Market Trends 2017/18: International Capital Markets

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This market trends article discusses a selection of trends experienced by companies as they raised capital in cross-border securities offerings in the international equity capital markets (ECM) and debt capital markets (DCM).

Overall, 2017 was a strong year in the international capital markets with low volatility. Globally, equity issuance was higher than in recent years and investment grade debt issuance continued at record levels, showing resilience despite various geopolitical events. High yield debt issuance was also robust. Developed markets performed well, buoyed by the U.S. election result, and the emerging markets (Africa, the Middle East, Russia, and the Commonwealth of Independent States / Central and Eastern Europe) reopened with successful bond issuances in February 2017 by Russian and Ukrainian issuers. Globally, Asia had the most active initial public offering (IPO) market and debt issuance levels were strong as well. The U.S. IPO market was also strong, including the notable Snap IPO, considerable special purpose acquisition company IPO activity, and an increase in Chinese issuers listing in the United States. The amount of capital raised in EMEA (Europe, the Middle East, and Africa) in IPOs was up significantly over 2016, although the London IPO market faced challenges after the summer with two significant IPOs withdrawn. Despite potential market fragility because of the uncertainty about macro events (e.g., the negotiation regarding the United Kingdom's exit from the European Union (EU) (Brexit), uncertainty regarding the Trump administration's policies, and the German election in September 2017 with the resultant difficulty of forming a new coalition government), the markets outperformed 2016.

However, this backdrop drove deal participants to continue to focus on how to structure deals to minimize execution risk. As such, the de-risking trends seen in 2016 continued in 2017 despite the lower market volatility. A key regulatory trend in 2017 was preparation for the recast Markets in Financial Instruments Directive (MiFID II), as discussed below. Although the greatest impact was on European entities engaged in financial services, MiFID II had a global impact as well. For example, the U.S. Securities and Exchange Commission (SEC) issued no action letters to deal with a potential conflict between U.S. rules and MiFID II. In another regulatory trend, stock exchanges (including in London and Hong Kong) sought to increase their attractiveness as listing venues relative to other exchanges by approving significant listing rule changes to attract new issuers that will come into effect in 2018; these developments are discussed below.

As is usually the case, U.S. companies tended to focus on the U.S. capital markets because they remain the deepest markets globally, and generally U.S. companies are required to meet certain U.S. disclosure requirements under applicable U.S. securities rules regardless of where they offer their securities and list. However, recently, the cost of raising debt capital in Europe has become lower than in the United States, which made eurobond offerings attractive for U.S. companies for the first time in many years. This trend was bolstered in June 2016, when the European Central Bank (ECB) began buying corporate bonds in a program of economic stimulus, thereby further reducing the cost of raising debt capital in Europe. In October 2017, the ECB pledged to continue this program for much of 2018, although it began tapering the pace by cutting the monthly amount by half from early 2018. By contrast, U.S. companies rarely use non-U.S. exchanges as the primary listing venue for their equity securities, although sales of equity securities in offerings by U.S. companies are often made to international investors. For additional information on international capital markets, see Debt Capital Markets in International Jurisdictions, Market Trends 2016/17: International Capital Markets, and International Stock Exchange Selection for an IPO

NOTABLE TRANSACTIONS IN 2017

Set forth below are notable transactions and trends in the following main regions for capital markets activity: Asia (excluding Japan), Europe, and the United States (according to financial markets platform Dealogic).

Asia (Excluding Japan)

ECM Largest IPOS – Asia (Excluding Japan)

- ***Netmarble Games Corp***, a $2.3 billion IPO by the South Korean mobile game publishing company, listed on the Korea Exchange
- ***Guotai Junan Securities***, a $2.1 billion international IPO by the Chinese brokerage firm, listed on the Hong Kong Stock Exchange, following the company's 2015 domestic IPO and listing on the Shanghai Stock Exchange
- ***ZhongAn Online P&C Insurance***, a $1.8 billion IPO by the Chinese online insurance company, listed on the Hong Kong Stock Exchange

ECM Largest Follow-On Offerings (Including Equity-Linked) – Asia (Excluding Japan)

- ***China Everbright Bank***, a $4.3 billion equity-linked offering by the Chinese commercial bank, listed on the Shanghai Stock Exchange
- ***Bank of Beijing Co Ltd***, a $3.2 billion follow-on offering by the Chinese commercial bank, listed on the Shanghai Stock Exchange
- ***Irico Display Devices Co***, a $2.9 billion follow-on offering by the Chinese producer of electronic information display devices, listed on the Shanghai Stock Exchange

DCM Largest Bond Offerings – Asia (Excluding Japan)

- ***Postal Savings Bank of China Co Ltd***, a $7.25 billion offering of U.S. dollar-denominated senior notes by the Chinese bank
- ***Alibaba Group Holding Ltd***, a $7 billion offering of U.S. dollar-denominated fixed rate notes by the Chinese e-commerce company
- ***State Grid Overseas Investment (2016) Ltd***, a $5 billion offering of U.S. dollar-denominated guaranteed senior notes by the Chinese infrastructure company

High Yield – Asia (Excluding Japan)

- ***China Evergrande Group***, a $3.8 billion offering of U.S. dollar-denominated senior notes by the Chinese property developer that also conducted a $1.5 billion offering earlier in the year
- ***Sunac China Holdings Ltd***, a $1 billion offering of U.S. dollar-denominated senior notes by the Chinese property developer

- ***Vedanta Resources plc***, a $1 billion offering of U.S. dollar-denominated bonds by the Indian mining company

Europe

ECM Largest IPOS Plus Top London Listing Separately – Europe

- ***Pirelli & C SpA***, a $2.8 billion IPO by the Italian tire manufacturer, listed on the Milan Stock Exchange
- ***Landis & Gyr Holding***, a $2.4 billion IPO by the Swiss smart meter and smart grid solutions company, listed on the SIX Swiss Exchange
- ***BAWAG Group***, a $2 billion IPO by the Austrian bank, listed on the Vienna Stock Exchange
- ***Allied Irish Banks***, a $3.8 billion "re-IPO" (privatisation) of the Irish bank, listed on the Irish and London Stock Exchanges. The bank had previously been listed in Ireland and London but was nationalized in 2010 during the Irish banking crisis following the global financial crisis.

ECM Largest Follow-On Offerings (Including Equity-Linked) Plus Top London Listing Separately–Europe

- ***UniCredit***, a $13.7 billion rights offering by the Italian bank, listed on the Milan Stock Exchange
- ***Deutsche Bank***, an $8.5 billion follow-on equity offering by the German bank, listed on the Frankfurt Stock Exchange
- ***Santander***, an $8.2 billion follow-on equity offering by the Spanish bank, listed on the Madrid Stock Exchange
- ***ConvaTec Group***, a $1.2 billion follow-on equity offering by the British medical products and technologies company, listed on the London Stock Exchange

DCM Largest Bond Offerings – Europe

- ***British American Tobacco***, a $17.3 billion offering by the British tobacco company in connection with its acquisition of Reynolds (but marketed in the United States)
- ***Volkswagen***, an $8.6 billion eurobond offering by the German auto manufacturer
- ***Reckitt Benckiser***, a $7.8 billion floating rate note offering by the British pharmaceutical company

High Yield – Europe

- ***Wind Tre***, an $8.6 billion offering by the Italian telecommunications company
- ***Intrum Justitia***, a $3.4 billion offering by the Swedish credit management services company
- ***Ardagh Packaging***, a $2.2 billion offering by the Irish packaging company

United States

ECM Largest IPOS – United States

- ***Snap***, a $3.9 billion IPO by the U.S. social media company, listed on the New York Stock Exchange
- ***Altice USA***, a $2.2 billion IPO by the U.S. telecommunications, media, and entertainment company, listed on the New York Stock Exchange
- ***Invitation Homes***, a $1.8 billion IPO by the home rental company, listed on the New York Stock Exchange

ECM Largest Follow-On Offerings (Including Equity-Linked) – United States

- ***Crown Castle***, a $3.9 billion follow-on offering by the U.S. wireless infrastructure provider, listed on the New York Stock Exchange
- ***Becton Dickinson***, a $2.5 billion follow-on offering by the U.S. medical technology company, listed on the New York Stock Exchange
- ***Equinix***, a $2.2 billion follow-on offering by the U.S. information technology (IT) company, listed on the Nasdaq Stock Market (Nasdaq)

DCM Largest Bond Offerings – United States

- ***AT&T***, a $22.5 billion U.S. bond offering by the U.S. telecommunications company in connection with its acquisition of Time Warner
- ***Microsoft***, a $17 billion U.S. bond offering by the U.S. IT company
- ***Amazon.com***, a $16 billion U.S. bond offering by the U.S. electronic commerce and cloud computing company

High Yield – United States

- ***Petrobras Global Finance***, two $4 billion offerings by the Brazilian oil and gas company in January and May 2017
- ***Tenet Healthcare***, a $3.8 billion offering by the U.S. healthcare services company
- ***Avantor***, a $3.5 billion offering by the U.S. chemical company

Global

Of the deals discussed by region above, the following sets forth the largest of those deals globally.

ECM Largest IPO – Global

Global IPO issuance was up 45% in 2016.

- ***Snap***, a $3.9 billion IPO by the U.S. social media company, listed on the New York Stock Exchange

ECM Largest Follow-On Offering – Global

Global ECM offering issuance (including follow-on, equity-linked, and IPOs) was up 20% in 2016.

- ***UniCredit***, a $13.7 billion rights offering by the Italian bank, listed on the Milan Stock Exchange

DCM Largest Bond Offering – Global

Global investment grade debt issuance was up 1% in 2016.

- ***AT&T***, a $22.5 billion U.S. bond offering by the U.S. telecommunications company

High Yield – Global

Global high yield debt issuance was up 49% in 2016.

- ***Wind Tre***, an $8.6 billion offering by the Italian telecommunications company

DEAL STRUCTURE AND PROCESS

Types of Capital Market Transactions

There is a wide range of products used in the international capital markets.

For ECM, there are:

- Companies listing their shares for the first time in an IPO
- Issues of new shares of a class that are already listed (such as capital increases or rights issues, open offers, and placings including by an accelerated book building process)
- Private placements of shares by companies across the spectrum of development

Existing shareholders also re-sell their shares in various ways, ranging from common secondary market trades to IPOs comprised wholly or partly of shares being sold by a private equity sponsor making an exit from its earlier investment in a portfolio company. Partial IPO investor exits may be completed by a series of subsequent sell downs, usually as block trades or accelerated bookbuilt transactions (referred to as ABBs or ABOs). ECM also includes offerings of equity-linked securities such as convertible bonds whereas offerings of hybrid capital securities (which also have both debt and equity characteristics) tend to be regarded as DCM. For additional information on equity offerings in the U.S. context, see Initial Public Offerings Resource Kit, Top 10 Practice Tips: Initial Public Offerings, Follow-On Offerings Resource Kit, Market Trends 2017/18: Follow-On Offerings, and Registered Securities Offerings Post-IPO. For additional information on equity-linked securities, see Equity Derivatives Essentials.

For DCM, the range of types of deal and issuer is characterized by a series of contrasts, including the following:

- An investment grade debt issuance by a company with a strong credit rating
- A high yield issuance by a company with a sub-investment grade rating
- An issuance by a company from the emerging markets

Common Elements

Although details may vary, in deal structure and process, there are common elements across all the capital markets products (ECM, DCM, and high yield) in the international capital markets, including:

- Choosing a listing venue and dealing with the regulator or competent authority where applicable
- Pre-marketing and marketing activities, including publicity and research
- Due diligence
- Disclosure
- Underwriting arrangements

Differences

There are differences as well, which vary according to the product and the market. Most notably, there will be differences relating to the timeline. An IPO can take several months whereas a high yield bond offering is typically accomplished with a tighter timetable. In contrast, a repeat investment grade debt drawdown from a Euro Medium Term Note (EMTN) program or an equity block trade or ABB can take place in days. As noted below, a recent trend in the international capital markets is mounting pressure to shorten the public timetable (the period between announcement and pricing of a deal) to make it easier to take advantage of market windows and to minimize execution risk. For additional information on medium-term note program in the U.S. context, see Medium-Term Note (MTN) Programs.

The markets targeted also make a difference to deal structures. For example, where the deal has a Rule 144A (17 C.F.R. § 230.144A) component for a private sale to qualified institutional investors in the United States, the timetable tends to be longer and the disclosure more detailed than for a deal sold entirely to investors outside the United States under Regulation S (17 C.F.R. §§ 230.901–230.905). For non-U.S. companies accessing the U.S. capital markets through an offering registered with the SEC, the process will generally have additional complexity and may require more time than similar transactions in other markets. For additional information on Rule 144A / Regulation S offerings, see Rule 144A / Regulation S Offerings Resource Kit.

However, the time period and complexity of the process also depend on the type of offering and type of issuer. A well-known seasoned issuer with an SEC-registered shelf registration can accomplish a large U.S. capital raising as swiftly as it can conduct a large eurobond offering from an EMTN program, and it might choose to proceed in parallel with both routes until it is clear which market offers the best price at the chosen time. By contrast, conducting an SEC-registered IPO may be more complicated and time-consuming for a non-U.S. company than in other markets, unless it qualifies for the lighter touch U.S. regulatory regime available to emerging growth companies (EGCs). Also, non-U.S. companies that meet the definition of foreign private issuer under U.S. federal securities law set forth in Rule 405 (17 C.F.R. § 230.405) under the Securities Act of 1933, as amended (Securities Act), and Rule 3b-4 (17 C.F.R. § 240.3b-4) under the Securities Exchange Act of 1934, as amended, benefit from several accommodations under the U.S. ongoing reporting regime once they become SEC-reporting companies (e.g., no quarterly reporting, exemption from Section 16 reporting short swing profit provisions and proxy rules, and ability to follow home country corporate governance). This lighter touch regime is not available to U.S. companies conducting their IPO in the United States, although some aspects apply where the issuer is an EGC.

Choosing the Listing Venue

Choosing the listing venue, particularly for an IPO, is a key decision for participants in the international capital markets and is made early in the process. Listing is accomplished at the time of the offering, except in high yield transactions where listing generally occurs after the offering. Many factors will be taken into consideration, from both regulatory and business perspectives, to determine the best fit for the company. For example, the scope of applicable EU regulation varies according to whether a security is admitted to trading on an EU-regulated market or a multilateral trading facility (MTF) or other unregulated venue. Directive 2004/109/EC of December 15, 2004, as amended (the EU Transparency Directive) and Directive 2003/71/EC, as amended (the Prospectus Directive), which together prescribe the detailed reporting and disclosure requirements for listed securities, apply only to securities admitted to trading on an EU-regulated market, although the EU Market Abuse Regulation – Regulation (EU) No.596/2014 (MAR) applies across all EU markets, regulated or unregulated. The difficulties caused by MAR that came into effect in July 2016 (as discussed below) prompted some high yield issuers to consider alternatives to EU listing venues. In April 2018, the Luxembourg Stock Exchange began offering a new service that allows debt and equity securities to be admitted to its official list in the Securities Official List (SOL) section without admission to trading, thereby largely avoiding the application of regulations related to admission to trading, including the Prospectus Directive, the EU Transparency Directive, MAR and MiFID II. By contrast, some venues, such as London and Hong Kong, have a so-called gold-plated approach for equity offerings with additional requirements not generally found elsewhere (e.g., on eligibility to list). For further information on MAR and MiFID II in various contexts, see Market Trends 2017/18: Sovereign Bonds, Market Trends 2016/17: Sovereign Bonds, Market Trends 2017/18: Hedge Funds, and Reverse Yankee Bonds and the New EU Market Abuse Regime.

For IPOs, the main markets for an international listing continue to be the United States, Hong Kong, London, and other major European exchanges such as Frankfurt and Amsterdam. London listings rebounded in 2017 making for one of the busiest years for the exchange despite concerns about Brexit. In Asia, the Shanghai Stock Exchange generally attracts Chinese companies, whereas the Hong Kong Stock Exchange attracts Chinese companies (including those with global operations) as well as Hong Kong and international companies. For DCM transactions, the main markets for European listings tend to be Luxembourg and Ireland while in the United States DCM transactions tend not to be listed but are often registered with the SEC. DCM transactions in Asia tend to be listed in Singapore or Hong Kong.

Another aspect in considering the regulatory burden of a venue is the regulator review process—how lengthy, substantive, and predictable it is, and whether filings are confidential. For equity offerings in some venues, a sponsor is required to act as the interface between the company and the listing authority (e.g., in London (for premium listings), Hong Kong, and Singapore). The sponsor is usually one of the investment banks acting on the offering. A further consideration is governance and other eligibility criteria that need to be met. Some exchanges have significant eligibility requirements while others, like the United States, focus on disclosure and allowing investors to make their own decisions based on that disclosure. Another area of difference between the United States and other international markets is with respect to the underwriting agreement. For example, in Europe and Asia the agreement tends to be specifically negotiated while in the United States, there is an established market practice.

A deciding factor in choosing listing venue has often been the ability to maintain founder control over the company and a substantial economic interest after the IPO. The United States (i.e., the New York Stock Exchange and Nasdaq) has often been the venue of choice for technology and other growth companies as it permits a dual-class capital structure, giving greater voting power to founding shareholders and does not have a significant free float requirement. Amsterdam is another example of an exchange that permits listing of a company with a dual-class capital structure. For further information on technology companies, see Technology Industry Practice Guide. By contrast, London (premium listings) does not permit the listing of companies with dual-class capital structures. This was also the case for the Hong Kong and Singapore exchanges until 2018 when both revised their listing rules to permit listings of companies from emerging and innovative sectors including (in certain cases) those with dual-class voting structures, as discussed below.

These developments illustrate a trend in 2017 for exchanges to look for ways to tailor their listing rules and processes to attract more international companies and companies from emerging industries. Throughout 2017, the Financial Conduct Authority, the EU National Competent Authority (i.e., securities regulator) for the United Kingdom (FCA), was consulting on changes to the London IPO process (as discussed below) in response to investor demand for more disclosure earlier in the process and to ensure objectivity and fairness in the provision of research. In addition, the Hong Kong Stock Exchange undertook a consultation on proposed new Listing Rules aimed at attracting the listings of emerging and innovative companies (discussed below). To a lesser extent, the SEC also made changes in 2017 aimed at making the U.S. public markets more attractive, for example, by extending confidential initial review of IPOs to more issuers and increasing its scope to include listings (i.e., without a capital raise) and follow-on offerings conducted within a year of an IPO. For more information on the SEC confidential review process, see Understanding the SEC Review Process.

De-risking Trend

De-risking is where the parties in an offering take actions designed to ensure (as far as possible) that the deal is accomplished at the desired price, with the desired structure, and within the desired timeframe. The de-risking trend has pushed the European markets to adopt a version of a pre-marketing strategy common in the

Asian markets where key investors are approached early in the process as anchor investors. In Asia, there is a practice of signing up cornerstone investors who will receive confidential information ahead of the launch of the offering, execute nondisclosure and lock-up agreements, and make a contractual commitment to invest at the IPO price. These arrangements are disclosed in the prospectus and can form part of the marketing message for the deal. In Europe, the anchor investor process does not generally involve early contractual commitments but involves educating potential anchor investors early in the process, bringing them into the book of demand early, and obtaining strong indications of interest from them. Ultimately, though, such investors participate in the actual offering in the same way as other investors. Another practice that has developed in Europe is earlier company engagement with a range of potential investors, particularly for IPOs, often initially taking place months before any offering and then at later stages thereafter.

Such pre-marketing when the company or a parent company already has securities listed in Europe raises a potential market abuse issue, and this difficulty has been exacerbated by MAR as discussed below. The question is what information can legally be given to potential investors earlier in the process, including about a potential transaction. For substantive information regarding the company, market participants are moving towards using a slide presentation of information about the company that can be publicly disclosed on the company website and used in the prospectus. However, there is pressure from investors for more detailed information to be delivered earlier as can be seen in the changes discussed below comprising the new London IPO process.

The market abuse concern is particularly acute in IPOs of businesses that are a spin-off or subsidiary of an existing public company. In that case, the parent entity will be very cautious about releasing material information other than publicly and only when such information has been properly subject to due diligence. For more information about pre-marketing in the U.S. context, see Market Trends 2017/18: Confidentially Marketed Public Offerings and Bought Deals.

Deal Terms

Deal terms have also evolved to reduce risk. For example, for a company that needs to raise equity capital for an acquisition but the regulator, the market, or the seller requires certain funds or a stronger balance sheet, a practice has developed where banks agree with the company to underwrite an amount of proceeds without specifying the number of shares to be issued or a price. Either a short form standby underwriting agreement or a full underwriting agreement with a pricing formula or pricing reset mechanism is entered into at the time of announcement and often before a prospectus has been prepared. Conditionality varies from deal to deal and market to market as well as upon the requirements of the relevant listing authority. In practice, once such an arrangement is in place, it is difficult for the banks to withdraw (although technically, depending upon the conditions to the agreement, they may have the right to do so).

DISCLOSURE TRENDS

Alternative Performance Measures

Financial disclosure in the prospectus is at the heart of the offering process. During 2016, securities regulators across the world focused on the quality of disclosure of alternative performance measures (APMs), also called non-GAAP financial measures (NGFMs), and throughout 2017 issuers and regulators continued to digest and develop this regulatory push. An NGFM is a numerical measure of financial performance that excludes (or includes) items that would be included (or excluded) in related generally accepted accounting principle (GAAP) line items and that do not appear on the face of the financial statements. The International Organization of Securities Commissions, the SEC, and the pan-EU regulator (the European Securities and Markets Authority or ESMA) all issued broadly consistent guidance on the topic and issuers have been adapting their disclosures to the new guidance. Common themes in the guidance include:

- Consistency in using an APM from period to period

- Using a label that faithfully represents what the APM conveys
- Reconciling the APM to the nearest related GAAP measure
- Explaining why the APM is used
- Defining it –and–
- Not giving the APM more prominence than the related GAAP measure

Because the guidance relates to APMs used in all disclosures, companies are also reviewing their use of APMs in their ongoing reporting disclosure.

At first, European national regulators simply asked for issuers to identify APMs in the prospectus and to confirm that they had complied with the ESMA guidance. By contrast, the SEC guidance (available at https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm) is more detailed and proscriptive, and the staff at the Division of Corporation Finance at the SEC has the ability to implement the guidance through the established comment letter process as they review disclosure in SEC filings. In October 2017, ESMA updated its guidance on APMs (available at https://www.esma.europa.eu/document/qa-esma-guidelines-alternative-performance-measures) with new questions covering constant currency, segment information, APMs that explain compliance with covenants/legislation, disclosure of “organic growth,” the need for numeric reconciliation, and dealing with biased measures of performance.

In Europe, the regulatory focus on APMs has extended to the marketing phase of transactions, effectively imposing more disciplined use of APMs in that context. Article 12 of a 2016 EU regulation called Omnibus II Directive RTS (Regulatory Technical Standards under Commission Delegated Regulation (EU) 2016/301) requires any APM used outside the prospectus in marketing an offering to be included in the prospectus. Subsequent ESMA guidance on this new regulation requires that any APMs given out orally in response to questions at a live presentation (such as a roadshow or interview), but not included in the prospectus, must be added to the prospectus. This would require amending a prospectus that is still subject to regulatory approval and supplementing a prospectus that has already been approved.

The developments on APMs point to a broader trend: investors want disclosure that enables them to understand the financial drivers of the business in the same way that company management does, including with more forward-looking information, such as profit forecasts. Broadly, for equity, current EU rules require profit forecasts to be disclosed in the prospectus and any profit forecast (whether already outstanding or made in the context of the offering) to be reported on by the accountants. Historically, the report requirement has proved a disincentive to making profit forecasts because it can be difficult, time-consuming, and costly to obtain. It is expected that the accountants’ report requirement will be dropped in the new EU Prospectus Regulation that will apply from July 2019 and is discussed below. In March 2018, ESMA issued guidance (available at https://www.esma.europa.eu/press-news/esma-news/esma-adds-new-qa-profit-forecasts) that takes a more expansive view as to what statements constitute a profit forecast than previously adopted by many regulators. As a result, a broader range of forward-looking statements are likely to be treated as profit forecasts triggering the need for an accountants’ report, at least until the new Prospectus Regulation discussed below applies (and assuming that the report requirement is dropped as expected). This may result in more forward-looking statements being reported upon during this period or fewer forward-looking statements being made.

This trend to provide more APMs and forward-looking information poses diligence and comfort challenges for counsel and other market participants that have potential liability for statements made by the company in the offering process. In Europe, there is likely to be pressure and uncertainty among market participants until market practice has developed around how best to balance liability concerns and investors' desire for (and regulators' requirements for) this forward-looking information. Although APMs and forward-looking disclosure may be material to, and sought by, the investor, it is difficult for counsel and third-party market participants to diligence such disclosure or obtain comfort on it from the accountants (which for profit forecasts will likely no longer be required). Deal participants will need to develop compliance and diligence methodology for APMs and forward-looking information. For example, participants are seeking comfort on components of APMs, finding ways to diligence a qualitative narrative, making use of management diligence, crafting assumptions and risk factors, and referring to comparable companies. For more information about APMs in the U.S. context, see SEC Regulation of Non-GAAP Financial Measures and Top 10 Practice Tips: Foreign Private Issuers.

Cybersecurity

Outside of financial disclosure, there was a significant development in February 2018 when the SEC issued an interpretive release on cybersecurity disclosure (available at https://www.sec.gov/rules/interp/2018/33-10459.pdf) which reinforces and expands on the principles-based guidance from the staff of the SEC's Division of Corporate Finance in 2011. The guidance applies to SEC registrants, including non-U.S. companies, in their SEC filings and is also relevant to disclosure in offerings by companies that are not SEC-reporting where that disclosure is subject to the Rule 10b-5 disclosure standard. Key points include the importance of cybersecurity policies and procedures, especially the role of disclosure controls and procedures; the application of insider trading and selective disclosure prohibitions in the context of cybersecurity including preventative measures or policies; and where cybersecurity risk is material, disclosure about the board's oversight role. Cybersecurity disclosure is topical given the recent difficulties experienced by the U.S. company Facebook over misuse of Facebook users' personal data by third parties and developments in European regulation with the entry into force in May 2018 of the EU General Data Protection Regulation (for more information, see https://www.eugdpr.org/). For a form of cybersecurity risk factor, see Cybersecurity Risk Factor.

INDUSTRY INSIGHTS

Different markets may focus on different sectors, and this focus can lead to development of rules, practices, and expertise tailored to particular sectors. For example, historically Hong Kong has attracted companies in the consumer sector with strong brands while Nasdaq tends to attract technology companies. As noted above, the Hong Kong Stock Exchange is changing its listing rules to make it easier to list for biotech issuers that are developing or producing pharmaceuticals, biologics, and medical devices and that would otherwise not meet the financial eligibility tests required for listed companies. Canada, the United States, and London are attractive to issuers in the energy sector, and each market may apply its own rules tailored to that sector.

Specialized Extractive Industry Disclosure Requirements

An example of such rules is the EU Transparency Directive requirement that any company listed in a European jurisdiction that actually makes a payment to a host country government for commercial development of reserves must report the payment. Under the European rules, an issuer would not have to report payments made by equity-accounted investees that are not its subsidiaries. A similar U.S. rule for SEC-reporting companies, domestic and non-U.S., was eliminated on February 14, 2017 when the president of the United States signed into law a joint resolution of Congress that had been passed under the 1996 Congressional Review Act (5 U.S.C. §§ 801–808) (which allows a new Congress to act quickly to invalidate recent rulemaking by governmental agencies). However, the SEC remains required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 to establish such a rule and the Director of the SEC's Division of Corporation Finance publicly indicated in February 2018 that the staff is preparing recommendations for a rule proposal to implement this resource extraction issuer disclosure provision. For more information on extractive industry disclosure in the U.S. context, see SEC's Previously Adopted Resource Extraction Issuer Disclosure Rule.

Reserves Disclosure Requirements

Another example of specialized disclosure rules is the requirement for disclosure of oil and gas reserves. The U.K. rules require that a Competent Persons Report be included in the prospectus needed for listing of an oil and gas company. This report is similar to an expert's report in the United States but relates only to an expert reporting on reserves. For more information, see Oil and Gas Industry Practice Guide.

By contrast, SEC Regulation S-K Items 1201–1208 (17 C.F.R. §§ 229.1201–229.1208) and the definitions in SEC Rule 4-10(a) of Regulation S-X (17 C.F.R. 210.4-10(a)) require specific reserve and resource disclosures for oil and gas companies. These rules do not permit the disclosure in a registration statement of estimates of oil and gas resources that do not qualify as reserves and do not permit a value to be attributed to such resources. The SEC definition of reserves is different from the definition applied by other international reporting standards, including the Petroleum Resources Management System (PRMS). Under the PRMS, to qualify for reserve treatment, the extractive project must be commercial rather than economically producible.

LEGAL AND REGULATORY TRENDS

Significant listing rule changes for Hong Kong and Singapore stock exchanges. In early May 2018, the Hong Kong Stock Exchange adopted new rules allowing the listing of the following three categories of company to its main board:

- Biotech companies that do not meet the financial eligibility tests currently required to list on the main board (provided that certain criteria are met)
- Companies that are both high growth and innovative and have weighted voting right structures (also known as dual-class capital structures) –and–
- Companies wishing to conduct a secondary listing in Hong Kong

In response to these rules, a substantial number of early stage biotech companies, including several with substantial operations outside of China including the United States, have filed listing applications under the new regime. In addition, the Singapore Stock Exchange in June 2018 introduced rules allowing companies with dual-class share structures to list on its main board, provided that certain protective measures are implemented. Both initiatives are intended to increase the number of listings in Hong Kong and Singapore of so-called new economy and technologically focused companies.

Brexit negotiation. On March 29, 2017, the United Kingdom gave formal notice to leave the EU. This action started a two-year negotiation of the terms of its exit, which will occur on March 29, 2019, potentially including arrangements for a transitional period after exit to December 31, 2020 (to avoid the disruption expected if there were a so-called hard or cliff-edge Brexit) during which key elements of EU membership (e.g., continued participation in the single market and customs union) may continue. The transitional period would allow more time for the future relationship between the United Kingdom and the EU to be worked out. It is impossible to predict how the process of the negotiations may affect market sentiment in the future where the only certainty is that the relationship of the United Kingdom and the EU remains uncertain. For more information, see Market Trends 2017/18: Brexit Disclosure.

New London IPO process. The financial services industry in the United Kingdom is likely to be considerably affected by Brexit in various ways. Market participants are seeking to ameliorate and, if possible, exploit the changes to protect or enhance London's competitiveness as a financial center and as a listing venue. The FCA did a five-year study of primary market activities in the United Kingdom (ECM, DCM, and mergers and acquisitions) in order to consider ways to improve the London IPO process and conducted a consultation on proposed reforms. In October 2017, the FCA published the results of the consultation and, most importantly, the final rules to implement the proposed reforms (available at https://www.fca.org.uk/publication/policy/ps17-23.pdf). The final rules include (1) making certain disclosures about the company available earlier in the process (in a registration document approved by the regulator but containing no information about an offering, with the approved prospectus including details of the offering to follow, which is an approach similar to that used in France) and (2) providing access to company management for analysts who are not connected to the banks underwriting the IPO. Market participants are continuing to work out the implications of the new process that went into effect in July 2018.

New premium listing category for sovereign-controlled companies. In 2018, the London Stock Exchange began offering a new premium listing category for commercial companies controlled by a shareholder that is a sovereign country. The new category is available for both shares and global depositary receipts (GDRs) and offers higher investor protection than would otherwise be available if such issuers used a standard listing (previously their only option). The new category benefits from relaxation of the controlling shareholder and related party transaction regimes otherwise applicable to premium listings (although all other premium listing eligibility requirements apply). Sovereign shareholders are exempt from the requirement to enter into a controlling shareholder agreement with the issuer but are subject to the requirement for the election of independent directors to be subject to separate approval by independent shareholders. The related party regime does not apply except for disclosing the details of a related party transaction as soon as possible after the terms are agreed—so there is no requirement for prior shareholder approval or a so-called fair and reasonable opinion from a sponsor for transactions with the sovereign (as a shareholder safeguard, premium-listed companies are required to seek sponsor guidance on the application of the related party regime where a proposed transaction is with a related party and the rules require the sponsor to confirm whether the terms of the proposed transaction are fair and reasonable as far as the shareholders are concerned). For more information about sovereign entities, see Sovereign Entities Practice Guide, Schedule B Foreign Sovereign Debt Offerings, Market Trends 2016/17: Sovereign Bonds, and Market Trends 2017/18: Sovereign Bonds.

MiFID II. The Markets in Financial Instruments Directive (MiFID) is the EU legislation that regulates EU investment firms who provide services to clients linked to financial instruments (e.g., shares, bonds, units in collective investment schemes, and derivatives), and the venues where those instruments are traded. This directive was replaced effective January 2018 by MiFID II and a new Markets in Financial Instruments Regulation to introduce sweeping changes to the EU regime for financial services regulation. Of most interest in the context of capital markets transactions are the rules relating to transaction reporting and to investor protection. Broadly, the effect of the new regime is to extend obligations that previously applied only to equities to all financial instruments, including non-equity securities. This has an impact on the way financial institutions sell bonds in the primary markets because of new requirements that include transparency on allocation to investors, disclosure requirements on fees, transaction reporting requirements, and product governance obligations. On transaction reporting, the new regime increases both the scope of financial instruments covered by the requirement and the amount of data required. On investor protection, there are new rules on product governance that apply to the manufacture and distribution of financial products and MiFID II broadly prohibits EU independent advisors and portfolio managers from taking inducements from product providers or third parties, which has implications for the provision of research services. Charges for third-party research (e.g., provided by investment banks / broker-dealers) must now be broken out separately by EU investment managers and no longer bundled up with the trading commissions that are passed on to investors, as had been the practice globally. The purpose of this requirement is to enable clients (investors) to understand clearly what they are being charged for. The requirement also caused a potential conflict with the regulatory regime in the United States, solved on a temporary basis in October 2017 by the SEC. See SEC Announces Measures to Facilitate Cross-Border Implementation of the European Union's MiFID II's Research Provisions (October 26, 2017), available at https://www.sec.gov/news/press-release/2017-200-0. This is an example of how non-EU counterparties may be indirectly affected by MiFID II when dealing with EU counterparties even though MiFID II is intended only to apply to EU entities and activities undertaken in the EU.

PRIIPs. The Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation is a piece of EU legislation in effect since January 1, 2018. It establishes a disclosure regime for PRIIPs and requires those who manufacture, advise on, or sell such products to provide retail investors with a key information document (KID) in the form prescribed. The regime applies where an investment product is a PRIIP and is being marketed to one or more investors in the European Economic Area. It applies to relevant new bonds issued after January 1, 2018, and to secondary trading of such bonds issued before that date. The PRIIPs regime complements the MiFID II regime and requires that retail investors in PRIIPs be provided with a KID a reasonable time before they are committed by any investment contract and that manufacturers (usually issuers) regularly review any KID and if necessary publish a revised KID.

Prospectus regulation. As part of the EU Capital Markets Union Action Plan of September 2015, the European Commission announced proposals to modernize the EU Prospectus Directive, which is the regulatory regime governing the offering and disclosure process for capital markets transactions in the EU. In 2017, a new Prospectus Regulation was adopted that repeals and replaces the existing prospectus regime, although most of the new rules are not effective until July 2019. Key changes include:

- Risk factors will be required to be grouped in a limited number of categories depending on their nature and ranked by materiality (i.e., judged on how likely the risk is to occur and how significant its impact would be) within each category.
- All issuers with securities admitted to trading on an EU-regulated market or MTF will be permitted to draw up a universal registration document (URD), which can form part of any future equity or debt prospectus (somewhat similar to a shelf registration statement in the United States).
- New simplified disclosure regimes will be introduced for certain secondary offerings and for offerings by smaller issuers viewed as growth companies.
- A new less onerous disclosure regime will apply to debt securities of any denomination that are to be traded only on a regulated market, or a specific segment thereof, to which only qualified investors can have access.

The technical changes needed to implement the new Prospectus Regulation are still working through the EC legislative process.

MAR. The EU Market Abuse Regulation that came into effect in July 2016 caused market participants to carefully consider the pre-marketing of deals. MAR replaced a similar regime but is broader in scope, expanding the prohibition of insider dealing, unlawful disclosure of inside information, and market manipulation to cover more trading venues. Issuers and other market participants both inside and outside Europe were concerned at first by this increased (but initially uncertain) scope and extraterritorial effect. Among other things, MAR also introduced a new regime for market soundings (i.e., gauging the interest of potential investors in a possible transaction and the conditions relating to it, such as its potential size/price before announcement of the transaction). The market soundings regime provides that disclosure of inside information during a market sounding is exempt from the prohibition on unlawful disclosure of inside information, as long as both parties to the sounding comply with their respective obligations under the market sounding regime. The obligations involve extensive record keeping, obtaining consents, and giving notice of prescribed details once the information ceases to be inside information. The requirements proved burdensome and unpopular with market participants, and the resulting and continuing trend is for deal participants to focus on ways to keep a deal out of scope of MAR. Bank syndicates, financial services industry bodies, and EU regulators have all worked together successfully to find workable solutions so initial concerns have largely been resolved as market practice has developed. In December 2017, ESMA updated its guidance on MAR with new questions covering an issuer's obligations on delaying disclosure of inside information that subsequently ceases to be price sensitive, the obligation of an issuer's advisors to maintain their own insider lists, and the scope of the market soundings regime. See Questions and Answers on the Market Abuse Regulation (MAR) available at https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf.

MARKET OUTLOOK

ECM continued to perform strongly in the first quarter of 2018 although there was a taste of pre-2017 volatility during February. In IPOs, the United States had an even stronger performance in the first quarter of 2018 than in 2017 while performance in Asia declined compared to 2017 despite remaining the most active region for IPOs (including a $4.7 billion IPO for China-based smart phone producer Xiaomi in July 2018). In Europe, deal value was up compared to 2017 but the number of deals was down, reflecting the impact of Brexit uncertainty and the spike in volatility in February 2018. Two mega deals on the Frankfurt Stock Exchange made a contribution to this performance: the $5.2 billion IPO of Siemens Healthineers and the $1.8 billion IPO of DWS Group (Deutsche Bank's spin-off of its asset management arm). DCM maintained a steady course with issuance in the first quarter of 2018 consistent with 2017.

There is cautious optimism about the outlook for the remainder of 2018. The promising start in the first quarter and a benign economic backdrop of global growth is tempered by an expectation that there will be more volatility than was the case in the unusually stable market conditions in 2017. There are many factors contributing to uncertainty, both positive and negative, including the following:

- The impact of the economic stimulus of U.S. tax reform, including U.S. companies repatriating overseas earnings
- Potentially increased capital expenditures and appetite for mergers and acquisitions as a result of such repatriation and other aspects of the tax reform
- Risk of trade wars (especially in view of the tariffs on goods between the United States and China imposed by each country midyear)
- Rising inflation and interest rates; tapering central bank economic support; geopolitical tensions –and–
- U.S. midterm elections in November 2018

David Ludwick

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David Ludwick is a US partner based in London with more than 25 years' experience who specializes in capital markets. He has extensive experience on a broad range of equity securities offerings (including IPOs, private placements, depositary receipts, rights issues and block trades) and debt transactions (including high yield, investment grade, convertible debt, hybrid securities and liability management transactions). He has broad global experience advising a wide range of companies seeking to access the US and international capital markets, as well advising investment banks and other financial intermediaries. David's clients come from various sectors including consumer, financial institutions, biotech and pharmaceuticals, energy and natural resources and real estate. David has advised on transactions in numerous countries including Australia, Belgium, Cambodia, China, Denmark, France, Germany, India, Indonesia, Israel, Italy, Luxembourg, Malaysia, the Netherlands, Philippines, Russia, Singapore, South Korea, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom and the United States. He is recognized as a leading capital markets lawyer by Chambers, Legal 500 and IFLR1000.

David joined Freshfields in 2015. He previously worked at Linklaters (in London and Hong Kong -- where he headed their US practice in Asia) and Davis Polk & Wardwell (New York). He has practiced for a decade in each of London and Hong Kong, prior to which he spent several years practicing in New York. David clerked for Judge Francis Altimari on the U.S. Court of Appeals for the Second Circuit in New York. He received his J.D. from Cornell Law School (1993).

Sarah Murphy

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Until her retirement in May 2018, Sarah Murphy was the head of Freshfields Bruckhaus Deringer's US capital markets practice in Europe and Asia and co-head of its international capital markets group. She has more than 30 years' experience advising companies and investment banks that want to access the US and international capital markets. She has represented clients from various sectors, including energy and natural resources, financial institutions, infrastructure, pharmaceuticals, real estate, retail and telecoms, and from various jurisdictions, including Finland, Germany, Ireland, Luxembourg, Russia, South Africa, Spain, Sweden, the UK and Ukraine, and acted on the full range of equity, debt and hybrid offerings, including IPOs, rights issues and other secondary equity offerings, GDR offerings, accelerated book builds, all types of bond issuance and liability management transactions.

Regularly recognised as a leading lawyer for equity and debt capital markets by Chambers and Legal 500, Sarah has been a speaker at external conferences and on the Advisory Committee for the Practising Law Institute's Annual Securities Institute on EU and US Securities Law in London. In 2016, Sarah was featured by Financial News on their FN 100 most influential Women in European Finance Powerlist during the last decade and, in 2017, was named by The Lawyer as one of the Hot 100 Lawyers in London.

Prior to joining Freshfields in 1998, Sarah was at Cravath, Swaine and Moore (New York and London) and clerked for Judge John F. Keenan on the US Federal Court for the Southern District of New York. She was educated at Williams College (BA 1977) and Fordham Law (JD 1983).

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Virginia joined Freshfields as a knowledge lawyer in 1997. Previously she was at Pillsbury Winthrop Shaw Pittman LLP (San Francisco), at Nishimura & Asahi (Tokyo) and began her career as a trainee at Freshfields (London). In the corporate securities team at Pillsbury she acted for issuers and banks in capital markets and M&A transactions as well as advising US public companies on their ongoing SEC reporting obligations. In Tokyo she worked on global securities offerings and Tokyo Stock Exchange listings for non-Japanese clients.

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