

# OTCQX International: Attractive US Trading Platform for Non-US Blue Chip Companies

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# Introduction

## *New OTC Platform*

OTCQX International has emerged as the pre-eminent over-the-counter<sup>1</sup> (OTC) securities marketplace for blue chip non-US companies trading in the United States. Many of the world's leading publicly traded companies are now quoted there, with over six dozen joining OTCQX International since the beginning of 2007.

The reasons for this move to OTCQX International's platform are two-fold: i) in 2007 the OTCQX began to be reorganised into separate tiers based on defined quantitative and disclosure standards, and ii) significant regulatory changes implemented by the United States Securities and Exchange Commission (the SEC) under the Securities and Exchange Act of 1934 (the Exchange Act) during 2007 and 2008 made a move by non-US companies to the OTCQX platform much easier and substantially more attractive.

## *What is OTCQX International?*

OTCQX International is the international segment of the premium tier of the OTC securities marketplace run by OTC Markets Group. OTC Markets Group operates an electronic interdealer quotation and trading system in the United States, where over 10,000 securities unlisted on the US-based stock exchanges are traded.

Historically, the securities marketplace operated by OTC Markets Group has been referred to as the Pink Sheets, and was operated by OTC Markets' predecessor NQB (National Quotation Bureau) from 1904. Companies traded through the Pink Sheets were generally thinly-traded, highly speculative or financially troubled US domestic companies. As such, they were often not sophisticated or successful enough to maintain, or bear the disclosure and compliance burdens of, a formal US stock exchange listing and the consequent Exchange Act registration.

On the other hand, for many years most established non-US companies seeking a platform for the trading of their securities in US markets listed their shares or American Depositary Receipts<sup>2</sup> (ADRs) on the New York Stock Exchange or the NASDAQ stock market. Those that did not list their shares on a US stock exchange often found them traded by dealers in the form of unsponsored ADRs quoted in the US OTC markets.

## *Reorganised and Tiered Platform*

Since 2007, OTC Markets Group has segregated and reorganised its previously undifferentiated Pink Sheets offering into separate tiers based on defined quantitative and disclosure standards. Companies that meet the highest such standards are eligible for OTCQX, which is in turn divided into segments devoted to US domestic companies and non-US companies already listed and trading on the larger non-US stock exchanges around the world. OTCQX International's recent success is due in part to this segregation and reorganisation of the OTC Markets platform.

## *Electronic US-Based Trading*

OTCQX International is a fully electronic interdealer quotation system affording investors and broker-dealers access through online and full-service brokerage firms in the United States. Trades are settled and cleared in US time zones using US currency like any US-based exchange-listed security. Trade reports are disseminated through most financial data providers.

## *US SEC Rule Changes*

OTCQX International's success owes much to recent significant regulatory changes implemented by the SEC that affect non-US companies qualifying as "foreign private issuers" under the Exchange Act.<sup>3</sup>

These changes arose as the SEC's considered response to the concerns of non-US companies over the scope, effects and ongoing "regulatory creep" of Exchange Act regulation on US-listed, non-US companies following adoption of the US Sarbanes-Oxley Act of 2002 (the Sarbanes-Oxley Act).

These rule changes include a simplified deregistration process for non-US companies seeking to terminate their Exchange Act registrations (including obligations under the Sarbanes-Oxley Act), often in connection with delisting from a US-based stock exchange, effective from June 2007, and a streamlined process for non-US companies seeking exemptive relief under Exchange Act Rule 12g3-2(b) from ongoing Exchange Act registration requirements, effective from October 2008.

Under the amended Exchange Act rules, non-US companies may now terminate their US-based stock exchange listing and Exchange Act and Sarbanes-Oxley disclosure and governance obligations, while at the same time maintaining trading in their shares in the United States on the OTCQX International platform. Similarly, under the amended rules, non-US companies with shares or ADRs that are not already listed on any US-based exchange may easily initiate US trading without incurring Exchange Act and Sarbanes-Oxley disclosure and governance obligations by having their shares or ADRs traded on OTCQX International.

### *Internationally Listed Companies and Home Country Disclosure*

OTCQX International is designed to be used by non-US companies that satisfy the listing requirements on qualified international stock exchanges (including most of the main international stock exchanges around the world) in their home countries and comply with the detailed local disclosure and reporting obligations applicable there.

Such companies can satisfy OTCQX International and Exchange Act disclosure obligations in one of two ways: i) by making their home country disclosure available in English as required under the Exchange Act Rule 12g3-2(b) exemption; or ii) by having their securities registered under the Exchange Act and complying with applicable US law and US SEC rules thereunder, as they would be required to do in connection with a stock exchange listing on the New York Stock Exchange or NASDAQ.

In general, non-US companies seeking quotations on OTCQX International choose the Exchange Act Rule 12g3-2(b) exemption approach. This allows them to develop or maintain an active US investor base able to execute trades in United States markets, without incurring the burden, expense and often duplicative disclosure obligations imposed by US stock market listing rules and the resulting mandatory Exchange Act and Sarbanes-Oxley compliance.

### *Joining OTCQX International*

In order to join OTCQX International, non-US companies are required to:

- Have either a sponsored ADR facility or an ordinary share eligible for Depositary Trust Company (DTC) treatment, such as Canadian common shares.
- Appoint a qualified, third-party Principal American Liaison (PAL) to assist them with admission and ongoing compliance.
- Comply with applicable OTCQX rules, applicable securities laws in their home market, and applicable US federal and state securities laws.
- Be listed on a qualifying international exchange.

## **Amended US SEC Exchange Act Rules**

### *"Public" Companies and Exchange Act Registration*

In general, the US federal securities laws require all but the smallest of public companies to file reports with the SEC and to comply with the Sarbanes-Oxley Act. Most observers imagine that companies voluntarily "go public" in the United States in one of two ways: either by having an SEC-registered initial public offering (IPO), or by registering the

company and its securities with the SEC under the Exchange Act in connection with a stock exchange listing. Either way, ongoing Exchange Act reporting, disclosure and governance obligations are triggered.

Technically, however, companies (including non-US companies with no other contacts or activities in the United States) can subject themselves to Exchange Act registration in *three* different ways:

- By listing their securities on a US securities exchange, such as the New York Stock Exchange or NASDAQ, or the OTCBB.
- By doing a registered public offering in the United States.
- By having more than 500 record shareholders worldwide, more than US\$10 million in total assets, and more than 300 US-resident record shareholders.

### *Exchange Act Registration and Non-US Companies*

Increases in international trading activity in recent decades have caused many non-US companies to exceed these shareholder and asset thresholds and therefore automatically become subject to Exchange Act registration, even without a US listing or registered IPO. Many such companies may never have been aware of the registration requirement. The SEC has not generally taken action against such companies in recent years.

For many decades, there has been available to qualifying non-US companies an exemption under Exchange Act Rule 12g3-2(b) from Exchange Act registration requirements. Until the recent rule changes discussed below, however, this exemption required a non-US company to take timely action to perfect the exemption before it was needed, and was unavailable to companies that had recently delisted from a US stock exchange. As such, the exemption was of very limited use to many non-US companies.

### *Sarbanes-Oxley Act Difficulties*

Most of the Sarbanes-Oxley Act and various related changes to US disclosure and corporate governance laws were applicable fully to companies, including non-US companies, subject to Exchange Act registration. As they became aware of the heightened compliance, disclosure, and governance obligations now applicable to them under these new or amended rules, many non-US companies with US listings or Exchange Act registrations began looking for ways to obtain relief from these requirements.

Under the old Exchange Act deregistration rules, however, they often found termination of their Exchange Act registration and reporting obligations difficult or impossible. This was true in many cases despite low trading volumes in US markets.

### *Amended Exchange Act Non-US Company Deregistration*

The new Exchange Act Rule 12h-6, adopted in 2007, was expressly designed by the SEC to address this problem by permitting non-US companies more easily to terminate their Exchange Act and Sarbanes-Oxley Act disclosure and governance obligations where they are able to meet new “bright line” quantitative thresholds.

Under new Exchange Act Rule 12h-6, a foreign private issuer may terminate its Exchange Act registration and reporting with respect to equity securities by certifying to the SEC that:

- It has had reporting obligations under the Exchange Act for at least the preceding 12 months, it has filed or furnished all reports required for this period, and it has filed at least one Exchange Act annual report.
- Its securities have not been sold in the United States in a registered offering under the Securities Act of 1933 (the Securities Act) during the preceding 12 months (subject to various exceptions).
- It has maintained a listing for at least the preceding 12 months on one or more exchanges in non-US jurisdictions that constitute its primary trading market.

- Either average daily trading volume in the United States for a recent 12-month period has been no greater than five percent of worldwide average daily trading volume for such period; or, on a date within the preceding 120 days, the securities were held of record by either less than 300 persons on a worldwide basis, or less than 300 persons resident in the United States.

Companies that deregister under Rule 12h-6 become *immediately* eligible for exemption from Exchange Act registration under Rule 12g3-2(b), meaning that their deregistration can be permanent, as long as they comply with Rule 12g3-2(b) going forward.

### *Amended Exchange Act Non-US Company Exemption*

In 2008, the SEC followed up these changes with various amendments to longstanding Rule 12g3-2(b) under the Exchange Act. These amendments had the effect of automatically exempting thousands of non-US companies from registration under the Exchange Act and, as a result, from various provisions of the Sarbanes-Oxley Act, while making various changes in the manner in which companies comply with the Rule.

Since adoption of these amendments, hundreds of new ADR facilities, which require either Exchange Act registration or a Rule 12g3-2(b) exemption, have been created with respect to the shares of non-US companies. (Please see our white paper *Amended US Exchange Act Rule 12g3-2(b) and ADR Programs* dated February 2009 for more details. This can be obtained through your usual McDermott Will & Emery lawyer or at <http://www.mwe.com/info/news/wp0209a.htm>

As amended, Rule 12g3-2(b) automatically exempts from Exchange Act registration most non-US companies that are listed in their home markets but not listed on any US stock exchange, as long as they publish prescribed financial and business information in English.

Under amended Rule 12g3-2(b), a non-US company is automatically exempt from the Exchange Act registration requirements if it has all of the following characteristics:

- It is not otherwise required to file or furnish reports under the Exchange Act because of a listing on a US securities exchange or a prior registered public offering.
- It currently maintains a listing on one or more exchanges in a non-US jurisdiction that, singly or together with another non-US jurisdiction, constitute the primary trading market for those securities.
- It has published promptly in English—on its website or through an electronic information delivery system generally available to the public in its primary trading market—information that, since the first day of its most recently completed fiscal year, it: i) has made public or been required to make public pursuant to the laws of the country of its incorporation, organisation or domicile; ii) has filed, or been required to file, with the principal stock exchange in its primary trading market and which has been made public by that exchange; and iii) has distributed or been required to distribute to its security holders.

As amended, Rule 12g3-2(b) does not itself require any minimum listing period in the primary trading market (unlike the OTCQX International rules, which require a 40-day “seasoning” period). The exemption is thus available to issuers immediately upon completion of an offering and listing in a non-US primary trading market (even one including a Rule 144A tranche to institutions in the United States).

Rule 12g3-2(b) is also immediately available in most cases to issuers that have terminated their Exchange Act registration under Rule 12h-6 under the Exchange Act.

The information delivery mechanics of Rule 12g3-2(b) also permit US registered broker-dealers to fulfill current information obligations concerning securities for which they seek to publish quotations, and allow non-US companies to have their securities traded in the OTC market in the United States (including over the OTCQX platform), without giving rise to any requirement for registration under the Exchange Act.

## OTCQX International Eligibility Criteria

### *Initial Eligibility for Admission*

To be considered for admission to and to remain on the OTCQX International market, a non-US company is required to meet the following criteria:

- Have proprietary priced quotations published by a Market Maker<sup>4</sup> in OTC Link, an electronic interdealer quotation system operated by OTC Markets Group that provides a centralised information network for competitive Market Maker price quotations in OTC securities.
- Maintain a listing on a Qualifying Foreign Stock Exchange,<sup>5</sup> which includes most of the main international stock exchanges around the world, and have been on this exchange for a minimum of the preceding 40 days.
- Be eligible for the exemption from registration provided by Exchange Act Rule 12g3-2(b) and be current and fully compliant with such rule, *or* have securities registered under the Exchange Act and be current and fully compliant with the applicable law and rules.
- Be included in a Recognised Securities Manual.<sup>6</sup>
- Satisfy the applicable financial qualifications for OTCQX International or OTCQX International Premier, as follows:

	<u>OTCQX International</u>	<u>OTCQX International Premier</u>	
Total Assets	US\$2 million	US\$2 million	
	Must also satisfy one of the below	Must satisfy A or B below	
		A	B
Net Tangible Assets	US\$1 million		
Net Income	US\$500,000		
Revenue	US\$2 million	US\$100 million	US\$75 million
Global Market Capitalization	US\$5 million	US\$500 million	US\$750 million
Aggregate Cash Flow for last three years		US\$100 million	
Minimum Cash Flow in each of two preceding years		US\$25 million	

### *Ongoing Eligibility*

Under the OTCQX International Rules, quoted companies are required to meet the following ongoing criteria:

- Compliance with OTCQX Rules for International Companies.
- Compliance with applicable securities laws of their country of domicile and applicable US federal and state securities laws.
- Eligibility of quoted securities for the Blue Sky Manual Exemption under the laws of each state that recognises such exemption for secondary transactions.
- Retention of and consideration of the advice of a PAL at all times.
- Notification of OTC Markets Group of appointment, resignation or dismissal of its PAL.
- Payment of applicable OTCQX fees.
- Eligibility of quoted securities for deposit with DTC.
- Response to OTC Markets inquiries and requests.
- Compliance with ongoing disclosure obligations under the Exchange Act or Rule 12g3-2(b), as applicable, and posting of all disclosures required under Rule 12g3-2(b) in English over the OTC Disclosure and News Service.
- Annual written compliance officers' certification by the quoted company to the PAL.
- Annual PAL compliance letter to OTC Markets.

## A Sponsor-Driven Platform

### *Each OTCQX International Company Needs a PAL*

All non-US companies applying for admission to OTCQX International must retain a relationship with a PAL.

The PAL can be:

- An investment bank.
- A law firm or attorney.
- An ADR depository bank, if the company will have sponsored ADRs quoted.

### *Attorney or Investment Bank PAL Requirements*

In order to be eligible to serve as an attorney or investment bank PAL, a candidate must meet the applicable eligibility requirements and use its best efforts in performing the following tasks:

- Review the company's business and securities to the extent required to render advice with respect to OTCQX International tier eligibility.
- Advise regarding compliance with Exchange Act Rule 12g3-2(b) and OTCQX Rules.
- Review company disclosure annually to confirm all information required to be made publicly available pursuant to Exchange Act Rule 12g3-2(b) has been posted on the OTC Disclosure and News Service and the company otherwise complies with OTCQX Rules.
- Assist with responses to requests and inquiries from OTC Markets Group.
- Provide the company with an appropriate letter of introduction for initial application to OTCQX and annual letters, as required by OTCQX Rules.

- Notify OTC Markets Group when initial disclosures are posted through the OTC Disclosure and News Service or the SEC’s Electronic Data-Gathering, Analysis, and Retrieval (EDGAR) system.

#### *ADR Depositary Bank PAL Requirements*

In order to be eligible to serve as an ADR depositary bank PAL, a candidate must meet the applicable eligibility requirements and use its best efforts in performing the following tasks:

- Provide the company with an appropriate letter of introduction for the initial application to OTCQX, and annual letters, as required by OTCQX Rules.
- Notify OTC Markets Group when required initial disclosures are posted through the OTC Disclosure and News Service or EDGAR.

#### *PAL Fees*

The PAL Application Fee is US\$1,000 in the case of an attorney PAL or investment bank PAL. This is due at the time the application is submitted to OTC Markets Group. In the case of an ADR depositary bank PAL, it is due at the time the appointment is submitted. All PALs are required to pay a non-refundable annual fee of US 1,000 for continued inclusion on the PAL List.

## Applying to OTCQX International

#### *Application Materials*

To apply for admission to OTCQX International, an applicant must submit the following materials:

- An OTCQX Application for International Companies.
- OTCQX application fees (non-refundable application fee of US\$ 5,000 and annual fees of US\$ 15,000).
- An OTCQX Agreement for International Companies, including exhibits and cover sheet.
- An application to serve as a PAL and the PAL application fee if the desired PAL is an attorney or investment bank and is not already included on OTC Markets Group’s list of approved PALs.
- One of the following forms as applicable: Issuer Appointment of an Attorney Principal American Liaison form, Issuer Appointment of an Investment Bank Principal American Liaison form, or Issuer Appointment of an ADR Depositary Principal American Liaison form.
- A copy of the corporate logo in Encapsulated PostScript (EPS) format, emailed to [issuers@otcmarkets.com](mailto:issuers@otcmarkets.com) with a subject line “Company Logo”.

The referenced forms are all available online at <http://www.otcqx.com/qx/int/forms>

#### *Initial Disclosure Materials*

Following receipt by OTC Markets of these application materials and fees, an applicant company must post its initial disclosure materials through the OTC Disclosure and News Service or on EDGAR (in the case of Exchange Act registered companies) within 90 days following the date of submission of its application materials. Under OTCQX International rules, the PAL is obligated to notify OTC Markets when initial disclosures have been posted.

The following initial disclosure materials must be made available to the public prior to admission:

- In the case of Exchange Act registered companies, the applicant must be current and fully compliant in its SEC reporting obligations.



- In the case of non-Exchange Act registered companies, the applicant must post, in English, through the OTC Disclosure and News Service, all information required to be made publicly available pursuant to Exchange Act Rule 12g3-2(b) for the preceding 24 months.

#### *PAL Letter of Introduction*

After the initial disclosure materials have been made available, the applicant is required to submit to OTC Markets an Attorney PAL Letter of Introduction, Investment Bank PAL Letter of Introduction, or an ADR Depository PAL Letter of Introduction, as applicable, containing the information prescribed in the OTCQX rules.

#### *OTC Markets Review*

Upon receipt of the application, OTC Markets Group is entitled to:

- Require the applicant, with the assistance of its PAL, to confirm, clarify or modify any information contained in its application materials.
- Require the applicant to provide a further undertaking, or fulfil a further condition, prior to admission.
- Delay admission pending the completion of further due diligence.
- Refuse the application if, in its opinion, the admission of the applicant for trading on OTCQX would be likely to impair the reputation or integrity of OTC Markets or be detrimental to the interests of investors.

#### *Timetable for quotation*

An illustrative timetable for an OTCQX International quotation prepared by OTCQX staff is attached this memorandum.

#### *Withdrawal From OTCQX International*

Quoted companies may withdraw their securities from trading on OTCQX International at any time, upon 24 hours prior written notice to OTC Markets.

## **Exchange Act Rule 10b-17/Financial Industry Regulatory Authority (FINRA) Rule 6490 and ADRs**

#### *Exchange Act Rule 10b-17*

One of the few regulations under the Exchange Act that may apply to non-US companies that are not listed on a US securities exchange or registered under the Exchange Act is Rule 10b-17, relating to untimely announcement of company actions.

Rule 10b-17 provides that it is a “manipulative or deceptive device or contrivance,” constituting fraud under Section 10(b) of the Exchange Act, for any “issuer of a class of securities publicly traded by the use of any means or instrumentality of interstate commerce or of the mails or of any facility of any national securities exchange” to fail to give appropriate notice of various company actions (including dividends and other distributions, stock splits, and rights and other subscription offers) relating to such securities. Rule 10b-17 goes on to prescribe how and when appropriate notice shall be given.

Rule 10b-17 applies to companies (such as Canadian and Dutch companies) the securities of which are quoted directly in the US OTC markets, including the OTCBB and OTCQX.

## *FINRA Rule 6490*

In September 2010, FINRA<sup>7</sup> Rule 6490 (Processing of Company-Related Actions) became effective. Rule 6490 codifies the requirements in Rule 10b-17 for providing timely notice to FINRA of the corporate actions referenced in Rule 10b-17 for securities traded in OTC markets. Rule 6490 also requires timely notification to FINRA of certain other specified corporate actions. The rule clarifies the scope of FINRA regulatory authority and discretionary power regarding company-related actions for OTC securities and implements FINRA fees.

Under Rule 6490, issuers, ADR depositaries and others are required to complete necessary forms and to pay required fees within prescribed time periods. Failure to do so will result in late fees and delayed processing of announcements. The text of FINRA Rule 6490 is available at [www.finra.org/rulefilings/2009-089](http://www.finra.org/rulefilings/2009-089).

Beginning in March 2011, providers of required notices to FINRA under Rule 6490 are required to provide such notices electronically. The electronic forms are now available via [www.finra.org/upc/forms](http://www.finra.org/upc/forms).

## *Rule 10b-17 and FINRA Rule 6490 re ADRs*

The staff of the SEC and of FINRA take the position that, in the case of ADRs listed on US securities exchanges or traded in US OTC markets such as the OTCQX International platform, Rule 10b-17 and FINRA Rule 6490 do not apply to the non-US company that is the issuer of the underlying common shares, but only to the ADR Depositary that has directly issued the ADRs.

## Impact on US Capital-Raising

### *Secondary Market Platform*

OTCQX is a platform for secondary trading of outstanding securities. It does not involve new issues or issuance and sale by the issuers themselves into the US public markets. As such, it may provide a useful and efficient platform for the flow of pricing information and issuer data to holders of outstanding securities. As a result, it may raise an issuer's profile among US investors and increase US interest or activity in its securities.

### *US Private Placements*

Non-US companies with an OTCQX International quotation are able to engage in private placements to US investors without in any way changing their exempt status under Rule 12g3-2(b) or jeopardising their status as quoted companies on the OTCQX platform. In fact, the ready availability of information, the familiarity to the brokerage and market maker community, and the enhanced liquidity fostered by a quote on the OTCQX platform will often make private placements easier for non-US companies to execute in the United States.

## Liability Issues Under US Federal Securities Laws

### *Generally*

Non-US companies often express concerns as to their potential exposure to increased regulatory or compliance burdens and to private lawsuits or liability under US federal securities laws in connection with a US listing or OTC quotation. These concerns have focused historically on compliance with the Sarbanes-Oxley Act and the Exchange Act, on one hand, and class action litigation under the anti-fraud provisions of the US securities laws, on the other.

The regulatory context in which the OTCQX International platform operates and an important trend in US judicial interpretation of the application of the anti-fraud provisions of the US securities laws internationally have, in recent years, substantially reduced the probability and likely impact of such potential exposures.

### *Applicable US Securities Laws*

Under US securities laws, there are two basic sources of liability: those under the Securities Act, which govern offers and sales of securities, and those under the Exchange Act, which govern a broad range of activities.

In general, the Securities Act will not be applicable to issuers merely because they have securities listed or quoted in US markets. This is because that process does not, of itself, involve any offer or sale of securities by the issuers.

Furthermore, a quotation on OTCQX International by a non-US company availing itself of the Rule 12g3-2(b) exemption from Exchange Act registration referred to above will not generally give rise to Exchange Act or Sarbanes-Oxley Act registration and compliance issues.

The main area of concern to non-US companies considering a quotation on an OTC platform such as OTCQX International has thus been potential exposure under the basic anti-fraud provisions under the Exchange Act. Under the Exchange Act, the two principal sources of liability are Section 18 (which provides that issuers are liable for false or misleading disclosures in Exchange Act filings) and Section 10(b) and Rule 10b-5 thereunder (which very broadly prohibit the use of manipulative and deceptive practices in the US securities markets).

Because most non-US companies considering a quotation on OTCQX International will likely not be subject to Exchange Act registration, they will not be making filings that would subject them to liability under Exchange Act Section 18. Home country disclosures made available in English as required under the Rule 12g3-2(b) exemption do not carry Section 18 liability.

Furthermore, as discussed below, recent US Supreme Court and federal court decisions interpreting Section 10(b) and Rule 10b-5 have very severely restricted the circumstances under which non-US companies can be subjected to liability under these provisions.

### *The Aftermath of Morrison v National Australia Bank*

In *Morrison v National Australia Bank*, decided by the US Supreme Court in June 2010, the Court held that Section 10(b) and Rule 10b-5 do not apply extraterritorially. In so holding, the Court stated that these anti-fraud provisions (which usually form the basis of class action lawsuits against non-US companies based on alleged fraudulent disclosures) apply “only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.”

In reaching this conclusion, the Court rejected explicitly decades of intricate “conduct and effects” analysis, under which non-US companies could be subjected to liability under the anti-fraud provisions based either on their conduct in the United States or on the effects of their conduct within the United States.

Under the *Morrison* approach, all that matters is the location of the securities purchase or sale transaction giving rise to the claim.

In several significant class action cases decided since *Morrison*, lower US federal courts have applied *Morrison* to reduce very dramatically, if not entirely eliminate, the potential liability of non-US companies.

The outlook remains uncertain. Many of the lower US federal court decisions interpreting *Morrison* may be appealed.

Meanwhile, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), passed into law in July 2010, largely codified the interpretation of the anti-fraud provisions that had existed prior to the *Morrison* decision by reinstating an expansive “conducts and effects” test with respect to US government and US SEC actions. The intent, form and consequent legal effect of this provision has inspired some debate, but at the least this measure returns some conduct and effects analysis to such actions. The Dodd-Frank Act also contains similar changes to the Securities Act and the Investment Advisers Act of 1940.

Another provision of the Dodd-Frank Act directs the US SEC to solicit public comment and conduct a study of the extent to which *Morrison* should effectively be reversed and private rights of action (such as class actions) under the anti-fraud provisions should be extended to cover transnational situations.

For more information, please contact your regular McDermott lawyer, or:

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For more information about McDermott Will & Emery visit [www.mwe.com](http://www.mwe.com).

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<sup>1</sup> The OTC markets in common shares in the United States include the OTC Bulletin Board and the various platforms operated by OTC Markets, previously referred to generally as the Pink Sheets. These involve electronic quotation systems displaying real-time quotes, last-sale prices, and volume information for many OTC securities that are not listed on national securities exchanges in the United States. Brokers can use the systems to access prices or enter quotes for OTC securities.

<sup>2</sup> Equity securities trade in international markets in various forms. The most common instrument in US markets is the ADR. An ADR is a physical certificate issued by a US custodian bank evidencing an American Depositary Share (ADS). An ADS is a security that represents an ownership interest in underlying securities deposited with the custodian bank in connection with an ADR facility. ADRs and other similar products are intended to make investing in companies outside an investor's home market easier, by providing readily available pricing data, lower transaction costs and more timely distributions. As the SEC has pointed out, market participants tend not to distinguish between ADRs and ADSs. For the sake of simplicity, this memorandum considers non-US companies (assuming that they qualify as "foreign private issuers" (see below) under the Exchange Act) with common shares underlying US-traded ADRs/ADSs in customary form, and refers to the US-traded securities simply as ADRs. ADR facilities are either "unsponsored" or "sponsored." Unsponsored facilities are created by one or more custodian banks without formal involvement by the issuer of the underlying common shares. Sponsored facilities are created by a single depository formally appointed by the issuer of the underlying common shares. Sponsored facilities allow the issuer of the underlying common shares more control as well as the ability to list the ADRs on a US stock exchange or to have them quoted on a platform such as OTCQX International.

<sup>3</sup> Under the relevant Exchange Act definition, a "foreign private issuer" means in effect a non-government entity organised under the laws of a non-US jurisdiction where not more than 50 per cent of its outstanding voting securities are directly or indirectly held of record by residents of the United States, or none of the following is true: (i) the majority of the executive officers or directors are citizens or residents of the United States, (ii) more than 50 per cent of the assets of the issuer are located in the United States, and (iii) the business of the issuer is administered principally in the United States.

<sup>4</sup> As used in the OTCQX Rules, Market Maker refers to a "firm that stands ready to buy and sell a particular security on a regular and continuous basis at a publicly quoted price."

<sup>5</sup> The non-US stock exchanges meeting the definition of Qualifying Foreign Stock Exchange are listed at <http://www.otcqx.com/qx/int/qfe>.

<sup>6</sup> As used in the OTCQX Rules, Recognised Securities Manual means a securities manual published by Standard and Poor's or Mergent (formerly known as Moody's). This is a way of dealing with US state securities or "blue sky" law compliance with respect to roughly three quarters of the US states. Additional states can be cleared on a case-by-case basis to broaden the blue sky coverage as desired.

<sup>7</sup> FINRA is a private corporation that acts as a self-regulatory organisation, regulating brokerage firms and securities markets in the United States. FINRA is the successor to the National Association of Securities Dealers, Inc.

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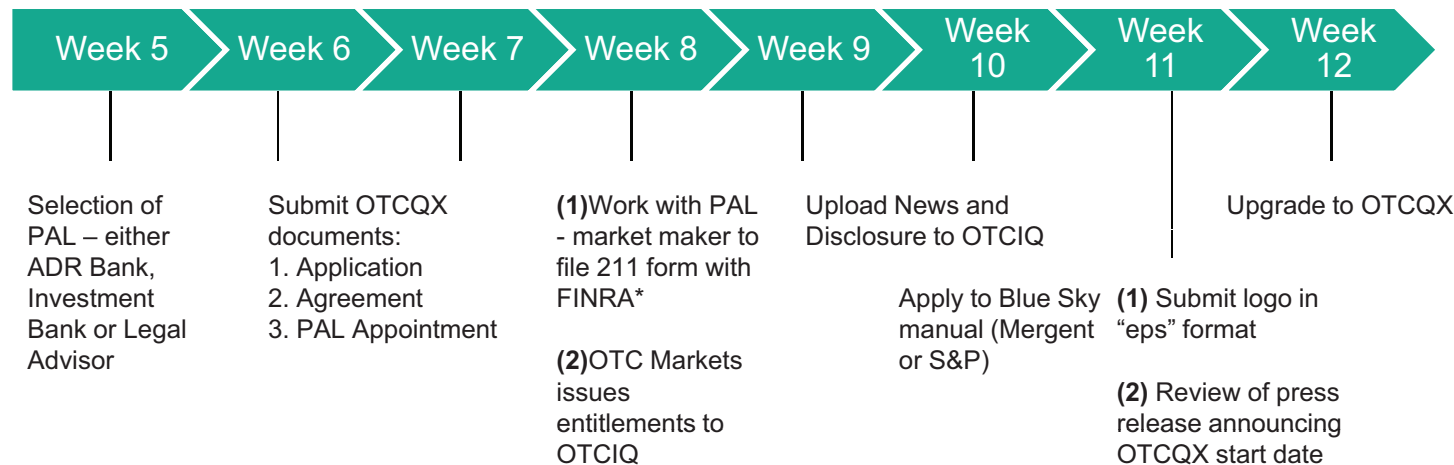
# OTCQX Upgrade & ADR Establishment Timeline

## ADR Timeline 8-10 weeks



Negotiate Deposit Agreement terms, board approval, file F-6, establish necessary clearance/work with ADR Bank

## OTCQX Timeline 4-6 weeks



\*Companies that are currently trading OTC Pink do not need to have a 15c211 filed

