Securities World

Jurisdictional comparisons **Fourth edition 2014**

General Editor:
Willem J L Calkoen NautaDutilh NV

THE EUROPEAN LAWYER REFERENCE

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Foreword

Willem J L Calkoen NautaDutilh NV

Directors of issuers, investor relationship directors and enterprise risk directors work together with their financial advisers, accountants, lawyers, representatives of financial institutions, supervisors and governments to create trust in the securities market. At the same time, they all try to work on establishing cost effectiveness and efficiency to lower the cost of capital. While it is true that balance must be found between the creation and maintenance of trust on the one hand and cost effectiveness on the other, in the end it is trust that is the most important, because the point of capital markets is that the public is prepared to invest money in the activities of entrepreneurs, with the hope of success. The more trust that exists, the higher and more consistent the listed prices will be. We all know that trust must be built up carefully over many years, but its fragility is such that it can be shattered with one event like the failure of a large company. Modern history has known crises, of which one of the largest took place in September 2008.

Since then, stock exchanges have played an important role in the revival of economies. First by debt capital bonds guaranteed by governments, then in 2009 companies raised the capital they could not borrow from banks using rights issues and in 2010 they raised clean equity and initial public offerings started up again. The stock exchanges of the BRIC countries (Brazil, Russia, India and China) are gradually becoming more important, while the Western stock exchanges are being used increasingly by BRIC corporations. At the same time investors on stock exchanges are becoming increasingly international. For the convergence that is taking place it is useful to understand the differences. Regulations are being relaxed in some areas, where there are special arrangements for smaller start-ups and special acquisition companies. At the same time many more regulations are being added.

Unsolicited public tender offers are an important phenomenon that stimulate the market. Several countries have legal defence mechanisms. Even the British Financial Services Authority, in the aftermath of Kraft's acquisition of icon Cadbury, is proposing higher thresholds for tender offerors. Large takeovers stimulate the market and a rise in the market can stimulate takeovers.

The first edition of *Securities World* appeared in 2005 after the Internet bubble burst. The second edition appeared after the implementation of many European directives in 2007. The third edition came in 2011 after the financial crisis and now I am proud to present this fourth edition with more regulation and hope of trust. The idea of *Securities World* is to have a jurisdictional comparison of the key questions: how does one get a listing on the stock exchange and how does one take over a listed company.

Our aim has been to achieve a high quality of content, so that *Securities World* will be seen as an essential reference work in our field. We have had some very favourable comments from stock exchanges around the world that are very happy with this book.

To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of securities and takeover law from each jurisdiction. I am very grateful to them for all their unstinting work.

Without the efforts of the European Lawyer we would not have completed the book. I am very grateful to the European Lawyer Reference team at Thomson Reuters. I am also grateful to Inge Moerland and Kathy Vermeij (of NautaDutilh Rotterdam) who managed the extensive correspondence with our contributors with skill, good humour and patience.

If you as reader have any comments, I would be very grateful to hear from you. Future editions of this work will obviously benefit from your thoughts and suggestions.

Willem J L Calkoen, NautaDutilh NV
General Editor
Rotterdam, 2014

United States of America

Wachtell, Lipton, Rosen & Katz
Adam O. Emmerich, John L. Robinson & Kevin S. Cooper*

1. GENERAL DESCRIPTION OF CAPITAL MARKETS

1.1 Number of Companies listed; division in markets (eg large/mid/small caps)

The primary exchanges for equities in the United States are the New York Stock Exchange (the 'NYSE') and the NASDAQ Stock Market ('NASDAQ'). As of 12 June 2014, the NYSE lists approximately 2,700 companies and NASDAQ lists approximately 2,600 companies.

NASDAQ is divided into three principal markets for equities: the NASDAQ Capital Market, the NASDAQ Global Market and the NASDAQ Global Select Market. Each NASDAQ market requires certain financial and other liquidity standards to be met for a company to list, with the Capital Market generally for smaller companies and the Global Select Market containing the largest issuers. The NYSE MKT is a separate exchange for small cap companies.

1.2 Foreign companies listed (dual listing)

As of 12 June 2014, there were 470 non-US entities listed on the NYSE (208 with a primary listing) and 301 on NASDAQ (230 with a primary listing). There were 271 companies listed on the NYSE and 75 on NASDAQ whose primary listing is on a foreign exchange as of that date.

1.3 Total market value

The total market capitalisation of companies with a primary or secondary listing on the NYSE was approximately $27 trillion and on NASDAQ was approximately $7 trillion (as of June 2014).

1.4 Issue activity in 2012 and 2013

In 2013 the US capital markets saw approximately $250 billion in initial public offerings and follow-on equity issuances, compared to approximately $210 billion in 2012.

1.5 Takeover activity in 2012 and 2013

The United States was one of the few global markets that saw an increase in M&A activity in 2013, with US deals of approximately $1 trillion, up 11 per cent compared to 2012.

1.6 Any hostile takeovers or attempts in 2012 and 2013

Hostile transactions accounted for approximately 6.6 per cent of the value of announced deals involving US companies in 2013, up from 4 per cent in 2012. There were a number of notable hostile deals and attempted deals in the past year, including Dish Network's bid for Sprint, Charter's pursuit of Time Warner Cable (which subsequently signed an agreement to merge with Comcast) and the takeover battle between Men's Warehouse and Jos. A. Bank.

2. REGULATORY STRUCTURE

2.1 Laws/regulatory framework for offering of securities and the sale and subscription of securities

As discussed in this article, the primary US statutes regulating securities offerings and issuers are the Securities Act of 1933, as amended (the 'Securities Act') and the Securities Exchange Act of 1934, as amended (the 'Exchange Act'). The Sarbanes-Oxley Act of 2002 ('Sarbanes-Oxley'), the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ('Dodd-Frank') and the Jumpstart Our Business Startups Act (the 'JOBS Act') signed into law in 2010 are also relevant to securities offerings and issuers' ongoing reporting obligations.

2.2 Regulation of offering new securities

Any public offer or sale of securities must be registered with the Securities and Exchange Commission (the 'SEC') unless a specific exemption applies. In a registered offering, the issuer must file a detailed registration statement with the SEC prior to offering securities and the registration statement must be declared effective (with the possibility of an SEC review and comment process) before securities are sold. A registration statement contains a prospectus that is distributed to investors and other information filed with the SEC but not distributed to investors. The contents of a registration statement are discussed in Section 5.

The statutory line drawn between public and private offerings is not sharply defined. To provide greater certainty to issuers and underwriters, the SEC has promulgated rules establishing various 'safe harbours' setting forth criteria that, if met, will be sufficient to avoid registration requirements. Examples of these safe harbours include:

- Regulation D, which permits securities to be offered and sold to 'accredited investors' (following Dodd-Frank, generally defined as certain categories of institutions and individuals having a net worth exceeding $1,000,000 (not including the value of the primary residence) or with an annual income exceeding $200,000 (or joint income with a spouse exceeding $300,000) in each of the two most recent years) and up to 35 non-accredited investors if certain requirements related to the number of offerees and manner of solicitation are met.
- Rule 144A, which exempts offers and sales of securities of a class not listed on a US exchange (other than by the issuer) to Qualified Institutional Buyers, which are generally defined either as institutions

(not individuals) having $100 million or more of securities invested in non-affiliates or as a registered broker-dealer investing at least $10 million in non-affiliate securities.
- Regulation S, which is a safe harbour for offers and sales targeted to non-US investors.

Unregistered offerings do not require a prospectus, but market practice generally calls for an offering memorandum closely based on prospectus requirements in a registered offering. Securities acquired in an exempt transaction may generally only be resold pursuant to an effective registration statement or in reliance on any other available exemption under the Securities Act.

2.3 Differences between local and foreign companies

US securities laws are in principle blind to nationality, with foreign and US companies generally treated the same unless a specific exemption for foreign companies applies. For example, US registration requirements generally apply to a public offering of securities in the United States regardless of whether the issuer is a US or non-US entity.

However, certain requirements apply differently to a foreign private issuer ('FPI'), which is defined as any foreign issuer (other than a foreign government) unless:

- more than 50 per cent of its outstanding voting securities are held by residents of the United States; and
- the majority of the executive officers are not US citizens or residents, more than 50 per cent of the assets of the issuer are located outside of the United States or the business of the issuer is administered principally outside of the United States.

Certain governance, reporting and disclosure requirements that apply to domestic US issuers do not apply to FPIs, including quarterly reporting requirements, proxy rules and proxy statement requirements. With respect to many exchange governance requirements, FPIs may instead comply with home country practices and disclose any significant ways in which their governance practices differ from those followed by US companies.

3. REGISTRATION OF THE ISSUER AND SECURITIES

3.1 Necessity for a (foreign) company to be locally registered or licensed; local formal presence and/or local agent to accept legal process

For securities of US or foreign companies to be admitted for trading on a US exchange, the issuer must register the securities by filing a registration statement with the SEC. A foreign issuer may register sponsored American Depository Receipts ('ADRs') by filing a Form F-6 registration statement. No local formal presence is required though issuers typically utilise a local agent to accept legal process.

3.2 Other requirements

Offerings conducted in the United States or using US jurisdictional means, including offerings of newly issued securities of a reporting company or securities offered in an exchange offer or business combination to US holders of a foreign entity, will generally be subject to registration requirements unless an exemption applies. In an exchange offer or business combination, for example, an exception may apply if US persons hold less than 10 per cent of the shares of a FPI target company.

3.3 Nature of securities

Registered shares, ADRs, debentures, notes and other securities such as warrants, partnership interests, limited liability company units and contingent value rights may be registered.

3.4 Clearing institutions

Transfer/clearing agents must register with the SEC, or if it is a bank, with the appropriate bank regulatory agency. The SEC has promulgated rules applicable to transfer agents, clearing agents and paying agents (the functions of which, in practice, may be performed by the same entity) that are intended to facilitate the prompt and accurate clearance and settlement of securities transactions and assure the safeguarding of securities and funds.

4. SUPERVISORY AUTHORITIES

4.1 Laws that create competency/authority for supervisory authorities

The SEC was established in 1934 by section 4 of the Exchange Act and remains the primary securities law regulator in the United States. In addition, the Exchange Act gives stock exchanges and self-regulatory organisations such as the Financial Industry Regulatory Authority ('FINRA') authority to supervise the conduct of their members subject to the oversight of the SEC.

4.2 Responsibilities of supervisory authorities

The SEC has authority to promulgate rules and regulations under US securities law statutes. The SEC also issues policy statements clarifying its positions on matters under the securities laws and non-precedential (though persuasive) no-action letters analysing particular factual circumstances presented by an issuer.

US stock exchanges apply listing rules that are adopted with the approval of the SEC and extend beyond matters directly relating to the trading of an issuer's stock on the exchange. For example, listing rules address several important aspects of corporate governance, including director independence, the duties and composition of board committees, certain shareholder voting rights, regulation of dual-class stock structures and the content of corporate governance guidelines and codes of business conduct.

5. OFFERING DOCUMENTATION

5.1 Offering document

5.1.1 Nature and statutory requirements of offering document for each type of security

The prospectus is the principal offering document used by issuers in registered offerings of securities in the United States and is required by the Securities Act to be delivered to investors. Generally, the prospectus is included in a registration statement that must contain or incorporate by reference material information regarding the issuer and the securities being offered, including a description of the issuer's business, its recent financial performance (including audited financial statements), risk factors, results of operations, material legal proceedings, executive compensation, the plan of distribution in the offering and the expected use of proceeds from the offering.

The contents of the registration statement depend on the type of form applicable to the offering. For example, in an initial public offering an issuer would file Form S-1 and in a business combination or exchange offer a Form S-4 (Forms F-1 and F-4, respectively, for FPIs). Once an issuer has made periodic filings pursuant to the Exchange Act for at least 12 months, it may be eligible to use Form S-3 (Form F-3 for FPIs), which is a short-form registration statement that allows the issuer to incorporate certain information by reference to its Exchange Act filings (including future filings).

5.1.2 Preparation of offering document

While the issuer (including its management and board of directors) and its counsel have primary responsibility for the preparation of the registration statement in connection with any registered offering of securities, the process also involves underwriters, their outside counsel, financial auditors and, in some offerings, banks providing fairness opinions in connection with the proposed transaction and their outside counsel.

5.1.3 Due diligence requirements

See 'Sanctions and disputes' below.

5.1.4 Responsibility for statements and liability for misstatements

See 'Sanctions and disputes' below.

5.1.5 Type of current and historical financial information

A registration statement must generally include the issuer's audited financial statements for the three most recent fiscal years and unaudited interim financial statements for the most recent three-, six-, or nine-month period following the most recent audited balance sheet. Target company and pro forma financial information is also generally required in an exchange offer or business combination.

5.1.6 Future projections required or permitted

Issuers may make forward-looking statements, including projections and other disclosure about future intentions, in reliance upon a safe harbour that protects the issuer from liability for material misstatements or omissions in such statements if, among other things, the statements are identified as forward-looking statements and are accompanied by meaningful cautionary language identifying factors that could cause actual results to differ.

5.1.7 Details for debentures
See 'Debentures – Specific Aspects'.

5.1.8 Disclosure of policy on dividends
Registration statements must generally include a description of the issuer's expected dividend policy.

5.1.9 Disclaimer/selling restrictions
See section 7 below.

5.1.10 Recognition of prospectus on other exchanges
Where a securities offering or business combination involves filing a prospectus with regulators in more than one jurisdiction, it may be possible to discuss with regulators the possibility of meeting foreign requirements by filing the US prospectus and a foreign 'wrapper' containing additional information.

5.2 Sanctions and disputes
Security holders have several causes of action under the Securities Act and Exchange Act. These liability provisions overlap in certain respects and are each coloured by nuanced judicial interpretations. As a general matter, however, liability can exist under the following provisions:

- Section 11 of the Securities Act imposes liability when a registration statement, at the time it became effective, contained an untrue statement of a material fact or omitted to state a material fact necessary to make the statements therein not misleading. Under section 11, buyers can sue the parties responsible for preparing the registration statement, including the issuer, its officers who signed the registration statement, the directors of the issuer, underwriters, auditors and other experts for losses sustained as a result of such misstatements or omissions.
- Section 12 of the Securities Act imposes liability on anyone who offers or sells a security in violation of the registration requirements of the Securities Act. It also allows buyers to seek rescission of a purchase (or sue for damages if they have already sold the security) if an offer or sale was made using a prospectus or oral communication containing material misstatements or omissions.
- Section 10(b) and rule 10b-5 under the Exchange Act provide an implied private right of action for material misstatements or omissions or employing a fraudulent scheme in connection with the sale or purchase of a security. The plaintiff in a 10b-5 claim must show that the person selling or purchasing the security intended to deceive or had a reckless disregard of the truth.

Certain defences may apply depending on the basis for liability. In particular, each potentially liable party (other than the issuer, which is strictly liable for material misstatements or omissions in a registration statement) may utilise a due diligence defence to section 11 liability and due diligence activities may mitigate section 12 and rule 10b-5 liability. A party asserting this defence must establish that, based on reasonable investigation, its belief that the registration statement was accurate and complete was reasonable.

6. DISTRIBUTION SYSTEM

6.1 Distribution system/control of distributor

6.1.1 Practice of distribution

Distributors or underwriters in a securities offering are typically investment banks or other financial institutions. In an initial public offering, underwriters typically commit at pricing to purchase the securities from the issuer for resale to investors and pay for the securities upon settlement (typically referred to as a 'firm commitment underwriting'). An underwriter can also agree to use best efforts to solicit buyers without any obligation to purchase securities it does not sell (typically referred to as a 'best efforts underwriting').

6.1.2 Dealers in another role

The financial institutions that act as underwriters are often large and diverse institutions. Special rules govern their ability to publish research reports when participating in a securities offering. The SEC has established safe harbours for research published by underwriters in secondary offerings before and during an offering that may allow an investment bank that published research reports in the ordinary course of business to continue to do so. The specific requirements and restrictions vary depending on a variety of factors related to the underwriter, the issuer and the offering.

6.1.3 Normal structure of distribution group

The lead underwriters play the most active role. In addition to purchasing securities from the issuer and selling to the public, lead underwriters offer financial and valuation advice to an issuer (particularly in an initial public offering), market the securities to prospective investors and are typically in frequent contact with the company and its other advisors.

6.1.4 Range of fees or commissions on different types of securities

Fees and commissions on securities offerings vary considerably depending on the type of offering and securities. On an initial public offering of equity securities, aggregate commissions typically range from 5 to 7 per cent of gross proceeds, depending on the size of the offering.

6.1.5 Requirement of registration of distributor

To participate in a public offering, an underwriter must be registered as a broker-dealer. Registration as a broker-dealer involves filing a Form BD with the SEC and applying for membership in a self-regulatory organisation such as FINRA.

6.1.6 Distributor active in preparation of offering document and/or settlement of it with regulatory Agency

See section 5.1.2 above.

6.1.7 Timing of marketing/distribution process

The timing of the marketing process varies depending on the type of offering, but can take place during the course of a day for secondary offerings or several weeks for an initial public offering. Trades typically settle within three business days of pricing.

6.1.8 Distribution normally made to public or to financial intermediaries

Financial intermediaries are typically used except in certain private placements. See section 2.2.

6.2 Debentures – specific aspects

Public offerings of debentures are normally subject to the same registration requirements as equity securities. In addition, debentures must generally be sold pursuant to an indenture that meets the requirements of the Trust Indenture Act unless the offering is made pursuant to certain registration exemptions. The Trust Indenture Act requires, in most cases, appointment of a trustee to act for the benefit of debenture holders.

7. PUBLICITY

Certain activities or publicity prior to filing a registration statement may result in a violation of the Securities Act. The definition of offer is construed broadly and can include any statement that has the effect of 'conditioning the public mind or arousing public interest in the issuer'. Consequently, a statement may constitute a violation even if not phrased in terms of an express offer and regardless of whether made orally or in writing.

The SEC has adopted safe harbours to permit limited publicity. For example, communications more than 30 days before filing a registration statement that do not reference a securities offering will not constitute an offer so long as the issuer takes reasonable steps to prevent further distribution of such communication during the 30 days immediately preceding the filing of the registration statement. During the 30 days preceding filing, an issuer may publicly disclose in a press release that it intends to make a public offering of securities but the content is limited to certain specified information such as the name of the issuer, the amount and basic terms of the securities, the anticipated timing of the offering, and a brief statement of the purposes of the offering.

Following the public filing of the registration statement, but before it becomes effective, written offers to sell securities are permitted only pursuant to a preliminary prospectus or a free-writing prospectus. Oral offers are permitted. In an initial public offering, for example, underwriters and management of the issuer will customarily conduct a 'road show,' or a series of informational meetings at which members of the selling group or potential investors listen to presentations from the issuer.

8. LISTING REQUIREMENTS AND PROSPECTUS REQUIREMENTS

8.1 Special listing requirements

Initial listing requirements for the NYSE and NASDAQ are coordinated with requirements to register securities with the SEC.

8.2 Mechanics of review process

A company must first register its securities with the SEC before listing on the NYSE or NASDAQ, requiring the effectiveness of a registration statement with the SEC as discussed in section 5. Upon SEC approval and completion of the exchange listing process, the exchange will certify its approval of the listing with the SEC.

The listing process typically occurs in parallel with the SEC review of a company's initial registration statement. A listing application must also be filed with the exchange, which typically includes the draft SEC registration statement (including the company's financial statements) along with a listing agreement, copies of the company's organisational documents, a distribution schedule of the company's shares, opinions of counsel and certifications from the registrar and transfer agent.

8.3 Prospectus obligation

See section 8.2.

8.4 Requirements and availability for listing

A company must satisfy certain minimum distribution requirements relating to the number of holders, market value requirements and financial requirements to list on the NYSE or NASDAQ. FPIs may qualify for listing either under the criteria applicable to US issuers or alternative listing standards with relaxed distribution requirements in the United States.

8.5 Authority of Exchange

The NYSE and NASDAQ each apply disclosure and reporting obligations to their listed companies. Notice requirements to the exchange apply in connection with specified events. As discussed in section 4.2, exchanges also impose corporate governance requirements.

8.6 General nature of listing agreement

The listing agreement requires the listed company to comply with the exchange's rules and corporate governance requirements, maintain a transfer agent and registrar, and pay any required fees associated with its listing on the exchange.

8.7 Obligation for sponsor

ADRs listed by a foreign issuer must be sponsored, meaning they are issued by a bank on behalf of the company whose shares underlie the ADRs. The issuer must enter into a deposit agreement with an American depository bank to provide services such as processing of cash and stock dividend payments, transfer of ownership and distribution of company financial statements.

8.8 Appeal
Appeal of a decision regarding an initial listing application is not typical.

8.9 Cost to obtain listing, annual costs
Initial fees to list on the NYSE or NASDAQ commonly range from $125,000 to $250,000. Annual fees are also payable based on the number of shares outstanding, with a minimum annual fee of $42,000 on the NYSE and $35,000 on NASDAQ ($32,000 for the NASDAQ Capital Market).

9. ONGOING COMPLIANCE REQUIREMENTS
9.1 Continuing requirements
9.1.1 Nature of current requirements
An issuer becomes a 'registrant' subject to ongoing reporting requirements under the Exchange Act if:
- it registers an offering of securities under the Securities Act;
- it registers securities under the Exchange Act in connection with listing securities on a US exchange (including, for FPIs, in connection with listing ADRs); and/or
- its securities are held by more than 2,000 persons or more than 500 non-accredited investors, excluding, persons who received unregistered securities pursuant to an employee compensation plan.

An FPI is exempt from registration under the third criteria if it publishes in English on its website information that it has made public since the beginning of its last financial year, and updates of that information, in accordance with its home country reporting standards and it maintains a listing on a foreign exchange that constitutes the primary trading market for its securities.

9.1.2 Annual and quarterly financial statements
Registrants are required to file annual reports on Form 10-K and quarterly reports on Form 10-Q. Annual reports include comprehensive description of the issuer's business, financial condition and operations, largely similar in scope to the information contained in an initial registration statement filed under the Securities Act, as well as audited financial statements.

The quarterly report on Form 10-Q is filed quarterly (except during the quarter coinciding with the release of the 10-K). Interim period financial statements within the 10-Q may be unaudited.

FPIs file annual reports on Form 20-F, which unlike Form 10-K permits annual financial statements to be audited in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board, rather than US GAAP. Financial statements of FPIs audited in accordance with other standards but must include a reconciliation to US GAAP. FPIs are not required to file quarterly reports.

9.1.3 Required interim disclosures

In addition to periodic reports, reporting companies must file a current report Form 8-K with the SEC to disclose a wide range of material events on an ongoing basis (generally within four business days). For example, a current report must be filed to disclose entry into or termination of a material definitive agreement, completion of a material acquisition or disposition of assets, announcements of results of operations, unregistered sales of equity securities, and appointments of new officers or directors.

FPIs must file current reports on Form 6-K. Filing obligations are limited to material information that the issuer makes or is required to make in its home country, files or is required to file with a stock exchange on which the issuer trades and which is made public by that exchange, or distributes or is required to distribute to its security holders.

9.1.4 Obligation to file solicitation of proxies

Public companies are required to send to shareholders a proxy statement meeting SEC requirements when soliciting shareholder votes, including in connection with the election of directors. This requirement does not apply to FPIs.

9.1.5 Disclosure

See sections 9.1 through 9.3.

9.1.6 Continuing requirements of reporting and notification of substantial shareholdings

See 'Notification of Substantial Shareholdings'.

9.1.7 Requirement of transfer agent, clearing, paying agent

See section 3.4.

9.1.8 Other continuing requirements: Sarbanes-Oxley

Sarbanes-Oxley imposes additional ongoing requirements on registrants, including certifications on the accuracy and completeness of the registrant's periodic reports by its principal executive and financial officers (typically the CEO and CFO); an assessment of the registrant's internal control procedures for financial reporting and an attestation to these procedures by the company's independent auditors and independence standards for the registrant's auditors and members of its audit committee.

9.2 Corporate governance

9.2.1 Law and/or code

US corporate governance is governed by both state and federal law. Each of the 50 states has its own corporate code. Public companies are also subject to US securities laws and stock exchange rules, and they are further constrained by the preferences of their shareholders, proxy advisory firms and other interest groups.

9.2.2 One-two tier; CEO-Chairman separate

US corporations feature a one-tier board structure. The roles of CEO and chairman are often combined, though this is becoming less frequent. In 2013, 55 per cent of S&P 500 companies had a single person discharging the roles of CEO and chairman, compared to 77 percent in 2003.

9.2.3 Obligations to issue regulations on internet

State law generally does not require a company to post information online, but exchange rules require a listed company to post its committee charters and corporate governance guidelines on its website.

9.2.4 Responsibility of inside/outside directors

All corporate directors, independent or not, have a core set of responsibilities that include, among others, hiring a CEO, monitoring corporate performance, directing management, setting executive compensation, dealing with crises and overseeing relationships. Boards typically delegate day-to-day management to the CEO and other senior management, who serve at the pleasure of the board.

9.2.5 Committees

US law and exchange rules require publicly traded companies to form audit, nominating and governance, and compensation committees comprised of independent directors that fulfil certain minimum duties. State law may require the use of a special committee in certain extraordinary circumstances, such as to evaluate a material transaction involving a conflict of interest between the company and a board member or controlling shareholder.

9.2.6 Obligation to ask consent of shareholders meeting

Although the board is charged with primary responsibility for managing the business and affairs of the company, shareholder approval is required for various corporate actions. In a merger, state law requires the target's shareholders to approve the transaction and US exchange rules require approval of the acquiror's shareholders if the securities issued as consideration will have 20 per cent or more of the voting power outstanding before the issuance. Exchange rules also require shareholder approval of equity compensation plans and certain issuances of securities to directors, officers and other affiliates of the company. Finally, state law generally requires shareholder approval of changes to a company's certificate of incorporation.

9.2.7 Depth of information; proxy solicitation

See section 9.1.4.

9.2.8 Appointment/dismissal of directors

Shareholders elect the board of directors. The number of seats up for election each year is determined by the company's charter. Likewise, the charter's bylaws determine when a director can be removed.

9.2.9 Income and options for directors
Director compensation decisions are made by the board of directors itself, though public-company boards are subject to stock exchange rules that generally require the use of a compensation committee in making compensation decisions.

9.2.10 Earnings guidance
Although earnings guidance is not required by US securities laws, it is often expected as a matter of course by investors and analysts for public companies. If historical information (ie, an earnings release for a recently completed period) is released it must be filed with the SEC on Form 8-K, but a press release or conference call providing guidance for a future period does not trigger a filing obligation.

9.2.11 MD&A
Management must provide a section titled Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) in an issuer's annual and quarterly reports as well as its Securities Act registration statements. MD&A provides a detailed, financial overview of the company's performance, important business trends, and future prospects.

9.2.12 Director liability
Most state laws generally allow a company's charter to limit directors' personal liability to the corporation or its shareholders, except in the case of liability arising out of breaches of a director's duty of loyalty, intentional misconduct, illegal dividends or transactions from which the director receives an improper personal benefit.

9.3 Notification of substantial shareholdings
Any person or group that acquires beneficial ownership of more than 5 per cent of a class of voting registered equity securities is required within 10 calendar days of crossing the 5 per cent threshold to disclose its ownership stake on a Schedule 13D that is filed with the SEC. Schedule 13D requires, among other things, a description of the identity and background of each filing person and each of its controlling persons, the purpose of the transaction and plans that the acquirer may have for the subject company or for accumulating additional securities and the percentage of the class acquired. An amendment to the Schedule 13D is required whenever a material change occurs in the facts set forth in the filing. An acquisition or disposition of beneficial ownership of 1 per cent or more is considered material.

Certain shareholders may be eligible to use the short-form Schedule 13G (which requires more limited disclosure), including certain institutional investors, passive investors and persons who acquired a greater than 5 per cent stake before the issuer registered its equity securities under the Exchange Act.

10. INSIDER TRADING

10.1 Laws and regulations

Under US law, illegal insider trading refers generally to buying or selling a security in breach of a fiduciary duty or other relationship of trust and confidence while in possession of material, non-public information about the security. For example, such a duty or relationship may be based on an agreement to keep the information confidential or a historical practice of confidentiality. Insider trading violations may also include ‘tipping’ such information, securities trading by the person ‘tipped,’ and securities trading by those who misappropriate such information. Employers can be liable for failing to prevent insider trading by employees.

10.2 Codes of conduct

A company that implements an insider trading policy can benefit not only from a reduction in potential insider trading by its employees, but also from a potential good faith defence if an action is brought against it for an insider trading violation by the employee. An effective policy may explain and prohibit insider trading, clearly define any applicable blackout periods and mandate company preclearance of certain trades by key individuals.

10.3 Sanctions

The SEC has authority to bring an injunctive action in federal court and seek disgorgement of profits (or losses avoided) as a result of insider trading or tipping. Under the Insider Trading Sanctions Act, the SEC has authority to seek treble damages and the Exchange Act also authorises a court to impose fines of up to $5 million ($25 million for entities) and prison terms of up to 20 years on persons convicted of insider trading.

10.4 Defences

Defendants in insider trading cases generally argue that the requirements discussed in section 10.1 were not met. As noted above, companies may also have a good faith defence to insider trading by employees if they implement an effective insider trading policy. In addition, an affirmative defence exists under rule 10b5-1 of the Exchange Act for insiders who regularly possess material non-public information (‘MNPI’) but adopt a written plan to buy or sell securities in the future on a predetermined schedule and subject to predetermined criteria. The plan must be adopted when the insider is not in the possession of MNPI.

11. INVESTMENT FUNDS

11.1 Special regulation for mutual funds

Mutual funds and investment advisors are regulated primarily by the Investment Company Act and the Investment Advisors Act. There are two primary types of funds in the US:

Open-ended funds offer shares in pooled investment vehicles to the public on a continuous basis. At the request of a shareholder, an open-ended fund must redeem its shares at net asset value and pay redemption proceeds to the shareholder.

Close-ended funds do not offer redeemable securities. Instead, shares must be bought and sold by investors on the secondary market.

Exchange traded funds are a type of open-ended fund whose shares trade on a stock exchange and market-determined prices.

11.2 Controlling power of agency/exchange

The SEC's Division of Investment Management is the primary regulator of companies subject to the Investment Company Act and the Investment Advisors Act.

11.3 Regulated functions

The Investment Company Act applies to any company that holds itself out as being engaged primarily in the business of investing, reinvesting or trading in securities. It also applies to any entity that owns, or proposes to acquire, investment securities having a value exceeding 40 per cent of its total assets. As a result, most mutual funds and other investment funds are subject to regulation by the SEC.

11.4 Exemptions

The Investment Company Act provides several exemptions from its broad scope, including exemptions for entities that might otherwise be deemed an 'inadvertent investment company' as a result of holding a significant amount of investment securities on their balance sheet. For example, issuers primarily engaged in a business other than investing (measured by examining the issuer's historical development, public representations of policy, activities of its directors and officers, nature of assets and sources of income) are exempted.

Separate exemptions are generally available to an issuer whose outstanding securities are beneficially owned by 100 persons or less or an issuer whose securities are owned exclusively by 'qualified purchasers' (determined based on certain financial requirements), provided that in their case the issuer is not making and does not presently propose to make a public offering of its securities. These exemptions are relied on by most hedge funds to avoid registration.

11.5 Requirements

Investment companies are required to dually register with the SEC, meaning that the fund is registered under the Investment Company Act and the securities issued by the fund are registered under the Securities Act. Registration under the Investment Company Act imposes the extra disclosure requirements discussed below.

The Investment Company Act divides investment companies into 'diversified' and 'non-diversified' companies. Diversified funds cannot make any single investment in an amount greater than 5 per cent of the fund's assets, although this limitation only applies in relation to 75 per cent of the fund's assets. The remaining 25 per cent of the fund's assets can be invested in a single issuer. 75 per cent of the fund's assets must also consist of cash and cash-like items, government securities, shares of other investment companies or other securities.

11.6 Special requirements for foreign entities

Registered investment funds must be organised in the United States. The Investment Company Act prohibits a foreign investment company from offering shares in the United States unless the SEC issues an exemptive order, which is rare.

11.7 Relation with clients

Advertising must be conducted mindful of the requirements of the Securities Act. See section 7 above.

11.8 Reporting/guarantee systems

Investment funds must deliver to their investors a prospectus or summary prospectus and annual and semi-annual reports, which contain the fund's financial statements and are certified by the fund's CEO and CFO. These reports are filed with the SEC along with quarterly reports containing information regarding the fund's portfolio holdings.

11.9 Extra disclosure requirements

An investment fund's registration statement must disclose the fund's investment objectives and policies, the types of securities in which the fund will invest and the means by which the fund will pursue its investment objectives. The registration statement must also disclose, among other things, whether the fund is diversified or non-diversified, the fund's policies with respect to borrowing money or making loans to other persons and issuing senior securities and whether the fund intends to invest 25 per cent or more of its net assets in any particular industry or group of industries.

11.10 Securities institutions

FINRA adopts regulations governing the practices of brokerage firms and exchange markets, regulating trading in equities, corporate bonds, securities futures, and options. FINRA licenses individuals and admits firms to the financial industry, issues rules governing their behaviour, conducts compliance examinations and is permitted to discipline registered representatives and member firms.

To participate in a public offering an underwriter must be registered as a broker-dealer, which involves filing a Form BD with the SEC and applying for membership in a self-regulatory organisation such as FINRA.

12. PUBLIC TAKEOVERS

12.1 Public Takeovers

12.1.1 Applicable laws and regulations

The full scope of US tender offer rules discussed below apply to any person who makes a tender offer to purchase, directly or indirectly, more than 5 per cent of securities of a company that files reports with the SEC under the Exchange Act, with more limited requirements applying to offers for other securities. However, in 2008 the SEC amended the cross-border tender offer rules to limit the applicability of most (but not all) US tender offer rules in an offer for a foreign target where less than 10 per cent of the target's shares (excluding shares held by the offeror or the target) are held by US investors. More limited relief aimed at reconciling US and foreign requirements is available where US holders (again excluding shares held by the offeror or the target) constitute less than 40 per cent of the target's shareholder base.

Separately, the registration requirements of the Securities Act apply to any public offer or sale of securities in connection with a tender offer where the consideration is the offeror's securities (an exchange offer) or the issuance of the acquiror's securities in a business combination such as a stock-for-stock merger. However, an exemption is available where less than 10 per cent of the target's shares (excluding shares held by the offeror or the target) are held by US investors.

12.1.2 Competent authority

The SEC is the competent regulator with respect to tender offers and business combinations and is responsible for reviewing tender offer documents and registration statements.

12.1.3 Acquisitions of large stakes

See 'Notification of substantial shareholdings'.

12.1.4 Obligation of same price for offer

The terms of the offer (including the price paid) must generally be the same for all holders of a class of securities. Tender offers may be made for consideration consisting of cash, shares or other securities of the offeror (referred to as an exchange offer) or a combination of securities and cash. If shareholders are given the choice to elect between forms of consideration, they must be afforded equal right to elect among the types of consideration offered (subject to equal proration).

12.1.5 Timing

A registration statement must be reviewed and declared effective by the SEC in a business combination involving stock consideration or an exchange offer, which review process can take as many as two to four months. Tender offers for cash consideration can be launched promptly (within a few days) of reaching an agreement with the target and upon filing a tender offer statement on Schedule TO with the SEC (required in a tender offer for registered equity securities). A tender offer can be open for as few as 20 business days (although competition or other required regulatory approvals typically extend the required timeline).

12.1.6 Strategy

Negotiated tender or exchange offers for the control of the company are often preceded by entry into a definitive acquisition agreement between the offeror and the target specifying the terms of the offer. In a hostile tender offer, the offeror and target each focus on communicating the merits of the offer and the target's business plans to shareholders with the assistance of their financial and legal advisors.

12.1.7 Irrevocables

Offerors may receive advance binding commitments from major shareholders of the target company to support a tender offer.

12.1.8 Buying on exchange

US tender offer rules restrict purchases from the public announcement of the tender offer until the tender offer expires. An offeror is generally not permitted to purchase outside the offer the securities that are the subject of the offer, although certain exceptions exist including for purchases in a subsequent offering period for the same form and amount of consideration and purchases pursuant to an unconditional, binding contract entered into before public announcement of the offer.

12.1.9 First announcement

A tender offer does not commence until the offeror first publishes, sends or gives the means to tender to target shareholders. The offeror can announce a tender offer prior to commencing it so long as target shareholders are not given the means to tender and the pre-commencement communication is filed with the SEC no later than the date of the communication.

12.1.10 Period between first announcement and offer document

Following announcement, pre-commencement communications relating to the tender offer must continue to be filed with the SEC no later than the date of the communication. Similar rules apply with respect to communications made in connection with an exchange offer before a registration statement is on file. Legends that urge investors to read the relevant documents filed or to be filed with the SEC must be included.

12.1.11 Offering document content

See section 5 above. In a public takeover, the offering document will also contain information about the terms of the transaction and the parties (including the background of the transaction and the parties' reasons for entering into it).

12.1.12 Drafting of offer document

See section 5.1.2 above.

12.1.13 Addressees of offer document

A tender offer statement or registration statement (in an exchange offer) must be filed with the SEC. The offeror can either make a long-form publication in a newspaper or make a summary publication and advertisement and then provide the tender offer materials to any shareholder who requests them. In an exchange offer or a business combination subject to registration requirements, the issuer must also deliver a written prospectus to target shareholders and file the registration statement containing the prospectus with the SEC.

12.1.14 Due diligence

In a negotiated transaction structured as a tender offer, the offeror and target may choose to exchange confidential information and conduct due diligence prior to entering into an acquisition agreement. However, offers for securities of a target (whether hostile or friendly) can be made without due diligence or access to non-public information.

12.1.15 Conditions

Tender offers may be conditioned on terms agreed between the offeror and the target. In the case of a hostile tender offer, the offeror can attach any conditions it deems appropriate. However, conditions must be fully and clearly disclosed to the target's stockholders so that they may assess the likelihood of completion (and, in a hostile tender offer, it is common for the target company to comment on the conditionality of the offer in its recommendation to its stockholders).

12.1.16 Obligations of financing

In a tender offer where the offeror will obtain debt financing, the target company will often require the buyer to obtain commitment letters from lenders in connection with entering into an acquisition agreement prior to commencement of the tender offer.

12.1.17 For cash/for shares mixed

See section 12.1.4.

12.1.18 Break-up fees

Break-up fees are generally permitted in definitive acquisition agreements. Unlike many foreign jurisdictions, Delaware courts have not articulated a specified percentage for permitted break fees. However, the fee must be reasonable and not so high as to unduly tax the stockholder vote. Parties typically agree that fees for termination in order to allow a party's board to comply with its fiduciary duties should not exceed 3 to 4 per cent of transaction value; higher fees may be appropriate and permissible in other circumstances.

12.1.19 For Europeans: Introduction 13th Directive

Not applicable.

12.1.20 Traditional and current legal and practical defence mechanisms

The target of a hostile bid has a wide range of defence mechanisms available. For example, the company may already have, or can usually quickly adopt, a stockholder rights plan, which effectively makes the acquisition by an offeror of a specified percentage (eg, 15 per cent) or the target's equity prohibitively dilutive and expensive to the offeror. A target may also seek to engage in a recapitalisation or extraordinary dividend or an alternative corporate transaction, such as a merger with a third party or the sale or spin-off of a division.

12.2 Foreign investment controls

Investments by foreign entities in US critical infrastructure, technology or energy assets are subject to review by the Committee on Foreign Investment in the United States ('CFIUS'). CFIUS has authority to impose conditions, permanently enjoin a transaction or unravel an already-completed acquisition. Although filings with CFIUS are voluntary, CFIUS also has the ability to investigate transactions on its own initiative, including after the transaction has closed. Interests of 10 per cent or less of a company's voting securities are safe harboured from CFIUS review if the investment is to be entirely passive.

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