



Adding a US listing: what UK listed company boards need to know

Introduction

Increasingly, UK listed company boards are actively considering the potential benefits of an additional listing on a US stock exchange. Freshfields has unrivalled experience implementing these transactions, advising each of Ferguson plc, Indivior PLC and Flutter Entertainment plc on their additional US listings. Through our extensive experience, we understand the issues of most relevance to PLC boards and how best to navigate them. We have set out some of the key issues to consider in this briefing.

Why consider an additional US listing?

Adding a listing on a US stock exchange will not be suitable for all UK listed companies. It is important to consider the size, sector, profile and geographic footprint of the relevant company and the precise benefits that a US listing is seeking to achieve.

Structuring an additional US listing

The optimal listing structure will depend on the specific circumstances and objectives of the company. As a starting point, boards should carefully consider the following factors:

- retaining, or changing, the existing location for the holding company's incorporation, headquarters and tax residence;
- raising additional capital through a concurrent secondary issuance of shares – capital raising will bring more complex technical and documentary requirements, as well as introducing market exposure considerations to timing;

- changing the size, profile and/or geographic footprint of the company through a concurrent combination with an existing US listed company / US-based business – again, this will be more complex than just adding a US listing on a standalone basis;
- choosing the optimal US listing venue – NYSE or NASDAQ may be more or less suitable depending on the company's objectives and industry focus;
- the pros and cons of retaining a UK premium listing versus transferring to a UK standard listing (and designating the additional US listing as the issuer's "primary" listing – an important eligibility criterion for US indexation);
- the speed of implementation and the importance of shareholder consultation – the profile of the share register (including the geographic location of shareholders) will significantly impact an issuer's decision to: (i) seek a "primary" US listing immediately; (ii) adopt a multiple-stage approach to a "primary" US listing; or (iii) retain the UK listing as the issuer's "primary" listing indefinitely; and
- how and when to obtain shareholder approval – both the addition of a US listing and a "downgrade" (or cancellation) of a UK premium listing will require the passing of separate special resolutions requiring 75% shareholder approval.

Indexation

Achieving US indexation, with the increased liquidity, US share ownership and analyst coverage that it brings, is a key driver for many UK issuers listing in the US. But domesticity requirements for both UK and US indices mean it is not possible to be an index constituent in both jurisdictions. Consequently, to become eligible for inclusion in primary US indices, UK index inclusion (including

FTSE membership) will necessarily be lost. To minimise the “orphan period” during which an issuer is no longer a UK index constituent but has not yet achieved US indexation, it is critical for boards to pre-emptively identify the eligibility requirements of its target US indices and proactively implement (sometimes structural) solutions to achieve US indexation as soon as possible.

Settlement

To list shares in the US, an issuer’s entire uncertificated share capital must be legally held by Cede & Co on behalf of the Depositary Trust Company, the central securities depository for US listed securities. To enable fungible cross-border trading following the US listing, and to ensure that UK domestic shareholders may continue to hold and manage their interests through CREST, a UK depository interest structure must be implemented. Implementing these settlement structures involves the cooperation of multiple counterparties and can take time to achieve. If the issuer’s shares are currently the subject of a sponsored or unsponsored ADR programme (which would terminate upon the implementation of a full US listing of shares), additional settlement arrangements may also be advisable to reduce “forced sellers” in the aftermath of the US listing.

Technical requirements for a US listing

To add a US listing, it will be necessary to prepare and file a US registration statement with the US Securities and Exchange Commission (**SEC**). The format of the registration statement depends on whether the issuer would be classified as a “foreign private issuer” (**FPI**) or a “domestic issuer” under US securities laws. The vast majority of UK listed issuers are likely to qualify for FPI status, which will allow for a generally less onerous listing application process. Once the initial filing is prepared, the SEC review period commences and will run for three to four months on average before the registration statement is finalised and the listing becomes effective.

For FPIs, the registration statement must contain a minimum of three years of audited financials in either IFRS IASB or US GAAP. An issuer’s choice of accounting standard is important. A decision to report in US GAAP is likely to enable broader US analyst coverage, and periodic US GAAP reporting is a key eligibility requirement for certain US indices (see below). However, preparing for US GAAP reporting and the conversion process for historical financial years is costly and time consuming, so

must be considered in light of the issuer’s specific objectives.

Corporate governance, remuneration and ongoing obligations

For so long as an issuer remains a FPI, it will benefit from less onerous US governance and reporting obligations and will, in most cases, be permitted to follow the governance and reporting practices of its home country. Importantly, adding a US listing will require issuers to comply with the internal control over financial reporting requirements of the Sarbanes-Oxley Act, requiring significant preparatory work, increasing compliance costs and placing additional demands on internal teams. Once US listed, issuers and their officers will also be subject to increased risks of shareholder litigation.

As its US shareholder base grows, it is likely that an issuer will lose its FPI status, at which point it will be required to comply with the governance and reporting obligations of a domestic issuer, including the use of US GAAP in its periodic financial reports and US-style proxy statements. Periodic financial reporting as a domestic issuer is a key eligibility requirement for certain US indices, for example those run by Standard & Poor’s. Some issuers may therefore consider voluntarily complying with domestic reporting obligations before losing FPI status. For the same reason, premium listed issuers may at this time choose to transfer to a standard listing and designate their US listing as “primary”. Such a decision has the additional benefit of reducing the issuer’s UK compliance burden and enabling departure from the UK Corporate Governance Code in favour of US governance practices.

Upon losing FPI status, an issuer may wish to adopt a more US public company remuneration structure to ensure it can attract and retain top executive talent. Corporate governance practices relating to remuneration will also shift to US practice, requiring additional compensation reporting for top earners and annual advisory “say on pay” votes by shareholders.

The factors identified in this briefing are only a subset of the factors that must be considered by a UK listed company board when evaluating a potential US listing. These factors will also be impacted by the shifting UK listed company regulatory landscape, including the outcome of the FCA’s ongoing Primary Markets Effectiveness Review. Please get in touch with your usual relationship contact or one of those listed below if you would like to discuss any of the above.



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