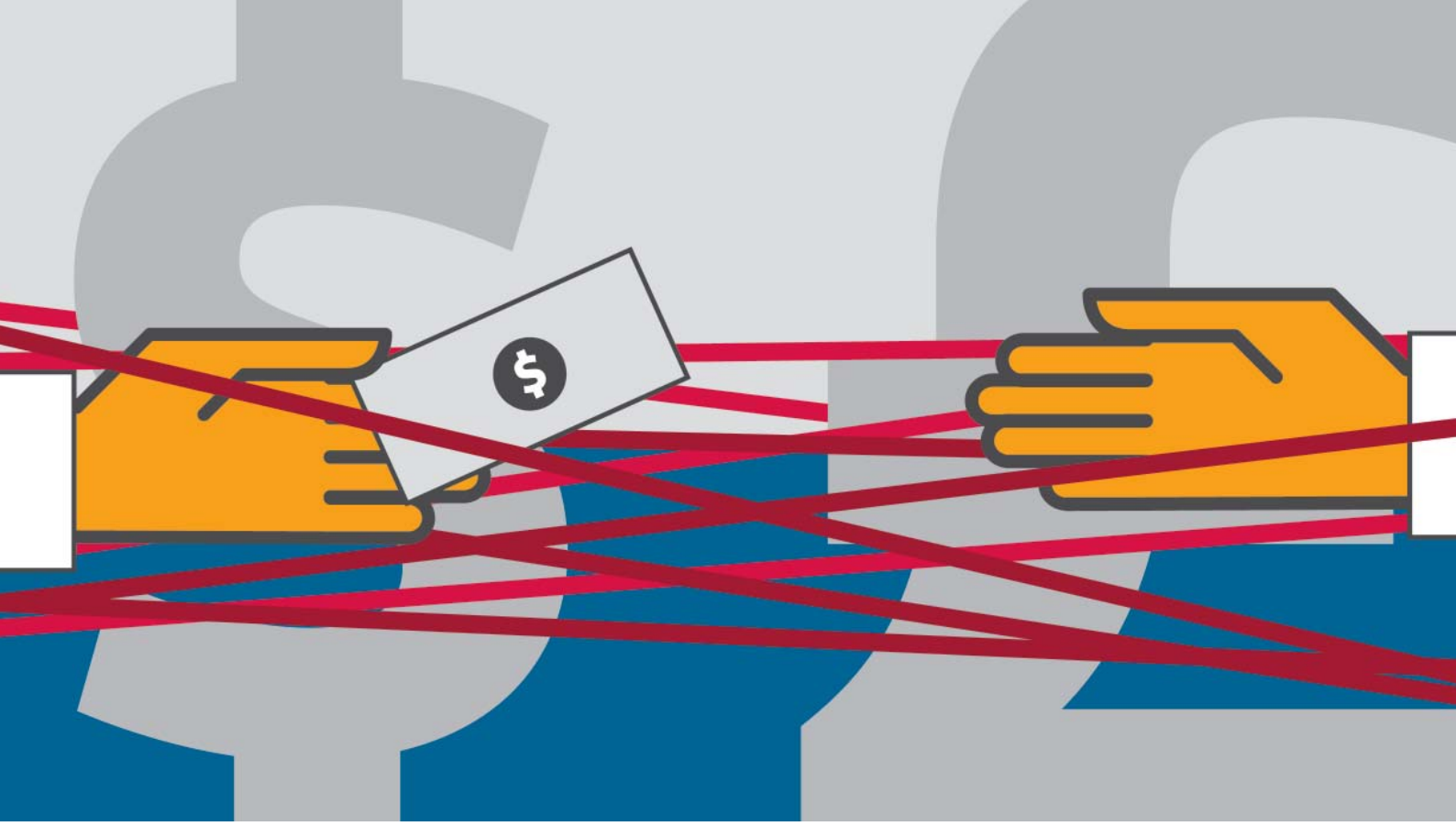


FOLLOW-ON OFFERINGS
US PUBLICITY CONSIDERATIONS

Peter Castellon of Proskauer Rose (UK) LLP and Mark Bergman of Paul, Weiss, Rifkind, Wharton & Garrison LLP look at the US publicity considerations for listed companies conducting follow-on offerings in the context of two scenarios.

How and when (and when not) to communicate information to the markets is one of the fundamental considerations that should be addressed early on by an issuer and its underwriters once the issuer decides that it will, or is reasonably likely to, access the capital markets. The publicity considerations for companies that are already listed and expect to conduct a follow-on, or secondary, offering differ from the publicity considerations for companies that are conducting their initial public offerings (IPOs).

By definition, listed companies must consider their existing public disclosure obligations, whether under the listing rules or the market abuse rules, as well as the fact that they have a public shareholder base and interact through their investor relations or the office of the chief financial officer with existing investors, potential investors and market participants on a regular basis. Shutting down all or most public statements is simply not a viable option.

This article addresses the publicity considerations for various different forms of communications in two scenarios:

- An English plc with shares listed only on the Main Market of the London Stock Exchange that is conducting a follow-on offering, such as a placing or rights offering, which is extended into the US on a private basis to qualified institutional buyers (QIBs).
- An English company with a dual listing, with shares listed on the London Stock Exchange as well as on a US securities exchange, that is conducting a follow-on offering outside the US under Regulation S (Regulation S) of the US Securities Act of 1933, as amended (Securities Act) and in the US on a registered basis.

The considerations discussed below generally will apply to any listed or dual-listed European company.

WHY RESTRICT PUBLICITY

Securities that are offered and sold in or into the US must either be registered with the US Securities and Exchange Commission (SEC) or offered in a transaction that is structured under an exemption or exclusion from the registration requirements of the Securities Act. In contrast to most other jurisdictions, the securities laws in the US apply to each leg of a securities transaction, and apply not only to initial issuances but also to subsequent issuances, and resales. The non-US portion

of an offering frequently will be structured to comply with Regulation S. Companies listed only on the London Stock Exchange will typically extend the offering into the US on a private basis to QIBs. Companies with a dual listing, being unable as a technical matter to rely on Rule 144A of the Securities Act, typically will extend their offerings into the US on a registered basis.

Issuers and their intermediaries need to consider restrictions on publicity for various reasons. In the case of exempt transactions, restrictions on publicity will help to ensure that the private character of the offering. In the case of a registered transaction, restrictions on publicity are necessary to avoid so-called gun-jumping concerns. The SEC has a broad interpretation of what constitutes an offer, and offers can only proceed once a registration statement has been filed.

Restricting publicity can also be important in order to reduce the likelihood that an investor will later claim that it relied to its detriment on the publicity rather than on a prospectus. If nothing else, the prospectus has the benefit of containing risk factors, which discrete announcements and other public statements will not. In the US, violations of the securities laws triggered by improper publicity at the very least give rise to rights of rescission. It is therefore important that issuers and their intermediaries are aware of, and follow, the publicity guidelines that will be prepared for the offering.

ENQUIRIES

A public company will receive enquiries from a variety of sources during the ordinary course of its business, which might coincide with the launch of an offering, and will likely receive enquiries following the announcement of a follow-on offering. The likelihood of enquiries is increased if the markets are focused on the company's need for liquidity; for example, if it is running into financial difficulties.

Shareholder enquiries

A UK-only listed company should be able to answer non-offering related questions that it receives from a shareholder before an offering is announced in accordance with the usual restrictions under the listing regime and the market abuse regime.

Where questions relate to any potential offering that has not yet been announced, there should be a script for any spokesperson to use that sets out the appropriate answers, for which the general response will be "no comment". Shareholder questions may be prompted, for example, by concerns regarding financial difficulties that the upcoming but unannounced offering is intended to address. Once the offering has been announced, the company can answer factual questions related to the offering, provided that the answer is consistent with, and limited to, information that is contained in any formal public announcement of the offering that has been made.

In the case of an offering by a dual-listed company, the offering should be announced through a press release that meets the conditions of Rule 134 of the Securities Act (*see box "Rule 134"*). Shareholders posing questions should be directed to the announcement and no further additional information should be provided.

Rule 134

Rule 134 of the US Securities Act of 1933, as amended, permits press releases in connection with registered US offerings, provided that the information contained in it is limited to some or all of the following:

- Limited factual information about the company, including its name, the address, telephone number and email address of the company's principal offices and point of contact for investors, the company's country of organisation and the geographic areas where it conducts its business.
- The full title and expected or final amount of the securities being offered.
- The preliminary or final subscription ratios and subscription price of the securities being offered.
- A brief description of the general business of the company, including the general type of services, the principal products and the segments in which the company conducts business.
- A brief description of the intended use of proceeds of the offering, including very limited information regarding any transactions to be entered into in that respect.
- The contact information of the issuer of the press release and a statement as to whether that person is participating or expects to participate in the offering.
- Details relating to the underwriting arrangements for the offering.
- The names of the underwriters and their additional roles, if any, within the underwriting syndicate.
- The anticipated schedule for the offering, including the dates and times of the offering, and the closing and settlement dates.
- A description of the procedures by which the underwriters will conduct the offering as well as instructions relating to participation in the offering and information relating to the availability of any investor presentation.
- Any statement or legend required by any applicable law or regulation.
- The exchanges on which the securities being offered will be listed and the ticker symbols.

The press release must also include the name and address of a person from whom the US prospectus may be obtained when it is available, which is typically a US representative of one of the underwriters.

Non-shareholder enquiries

A UK-only listed company should be able to answer non-offering related questions that it receives from potential investors that are not current shareholders by answering with factual business information.

At any time during the offering process, Rule 168 (for SEC-reporting companies, such as a dual-listed company) and Rule 169 (for non-SEC reporting companies) under the Securities Act are, taken together, available as a non-exclusive safe harbour permitting the communication of regularly released factual business information. Factual business information is information that does not relate to the offering, is not released or disseminated as part of the offering and is limited to:

- Actual information about the company, its business or financial developments or other aspects of its business.
- Advertisements of, or other information about, the company's products or services.

To qualify for the safe harbour, the following conditions must be met:

- The company must have previously released the same type of information in the ordinary course of its business. There must be some track record of releasing that particular type of information, although a single previous release of information will suffice.
- The timing, manner and form in which the information is released or disseminated must be materially consistent with past practice.
- The information must be intended for persons, such as customers or suppliers, other than in their capacities as investors or potential investors.
- Only employees or agents who have historically provided this information may provide the information.

Securities analysts

Either company can speak to securities analysts that cover it in relation to both the offer and non-offer matters, and those analysts can publish research under Rule 139 of the Securities Act (*see feature article "Rule 139 of the US Securities Act: research reports", www.practicallaw.com/w-010-5583*).

Rule 135e

Rule 135e of the US Securities Act of 1933, as amended (Securities Act) (Rule 135e), provides a safe harbour for press releases and other press-related materials in connection with an offering structured under Regulation S of the Securities Act with or without a concurrent offering to qualified institutional buyers. Inserting the legends below (and otherwise complying with Rule 135e) will have the effect of the press release not constituting general solicitation, general advertising or directed selling efforts.

The following legend should be inserted at the top of the press release in upper case letters:

"NOT FOR RELEASE, PUBLICATION OR DISTRIBUTION IN WHOLE OR IN PART IN OR INTO THE UNITED STATES."

The following legend should be inserted at the end of the press release in addition to any legends or rubrics that might be required by local law or practice:

"This announcement is not for publication or distribution, directly or indirectly, in or into the United States of America. This announcement is not an offer of securities for sale into the United States. The securities referred to herein have not been and will not be registered under the U.S. Securities Act of 1933, as amended, and may not be offered or sold in the United States, except pursuant to an applicable exemption from registration. No public offering of securities is being made in the United States."

The first legend frequently includes Canada and Japan. There is a practice developing of including further jurisdictions, such as Australia, South Africa and New Zealand. There is also practice of including a sweep-up clause, such as "and any other jurisdiction where such activity would be unlawful". Practitioners should consider leaving out a sweep-up clause because it is of no help to the person who is distributing the press release.

The second legend should be inserted in press releases as its own, standalone paragraph. It should not be combined with other legends.

However, while it is possible, it is generally not prudent for either company to speak with analysts largely because that conversation risks triggering a premature announcement of the offering. If it is considered necessary, there should be a script agreed with the publicity working group that is advising on the offering, including counsel to the issuer and counsel to the underwriters. The company generally should not speak at any point in the offering process to securities analysts that do not cover the company following an announcement of the offering. These conversations could be seen as offering-related.

ANNOUNCEMENTS

Public companies regularly release information to the market by way of announcements, and particular attention needs to be paid if an offering is likely to be launched.

Results announcements

In both scenarios, if a company issues financial results at approximately the same time every year, whether annual or interim, it should be able to publish the results at its customary time even when an offering is pending. Indeed, in practice, the offering may well be timed to follow the announcements of the results.

In the case of an offering by a UK-only listed company extended to QIBs, the results announcement and press release should not need a Rule 135e legend or be posted behind a gatepost (*see box "Rule 135e"*) (*see "Website content" below*). Similarly, if the company issues a press release with financial results solely to comply with market abuse regulation requirements, that press release should not need to be restricted. For example, in this situation, the company could post its results in a press release in the normal way, then immediately thereafter launch its offering.

For a dual-listed company, the results announcement would be submitted to the SEC under a Form 6-K and be incorporated by reference in the registration statement filed for the US portion of the offering.

In the case of an offering to QIBs, the press release announcing the offering must comply with Rule 135c, which is often difficult because Rule 135c does not allow the managers to be named in the press release, or with Rule 135e (and be placed behind a gatepost) (*see box "Rule 135c"*) (*see "Website content" below*).

Earnings guidance

If the UK-only listed company makes financial results public at an irregular time or issues guidance at an irregular time, this should be considered offering-related from a US securities law perspective and potentially as conditioning the market. In the case of an offering to QIBs by a UK-only listed company, this type of announcement should comply with Rule 135e and be posted behind a gatepost (*see "Website content" below*).

A dual-listed company should not make any financial announcement during its offering. Any such information would need to be included in the prospectus or in a "free-writing prospectus", that is, a permitted written or oral communication that does not meet the content requirements of a statutory prospectus.

SHAREHOLDER DOCUMENTS

In the case of an offering to QIBs by a UK-only listed company, if the company needs to prepare a circular or a notice to shareholders in connection with its offering in order to obtain authority to issue the shares being offered, the authors believe that it should not combine the circular with the offering document for the transaction. Ideally, it should not send the circular into the US unless all of its US shareholders are QIBs, which might be unlikely to be the case or might be difficult to determine. If a circular must be sent to all shareholders, the company should first ensure that the circular is clearly a communication to shareholders and not also a selling document for the offering.

The UK-only listed company could consider distributing two circulars: one that contains only the required information for US shareholders and a more comprehensive circular for all other shareholders. The US version might contain a scaled-down version of the chairman's letter, particularly in a rights issue context where the company is facing financial difficulties. The first page of the notice of meeting should advise why US shareholders are receiving the document (namely, to comply with applicable legal requirements in respect of the rights of shareholders), that the document does not constitute an offering and that, subject to certain limitations, US shareholders will be unable to participate in the offering that is the subject of the resolutions on which they are being asked to vote.

In the case of a dual-listed company, the shareholder circular would have to be submitted to the SEC under a Form 6-K and incorporated by reference in the registration statement filed for the US portion of the offering.

NON-DEAL ROADSHOWS

An offering often will be accompanied by an investor roadshow, where the company's senior management team meets existing and potential investors to promote the offering. Non-deal roadshows are similar meetings conducted by listed companies but take place in the ordinary course of business and do not relate to a specific offering, although an offering may in fact follow soon thereafter.

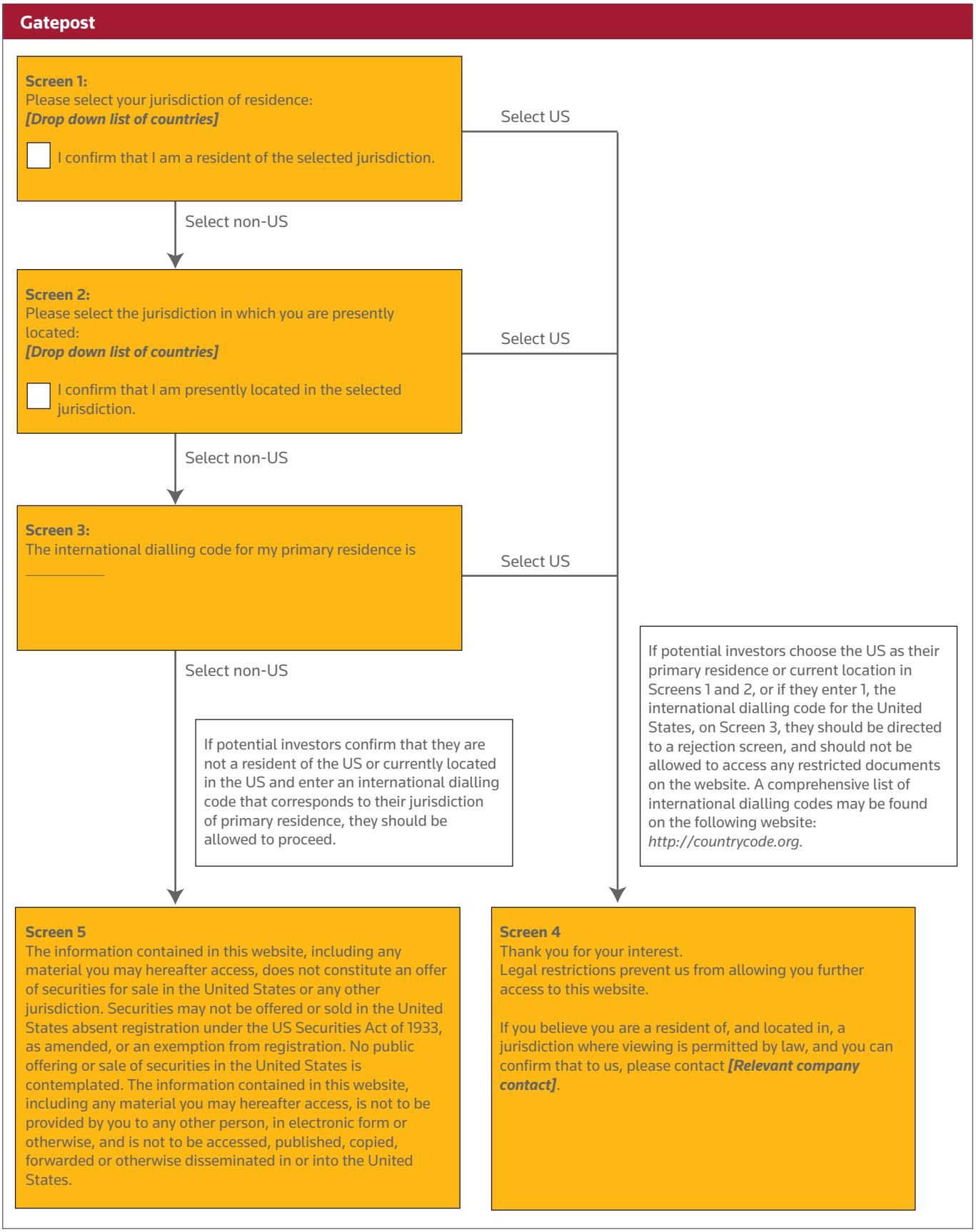
In the case of an offering to QIBs by a UK-only listed company, non-deal roadshows can present concerns if the roadshow takes place in close proximity to the offering. Shareholders may take the position that they made their investment decision for an

Rule 135c

Rule 135c of the US Securities Act of 1933, as amended (Rule 135c), allows press releases announcing an offering, provided that the following conditions are met:

- The announcement is not used for the purpose of conditioning the market in the US for any of the securities offered.
- The announcement states that the securities offered will not be or have not been registered in the US and may not be offered or sold in the US absent registration or an applicable exemption from registration requirements.
- The announcement contains no more than the following additional information:
  - The name of the issuer;
  - The title, amount and basic terms of the securities offered, the amount of the offering, if any, made by selling security holders, the time of the offering and a brief statement of the manner and purpose of the offering without naming the underwriters;
  - In the case of a rights offering to security holders of the issuer, the class of securities the holders of which will be or were entitled to subscribe to the securities offered, the subscription ratio, the record date, the date on which the rights are proposed to be or were issued, the term or expiration date of the rights and the subscription price; and
  - Any statement or legend required by state or foreign law or administrative authority.

Rule 135c is only available to companies that comply with Rule 12g3-2(b) of the US Securities Exchange Act of 1934 (Rule 12g3-2(b)). Rule 12g3-2(b) sets out a framework for non-US companies to provide information to investors. Many non-US companies comply voluntarily with the rule (*see feature article "Avoiding US reporting obligations: exemptions for non-US issuers", www.practicallaw.com/6-384-0242*). Unlike a Rule 135e-compliant press release, if a Rule 135c-compliant press release is posted on the company's website, it does not need to be placed behind a gatepost and it can be distributed in the US.



offering based on the roadshow rather than on the earnings press release, in the case of an offering made on the back of an earnings announcement, or the prospectus, if one is required. One problem is that the roadshow materials do not contain risk factors that could be relied on to indicate that caution should be exercised.

A UK-only listed company should only invite QIBs to non-deal roadshow presentations that take place in the US in advance of the announcement of the offering. Counsel to the issuer and its investment bank will need to determine how much time must elapse at a minimum between the non-deal roadshow and the launch of an offering. Many English companies only invite QIBs to ordinary course

Related information

This article is at practicallaw.com/w-019-5163

Other links from uk.practicallaw.com/

Topics

Cross-border: equity capital markets	topic/5-103-1376
Securities, markets and investments	topic/2-541-9505
US securities law for non-US issuers	topic/9-201-5199

Practice notes

US Securities Laws: overview	3-383-6798
Regulation S transactions	5-383-1182
Selling debt securities: Rule 144A	1-385-6037
US securities laws: introduction to US registered and unregistered offerings for non-US companies	4-506-5032
US securities laws for non-US debt securities issuers	7-621-9715

Previous articles

Rule 139 of the US Securities Act: research reports (2017)	w-010-5583
US private placements: when Rule 144A is unavailable (2015)	7-615-3385
SAS 72 letters: seeking comfort (2013)	1-525-4623
Pre-marketing: threading the needle (2013)	1-524-0551
The US Investment Company Act: a legal minefield for non-US issuers (2013)	6-524-0025
US private offerings: solicitation and advertising on the cards (2012)	2-521-4900

For subscription enquiries to Practical Law web materials please call +44 0345 600 9355

investor relations roadshows anyway, so this will not require a change in practice. If the company, however, has a practice of inviting institutional investors without regard to QIB status, in advance of an offering it should ask its investment bank to help it screen out non-QIBs from the invitation list. No written materials, such as the slide deck used for the presentation, should be provided to attendees.

In the case of an offering by a dual-listed company, there currently is a testing-the-waters exemption for emerging growth companies, which allows these issuers to engage in oral or written communications with potential investors that are, or are reasonably believed to be, QIBs or institutional accredited investors, either before or following the filing of a registration statement, to determine whether those investors might have an interest in a contemplated registered securities offering.

In February 2019, the SEC proposed expanding the exemption to all SEC-reporting companies and there was also legislation proposed in US Congress that would accomplish the same extension.

An emerging growth company will need to comply with the testing-the-waters exemption when conducting its non-deal roadshow in advance of an offering. Assuming the SEC proposal is adopted, non-emerging growth companies will similarly need to follow the procedures. The company should only invite QIBs and institutional accredited investors to the non-deal roadshow presentation. Pending effectiveness of the proposed rule change to expand this exemption, a dual-listed non-emerging growth company should not conduct any non-deal roadshows in the US within 30 days of its expected public filing in order to fall within the 30-day gun-jumping safe harbour. It will need to comply with the other requirements of that safe harbour, including not referring to the offering.

No written materials should be provided to attendees in any such roadshow and no information should be included in any presentation that will not also appear in the prospectus.

WEBSITE CONTENT

In the case of an offering to QIBs by a UK-only listed company, any offering-related materials that are posted on the company's website must be placed behind a gatepost (*see box "Gatepost"*). This includes any press release announcing the offering and any accompanying offering document. There is no similar requirement in the case of an offering by a dual-listed company.

It is important to note that, despite the ubiquitous nature of web-based communications, not to mention social media and other means of communicating business and other information, the governing principles on which the publicity considerations for an offering extended into the US continue to be based on SEC interpretive releases that were issued in 1998 and 2000.

Peter Castellon is a partner at Proskauer Rose (UK) LLP and Mark Bergman is a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP.