

Morgan Lewis

GLOBAL PUBLIC COMPANY ACADEMY

ISSUES FOR FOREIGN PRIVATE ISSUERS

Bradley Edmister, Mathew Lewis
and Sin Teck Lim

December 16, 2020

© 2020 Morgan, Lewis & Bockius LLP



INTRODUCTION TO GLOBAL OFFERINGS



Global Offerings

- What is a typical Global Offering?

Local Public Offering/Listing

+

International Offering

- Nondomestic sales are typically institutional private placements
- May or may not include a US offering (Reg. S vs. 144A or Registered)
- May be equity or debt

Types of Global Offerings

- What are the main types of Global Offerings?
 - SEC Registered
 - US public offering “registered” with the SEC
 - Regulation S
 - Non-US offering
 - Typically an institutional private placement
 - Rule 144A/Regulation S
 - Non-US offering (Reg. S) and
 - US institutional private placement (Rule 144A)
 - Qualified Institutional Buyers, or “QIBs”

Types of Global Offerings (cont'd)

- US Registered Offering
 - US Securities Act of 1933
 - Public securities offerings in the United States generally must be “registered” with the SEC
 - “Retail” offering to the public permitted
 - Registration exemptions for private (nonpublic) offerings
 - What is a US Registered Offering?
 - Public offering of securities “registered” with the SEC under the US Securities Act of 1933
 - Similar to registered public offering in many major markets in the world
 - Advantages
 - Deep market and favorable pricing

Types of Global Offerings (cont'd)

- US Registered Offering
 - Registration Process
 - Due diligence and preparation
 - Submission of Registration Statement to the SEC
 - Includes Preliminary Prospectus
 - Disclosure dictated by SEC forms and rules
 - US GAAP or IFRS financial statements or reconciliation
 - 2-4 month review and comment process with the SEC
 - Focused on disclosure, rather than merits
 - Effectiveness and pricing; Final Prospectus



Types of Global Offerings (cont'd)

- Other US Registered Offering Issues
 - Ongoing disclosure requirements
 - Similar to listed company in many major markets in the world
 - Period reports, including quarterly, semiannual, and annual US GAAP or IFRS financial statements
 - Timely reporting of material events
 - Compliance with US Sarbanes-Oxley Act
 - CEO/CFO certifications
 - Auditor attestation of internal controls
 - Pro forma requirements



Types of Global Offerings (cont'd)

- Regulation S Offering
 - Offer and sale entirely outside the United States
 - “Offshore” offering pursuant to Regulation S
 - Exempt from US registration requirements
 - Non-US public offering technically “Reg. S”
 - US offering and publicity restrictions
 - May not have a 10b-5 opinion
 - Due diligence process may be more limited and driven by domestic market practice
 - Local market rules largely govern process and timing

Types of Global Offerings (cont'd)

- Regulation S Offering
 - Disclosure and marketing
 - Lower perceived antifraud liability risk
 - Disclosure informed by marketing needs
 - Physical road shows or only net roadshow
 - Level of disclosure and marketing plan to be coordinated closely with underwriters
 - Ongoing disclosure
 - Primarily local listing market and IR driven
 - AIFMD notification and reporting for certain issuers



Types of Global Offerings (cont'd)

- Rule 144A/Regulation S Offering
 - Rule 144A institutional private placement in United States + Regulation S non-US Offering
 - Access to both US and non-US overseas markets
 - What is Rule 144A?
 - Resale offering exemption for certain institutional private placements in the US
 - Sales to QIBs under 144A
 - Deep, well-established QIB market in United States
 - Liquidity significantly increased by 144A tranche

Types of Global Offerings (cont'd)

- Rule 144A/Regulation S Offering
 - Disclosure and Marketing
 - May be broadly marketed to QIBs in the United States
 - Liability risk more limited than US registered offering
 - Technical statutory differences
 - 10b-5 liability standard (Rule 10b-5) theoretically similar to US registered offering, but practical risk more limited due to sophistication of investors and limited QIB distribution
 - Due diligence comparable to US registered offering
 - 10b-5 disclosure letter
 - SEC form requirements and rules do not apply
 - More flexibility than US registered offering
 - Materiality judgments reflect QIB investors base

Types of Global Offerings (cont'd)

- Rule 144A/Regulation S Offering
 - Comfort letters (US SAS 72/SAS 100)
 - Ongoing disclosure
 - Rule 144A requires issuer to provide financial statements and brief description of business to investors or prospective purchasers upon request
 - Many issuers satisfy disclosure by perfecting Rule 12g3-2(b) exemption
 - AIFMD notification and reporting



Types of Global Offerings (cont'd)

- Rule 144A/Regulation S Offering
 - Rule 12g3-2(b)
 - Non US companies must “register” in the United States if shares are held by 300 or more US holders
 - Exemption under Rule 12g3-2(b)
 - Issuer must promptly disclose on website translations of material press releases and shareholder materials
 - Exemption makes future 144A offerings easier and reduces inadvertent registration risk



Types of Global Offerings (cont'd)

- How do I tell the difference?



KENEDIX
Residential Investment Corporation

Kenedix Residential Investment Corporation

67,900 Investment Units
OFFER PRICE: ¥340,762 PER UNIT

Kenedix Residential Investment Corporation is issuing 67,900 new investment units in a global offering, out of which 27,160 new units are being offered outside Japan in an international offering by the international joint lead managers named in this offering circular, and 40,740 new units are being offered in Japan by Japanese underwriters.

The international units are being offered by the international joint lead managers to non-U.S. persons **in offshore transactions outside the United States and Japan in reliance on Regulation S under the U.S. Securities Act of 1933,** as amended (the “Securities Act”), and, unless the international units are registered under the Securities Act or an exemption from the registration requirements of the Securities Act is available, may not be offered, sold or delivered within the United States. For a description of certain restrictions on offers and sales of the international units and distribution of this offering circular, see “Transfer Restrictions” and “Purchase and Sale.”

In connection with the Japanese offering, SMBC Nikko Securities Inc. (“SMBC Nikko”) will over-allot an additional 2,100 units in Japan. We have granted SMBC Nikko, as representative of the Japanese underwriters, an option to purchase up to an additional 2,100 units in connection with any over-allotments in the Japanese offering. See “Purchase and Sale.”

Types of Global Offerings (cont'd)

144A/Reg. S

- May be broadly marketed in the United States (QIBs)
- 10b-5 disclosure letter
- Customary US-style due diligence
- OC disclosure similar to US registered offering
- Ongoing Disclosure:
 - Rule 12g3-2(b)
- US comfort letter (SAS 72; SAS 100)

Reg. S Only

- Limited liquidity and less favorable pricing
- No 10b-5 disclosure letter
- Due diligence may be more limited
- OC disclosure may be more limited/include other information
- Ongoing disclosure:
 - Local listing, IR driven; AIFMD
- Non-US comfort letter (ICMA)

LISTING OUTSIDE THE UNITED STATES



Listing in Foreign Jurisdictions – Similarities

- Process
- Prospectus/due diligence, listing qualifications, regulatory review

But then again . . . differences

- Different market – pricing, appetite for industry/country
- Different target shareholders
- Different specific requirements

... and complications

- Multiple legal regimes and defenses
 - e.g., comfort letters
 - e.g., verification notes
 - e.g., publicity concerns
- Different regulatory philosophies and practices
 - “sunlight disinfects” or “father knows best”?
 - Not just individual laws but whole regime
- Unexpected consequences
 - e.g., Investment Company Act of 1940

Listing on the HKSE – Qualifications

1. Financial Requirements (satisfy one)

– **Profit Test**

- \$50M of profit attributable to shareholders in the last three financial years
 - \$20M in the last financial year
 - \$30M in the two years preceding the last financial year
- At least \$500M in market capitalization
- Market Cap/Revenue Test
- Market Cap/Revenue/Cashflow Test

Listing on the HKSE – Qualifications

1. Financial Requirements (satisfy one)

- Profit Test
- **Market Cap/Revenue Test**
 - \$4B in market capitalization
 - \$500M in revenue in the most recent audited financial year
- Market Cap/Revenue/Cashflow Test

Listing on the HKSE – Qualifications

1. Financial Requirements (satisfy one)

- Profit Test
- Market Cap/Revenue Test
- **Market Cap/Revenue/Cashflow Test**
 - \$2B in market capitalization
 - \$500M in revenue in the most recent audited financial year
 - Positive cashflow from operating activities of \$100M in aggregate for the three preceding financial years

Note: Some specific exceptions for pre-revenue companies in certain industries (mining, biotech)

Listing on the HKSE – Qualifications

2. Acceptable Jurisdiction

- standards of shareholder protection of its place of incorporation

3. Accounting Standards

- Hong Kong Financial Reporting Standards
- International Financial Reporting Standards
- US GAAP if (i) primary listing on another stock exchange or (ii) US/HK dual-primary listing

4. Suitability for Listing

- No bright line test
- *Example:* If assets of issuer consist wholly or substantially of cash and/or short-term investments, then it will generally be regarded as unsuitable for listing

Listing on the HKSE – Qualifications

5. Operating History and Management

- Trading record of at least three financial years
- Management continuity for at least three preceding financial years
- Ownership continuity and control for at least the most recent audited financial year

6. Public Float, Spread of Shareholders

- Market capitalization held by the public: \$125M
- Percentage of market capitalization held by the public: at least 25%
- At least 300 shareholders at the time of listing
- No more than 50% of the shares can be held by the largest three public shareholders

Listing on the HKSE – Qualifications

GEM Board

- A market that provides capital formation opportunities for growth companies from all industries.
- Designed to serve companies that do not fulfill the profitability/track record requirements of the Main Board of the Stock Exchange of Hong Kong.
- Track-record period: two financial years
- Positive cashflow from operating activities: \$30M for the two preceding financial years
- Market Cap: \$150M

SINGAPORE IPOS



Singapore IPOs

- Similar to US IPOs:
 - Lodgment of prospectus with MAS (equivalent to filing of Registration Statement with the SEC) – roadshow to institutional investors may commence.
 - Exposure period of up to 28 days (typically between 14 and 21 days).
 - Registration of Prospectus by MAS (equivalent to effectiveness of Registration Statement) – public offer may commence
- Differences with US IPO process:
 - “Disclosure Based Regime”, but in practice significant oversight by MAS (equivalent to the SEC) and SGX.
 - Confidential submission
 - May sometimes be a long process

SGX Listings – Main Board

- Shareholding spread and distribution requirement (amount depends on market cap)
- Quantitative criteria (satisfy one of the following):
 - Minimum pre-tax profit of S\$30m in latest financial year + three years' operating track record
 - Profitable in latest financial year, three years' operating track record and minimum market cap of S\$150m
 - Operating revenue in latest financial year and minimum market cap of S\$300m
- Additional conditions for Life Sciences companies, or Mineral, Oil, and Gas companies
- Dual Class Share Structure permitted; additional conditions

SGX Listing – Catalist Board

- No minimum operating track record, profit, or market cap requirements
- Shareholding spread and distribution:
 - At least 15% public float
 - At least 200 public shareholders
 - Allocation value of at least S\$200 per investor

CLE

- If you registered noting that you need CLE the code is **DOR8778**. Please be sure fill out the post event survey and enter this code and save this number; you will need this to receive a Certificate of Attendance. You will be contacted within 30-60 days by our CLE administrative team.
- We will process your credits for other states where this program has been approved.
- Questions? Please email Daniel Gieseke at daniel.gieseke@morganlewis.com

RIGHTS ISSUES



Rights Issues – Exemptions

- Section 4(a)(2):
 - Commonly relied upon for the placement of rights (and upon exercise, the shares) to US shareholders.
 - Issuer (and not underwriter) provides general private placement exemption, with further guidance provided by Regulation D.
 - Issuers usually limit sales to QIBs.
 - No general solicitation or general advertising.
- Rule 144A:
 - Resale exemption, commonly used by underwriters to sell rump shares.
 - Issuers sell to underwriters pursuant to Section 4(a)(2) or Regulation S exemption.

Rights Issuers – Exemptions

- Regulation 801:
 - Available to non-US issuers
 - Allows rights to be extended to both institutional and retail investors, but only if certain requirements are met
 - US beneficial share ownership of the issuer is 10% or less
 - Rarely been relied upon in Asia:
 - Tests for determining US ownership are both complex and uncertain
 - Raises other considerations such as US blue-sky laws, which may be deemed too burdensome
- Regulation S:
 - Offshore transactions
 - No directed selling efforts

Rights Issues – Typical Structuring

	Type 1 (No material US shareholdings; No rump placement in US)	Type 2 (More than 10% US shareholdings; No rump placement in US)	Type 3 (More than 10% US shareholdings; Rump placement in US)
US Distribution of Rights	None.	QIBs only.	QIBs only.
US Distribution of Rump	None.	None.	QIBs only.
Typical Disclosure	Local standard; US legends.	Local standard that integrates certain US disclosure.	US disclosure standard.
Minimum Comfort Package	Local comfort package.	Varies depending on number/size of US participation.	US standard due diligence and comfort letter.
Other Deal Communications	None to US shareholders.	QIBs only.	QIBs only.

QUESTIONS?

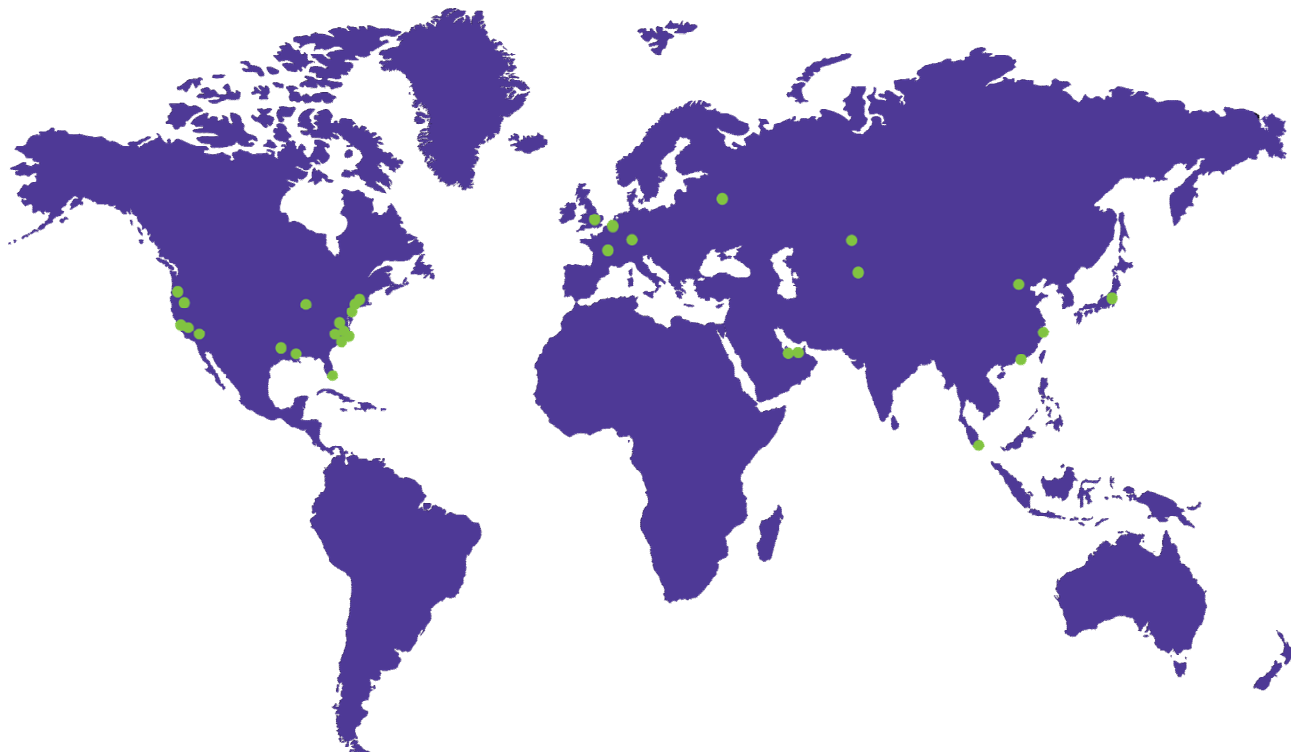


Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Beijing*
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong*
Houston
London
Los Angeles
Miami
Moscow
New York
Nur-Sultan
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Shanghai*
Silicon Valley
Singapore*
Tokyo
Washington, DC
Wilmington



Morgan Lewis

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

THANK YOU

© 2020 Morgan, Lewis & Bockius LLP
© 2020 Morgan Lewis Stamford LLC
© 2020 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.