Title: Internet Guidance for Foreign Private Issuers Conducting Unregistered Offerings: Is a Gatepost Still a Sign of the Times?

Overview: Guy P. Lander, Chair of Carter Ledyard's Securities practice, writes about internet Guidance for Foreign Private Issuers Conducting Unregistered Offerings.

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Full Article:

Internet Guidance for Foreign Private Issuers Conducting Unregistered Offerings: Is a Gatepost Still a Sign of the Times?

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The SEC last issued guidance to foreign private issuers on the use of the Internet in 1998 (the 1998 Guidance). The 1998 Guidance discusses examples of measures that would be adequate to avoid Internet based activities from being considered to take place "in the United States," providing different examples in the context of both US and foreign entities.

In the more than 25 years since the 1998 Guidance was issued, there have been considerable developments in market practices around the world surrounding Internet communications relating to securities offerings, making it timely to revisit the application of the 1998 Guidance, particularly to foreign private issuers.

This article focuses solely on the application of the 1998 Guidance to foreign private issuers posting disclosure on the Internet about or relating to an offering that is not being registered under the US Securities Act of 1933, as amended, and is not intended to address the different considerations that may apply to US domestic issuers.

Furthermore, the article only deals with the registration requirements of Section 5 of the Securities Act and not jurisdictional issues or disclosure issues.

The 1998 Guidance is important because, among other things, Internet-based activities in the United States that relate to securities offerings may result in unregistered offers and sales of securities that contravene the registration requirements of Section 5 of the Securities Act or that constitute "general solicitation" or "general advertising" disqualifying reliance on certain exemptions from registration under the Securities Act. Such activities may also constitute "directed selling efforts," disqualifying reliance on Regulation S under the Securities Act to

conclude that registration is not required for the offers and sales of securities taking place outside the United States.

The 1998 Guidance was principles-based, setting out the following key principles with respect to offers and sales of securities under the Securities Act:

■ Posting offering or solicitation materials on a website may, or may not, be considered activity taking place "in the United States" depending on the facts and circumstances.

■ If the activity is deemed to take place "in the United States", then the registration requirements of US securities laws would apply to that activity, based on the requirement that all offers and sales in the United States be registered under US federal securities laws or be made under an available exemption.

■ Internet offers, solicitations or other communications should be considered to be taking place "in the United States," and therefore subject to US registration requirements, if and only if they are "targeted to the United States."

Market participants that implement measures reasonably designed to guard against sales or the provision of services in the United States should ***not*** be viewed as targeting persons in the United States with their Internet offers and the offers would not result in a registration obligation under Section 5.

■ Measures that may be adequate for non-US issuers would not necessarily be adequate measures for US issuers. US issuers should undertake more restrictive measures than non-US issuers.

The 1998 Guidance included a statement that an offshore Internet offer made by a non-US offeror generally would *not* be considered to be targeted at the United States, if

1. It includes a prominent disclaimer stating it is *not* directed at persons in the United States, *and*

2. It employs procedures reasonably designed to guard against sales to persons in the United States.

As an example of a procedure designed to guard against sales in the United States, the 1998 Guidance suggested that the offeror could ascertain the purchaser's residence by asking for a mailing address or telephone number, and then block participation if a US mailing address or a telephone number with a US area code were provided. Procedures such as this, whether intended to block access to a website or certain portions of it by US persons or to preclude the receipt of securities or services in the United States, can be generally described as a "gatepost" designed to keep US persons out.

The 1998 Guidance was, however, very clear that the procedures it discussed, including the concept of a gatepost, were *not* intended to be exclusive and that other procedures that guard

against sales in the United States could also be used to demonstrate that an offer, solicitation or other communication is not targeted at the United States.

The following are examples of communications where, consistent with the market practices and procedures currently being followed in certain jurisdictions, it generally may be concluded that the communication is *not* directed at persons in the United States.

Example I: Rule 135c Press Releases
A press release or announcement that substantially complies with the principles of Rule 135c can be posted on a foreign private issuer's website *without* a gatepost, even if the issuer is not a registrant and is not Rule 12g3-2(b) compliant or eligible.

Example II: Rule 135e Press Releases

A press release or announcement that complies with Rule 135e can be posted on a foreign private issuer's website without a gatepost so long as the material is posted in the same way as other documents that are *not* offering-related are posted on the website.

This assumes that the press release or announcement is posted with other press releases and announcements of the company. For example, if the issuer creates a web page or a microsite titled "rights offering" or "share placing" a different analysis would need to take place to determine whether a gatepost is needed.

If a foreign private issuer wants an announcement or press release to feature more prominently on the website than other announcements or press releases, it could consider relying on Rule 135c instead of Rule 135e or it could consider posting a rule 135c-compliant announcement or press release on its website (without a gatepost) and distributing a separate Rule 135e-compliant press release outside the United States. A press release or announcement may also be required to be posted on a third-party website by local law or regulation. (*See* Example IV.)

Example III: Offering Documents

An offering document for an *unregistered offering* and any related shareholder circular that is *not* specifically targeted to the attention of US investors may be posted on a foreign private issuer's website *without* a gatepost, so long as the documents contain appropriate legends and any US sales are made only in compliance with an available US exemption from registration.
"Specifically targeted" would include posting an offering document with a US wrap or posting a separate version of the offering document that contains US disclosure not included in the local version.

"Specifically targeted" would also include posting an English-language offering document on a website where other documents are predominantly in another language. This assumes that the offering document is posted with other documents or presentations of the company with no greater prominence. For example, if the issuer creates a webpage or microsite titled "rights offering" or "share placing" and includes the offering document there, a different analysis would need to take place to determine whether a gatepost is needed.

In some jurisdictions, issuers are required to post announcements, press releases, offering documents or circulars on a third-party website. These third-party websites typically do not have gateposts.

Examples of this practice include the following:

■ English public companies are required to post all press releases on the RNS website and certain offering documents on the website of the FCA National Storage Mechanism.

■ Spanish public companies are required to post all press releases on the website of the local regulator.

■ Canadian public companies are required to post all material press releases and all public offering documents and continuous disclosure documents on SEDAR (the website operated by the Canadian securities regulatory authorities).

■ German public companies are required to post ad hoc announcements on the website of the local regulator.

Example IV: Rule 135e Press Releases (Third-Party Websites)

Any Rule 135e-compliant press release that is required to be posted on a third-party website by local law or regulation may also be posted on the foreign private issuer's website *without* a gatepost, once it has been posted on the third-party website.

Example V: Offering Documents (Third- Party Websites)
Any offering document for an *unregistered offering* and any related shareholder circular that is required to be posted on a third-party website by local law or regulation may also be posted on the foreign private issuer's website *without* a gatepost, once it has been posted on the third-party website so long as the documents contain appropriate legends.

Example VI: Continuous Disclosure Documents
Any continuous disclosure document, current or periodic reporting document, or proxy document or circular required under local law or regulation, may be posted on a foreign private issuer's website *without* a gatepost, whether or not the document relates to an offering, so long as the material is posted in the same way as other documents are posted on the website as part of the foreign private issuer's home country disclosure compliance even if the foreign private issuer is conducting a registered offering or an *unregistered offering* at the time and so long as documents relating to the offering contain appropriate legends.

None of these documents should normally be considered targeted at the United States, unless extraordinary measures are taken to bring them specifically to the attention of persons in the United States.

Example VII: Ad Hoc Announcements

An ad hoc announcement is required to be made in certain jurisdictions by way of a press release or website posting for the purpose of disclosing material information.

If a foreign private issuer is required by a relevant regulatory authority or under applicable law to post an ad hoc announcement regarding an offering of securities on the issuer's website without a gatepost, the issuer may do so, whether or not the issuer is making a bona fide offering outside the United States, so long as the announcement otherwise complies with Rule 135e and so long as the announcement does not contain any more information about the offering of securities than is required by the relevant regulatory authority or under applicable law.

As used in this article, *unregistered offering* includes any of the following:

■ A combined Rule 144A/Regulation S offering

■ An offering in the United States pursuant to another exemption combined with a Regulation S offering (for example a Section 4(a)(2)/Regulation S offering or a Regulation D/Regulation S offering or a Section 4(1½)/ Regulation S offering)

■ A stand-alone Regulation S offering

■ A Regulation S offering that is concurrent with an SEC-registered offering

The examples in this article apply to both equity and debt offerings. The observations in this article are limited to offerings of conventional securities involving customary market participants and marketing processes.

We also assume customary scope of the Internet based activities consistent with an issuer's general ordinary course practice (that is, in the same manner as non-offering related material) and without any unusual facts or circumstances.

For example, the initial launch of a publicly available website, initial publication of information in English, unduly prominent display of offering related information within a website, unduly promotional rather than informational content, unusual links to offering-related content or creating dedicated webpages or microsites (for example, titled "rights offering" or "share placing") may raise specific issues not considered here. IPOs would generally need to be considered in a different light from a routine follow-on offering.

Investment banks and frequent issuers may have internal procedures that are more restrictive than the examples provided here. Those procedures might take into account reputational concerns and factors specific to the investment bank or issuer. Market participants should *always* check if internal procedures would apply a different result.

LinkedIn did not exist in 1998. Sometimes officers of foreign private issuers or bankers will post on LinkedIn about an IPO or other securities offering with which they were involved. The CEO might post a photograph ringing the bell at the local stock exchange on the first day of trading.

A post on LinkedIn would *not* constitute general solicitation, general advertising, or directed selling efforts in connection with an *unregistered offering* if it is posted after the transaction has priced and the book has closed, so long as the text of the post indicates finality.

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A post on LinkedIn would *not* constitute general solicitation, general advertising, or directed selling efforts in connection with an *unregistered offering* if it is posted after the transaction has priced and the book has closed, so long as the text of the post indicates finality.

■ The post may *not* suggest that investors buy securities.
■ The post may *not* comment on how the securities are trading.
■ The post may *not* be forward-looking in any way.

Examples of posts that are acceptable include the following:

■ “Thrilled to have helped the Widget Company on its offering.”
■ “It was a long journey, but the Widget Company finally had its first day of trading today.”

■ “Delighted to have helped the Widget Company reach this milestone.”

We have intentionally only covered LinkedIn and *not* other social media.