

Tapping US Markets: Regulation Lawyers and Listings

For foreign companies coming to the US market to sponsor or list an ADR, or other securities, the high degree of regulation in the market place can look daunting in the extreme. They are bound to have to foot extensive legal fees - that goes without saying. But what is the process for finding and retaining the services of an appropriate American law firm?

One of the first steps in the ADR process for a foreign issuer is the selection of legal counsel and a depository bank. 'During that process,' says Ann Fisher, a partner at Sullivan & Cromwell in New York, 'one can learn about the fundamentals of the US securities market - what is involved in an offering, what the fees will be.' She says the competition among law firms is fierce and that one should take time to interview a number of firms, and 'be selective'. Fisher counsels company representatives to 'ask lots of questions and to push for specifics during these presentations, before they plunge into the process.'

Joseph Donley, vice-president of J P Morgan in New York, stresses the importance of retaining the services of a US law firm, as well as investor relations counsel, with recognised expertise in the securities market. Donley points out that the CEO and the CFO must understand the time commitment necessary to complete an offering, adding that they should plan at least two annual visits to the US.

Charles Engros, a partner at Lord Day & Lord, Barrett Smith, also underlines the need to work with a firm which has handled ADRs and has the experience to handle the next offering. 'One does not want to retain the services of a firm that has never handled an ADR offering. The education process is lengthy and expensive, and the waters can be treacherous.'

Law firms are generally recommended by investment banks, so Engros believes that beauty contests are less of a factor here. 'It's probably the depository bank that has made the presentation to the company planning the offering. They may recommend one or two law firms. But it's up to the company to make sure it will receive the personal atten-

tion and commitment of the attorney who is handling the offering throughout the entire process. Commitment and the relationship between the management, legal counsel, the investment bank and the IR firm are important to the success of closing the deal.' Engros adds that, however important it is to promote the stock and raise interest among investors, companies must look to their legal counsel to learn whether they are 'running afoul of US securities laws.'

Disclosure and other SEC requirements may be less stringent for non-US issuers than for domestic companies, but it's no less important for foreigners to keep abreast of, and in line with, the current rules.

Daniel Bushner, of the London office of New York lawyers Rogers & Wells, notes that one prominent feature of US securities laws is their severe provisions regarding civil and criminal liability. 'The most stringent of these relate to liability for mis-statements in, or omissions from, registration statements for public offerings,' he says. Bushner warns that anyone who buys securities on the basis of statements which are misleading - because of mis-statements or omissions - can recover their losses 'from the issuer of securities, from every person who signed the registration statement (which must include the principal executive, financial and accounting officers and a majority of its directors), from every director or person named as about to become one, from every underwriter and, to a limited extent, from every accountant, engineer or other expert who is named as having prepared or certified a part of the registration statement.'

No one doubts that the legal environment of the US securities markets can be a mine field. And, to a newcomer, it may seem impossible to pay much attention to anything but the immediate need - the legal ramifications of the issue or the listing.

However, Monte Wetzler, a partner at Breed, Abbott & Morgan who specialises in securities law, suggests that foreign companies should be more concerned about future representation. 'Once an offering has been made in the US, the company is under the jurisdiction of the SEC and is responsi-

'This is not an area where a company of any size can afford to make an error in judgment.'

ble for ongoing compliance with SEC rules and regulations. In many cases, companies are too narrowly focused on the current project to assess the future.'

William Voge, a partner in the New York office of Latham & Watkins, the Los Angeles-based law firm, comments: 'We see opportunities in the ADR market for companies in the biotechnology and pharmaceuticals industries which have perhaps never done an offering in the UK or US. They have developed a product and are ready to bring it to market. The choice is to go back to the original private investors, to seek venture capital or to issue an offering.' While leading non-US companies - the UK's FT-SE 100 stocks, for example - will probably already have US legal counsel, seed companies generally will not. They will look to their investment bank to provide them with a list of appropriate US firms.

Sullivan & Cromwell's Ann Fisher expects to see 'innovation in the use of existing ADR facilities'. She emphasises the importance of selecting legal counsel with depth of experience, not just in ADRs but in a variety of international financial work. 'There is not a great deal of mystery to handling an ADR, on the one hand, but on the other, you do want someone with experience,' she says.

But can seed companies really afford the counsel of a top tier US law firm like Sullivan & Cromwell? 'Yes,' says Fisher. In her view, no company can afford not to take first class advice. 'This is not an area where a company of any size can afford to make an error in judgment.'

By Elizabeth Howard, of Elizabeth Howard & Company, New York-based corporate marketing communications and IR Firm.