HAVE YOU CONSIDERED LONDON?

Why U.S. Companies Should Consider Listing in London and the Relevant U.K. and U.S. Legal Considerations

London always has and continues to be a popular destination for overseas companies. Listing in London provides access to the largest capital market in Europe with a deep pool of liquidity and international investors, providing the ability to raise a company's corporate profile internationally.

In recent years, the number of companies from North America that have obtained a listing in London has increased, with the U.S. and Canada being the largest source of international equity listings in London with over 90 listings since 2017. Listing in London comes with a host of advantages to U.S. companies, one of the most interesting for U.S. companies being that you don't need to be a 'unicorn' to list in London.

There are various markets in London that offer listing environments that are built for and tailored to small and medium enterprises companies (SMEs) as well small/micro-cap companies. For example, growth markets tailored to SMEs have a much lower market capitalisation requirement, which can be as low as £2m[1] (approximately $2.5m USD) – whereas in comparison, the minimum market capitalisation to list on the Nasdaq Capital Market is $50m USD.[2]

A London listing for smaller companies remains attractive as well due to the lower costs involved in the listing process and to maintain that listing in comparison to a U.S. listing. As such, for these reasons and more, it is easy to see why a London listing might be an attractive alternative for a growing U.S. company that can even be used as stepping stone to a subsequent dual-listing or listing in the U.S.

A London listing offers a range of markets with different levels of regulation and prestige. In this article, we will look at the key considerations for U.S. companies when seeking a listing in London. One of the first considerations for listing in London will be determining the most suitable exchange and market for the U.S. company. There are two stock exchanges in London – with various principal markets across the exchanges.

Note 1: This is the lowest prescribed minimum which is the minimum for Access Segment on the Aquis Growth Market of the Aquis Stock Exchange. However, an AIM market listing has no prescribed market capitalisation minimum but in practice what is required may be subject to discussions with your Nominated Advisor and for cash shell companies/ SPACs looking to list on AIM are subject to a minimum market capitalisation of £6m.

Note 2: The Nasdaq Capital Market is one of three tiers within Nasdaq and comprises a market for companies with the lowest market capitalisations listed on Nasdaq. Nasdaq's Listing Rules contain initial listing standards applicable to companies who wish to list on the Nasdaq Capital Market. Maintaining a market value of listed securities of at least $50m is one way in which listed companies can satisfy Nasdaq's initial listing standards for the Nasdaq Capital Market.

The principal markets operated by the London Stock Exchange (LSE)[3] are:

- **The Equity Shares Commercial Companies (ESCC) Segment of the Main Market of the London Stock Exchange:** This is the most prestigious market in London that houses well-known blue chip and other larger companies and is generally designed for established companies. As such, ESCC is typically used by large companies looking to benefit from an increased profile and highly liquid market. Indeed, it is only with an ESCC listing that a company can be eligible for inclusion in the FTSE indexes. To maintain a ESCC listing, companies must meet the U.K.'s highest standards of regulation and corporate governance, and the costs associated with this are higher as a result. An ESCC listed company must have a minimum market capitalisation of at least £30 million (approximately $38 million).
- **The Equity Shares Secondary Listing (ESSL) of the Main Market:** This is a new market segment but one also aimed at larger established companies with the difference being it is only available to non-U.K. incorporated companies (noting that non-U.K. incorporated can still choose to dual list on the ESCC). An ESSL listed company must also have a minimum market capitalisation of at least £30 million (approximately $38 million) at the time of listing.
- **The AIM Market:** This is the London Stock Exchange's growth market, which is aimed at earlier stage growth companies. It is the most successful growth market in the world which attracts a truly international range of companies. There is no need for the company to have a track record or a minimum market capitalisation at the time of listing, however there is a minimum fundraise of £6m on admission for shell companies/SPACs.

The principal markets operated by the Aquis Stock Exchange (LSE) are:

- **Aquis Main Market:** Similar to the ESCC the Aquis' Main Market is a U.K. regulated market supervised by the U.K.'s Financial Conduct Authority (FCA). The Aquis Main Market is targeted at well-established companies with a minimum track record of years and a minimum market capitalisation of £10m.
- **Aquis Growth Market:** The Aquis Growth Market is a U.K. multilateral trading facility (MTF) that is supervised by Aquis (as a recognised investment exchange). As an MTF, it is subject to a lighter degree of regulation than the Aquis Main Market and is the only U.K. MTF outside of AIM. It is a competitor to the AIM market and companies seeking to list on the Aquis Growth Market enjoy similar advantages to those that list on AIM. This includes tax reliefs for capital gains tax and inheritance tax as well as the benefit of trades being exempt from stamp duty. The Aquis Growth Market is further divided into segments: the Access Segment and Apex Segment.
    - **Apex Segment:** While the Apex segment is still aimed at SMEs, it is designed for more established companies and is considered to have greater levels of liquidity than the Access Segment. There is also a greater level of interest and participation from the public and institutional investors when listing. Being targeted at more established SMEs, the Apex Segment requires a minimum track record of 2 years and a minimum market capitalisation of £10m
    - **Access Segment:** The Access Segment is designed for younger and growing companies to enable them to list but also to focus on growing their business rather than being distracted by red tape. In line with this focus, there is no minimum track record required and the minimum market capitalisation for listing is £2m.

For more information on the listing requirements for LSE and Aquis, please see our listing guides linked here - AIM and Aquis and the appendices to these brochures for listing comparisons.

Note 3: The Main Market of the London Stock Exchange was recently re-organised from the old 'Standard' and 'Premium' listing segments into two new segments, being the Equity Shares Commercial Companies which effectively replaces both and a new Equity Shares Secondary Listing segment. Noting there are two other segments available for equity shares namely Equity Shares Transition (a transitionary segment for legacy Standard listed companies) and the Equity Shares Shell Companies which is a market segment specifically for shell companies/SPACS – these are not covered in this article.

CAPITAL STRUCTURE

The listing rules for LSE Main Market have been recently updated and as previously discussed, there are different market segments open to companies with different listing rules and requirements. U.S. companies looking to list on ECCS are permitted to have dual/multiple share class structures at admission. While there are further additional rules regarding enhanced voting rights, these are also allowed. This may be more attractive, particularly to tech companies looking to list in the U.K. that may have different share class structures and voting rights. ESSL does not afford the same flexibility, and if the U.S. company is already listed, it will need to also list the same class of listed shares. Similarly, it would not be possible to list dual share structures on AIM of the LSE or on the Aquis Growth Market.

GROUP STRUCTURING

Prior to listing, it is important to consider the best corporate structure for the U.S company. There are various considerations to take into account when making a decision on structure, including operational perspectives. However, taxation considerations as well marketability of the company for a U.K. listing may ultimately dictate the best structure.

While it is possible for a U.S. company to directly list their stock, particularly with the introduction of the ESSL Segment), it can often be done indirectly. This can be achieved by inserting a U.K. registered company (the TopCo) or an offshore registered company, such as those in the British Virgin Islands or Jersey, on top of the existing U.S. company with the shares in the TopCo being listed instead.

Despite the need for corporate restructuring to include a TopCo, this can be the preferred route. The benefit of listing a U.K. TopCo is that it will ultimately be a more familiar structure to U.K. investors and provides certainty as they are likely already aware of the legal protections in the U.K. that are afforded to investors. As mentioned above, this type of structure consideration would be relevant as it may affect the marketability, with a U.K. TopCo being an easier option to market to potential U.K. investors.

However, many U.S. companies still do directly list their shares in the U.K. An important consideration in this process is determining the necessary amendments to the U.S. company's governing documents to make it suitable for listing and ensure it provides investors with the protections they would expect from a U.K. listed company.

MANAGEMENT TEAM AND CORPORATE GOVERNANCE REQUIREMENTS

There are no hard and fast rules regarding the residency of board members/directors. However, from our experience, there is usually an expectation from U.K. investors that at least two directors (subject to size of the company) are residents in the U.K.

When a company is listing in London, they will also need to adopt and comply with a corporate governance code. There are differing levels of compliance depending on the market. Companies listing on ECCS are required to adopt and comply with the U.K. Corporate Governance Code and, if they cannot comply, they must explain the non-compliance.

Companies listing on ESSL have no additional corporate governance requirements and they can just continue to apply their own domestic code. If they have no domestic code, they need only comply with the Quoted Companies Alliance Code (QCA Code).

While ECCS has stricter corporate governance requirements, Companies listed on AIM Market, ESSL and the Aquis Growth Market generally have more flexibility to adopt and/or comply or explain against the QCA Code. This is a corporate governance code aimed at smaller and mid-sized companies and offers greater flexibility in terms of corporate governance requirements.

ACCOUNTING MATTERS

For the ECCS and ESSL, there is no listing requirement for historical financial information or a revenue track record. However, while there is no longer a requirement for this information on admission onto these markets, they still require publishing a prospectus. A prospectus currently requires disclosures of historical financial information to the extent available and must include a working capital statement.[4]

As previously mentioned, there is no financial track record required for the Access Segment, but the Apex Segment will require 2 years of audited historical financial information covering at least 2 financial years prior to admission. The AIM market requires 3 years of audited accounts (or shorter period since incorporation) and no more than 9 months old audited accounts, or otherwise interim financial information (which may be unaudited) may also be required.

The historical financial information included in the prospectus (prepared in connection with a listing on ECCS or ESSL) or the admission document (prepared in connection with a listing on the AIM market or the Aquis Growth Market) on the company's group may need to be converted from U.S. GAAP to IFRS either for marketing purposes or where a U.K. TopCo is adopted.

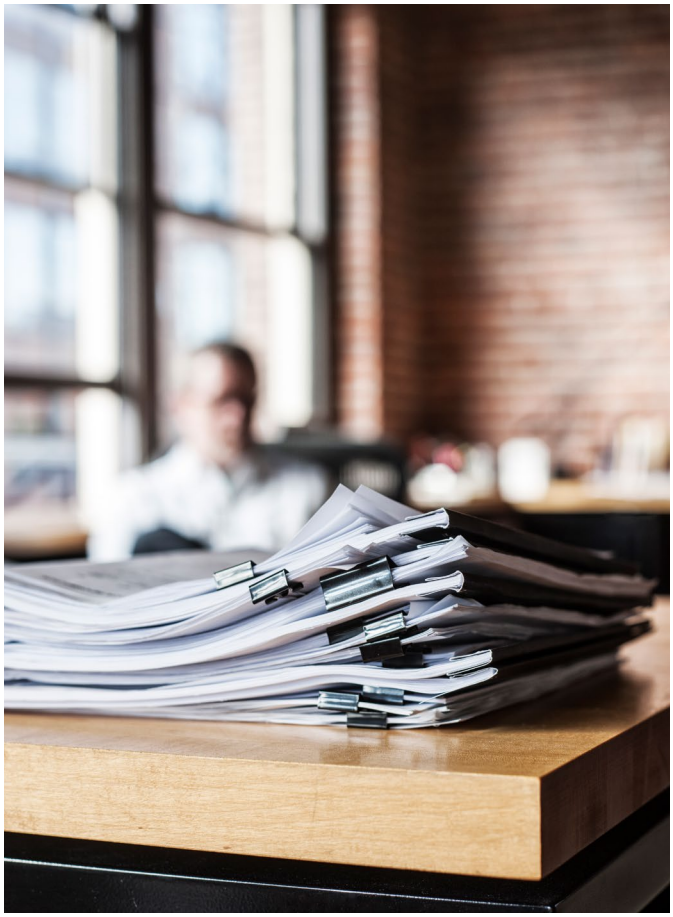
U.S. SECURITIES LAWS

In general, Section 5 of the U.S. Securities Act of 1933, as amended (the Securities Act) requires that every sale of securities must be registered with the U.S. Securities and Exchange Commission (SEC) or exempt from such registration. Even though Section 5 of the Securities Act only applies to offers and sales of securities in the U.S., when a U.S. company offers its securities outside of the U.S., there is risk that those securities will be acquired by persons in the U.S. (i.e., a "flowback" of unregistered securities into the U.S.).

A flowback of unregistered securities could result in a violation of the registration and prospectus delivery requirements of Section 5 of the Securities Act and result in significant penalties. As a result, any offering of securities by a U.S. non-reporting company in the U.K. capital markets should be structured to comply with Regulation S of the Securities Act. This offers a regulatory safe harbour and exemption from registration and prospectus delivery requirements for sales of U.S. securities made outside of the U.S. that meet two basic conditions: (1) the offer and sale of the securities must be made in an "offshore transaction", and (2) there can be no "directed selling efforts in or into the U.S. of the securities offered under Regulation S".

Given that any securities sold outside of the U.S. carry a risk that they may flowback into and be acquired by persons in the U.S., Regulation S sets out restrictions attaching to the issuer's shares based on three categories: Category 1, Category 2 and Category 3 securities. The way in which the issuer's securities are categorised will depend on the type of securities offered, the nexus that the issuer has to the U.S. and the risk of such flowback occurring. Typically, a U.S. issuer (reporting or non-reporting) offering equity securities will be deemed to have a close nexus to the U.S. Its equity offerings will be categorised as Category 3 offerings, which carry the most restrictive offering requirements in order to qualify for the safe harbour provided under Regulation S.

These restrictions include a distribution compliance period whereby, in the case of a non-reporting issuer, the Category 3 equity securities are subject to a 12-month dealing restriction from the later of the date the securities are first offered to the public and the closing date of the offering. During this period, the holders of the Category 3 securities are prevented from selling their shares back into the U.S. other than in compliance with Regulation S, under a registration statement or pursuant to an applicable exemption under the Securities Act.



Note 4: The prospectus regime in the U.K. is still under review.

U.S. SECURITIES LAWS (CONT.)

Historically, this would require the Category 3 securities to be issued in certificated form containing a prominent legend indicating the restrictions on resale. However, this obligation was inconsistent with the London Stock Exchange's requirement for an issuer's securities to be settled by electronic means, and therefore the London Stock Exchange introduced procedures enabling Category 3 securities to be settled electronically within a central securities depository (i.e., in the U.K.'s CREST system operated by Euroclear UK & International).

These procedures effectively incorporate the old legending, certification and transfer restriction requirements of Category 3 securities into CREST by (a) encoding the securities in CREST with a special identifier so that the transfer restrictions are visible, and (b) requiring CREST members not to engage in any trade in a Regulation S security unless that member has a reasonable basis to believe, after inquiry and confirmation, that the trade complies with applicable U.S. securities laws. There are some nuances with these procedures which will need to be worked through at the outset.

Category 3 securities are also subject to a notice requirement. Distributors (underwriters, dealers or other persons contractually participating in the distribution of the securities) of the securities who sell to another distributor, dealer or a person receiving a commission before the distribution compliance period expires must deliver notice to the buyer informing the buyer that it is subject to the same restrictions on offers and sales that apply to the distributor. Buyers of Category 3 securities must also make certain certifications to the issuer.

Sometimes, the use of an overseas TopCo will remove the company from the remit of the Category 3 securities restrictions altogether because the TopCo may qualify as a foreign private issuer (FPI). An FPI may be able to rely on the less restrictive Category 1 offering exemption of Regulation S. Broadly speaking, an issuer organised in a foreign country will be classified as an FPI unless (1) more than 50% of its outstanding voting shares are held (directly or indirectly) by U.S. residents, and (2) more than 50% of the issuer's executive officers or directors are U.S. citizens or residents, more than 50% of its assets are located in the U.S. or its business is administered principally in the U.S.

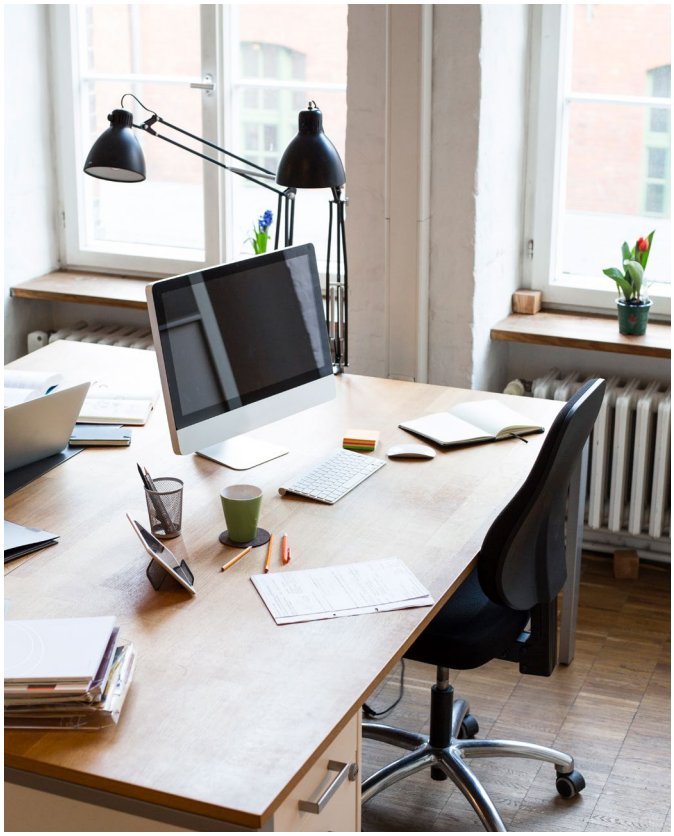
The foregoing is intended to be a high-level summary of considerations under Regulation S deemed relevant for purposes of this article and should not be construed as a complete analysis of the safe harbour available thereunder. Qualifying for the Regulation S safe harbour requires a fact-specific analysis of the issuer, the offering and the plan of distribution, and should be done in consultation with qualified U.S. securities counsel.

U.S. TAX CONSIDERATIONS

When evaluating whether or not to use a U.S. or U.K. company as the listing vehicle, it will be important to determine whether or not U.S. "anti-inversion" rules will apply. An inversion occurs when a non-U.S. company acquires all the shares (stock) of a U.S. corporation, with the result that the U.S. corporation is removed from the reach of the U.S. corporate tax system. The anti-inversion rules are designed to deter such inversions by subjecting the U.S. corporation, its shareholders and insiders to U.S. taxation.

In effect, the insertion of a non-U.S. TopCo onto a U.S. corporation could result in the TopCo becoming subject to taxation in both the U.S. and the overseas jurisdiction in which the TopCo is based, and the reduction of certain tax benefits of the inversion transaction that otherwise would have been available had the inversion not occurred. Furthermore, dividends paid by the non-U.S. TopCo to non-U.S. shareholders may also become subject to a U.S. withholding tax as if they were paid directly from the U.S. corporation.

Whether or not an inversion of the U.S. corporation takes place will depend on the profits achieved at the TopCo level and the percentage of voting power and the value of the shares in the TopCo that are held by U.S. persons after the acquisition of the U.S. corporation takes place. As part of any restructuring of the group, it will be important to ensure that existing shareholders in the U.S. corporation do not suffer any adverse tax consequences as a result of the restructuring.



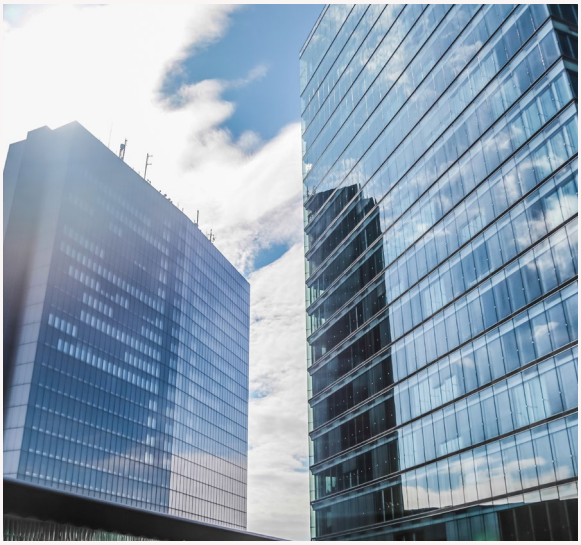
CONCLUSION

The continuing popularity of North American companies listing in London in the last few years continues to be the driver of listings in London. While successfully listing a U.S. company involves key considerations in the early stages, for those struggling to raise capital or gain visibility in the North American markets due to their size or stage of development, London could be a viable option that U.S. companies should seriously consider.

HOW CAN LAYTONS ETL & DICKINSON WRIGHT HELP

Laytons ETL is a full service commercial law firm head quartered in the City of London which services U.K. and international clients, which is a part of ETL GLOBAL, a multinational professional services network. Our Equity Capital Markets team is experienced in advising clients in the context of U.K. equity capital markets transactions and in advising U.S. companies on listing here in London. If you would like to discuss a London listing, or need any further guidance, please contact the Laytons ETL Equity Capital Markets team.

As a full-service law firm with offices strategically located across the U.S. and in Canada, as well as affiliations and relationships with local firms around the world, Dickinson Wright's Securities team represents a diversified mix of public and private companies raising capital in registered and exempt offerings. If you would like to discuss the U.S. law implications of a London listing, or need further guidance, please contact the authors or any member of the Dickinson Wright Securities team.



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