Dual Listing for Depositary Receipts

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A number of companies listed outside the United States have been reported to be considering listing in the United States, citing that U.S. exchanges offer greater liquidity and a deeper investor base. A successful dual listing—maintaining a listing outside the United States while also having a listing on a U.S. exchange—requires careful coordination with regulators, exchanges and clearing systems.

Below, we discuss certain key issues related to a dual listing of a company's global depositary receipts ("GDRs") listed outside the United States by way of an "upgrade" of its Regulation S GDRs into American depositary receipts ("ADRs").

Overview of Depositary Receipt Programs

Depositary shares are tradeable securities that represent shares of a company organized outside of the United States that are denominated in a currency other than U.S. dollars and are evidenced by depositary receipts. A depositary receipt is a negotiable certificate that evidences depositary shares, which in turn represent a certain number of shares of a company.[1] Depositary receipts are most commonly either in the form of ADRs, which allow for trading in the United States, or GDRs, which are typically issued in Regulation S and Rule 144A offerings.

ADRs may trade in the United States "over the counter" only (classified as Level I ADRs) or pursuant to a listing on a U.S. exchange (classified as Level II or Level III ADR programs, respectively, based on whether they are issued without or with capital raising in the United States).

Regulation S GDRs are GDRs issued outside of the United States in a transaction that meets the requirements of Regulation S under the U.S. Securities Act of 1933, as amended (the "Securities Act"). Regulation S GDRs can be used for capital raising and

[1] The terms "depositary receipts" and "depositary shares" are often used interchangeably. For convenience, we use the term "depositary receipts" in this Debevoise In Depth.

are "unrestricted" securities for the purposes of the Securities Act following the expiration of a distribution compliance period (if any).

Regulation S GDRs settle in Euroclear Bank S.A./N.V. ("Euroclear") and Clearstream Banking, *société anonyme* ("Clearstream") and are evidenced by a Regulation S Master GDR, which includes the terms and conditions of the GDRs and is registered in the name of a common depositary for Euroclear and Clearstream. Rule 144A GDRs settle in The Depository Trust Company ("DTC") and are evidenced by a Rule 144A Master GDR, which includes the terms and conditions of the GDRs and is registered in the name of Cede & Co. as nominee for DTC.

"Upgrade" of Regulation GDRs into ADRs

In order to permit the trading of depositary receipts in the United States on an unrestricted basis, a company would need to "upgrade" its Regulation S GDR program into an ADR program. The "upgrade" would entail making certain technical changes to the deposit agreement and renaming the RegulationS GDRs as ADRs. The "upgrade" would normally not require any action on the part of the existing holders of Regulation S GDRs—such investors, following the "upgrade" would continue to hold the ADRs through Euroclear and Clearstream through their respective custodian banks in DTC and would be able to trade their ADRs immediately following the U.S. listing.

The "upgrade" into ADRs is not available for Rule 144A GDRs as they are "restricted securities" under the Securities Act. If Rule 144A GDR holders have held their securities for more than a year, it may be possible to transfer such securities to the Regulation S GDR program prior to or following their "upgrade" into ADRs if certifications satisfactory to the depositary bank are provided and, in some cases, also a U.S. legal opinion.

SEC Process

In order to allow for the listing of depositary receipts on a U.S. exchange or over-the-counter market, the ADRs would need to be registered on a Form F-6 with the U.S. Securities and Exchange Commission (the "SEC"). For companies looking to list the ADRs on either the New York Stock Exchange or Nasdaq, with or without a public offering in the United States, the underlying securities (such as common stock or ordinary shares) would additionally need to be registered on a Form F-1 with the SEC.

During the process to implement the "upgrade," it will be important to have an effective and collaborative relationship with the SEC, the U.S. stock exchange, the depositary bank and its legal advisors, and the underwriters (and their counsel) to the extent an offering was occurring. Communicating clearly with all relevant parties, including explaining the proposed structure and steps and detailing the rights and entitlements related to the holding of ADRs, will be essential to ensuring a smooth listing process.

Local Jurisdiction Requirements

In addition to compliance with applicable SEC requirements, a company will need to consider any filing obligations or restrictions under the rules of the local jurisdiction or exchange where the GDRs are listed, which may involve the potential requirements to publish a prospectus. To be able to present compelling arguments to the local regulator why a prospectus should not be required, it may be useful for the amendments to the deposit agreement to be kept only to technical and required changes. Under such amendments, holders of ADRs would retain the same rights and economic entitlements attached to the existing Regulation S GDRs. If a prospectus was required in the local jurisdiction, additional time may need to be factored into the overall listing process.

Continuation of Trading

Ensuring no suspension of trading in the existing local market and a seamless investor experience will be especially important for existing holders of Regulation S GDRs. Prior to the commencement of trading of ADRs, the depositary bank would have to coordinate with the clearing systems to ensure the smooth transition to trading of the ADRs through DTC and take the required steps for the primary place of issuance to be changed to DTC from Euroclear and Clearstream. To ensure that trading continues uninterrupted upon the U.S. listing of the ADRs, a listed company (and its legal advisors) will need to explain the proposed structuring of the "upgrade" and steps required in connection with the "upgrade" to the depositary bank and clearing systems early to ensure that the ADRs will be able to retain the same security identifiers (i.e., ISIN and CUSIP) that the Regulation S GDRs have. In addition, clear communication will need to be made to existing Regulation S GDR investors throughout the process to clearly explain the securities held and where (and how) they may be traded following an "upgrade."

Continued Listing Requirements

Following the "upgrade," the company will have to continue to comply with the requirements of local law and stock exchange listing rules applicable to its GDR listing outside the United States, as well as those new regulations relating to the U.S. listing, which may at times conflict. For example, the United States and other jurisdictions may impose different obligations relating to the disclosure of material information, in addition to applying differing standards around corporate governance matters, such as director independence and responsibilities of board committees.

Rule 144A GDR Program

As a Rule 144A GDR program is not eligible for an "upgrade" into an ADR program, the company needs to assess whether it should continue the program if the Regulation S program is to be upgraded into an ADR program. If the trading volume and overall holdings in the Rule 144A program are low, the company may consider closing the Rule 144A GDR program by giving the termination notice as set out in the relevant deposit agreement. Alternatively, as mentioned above, the Rule 144A GDR holders may be eligible to switch to the Regulation S GDR program prior to or following the "upgrade" if the holding requirements under the Securities Act have been met.

Looking Ahead

We expect that pursuing dual listings will be an increasingly attractive option as companies with GDRs listed on the London Stock Exchange and other international exchanges continue to look to the United States for greater liquidity for their securities.

On 17 April 2024, Debevoise & Plimpton LLP and The Bank of New York Mellon co-hosted a webinar on the topic of "*U.S. Listings for Existing Public Companies: What Issuers Need to Know before Making the Big Move.*" The capital markets teams, which were involved in the recent successful U.S. listing of JSC Kaspi.kz, shared best practices and insights into setting up a U.S. listing and discussed:

- unique aspects of a U.S. offering and listing, including SEC disclosure requirements and enhanced liability;
- successful management of ongoing IR and disclosure processes during the listing move;

- securities clearing and settlement options, including the advantages of establishing an ADR program; and

- seamless adaptation to life as a U.S. public company post-listing.

A link to the recording is at:
https://event.on24.com/wcc/r/4529599/4C1BA5AD54D6420A0DF24DCEE43F6E9F.

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Please do not hesitate to contact us with any questions.

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