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U.S. Regulation of the International Securities and Derivatives Markets

Twelfth Edition

Securities Markets

by Edward F. Greene, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, Nicolas Grabar and Adam E. Fleisher

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U.S. Regulation of the International Securities and Derivatives Markets, Twelfth Edition, Securities Markets provides the only available comprehensive analysis of the application of U.S. securities laws to participants and transactions in securities in the international capital and financial markets. The book provides in-depth analysis of the legal framework for all types of securities offerings—from registered IPOs to Rule 144A offerings, including the principal issues a foreign company should consider when deciding whether and how to offer securities in the United States (*i.e.*, publicly or privately). It also offers guidance on U.S. regulations governing brokers and dealers, investment companies and investment advisers.

Prior editions of this treatise covered both U.S. regulation of the international securities markets and U.S. regulation of the international derivatives markets. With this Twelfth Edition, we have divided the topics into two separate volumes. For a detailed description of the U.S. regulatory regime governing international financial transactions involving derivatives, as well as the U.S. regulatory regime governing futures commission merchants, dealers in swaps and security-based swaps, major participants in swaps and security-based swaps, commodity pool operators and commodity trading advisors, please refer to *U.S. Regulation of the International Securities and Derivatives Markets, Twelfth Edition, Derivatives Markets*, forthcoming.

This treatise was authored by a team of attorneys at Cleary Gottlieb Steen & Hamilton LLP, renowned as one of the foremost law firms in international capital markets and financial transactions.

The book is divided into 16 chapters:

Chapter 1: Statutory and Regulatory Framework introduces the key pieces of legislation that are discussed in more detail in subsequent chapters and discusses the principal ways in which this legislation is evolving.

Chapter 2: Key Considerations for a Foreign Company Accessing the U.S. Capital Markets for the First Time is an entirely new chapter that presents the key issues for a foreign company considering offering securities in the United States for the first time, including whether to do so as a public offering or private placement.

Chapter 3: The U.S. Public Offering Process for Foreign Issuers discusses in detail the U.S. public offering process and the considerations that will affect how a foreign company approaches the U.S. public market.

Chapter 4: Foreign Issuer Disclosure in the U.S. Public Securities Market details the disclosure required of foreign issuers under the SEC's rules for public offerings and reporting companies, and it explores the major issues foreign issuers often encounter in attempting to meet these disclosure requirements.

Chapter 5: Corporate Governance and Similar Requirements Applicable to Reporting Foreign Private Issuers now consolidates in one chapter a detailed discussion of the corporate governance requirements applicable to a foreign company that is public in the United States.

Chapter 6: Certain Requirements Relating to Directors, Officers and Major Shareholders of Foreign Private Issuers that Are Public Companies in the United States analyzes the reporting obligations under the U.S. securities laws applicable to senior officers, directors and significant shareholders of foreign companies whose securities are publicly traded in the United States.

Chapter 7: Private Offerings in the United States by Foreign Issuers deals with Rule 144A offerings and other private placements exempt from Securities Act registration.

Chapter 8: Financings Outside the United States discusses the requirements of the safe harbor provisions of Regulation S that afford an exemption from Securities Act registration for securities offerings outside the United States.

Chapter 9: Tender Offers, Repurchases of Equity Securities, Liability Management, Business Combinations describes the rules governing tender and exchange offers, liability management transactions, business combinations and other issues relating to the acquisition—whether by the company or third parties—of significant interests in companies whose securities trade in the United States or that conduct business in the United States.

Chapter 10: Selected Practical Issues in Cross-Border Offerings discusses various practical issues related to international offerings as well as certain types of nontraditional offerings, such as continuous offerings, block trades, rights offerings, spin-offs and offerings of tracking stock and contingent value rights.

Chapter 11: Enforcement of the U.S. Securities Laws addresses governmental and private remedies, including class actions, relating to violations of the U.S. securities laws.

Chapter 12: Categorization and Regulation of Securities analyzes the continuing evolution of the jurisprudence governing the legal status of certain financial instruments, including derivatives, under the U.S. securities laws.

Chapter 13: The U.S.-Canadian Multijurisdictional Disclosure System analyzes the MJDS, which provides for complex reciprocal arrangements intended to facilitate certain U.S.-Canadian cross-border securities offerings and tender offers.

Chapter 14: Foreign and Foreign-Owned Broker-Dealers discusses the regulatory frameworks applicable to broker-dealers, focusing on jurisdictional issues, registration requirements and applicable exemptive provisions, and summarizing the regulatory regime applicable to registered entities.

Chapter 15: Foreign Investment Companies describes the regulatory framework applicable to investment companies, focusing on jurisdictional issues, registration requirements and applicable exemptive provisions.

Chapter 16: Foreign and Foreign-Owned Investment Advisers discusses the regulatory frameworks applicable to investment advisers, focusing on jurisdictional issues, registration requirements and applicable exemptive provisions.

The *Guide to Locating Relevant Forms, Statutes, Rules and Regulations*, which is now part of the front matter of this book, guides readers to the location of electronic copies of a wide variety of the authorities cited in the book, including statutory provisions, rules, regulations, forms, cases and administrative decisions.

Highlights of the Twelfth Edition

This Twelfth Edition covers a number of topics not previously discussed in the book and has been reorganized and streamlined. New Chapter 2 presents the key issues for a foreign company considering offering securities in the United States for the first time, including whether to do so in a public offering or private placement. This new chapter functions as an executive summary of issues that are discussed in detail later in the book, and includes a roadmap to these subsequent discussions. In addition, this Twelfth Edition now covers pre-deal

communications such as pilot fishing and the role of anchor and cornerstone investors (discussed in Chapter 3) and liability management (discussed in Chapter 9). Chapter 10 includes a new discussion of contingent value rights. We have also reorganized the book to consolidate the discussion of corporate governance requirements applicable to foreign issuers in one chapter (new Chapter 5) and to present in one chapter the discussion of requirements applicable to senior officers, directors and significant shareholders of U.S. public companies (new Chapter 6).

This Twelfth Edition also discusses recent developments in a number of areas. Continuing its emphasis on facilitating access to the capital markets for issuers previously evidenced by the passage of the Jumpstart Our Business Startups Act (the "JOBS Act") in 2012, in late 2015 Congress passed the Fixing America's Surface Transportation Act (the "FAST Act"), which, among other legislation, included several bills designed to facilitate the offer and sale of securities by providing accommodations related to the SEC registration process for "emerging growth companies" beyond those that had been provided by the JOBS Act. We discuss those additional accommodations in Chapter 4. In 2016, the SEC staff published several Compliance and Disclosure Interpretations aimed at curbing what it perceived to be increased misuse of non-GAAP measures; Chapter 4 discusses those interpretations as well as the SEC staff's subsequent posture with respect to non-GAAP measures in several comment letters to issuers. In Chapter 9, we discuss the *Marblegate Asset Management v. Education Management Corp.* line of cases interpreting § 316(b) of the Trust Indenture Act with respect to the meaning of "impairment" of the rights of debt holders to receive principal and interest when due in the context of restructuring transactions. Lastly, Chapter 11 discusses the courts' evolving interpretation of what constitutes a "personal benefit" for purposes of insider trading liability, which culminated in the Supreme Court's unanimous decision in *Salman v. United States* in late 2016.

This book covers, among other topics, rules and requirements applicable to public companies in the United States that were adopted pursuant to the Dodd-Frank Act, including certain disclosure-related rules that were intended to achieve social or political goals. The Trump administration has moved quickly to reverse certain of these Dodd-Frank related rules, as discussed in detail in Chapter 4 with respect to conflict minerals and resource extraction payments. The administration has also moved to reverse a Dodd-Frank mandated rule recently promulgated by the Department of Labor regarding the fiduciary duty of financial advisors under certain circumstances, which is discussed in Chapter 14. More generally, President Trump has stated publicly he intends to undertake a thorough reexamination of the Dodd-Frank Act, and it remains to be seen whether he will achieve a significant scaling back of Dodd-Frank, in the form of modification or repeal of existing rules, enforcement priorities or otherwise, during the course of his administration. It also remains to be seen whether the SEC under the new administration and new Chair nominee Jay Clayton will make liberalizing rule changes, including adoption of pending rule proposals with respect to, among other things, streamlining disclosure requirements.

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