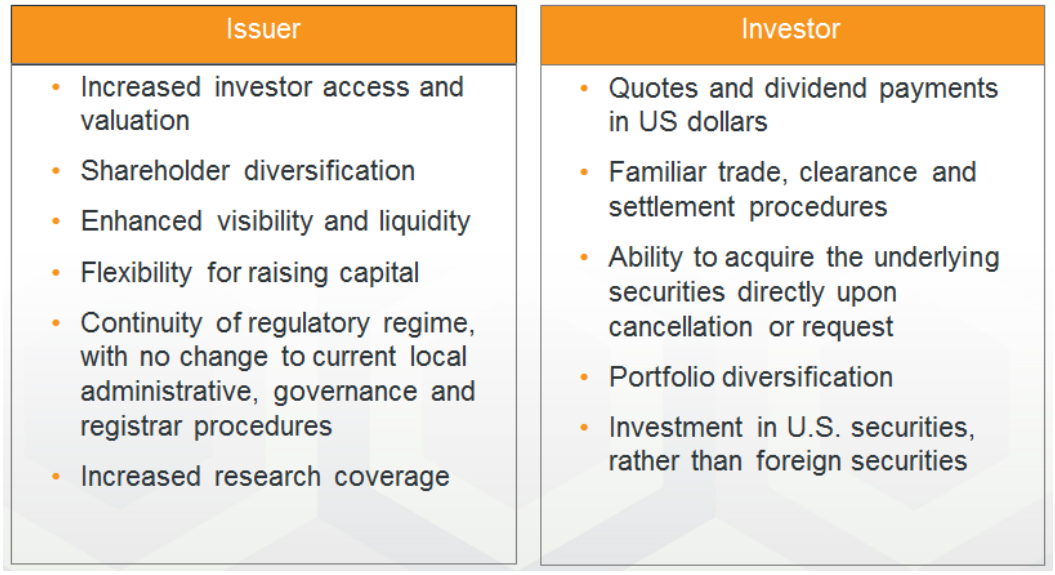
American Depositary Receipts, or ADRs, facilitate trading of foreign securities in US markets by creating instruments that represent ownership of a foreign company's equity or debt securities. Use of ADRs can significantly broaden a foreign company's investor base because it is often difficult for investors in the US to otherwise access securities listed on foreign exchanges.

US depositary banks issue ADRs to evidence ownership of underlying securities that they hold as custodian. ADRs are denominated in US dollars and are traded like other domestic securities, either on an exchange or over-the-counter. Depositary banks periodically transfer any dividends or distributions from the securities to ADR holders in US dollars. Foreign companies also have flexibility as to the number of securities underlying each ADR, with ADRs representing anything from a fraction of an underlying security to several underlying securities. ADR holders may be able to access the underlying securities, either through cancellation of the ADR facility or by request.

Foreign companies and US investors benefit from many advantages that ADRs offer, including:

- Expanded access to the deep institutional investor base in the US;
- Favorable pricing and valuation recognition as a result of increased analyst coverage and higher levels of liquidity in the US;
- Minimum impact to local administrative, governance and registrar procedures to which the company is subject in their country; and
- Ability to use ADRs as a currency for M&A, as well as for employee retention.

Some additional benefits to issuers and investors are highlighted in the table below. Below is a FAQ on ADR programs.



Common Questions about ADR Programs

GENERAL

Q: Many foreign companies that are public already in their home country often have in place in the United States a so-called sponsored Level 1 ADR program, a listed Level 2 ADR program on the NYSE/Nasdaq, or an unsponsored Level 1 ADR or a GDR program. What are these and what are the basic differences between these programs from a legal perspective?

A: ADRs may be "sponsored" or "unsponsored." Sponsored ADRs are those in which the non-U.S. company enters into an agreement directly with the U.S. depositary bank to arrange for recordkeeping, forwarding of shareholder communications, payment of dividends, and other services. An unsponsored ADR is set up without the cooperation of the non-U.S. company and may be initiated by a broker-dealer wishing to establish a U.S. trading market.

Level 1 ADR programs establish a trading presence but may not be used to raise capital. It is the only type of facility that may be unsponsored and, as a result, may be traded only on the over-the-counter market (not a national exchange such as NYSE or Nasdaq).

Level 2 ADR programs establish a trading presence on a national securities exchange but may not be used to raise capital. At this level and above, the issuer is required to

file reports with the SEC, prepare financial statements in accordance with GAAP or international financial reporting standards, and comply with Sarbanes-Oxley.

Level 3 ADR programs may be used not only to establish a trading presence, but also to raise capital for the foreign issuer. Issuers conducting a U.S. public offering would establish Level 3 programs.

A Global Depository Receipt (GDR) is similar in concept to an ADR. GDRs represent bank certificates issued in more than one country for shares in a foreign company.

Q: When talking about registration with the SEC, we also hear that companies with a L1 program need to be "blue skyed". What does that mean for them?

A: As a general rule, issuers need to observe the securities laws of nearly every U.S. state (colloquially named "blue sky" laws), in addition to the federal securities laws. Under many circumstances, federal securities laws pre-empt state blue sky laws so that only compliance with the federal law is necessary. One of those circumstances applies with respect to securities listed on a national exchange (e.g., NYSE, Nasdaq). Because national exchanges require at least a L2 program, unsponsored and L1 programs are not pre-empted by federal law and therefore must observe blue sky requirements.

Q: Under the law in the United States, ADR issuers are referred to as "FPIs" – foreign private issuers. I understand "foreign" and I understand "issuer" but why "private"?

A: A "foreign issuer" includes a foreign government, but a "foreign private issuer" requires that the issuer is not a foreign government, among other things. In short, the definition is intended to distinguish governmental entities rather than publicly-traded entities.

Q: Recently a biotech company contacted us wanting to list an ADR. Their headquarters are in the United States. Can they still list an ADR as an FPI? Can you elaborate?

A: Technically yes, but it may be a bit difficult. An FPI is defined as an entity incorporated or organized under the laws of a jurisdiction outside of the United States unless:

- *more than 50% of its outstanding voting securities are directly or indirectly owned of record by U.S. residents; and*
- *any of the following applies:*
  - *the majority of its executive officers or directors are U.S. citizens or residents;*
  - *more than 50% of its assets are located in the United States; or*
  - *its business is administered principally in the United States.*

A factual analysis would need to be made as to where the issuer's assets are located and where their business is administered principally. Even if the issuer is incorporated in a jurisdiction outside the United States, having its headquarters in the United States would likely lead to the assumption that the issuer's business is principally administered in the United States, but if the issuer is able to demonstrate otherwise, and assuming that the other tests are properly satisfied, then the issuer could still qualify as an FPI.

It is important to highlight that it is not necessary to be an FPI to list ADRs. Noted above are some of the benefits of FPI status (e.g., reduced disclosure, can use home country rules, use of International Financial Reporting Standards, or IFRS, etc.), but a foreign organized issuer that is not an FPI may also list ADRs. So, even if a foreign issuer has its headquarters in the United States and is subject to the full domestic US reporting regime, it may choose to employ ADRs (e.g., if the securities settlement process in its home country is not compatible with the US). Similarly, foreign issuers headquartered outside the United States hypothetically might not list ADRs if they're actually organized as a domestic US corporation, e.g., in Delaware, where traditional securities are offered and thus a direct (non ADR) listing is easy to do.

Q: A common question we often get: What's the difference between an ADR and an ADS – are these terms interchangeable?

A: ADRs (American Depositary Receipts) are receipts issued by U.S. depositary banks evidencing ownership of ADSs (American Depositary Shares). ADSs are the shares of the foreign issuer that are listed and traded on a U.S. exchange. ADSs can represent any number of original shares of the foreign issuer, which may be called "ordinary

shares", "common shares", "common stock" or other names, depending on the jurisdiction in which the foreign issuer is organized.

Q: Can any company headquartered outside of the United States list an ADR?

A: If the company is organized under foreign law, then it can consider listing ADRs.

Q: Are there any benefits for a company coming from a foreign country to list an ADR rather than pursuing a direct listing from a legal perspective?

A: ADRs may be utilized for a variety of reasons, oftentimes to facilitate holding and trading in foreign companies that investors in domestic companies are accustomed to. Foreign securities sometimes were available only in bearer form, making it difficult for U.S. shareholders to receive dividends and for the issuer to demonstrate it had sufficient U.S. shareholders to qualify for listing. Sometimes foreign rules may require inconvenient transfer procedures, whereas ADRs may be transferred through book-entry procedures in the same manner as domestic shares. Certain countries may require investors to register with the securities regulator or central bank prior to investing in a local company; ADRs permit the custodian to be the registrant instead.

Q: Issuers often want to know who their beneficial shareholders are – is there a legal way to force them to disclose themselves?

A: Investors in foreign private issuers still remain subject to Section 13 reporting (though are not subject to Section 16 reporting). Through review of public filings, foreign issuers can often learn information about their largest holders to a similar degree as domestic issuers. Foreign issuers, like domestic issuers, may also obtain ownership information on smaller shareholders through a broker search or a Non-Objecting Beneficial Owner, or NOBO, request.

Q: How does having an ADR program affect a company's risk of being sued by shareholders in the United states? Does the risk change in sponsored versus unsponsored programs? And is it different for a FPI with a home listing only even if company representatives come to the United States regularly for investor

meetings? And one more question – does it make a difference if I sell my products in the United States?

A: For sponsored ADR programs, the full suite of federal securities laws apply, including the anti-fraud and other provisions that give rise to potential liability in the United States. For an unsponsored program, it would be more difficult (but not impossible) for a U.S. court to find jurisdiction.

If an FPI does not list its securities in the United States at all, then, similar to an unsponsored ADR program, the federal securities laws would be less likely to apply. The issue again would be whether the U.S. courts could find jurisdiction. While this is not a full analysis of jurisdiction, the fact that company representatives come to the United States for meetings and/or sell products in the United States, may create more links to the United States allowing for a court to find that sufficient jurisdiction exists to allow lawsuits to move forward.

Q: Can I use an ADR program as a vehicle for my employee stock programs?

A: Yes. Companies can set up their Employee Equity Incentive Programs to issue their ordinary shares, ADRs or a combination of both. Having a Level 1 ADR Program allows a foreign private issuer to set this up, where employees can receive ADRs rather than ordinary shares, which may be difficult to trade in the U.S. market. It is important that, unless the ADRs are listed under the Securities Act (Level 2 or Level 3 programs), an FPI ensure it takes advantage of various exemptions from registrations when setting up these plans so as to avoid being required to register and list the ADRs under the Securities Act.

Q: The IR professionals in our audience regularly meet with investors. They are exempt from Reg FD in the United States, but do they have other obligations around disclosure?

A: It is true that Reg FD does not apply to foreign private issuers, but home country jurisdictions may have similar or related rules, particularly for issuers that are dual-listed in the United States and in their home jurisdiction. In addition, as a matter of good corporate governance and disclosure practices, many foreign issuers voluntarily adhere to the principles of Reg FD.

PROXY

Q: How do ADR holders vote? Can they attend AGMs?

A: ADR voting in practice is mostly a matter of contract between the issuer and the depositary under the depositary agreement. Generally depositary agreements provide that ADR holders may instruct the depositary to vote the ADSs underlying their ADRs (as discussed below). The depositary agreement may also provide that ADR holders may attend AGMs if they provide the issuer with advance notice; however, they will be unable to vote at the AGM.

Q: Do foreign private issuers have to distribute proxy material to ADR holders?

A: FPIs must adhere to their home country laws with regards to the distribution of proxy materials to ADR holders. Additionally FPIs can contract with their depositary with regard to the distribution of proxy materials to ADR holders, but they are not required to do so.

When arrangements are made pursuant to the depositary agreement, the proxy materials distributed or made available to ADR holders generally include a voting card, a notice of meeting and agenda, a shareholder's letter, and the annual report with the financial statements. Increasingly, only the voting card is mailed, with the other materials made available through the issuer's website. An issuer can contractually agree that its depositary will distribute the proxy material to the registered holders, receive and tabulate the votes and submit the voting results to the custodian and the issuer.

Q: In the United States, the SEC has disseminated proxy rules. Are FPIs obligated to follow these proxy rules?

A: Foreign private issuers are generally not subject to the same proxy rules as domestic issuers. Home country rules generally govern voting by shareholders of a foreign private issuer.

Q: Are there ways for investors in ADRs to request or require a proposal to be added to a proxy?

A: Applicable country local laws set out how investors of ADRs may request or require a proposal to be added to a proxy.

Q: Proxy Access has become a big issue in the United States. Should ADR issuers be paying attention even if they are not obligated to follow these rules? Is Proxy Access a global issue?

A: Foreign issuers, particularly those who have completed public offerings in the United States should be cognizant of shareholder access issues. For many foreign issuers, the U.S. market is their largest or principal trading market, and where their largest and most influential shareholders are located.

Q: I want to protect my company from shareholder activism. Can I use the depositary agreement as some form of protection?

A: Takeover defences are typically enshrined in an issuer's organizational documents, and are intended to discourage, delay or prevent efforts by shareholders to effect changes in management or ownership of an issuer. We have not encountered an issuer using its depositary as an anti-takeover defence, and suspect that a depositary would be unwilling to be used in such a manner.

Q: Can you explain what a discretionary proxy is? There are different ways to have a discretionary proxy – can you highlight what they are?

A: Generally, a depositary agreement will provide that if the depositary has not received instructions from the ADR holder with respect to a matter and an amount of ADRs on or before a specific date, the depositary may deem that the ADR holder instructed the depositary to give a discretionary proxy to a person designated by the company to vote that amount of deposited shares.

The depositary agreement may contain carve outs to this including: that no instruction shall be deemed given with respect to any matter as to which the company informs the

depositary that (x) the company does not wish a proxy given, (y) substantial opposition exists or (z) the matter materially and adversely affects the rights of holders of shares.

Q: Is there a downside in using a discretionary proxy? Any legal risks?

A: There are minimal downsides to using a discretionary proxy. In fact, it is generally advantageous for an issuer to have a discretionary proxy in order to avoid having a block of un-voted shares, which can prevent essential resolutions from being passed (such as approving annual accounts).

NEW TRENDS IN THE MARKET

Q: The Jobs Act was designed for U.S. companies, but we have seen a number of ADR issuers raise capital through the Jobs Act. First – what is the Jobs Act and who can access capital through this route?

A: The JOBS Act (and later the related FAST Act) was intended to facilitate capital-raising activities by emerging companies by conferring certain benefits such as reduced disclosure requirements and a confidential SEC review process. The JOBS Act created a class of "emerging growth companies" ("EGCs") that are eligible to take advantage of these benefits. Companies may be EGCs if they had annual gross revenues of less than $1.07 billion during their most recent fiscal year and did not issue more than $1 billion in non-convertible debt during the prior three years. Foreign private issuers can take advantage of JOBS Act benefits (in addition to their own benefits).

Q: If an FPI is already a public company in the United States, can they subsequently do an offering under the JOBs Act?

A: Existing public companies in the United States can take advantage of JOBS Act benefits (not only offering-related but also related to ongoing reporting), but only so long as their EGC status is maintained. EGC status can be maintained for up to five years post-IPO, but can be lost earlier if thresholds related to gross revenue or issuance of non-convertible debt or public float are exceeded. An issuer that went public before December 9, 2011 would not be considered an EGC.

Q: Anything new on the Sarbanes-Oxley Act?

A: FPIs that register securities under the Securities Act or with securities listed on a national securities exchange are subject to the requirements of the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act"), which was enacted in response to a series of corporate scandals in the United States. The Sarbanes-Oxley Act affects all SEC reporting companies, as well as any company that has publicly filed a Securities Act registration statement that has not yet become effective but that has not been withdrawn.

Pursuant to Section 302 of the Sarbanes-Oxley Act, in connection with the filing of an annual report on Form 20-F, the CEO and CFO of a foreign issuer must certify, among other things, that he or she has reviewed the report, that based on his or her knowledge, the report contains no material misstatements or statements made misleading by the omission of material facts and that based on his or her knowledge, the financial statements and other financial information fairly present in all material respects the financial condition, results of operations and cash flows of the issuer as of, and for, the periods presented in the report.

Additionally, pursuant to Section 906 of the Sarbanes-Oxley Act, in connection with the filing of an annual report on Form 20-F, the CEO and CFO of a foreign private issuer must certify that the report fully complies with the requirements of Section 13(a) or 15(d) of the Exchange Act (as applicable) and that the information contained in the report fairly presents, in all material respects, the financial condition and results of operations of the issuer. False certifications may be subject to criminal penalties.

The Sarbanes-Oxley Act requires that the SEC mandate that all companies (including foreign private issuers) listed in the United States have a fully independent audit committee. "Independent" in this context, as the SEC has defined the term in Rule 10A-3 under the Exchange Act, means that no member of the audit committee may be an "affiliated person" of the issuer or any subsidiary of the issuer, apart from his or her capacity as a member of the board of directors or any board committee, and may not accept any consulting, advisory or other "compensatory fee" (including fees paid directly or indirectly) from the issuer or any of its subsidiaries, other than in his or her capacity as a member of the board of directors or any board committee (including the audit committee).

The Sarbanes-Oxley Act also mandates certain disclosures in annual reports relating to corporate governance practices, namely whether the issuer's audit committee includes an "audit committee financial expert," whether such person is "independent" and whether or not an issuer has adopted a code of ethics for its CEO and senior financial officers regarding their conduct with respect to the business of the issuer. A U.S.-listed foreign private issuer must disclose whether its audit committee financial expert is independent, as that term is defined by the U.S. securities exchange or U.S. securities association rules applicable to that issuer. A foreign private issuer not listed or quoted in the United States must disclose the independence of its audit committee financial expert (if it has one) using any of the exchange or association definitions that have been approved by the SEC.

In addition, a foreign private issuer listed on the NYSE must disclose any significant ways in which its corporate governance practices differ from those followed by U.S. companies under the NYSE listing standards. Foreign private issuers must disclose these differences in their annual report on Form 20-F. Similarly, a foreign private issuer listed on Nasdaq must disclose in its annual report on Form 20-F each corporate governance requirement applicable to Nasdaq-listed companies that it does not follow and describe the alternative home-country practice followed in lieu of such requirement.

The Sarbanes-Oxley Act further imposes a number of other duties on, and prohibitions with regard to, the conduct of issuers. The Sarbanes-Oxley Act, among other things, (i) imposes duties on an issuer's lawyers (including in-house lawyers) to report suspected violations of securities laws or fiduciary duties up-the-ladder, including, in certain circumstances, to the issuer's board of directors, (ii) prohibits any issuer, directly or indirectly, from extending or maintaining credit or arranging for the extension of credit, in the form of a personal loan, to or for any director or executive officer of that issuer, (iii) requires the reimbursement to the issuer of incentive or equity-based compensation paid to CEOs and CFOs in the 12 months following the filing of a financial document subject to restatement as a result of "misconduct" and (iv) prohibits officers and directors, or any other person acting under their direction, from taking any action to fraudulently influence, coerce, manipulate or mislead an issuer's independent auditors for the purpose of rendering the issuer's financial statements materially misleading.