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U.S. Law Guide for U.S. Companies on ASX

U.S. securities law considerations for U.S. companies listing or listed on the Australian Securities Exchange

Why U.S. companies choose ASX?

The Australian Securities Exchange (***ASX***) is an attractive market for many U.S. companies, with more than 20 companies incorporated in a U.S. state currently listed on ASX. In addition, approximately 30 companies incorporated in Australia but with headquarters or principal operations in the United States are listed on ASX.

U.S. companies choose to undertake an initial public offering in Australia and list on ASX for a variety of reasons, including:

- less dilution and loss of control for founders compared to additional venture capital funding;
- ASX is one of the world's top exchanges for IPOs and has a well-regarded regulatory regime;
- easier and less expensive to list on ASX compared to a U.S. stock exchange;
- strength in small and mid-cap markets as well as early stage IPOs;
- sector specialties include technology, healthcare (including medical devices), resources and gaming;
- "big fish in a small pond" (*i.e.*, a small or mid-cap company is better able to stand out on ASX compared to a U.S. stock exchange);
- follow-on capital raisings are generally easier and more cost-efficient on ASX compared to a U.S. stock exchange;
- Australia has a less litigious environment than the United States; and
- ASX can be a good pathway or "stepping stone" to a potential subsequent listing on a U.S. stock exchange (if desired).

This Guide is designed to assist U.S. companies in understanding U.S. securities law considerations when listing or already listed on ASX as a primary listing.

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1 Introduction

An initial public offering (***IPO***) is the process by which securities in an entity are offered to the public for the first time and the entity is listed on a stock exchange, enabling its securities to trade on that exchange.

1.1 Purpose of this Guide

While most legal work for an IPO in Australia will be undertaken by Australian counsel to an issuer, it is also important for a U.S. issuer to consider U.S. securities law implications when listing on ASX.

In undertaking an Australian IPO, a U.S. company must consider U.S. securities law implications.

This Guide assists U.S. companies listing or already listed on ASX as a primary listing. In particular, this Guide provides an overview of U.S. securities law considerations for an IPO and the continued listing of a U.S. company's securities on ASX. As discussed in section 3.2, if certain asset and ownership thresholds are exceeded, then a U.S. company could be required to register its common stock with the U.S. Securities and Exchange Commission (***SEC***).

1.2 About Rimôn

Rimôn is the leading U.S. law firm advising U.S. companies with a primary listing on ASX as well as ASX-listed Australian companies with a secondary listing on Nasdaq.

We have unique experience in advising U.S. companies listing and listed on ASX. Over the past 25 years, our Sydney-based U.S. lawyers have acted as special U.S. counsel to more than 10 U.S. companies listing or already listed on ASX.

Given our expertise, we can provide more effective and cost-efficient U.S. securities law advice to a U.S. company undertaking an Australian IPO with listing on ASX compared to a company's U.S.-based counsel, who may be unfamiliar with relevant U.S. securities law and Australian market practice.

Australian IPOs often involve a private placement to institutional investors in the United States and other countries. We can advise on a private placement in the United States as part of an Australian IPO by a U.S. company. In addition, we regularly act as International Counsel in advising on an offer of securities to institutional investors in other international capital markets in an effective, convenient and cost-efficient manner.

Founded 15 years ago in Silicon Valley, Rimôn is an innovative law firm with 200 lawyers around the world, including U.S. capital markets lawyers in New York, San Francisco and Sydney.

2 U.S. law considerations for an Australian IPO

An offer and sale of securities must be registered under the U.S. Securities Act of 1933 (***Securities Act***) unless the transaction is exempt from, or not subject to, the registration requirements.

Regulation S under the Securities Act provides that offers and sales of securities in "offshore transactions" are not subject to the registration requirements. In order to enable U.S. companies that are not SEC-registrants to list on ASX in compliance with Regulation S, the ASX sought and obtained "no action" relief from the SEC in 2000.

2.1 Regulation S

A U.S. company undertaking an IPO in Australia is subject to the most stringent conditions (Category 3) of Regulation S and, as a result, must satisfy the following conditions:

- No "directed selling efforts" are made in the United States. The term "directed selling efforts" means any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for the securities sold in reliance on Regulation S.
- Investors certify that (i) they are not U.S. persons and are not acquiring the securities for the account or benefit of a U.S. person or (ii) they are U.S. persons who purchased the securities in a transaction that did not require registration under the Securities Act.
- Investors agree to (i) resell the securities only in accordance with the registration or exemption provisions of the Securities Act or in compliance with Regulation S (including ordinary course sales on ASX) and (ii) not engage in hedging transactions with regard to such securities unless in compliance with the Securities Act.
- Any certificate representing the securities contains a restrictive legend to the same effect as the preceding sentence.
- The issuer's bylaws must provide that the issuer will refuse to register any transfer of restricted securities not made in accordance with the provisions of Regulation S, pursuant to registration under the Securities Act or pursuant to an available exemption from registration.
- Any distributor agrees in writing to certain offering restrictions and any offer document must include statements regarding the offering restrictions.
- Prior to the expiration of a 6-month or 1-year distribution compliance period, any distributor selling the securities to a dealer or a person receiving a selling concession, fee or other remuneration must send a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

2.2 “No action” letter issued by the SEC to the ASX

An Australian IPO by a U.S. company cannot be made in strict compliance with all requirements of Regulation S because trading on ASX is available to all U.S. investors and the market operated by ASX is fully electronic. In particular, the ASX does not permit the issuance of share certificates to shareholders due to its all-electronic settlement system and, as a result, ASX-listed issuers cannot issue share certificates with the restrictive legend required under Regulation S.

In 1999, the ASX sought accommodation from the SEC to enable U.S. companies to list on ASX while complying with Regulation S to the extent possible. In 2000, the SEC issued a “no action” letter to the ASX that provides relief from certain of the requirements of Regulations S for U.S. companies listing on the ASX but subject to additional restrictions suitable to the ASX’s settlement system during the distribution compliance period (which is one year or, for an SEC-registrant, six months).

Subject to compliance with Regulation S as modified by the “no action” letter, U.S. companies may conduct an IPO in Australia and list on ASX.

In summary, U.S. companies must comply with the following terms of the “no action” letter:

- the prospectus must disclose that purchasers in the IPO will be deemed to have made representations regarding their non-U.S. status and agree to restrictions on resale under Regulation S;
- the global share certificate representing the securities must contain a restrictive legend;
- any press release about the IPO must include a statement that the securities have not been registered under the Securities Act and are subject to restrictions under Regulation S;
- the ASX trading symbol must include a designation of “FOR US” (Foreign Ownership Restriction – United States), which indicates to brokers that the securities are restricted under Regulation S and, as a result, may not be sold to U.S. persons (excluding “qualified institutional buyers”, as defined and in compliance with Rule 144A under the Securities Act);
- confirmations sent to shareholders must indicate that the securities are subject to restrictions;
- a company must instruct its share registry that no securities may be transferred from the Regulation S global security without an opinion of U.S. counsel; and
- companies must provide notification in their annual report, interim reports and notices of shareholder meetings that the ASX-listed securities are restricted under Regulation S and may not be sold to U.S. persons (excluding “qualified institutional buyers”, as defined and in compliance with Rule 144A under the Securities Act).

While the SEC “no action” letter restricts the ability of U.S. persons to purchase securities of a U.S. company on the ASX, it does not restrict the ability of a U.S. person to sell such securities in ordinary brokered transactions on the ASX.

2.3 Chess Depositary Interests

The ASX is an electronic exchange and does not permit the issuance of certificates representing shares trading on ASX. In contrast, Delaware law permits a shareholder to request that a Delaware corporation issue a stock certificate representing the shares owned by the shareholder. As a result of this conflict, a U.S. company must have its shares of common stock trade on ASX in the form of Chess Depositary Interests (***CDIs***), with each CDI representing a certain number (or fraction) of shares of the company's common stock.

A CDI is a financial product that is a unit of beneficial ownership in an underlying security such as common stock. Legal title to the underlying securities is vested in an ASX subsidiary known as CHESS Depositary Nominees. With the exception of voting arrangements and some corporate actions, a CDI holder essentially has the same rights as holders whose securities are legally registered in the holder's own name.

2.4 Australian "top hat" structure

We note that approximately 30 ASX-listed Australian companies have their headquarters or principal operations in the United States.

If a company incorporated under the laws of a U.S. state would prefer to avoid the implications of the "no action" letter and more than 50% of its voting securities are (and will continue to be) held by non-U.S. residents, then it could consider creating a new Australian parent company that would list on the ASX. This is known as an Australian "top hat" structure. We note that the restrictions of Regulation S (Category 3) and the "no action" letter discussed above would not apply if the Australian company qualified as a "foreign private issuer".

The term "foreign private issuer" is defined as an issuer incorporated or organized outside the United States *except* for such an issuer that meets the following criteria as of the last business day of its most recently completed second fiscal quarter:

- more than 50% of its outstanding voting securities are held, directly or indirectly, by residents of the United States; and
- any of the following:
  - the majority of its executive officers or directors are U.S. citizens or residents;
  - more than 50% of its assets are located in the United States; or
  - its business is administered principally in the United States.

In short, if less than 50% of its voting securities would be held by U.S. residents, then the Australian "top hat" entity could be a "foreign private issuer" and therefore not be subject to the SEC "no action" letter. While this would mean that any U.S. investor (rather than only "qualified institutional buyers") could purchase the company's shares on the ASX, the company would need to monitor its U.S.-ownership level and other criteria for being a "foreign private issuer".

In contrast, if a U.S.-based company considering listing on ASX via an Australian "top hat" structure would have more than 50% of its voting securities held by U.S. residents, then it would be treated as a U.S. domestic issuer (assuming it is administered principally in the United States, has a majority of U.S. officers or directors, or a majority of its assets are located in the United States). In such scenario, the company would be subject to the SEC "no action" letter and it would probably be advisable to list a Delaware parent company.

2.5 Special U.S. counsel

Rimôn regularly acts as special U.S. counsel to U.S. companies undertaking an Australian IPO as well as when they are listed on ASX.

Our role for an Australian IPO includes:

- advising on U.S. securities law matters for the IPO, including compliance with Regulation S as supplemented by the "no action" letter;
- advising on the offer structure so as to minimize the risk of exceeding the shareholder thresholds that require registration under the U.S. Securities Exchange Act of 1934 (***Exchange Act***), as discussed in section 3.2;
- reviewing and commenting on the IPO underwriting agreement, any sub-underwriting agreement, any co-manager agreement and the form of confirmation letter for investors;
- reviewing and commenting on the underwriter's research distribution guidelines;
- reviewing and commenting on other marketing and transaction documents, including the prospectus, roadshow presentation, other offering materials and the application to the ASX for the Foreign Ownership Restriction designation on the company's ASX ticker symbol (as required by the "no action" letter);
- delivering a U.S. law opinion to the ASX to the effect that the IPO is being conducted in compliance with the "no action" letter;
- advising on any concurrent private placement of CDIs to U.S. investors; and
- delivering a U.S. law opinion to the underwriter that the securities offered in the Australian IPO are not required to be registered under the Securities Act.

As special U.S. counsel, we can expertly advise on navigating U.S. law matters arising in an Australian IPO with listing on ASX.

Once a U.S. company is listed on ASX, our role as special U.S. counsel includes:

- advising on continued compliance with Regulation S as supplemented by the SEC's "no action" letter, including with respect to employee incentive plans;
- advising on how to monitor the number of securityholders to determine if registration is required under the Exchange Act;
- advising on registration under the Exchange Act if necessary; and
- advising on capital raisings in compliance with U.S. securities law, including delivering a U.S. law opinion to the Australian lead managers for a capital raising that the securities being sold are not required to be registered under the Securities Act.

Our hourly rates are consistent with the Australian legal market rather than the much higher billing rates in the United States. In order to ensure value and certainty on legal costs, we can act as special U.S. counsel on a flat fee arrangement.

3 Becoming an SEC-registrant

A reason some U.S. companies seek to list on ASX rather than a U.S. stock exchange is to avoid the cost and complexity of registering securities under the Securities Act. While a U.S. company's IPO in Australia can be structured so as not to be subject to registration under the Securities Act as discussed in section 2.2, a U.S. company could subsequently be required to register its common stock under the Exchange Act in certain circumstances.

3.1 Circumstances in which a U.S. company becomes an SEC-registrant

A U.S. company with its primary listing on ASX could become an SEC-registrant under any of the following scenarios:

- if it seeks to undertake a public offer of securities in the United States, then it would file with the SEC a registration statement on Form S-1 under the Securities Act;
- if it seeks a compliance listing on a U.S. stock exchange, then it would file with the SEC a registration statement on Form 10 under the Exchange Act; or
- if it becomes a *de facto* public company by virtue of having a significant number of shareholders (as discussed below), then it would file with the SEC a registration statement on Form 10 under the Exchange Act.

Upon effectiveness of a registration statement, the U.S. company would become subject to the reporting requirements under the Exchange Act.

Once a U.S. company's common stock has been registered under the Exchange Act, the restrictions under the "no action" letter discussed in section 2.2 would no longer be required.

3.2 Registration required when shareholder limitation is exceeded

A U.S. company must register its class of equity securities under the Exchange Act within 120 days after the last day of its first fiscal year on which it has:

- total assets of more than US$10 million; and
- equity securities (*e.g.*, shares of common stock and CDIs) held of record by:
  - 2,000 persons; or
  - 500 persons who are not "accredited investors".

The term "accredited investor" is defined in Rule 501(a) under the Securities Act and includes, amongst others:

- certain legal entities with total assets over US$5 million;
- directors and executive officers of the issuer; and
- individuals with annual income over US$200,000 (for each of the past two years and expectation of the same in the current year) or net assets over US$1 million (excluding the primary residence).

For purposes of determining the number of persons who hold equity securities of record, an issuer may exclude holders who have received equity securities pursuant to an employee compensation plan in a transaction exempt from the registration requirements under the Securities Act.

In its rulemaking, the SEC considered providing a "safe harbor" method for determining "accredited investor" status but chose not to do so because it would then become the de facto standard. Instead, the SEC decided to allow flexibility in how to establish a reasonable belief of a security holder's status as an accredited investor. We can advise on this.

3.3 Registration process under the Exchange Act

In order to register securities under the Exchange Act, a U.S. company must prepare and file a registration statement on Form 10 with the SEC. Form 10 requires detailed information regarding the issuer's business, risk factors, management, executive compensation, significant shareholders, financial performance and liquidity as well as include financial statements. The registration statement is comparatively more comprehensive than a prospectus prepared for an IPO in Australia.

Audited financial statements for the preceding three fiscal years (or two fiscal years for a "smaller reporting company", as discussed in section 4) must be included in the registration statement and must be prepared in accordance with U.S. generally accepted accounting principles. Such financial statements must be audited by a firm that is registered with the Public Company Accounting Oversight Board and the audit must be conducted in compliance with U.S. audit standards. In addition, financial statements for any interim period must be included but do not need to be audited. If a company believes it may be required to prepare a registration statement in the future, then it should determine whether its current auditor is PCAOB-registered.

In addition, material contracts outside the ordinary course of business must be filed as exhibits to the registration statement. An issuer may, however, seek confidential treatment of commercially sensitive provisions of material contracts.

Once the registration statement is filed, the SEC will review and comment on the document. The SEC normally provides initial comments on a registration statement within 28 days after the filing date. Lawyers and accountants at the SEC review the registration statement and provide a written comment letter. The SEC may request that an issuer amend its registration statement to provide additional disclosure and may also ask the issuer to provide the SEC staff with additional information or documents.

Once all SEC comments are resolved, the issuer may request the SEC to declare the registration statement "effective". If the company is seeking to list shares on a U.S. stock exchange, then the shares may be listed upon effectiveness of the registration statement and approval of a listing application by the stock exchange.

The entire registration process can take 4 – 6 months (or potentially longer).

4 Comparison of ASX and SEC reporting requirements

If an ASX-listed U.S. company were to become an SEC-registrant, then it would be subject to reporting requirements under the rules of both the ASX and the SEC. This creates a potential risk of inconsistency and redundancy.

We note that the SEC does not provide special accommodation for U.S. companies like it does for "foreign private issuers" simply because a U.S. company is listed on ASX or another foreign stock exchange. The SEC does, however, provide scaled disclosure requirements for any "smaller reporting company". This term is generally defined as a company (i) with a public float of less than US$250 million or (ii) that has both less than US$100 million in annual revenue and a public float of less than US$700 million.

The ASX, on the other hand, provides varying levels of accommodation for U.S. and other non-Australian companies.

We note that a U.S. company can list equity securities on ASX under one of the following two categories:

- ***ASX Foreign Exempt Listing*** – this category is available for a U.S. company that (i) has a primary listing on Nasdaq or the New York Stock Exchange and a secondary listing on ASX and (ii) meets certain eligibility criteria (*e.g.*, net tangible assets or market capitalization of at least A$2 billion). A company that fulfills these requirements is expected to comply primarily with the listing rules of its home exchange and is exempt from complying with most of the ASX Listing Rules.
- ***Standard ASX Listing*** – this category is for a company that has ASX as its primary listing and, as such, is subject to all ASX Listing Rules unless a waiver is obtained with respect to a particular rule. In order to reduce compliance burden and avoid conflict between reporting requirements, the ASX may grant waivers in relation to certain rules to a U.S. company that is an SEC-registrant.

The following chart compares reporting requirements for U.S. companies with a Standard ASX Listing under:

- the ASX Listing Rules and the Australian Corporations Act 2001 (***Corporations Act***), as administered by the Australian Securities & Investments Commission (***ASIC***)); and
- the rules and regulations of the SEC for U.S. companies that are SEC-registrants.

This situation can arise when a U.S. company (i) undertakes an Australian IPO in compliance with the "no action" letter (as discussed in section 2.2) and (ii) subsequently exceeds the shareholder limitation that requires the U.S. company to register its equity securities under the Exchange Act or lists its equity securities on a U.S. stock exchange (as discussed in section 3).

Item	ASX and ASIC requirements	SEC requirement	Comment
Annual reporting	An ASX-listed entity must: – prepare financial statements in respect of each financial year, have the statements audited and obtain an auditor's report; – as soon as available but by no later than 2 months after the end of the financial year, give the ASX a preliminary report (which need not be audited) together with an Appendix 4E containing prescribed information (except mining exploration entities and oil & gas exploration entities are not required to lodge a preliminary final report); – within 3 months after the end of the financial year, lodge audited financial statements, auditor's report and directors' report with the ASX and ASIC; and – within 4 months after the end of the financial year, send the annual report (including the audited financial statements, auditor's report, director's report and a corporate governance statement) to shareholders who have elected to receive a copy of the report and make available the annual report on a readily accessible website.	U.S. public companies must file annual reports on Form 10-K with the SEC within a certain period of time (depending on the company's public float) after the end of each fiscal year. In an annual report on Form 10-K, a company must: – describe its business, risk factors and any material pending legal proceedings affecting it; – provide information on which market its common stock trades; – provide a table of certain operating and balance sheet information for its five most recent fiscal years; – provide a section on management's discussion and analysis of the company's financial condition and results of operations; – provide quantitative and qualitative disclosures about market risks it bears; – provide audited financial statements for the most recently completed fiscal year and certain additional fiscal years; – describe anything that occurred in the fourth fiscal quarter that was required to be disclosed in a Form 8-K but that was not so disclosed; – list its executive officers and directors and disclose previous experience for those individuals; – describe the compensation of its mostly highly paid executive officers; – provide information about its compensation plan; – provide financial statements prepared in accordance with U.S. generally accepted accounting principles and audited by an auditor registered with the Public Company Accounting Oversight Board; and – file as exhibits certificates of the CEO and CFO as required by the Sarbanes-Oxley Act of 2002. The annual report on Form 10-K is due 60 days after the end of the Company's fiscal year end if it is a "large accelerated filer", 75 days if it is an "accelerated filer" or 90 days if it is a non-accelerated filer.	We note that ASX Guidance Note 17 (***GN17***) sets forth waivers that ASX views as "standard" and will generally be granted unless there is something unusual in the circumstances. Under a GN17 waiver, a U.S. company may, in lieu of an Appendix 4E for a financial year, file with ASX a copy of its annual report on Form 10-K that has been filed with the SEC. A cover sheet for the 10-K being filed with the ASX must be headed "Results announcement to the market" and include key information set out in section 2 of Appendix 4E.

Item	ASX and ASIC requirements	SEC requirement	Comment
Half yearly report	An ASX-listed entity must: – prepare financial statements for the first six months of the financial year, have the statements audited or reviewed by the company's auditor; and – within two months (slightly longer for an exploration entity) after the end of the half-year, lodge the financial statements and auditor's report with the ASX and ASIC together with Appendix 4D (except exploration entities are not required to lodge an Appendix 4D).	Same as for quarterly reporting, as discussed below	Under a GN17 waiver, a U.S. company may, in lieu of an Appendix 4D for the first half of a financial year, file with ASX a copy of its quarterly report on Form 10-Q that has been filed with the SEC with respect to its first two quarters. A cover sheet for the 10-Q being filed with the ASX must be headed "Results announcement to the market" and include key information set out in section 2 of Appendix 4D.
Quarterly reporting	Quarterly cash flow report on Appendix 4C as well as a quarterly activity report must be lodged with the ASX by certain entities (*e.g.*, (i) entities that at listing had more than half of their assets in cash or assets readily convertible to cash, other than listed investment companies and mining exploration companies or (ii) as may be requested by ASX if the auditor's report for an entity has a 'going concern' emphasis of matter) within one month after each quarter of a listed entity's financial year. Quarterly reports with specific information set out in Chapter 5 and (where applicable) Appendix 5B of the ASX Listing Rules are also required to be lodged by mining or oil & gas exploration entities, as well as mining or oil & gas producing entities, in each case within one month after each quarter.	U.S. public companies must file quarterly reports on Form 10-Q within a certain period of time after each of their first three fiscal quarters. In a quarterly report, a company must: – provide unaudited financial statements for the most recently completed fiscal quarter; – provide a section on management's discussion and analysis of the company's financial condition and results of operation; – state conclusions of the CEO and CFO regarding the effectiveness of the company's disclosure controls and procedures; – describe material pending legal proceedings affecting it; – provide any material updates as to risk factors from its most recent annual report on Form 10-K; – describe any sales of its equity during the most recent quarter that were not registered with the SEC; and – any other information that should have been previously disclosed in a Form 8-K but that was not so disclosed. Quarterly reviews by an independent registered public accounting firm are required by the SEC. The quarterly reports on Form 10-Q are due 40 days from the end of the quarter for both large accelerated filers and accelerated filers, and 45 days for non-accelerated filers.	Under a GN17 waiver, a U.S. company may, in lieu of an Appendix 4C and quarterly activity report for any of the first three quarters, file with ASX a copy of its quarterly report on Form 10-Q with respect to such quarters. If there is any information that ought to be disclosed under ASX Listing Rule 4.7C that is not included in the company's 10-Q for that quarter, then a supplement to the 10-Q must be filed. In addition, a U.S. company may, in lieu of an Appendix 4C and quarterly activity report for its final quarter, file with ASX a copy of its annual report on Form 10-K that has been filed with the SEC with respect to that financial year. If there is any information that ought to be disclosed under ASX Listing Rule 4.7C that is not included in the company's 10-K for that year, then a supplement to the 10-K must be filed.

Item	ASX and ASIC requirements	SEC requirement	Comment
Continuous disclosure / current reporting	ASX Listing Rule 3.1 requires an ASX-listed entity to disclose any information that a reasonable person would expect to have a material effect on the price or value of the entity's securities, immediately upon becoming aware of such information.	A current report on Form 8-K must be filed within 4 business days of the occurrence of certain events set forth in the Form 8-K. These events include: – entry or termination of a material agreement; – bankruptcy; – completion of acquisition or disposition of material assets; – results of operations and financial condition; – material impairments; – notice of delisting or transfer of listing; – unregistered sales of equity securities; – changes in independent accountant; – non-reliance on previously issued financial information; – change in control; – departure of directors or officers or appointment of directors or officers; and – other important events. In addition, under Regulation FD and the common law doctrine of "fraud on the market", a company is encouraged to promptly update the market as may be necessary.	ASX Listing Rule 3.1 applies to U.S. companies listed on ASX. Given the requirement of the rule to make disclosure immediately and a Form 8-K can be filed within 4 business days, a U.S. company should file an 8-K immediately with the SEC. If time is needed to prepare the 8-K, the company can request a trading halt on ASX. GN17 requires a U.S. company to immediately file with the ASX any Form 8-K that it files with the SEC (*i.e.*, before the opening of the next ASX trading day given the time zone difference).
Disclosure of substantial holdings	The Corporations Act requires every person who is a substantial holder in an Australian-listed entity to notify the listed entity and the ASX within 2 business days and to give prescribed information in relation to their holding if: – the person first has a substantial holding in the entity; – the person has a substantial holding in the entity and there is a movement of at least 1% in their holding; – the person ceases to have a substantial holding in the entity; or – the person makes a takeover bid for securities of the entity.	A person who beneficially owns more than 5% of a U.S. company's common stock must file a Schedule 13D or Schedule 13G with the SEC that discloses: – how many securities are beneficially owned by the filing person; – whether there is a movement of at least 1% in their beneficial ownership; and – whether they have an intent to control or influence control of the company.	A U.S. company listed on ASX is not subject to Chapters 6, 6A, 6B and 6C of the Corporations Act (*i.e.*, substantial holders and takeovers). Instead, an ASX-listed U.S. company must submit to ASX any Schedule 13D or Schedule 13G that has been filed with the SEC.

Item	ASX and ASIC requirements	SEC requirement	Comment
Reporting of interests by Directors, executive officers and more than 10% shareholders	An ASX-listed entity must report a director's initial notifiable interest in the entity's securities (and any change in that notifiable interest) within 5 business days of the relevant date. The notifiable interests include relevant interests in the entity's securities and interests in contracts that may call for the delivery of securities in the future. We note that the ASX rule captures a broader range of interests in a listed entity's securities than the substantial holder reporting rules in the Corporations Act. No reporting obligation under ASX Listing Rules applies to an officer or more than 10% shareholder of an entity unless the person is also a director.	Directors, officers and persons who beneficially own more than 10% of a company must report to the SEC their beneficial ownership interest and changes in ownership. A Form 3 must be filed within 10 days after a person becomes a director, executive officer or greater than 10% shareholder. A Form 4 must be filed within 2 business days after a change in beneficial ownership. The term "beneficial owner" of a security includes any person who, directly or indirectly (through any contract, arrangement, understanding, relationship or otherwise) has or shares (i) voting power (which includes the power to vote or direct the voting of a security) or (ii) investment power (which includes the power to dispose or direct the disposition of a security). Beneficial ownership via derivative securities (including options and warrants) are to be reported.	We note there is potential duplication as both the ASX and the SEC require director notices, albeit in a different format.
Notice of meeting / proxy statement	Where shareholder approval is required under the ASX Listing Rules, the rules prescribe the form of resolution and associated voting restriction statement, as well as outlining the content to be included in respect of that resolution in the explanatory material for shareholders. ASX Listing Rule 15.1 requires the draft meeting documents to be lodged with ASX before they are sent to shareholders and ASX will either (i) provide comments or objections or (ii) advise it does not object to the draft meeting documents. The ASX Listing Rules do not otherwise prescribe the overall form or method of giving notice to shareholders, nor the notice period for the meeting. These matters are left to the entity's place of incorporation. The ASX simply requires the meeting documents to be released to ASX when they are sent out to shareholders.	A U.S. company that is an SEC-registrant must prepare a proxy statement prior to any shareholder meeting. The information contained in the statement must be filed on Schedule 14A with the SEC before soliciting a shareholder vote on the election of directors and the approval of various corporate actions. Solicitations, whether by management or shareholders, must disclose all important facts about the issues on which shareholders are asked to vote. Proxy statements are subject to review by the SEC.	We note there is potetenial inconstistency given the disclosure rules of the ASX and the SEC are different for notice of meetings / proxy statements and are subject to review by both the ASX and the SEC.
Reporting results of a shareholders meeting	ASX Listing Rule 3.13.2 requires a company to disclose information about the results of a shareholders meeting.	Item 5.07 of Form 8-K requires a company, within 4 business days of a shareholders meeting, to disclose information about the results of the shareholders meeting.	We note there is potential duplication as both the ASX and the SEC require disclosure of the results of a shareholders meeting, albeit in a different format.

5 Comparison of systems for follow-on capital raisings

Following an IPO, a capital raising is generally easier and more cost-efficient for a company listed on ASX compared to a U.S. stock exchange.

We note that follow-on capital raisings in Australia are mostly regulated by the ASX Listing Rules whereas in the United States they are regulated by U.S. securities law, including rules promulgated by the SEC. This section provides a summary comparison of the two systems.

5.1 Overview of Australian system for follow-on capital raisings

Company registration system

Australia has a company registration system. Once a company is listed on the ASX (using a prospectus), it may issue additional shares without any registration or prospectus except under certain circumstances. For instance, shares sold in a private placement to sophisticated and professional investors may be resold immediately on the ASX, subject to certain conditions discussed below that are relatively easy to satisfy.

Continuous disclosure regime

The ASX has a continuous disclosure regime that requires ASX-listed issuers to promptly disclose material information to investors. As a result, ASX-listed issuers often sell shares to sophisticated and professional investors without a formal offer document. Instead, investors acknowledge in a confirmation letter that they have had access to all information that they believe they require, including the issuer's financial reports and announcements that are available on the ASX's website.

Requirements for follow-on capital raising with trading on ASX

The Corporations Act contains "secondary trading" provisions that restrict the ability to sell securities within 12 months of their original date of issuance by a company if the shares were not issued under a prospectus. An exemption is available from the secondary trading prohibition for an issuance of securities when an ASX-listed issuer files a "cleansing notice" with the ASX within five days after the issuance, which the issuer is entitled to do if:

- those securities are in a class of securities that have been quoted at all times for the preceding three months;
- trading in that class of securities has not been suspended for more than five days during the shorter of (i) the period for which the class of securities have been quoted and (ii) the period of 12 months before the day on which the relevant securities were issued; and
- the company did not issue the securities with the purpose of on-sale.

The cleansing notice must:

- state that as at the date of the notice, the company has complied with the financial reports as well as the audit and continuous disclosure provisions of the Corporations Act; and
- set out any information that has been excluded from disclosure to the market that investors and their professional advisers would reasonably require in order to make an informed assessment of the assets and liabilities, financial position and performance, profits, losses and prospects of the company or the rights and liabilities attaching to the securities.

Shareholder approval required for placement of shares over 15% of share capital

ASX-listed companies are generally prohibited under the ASX Listing Rules from issuing or agreeing to issue equity securities in excess of 15% of their capital on a rolling 12-month basis without shareholder approval. For this purpose, an issuance of options or other convertible securities counts as an issuance of the underlying shares.

The requirement for shareholder approval is subject to a number of exceptions, including:

- an issuance to shareholders under a pro rata offer (such as an entitlement or rights offer) and placement of any shortfall shares within three months of the close of the offer to shareholders;
- an issuance to shareholders under a share purchase plan (being an offer of up to A$30,000 per shareholder, which can be made no more than once every 12 months) so long as the issuance is capped at 30% of the number of the outstanding shares;
- an issuance on conversion of convertible securities where the original issuance complied with the ASX Listing Rules;
- an issuance under a dividend reinvestment plan; and
- an issuance under an employee incentive plan (subject to certain conditions).

Small to mid-cap companies (defined as those with market capitalization below A$300 million and not included in the S&P/ASX 300 Index) may place an additional 10% of share capital each year if shareholder approval was obtained at the company's most recent Annual General Meeting of Shareholders. Such securities may not be issued at a price that is less than 75% of the volume weighted average price of the securities calculated over the 15 trading days preceding the date on which the securities were priced or issued (if the securities are not issued within five trading days of the date on which the issue price is agreed).

Australian offer structures

The most common follow-on capital raising structures for an ASX-listed company include:

- placement to sophisticated and professional investors;
- entitlement (or rights) offer to existing shareholders; and
- share purchase plan that enables each shareholder to purchase up to A$30,000 worth of shares.

We note that an ASX-listed U.S. company may undertake follow-on capital raisings using the Australian "low doc" regime even if it were to become an SEC-registrant. For U.S. securities law purposes, the company would either have to register the securities under the Securities Act or comply with the restrictions under the "no action" letter discussed in section 2.2.

5.2 Overview of American system for follow-on capital raisings

Unlike Australia, the United States does not have a company registration system. Instead, the Securities Act focuses on each securities transaction to consider whether registration is required. The offer and sale of securities to investors in the United States must either be registered under the Securities Act or be made in a transaction exempt from the registration requirements. In other words, securities may not be offered to the public in the United States or sold on a U.S. stock exchange without a registration statement that has been declared effective by the SEC.

Shares sold in a private placement by an SEC-registrant are "restricted securities" and may not be sold on a U.S. stock exchange except under an effective registration statement or if the relevant holding period (typically six months) has lapsed.

The most common follow-on capital raising structures for a company listed on a U.S. exchange include:

- private placement with registration rights to institutional investors (also known as a PIPE);
- registered direct offering to a limited number of investors;
- underwritten public offering; and
- At The Market (***ATM***) offering.

The most analogous U.S. offer structure to an Australian placement is a PIPE (Private Investment in Public Equity). Under this offer structure, an issuer sells shares to a limited number of institutional investors in a private placement and agrees to file a registration statement after the closing of the transaction to register the newly issued shares for resale on a U.S. stock exchange (*i.e.*, "registration rights"). Upon effectiveness of the registration statement (which can occur within one week from filing with the SEC if the SEC has no comments on it), the shares could be sold on the U.S. stock exchange where the issuer's shares are trading. In such a transaction, the investors would not need to hold the shares for the full 6-month restrictive period discussed above.

While the United States does not have a "low doc" regime like Australia, the SEC has developed a registration system to facilitate follow-on capital raisings. Once a U.S. company has been an SEC-registrant at least 12 calendar months and has timely filed reports required to be filed during the preceding 12 months, it may use a "shelf" registration statement on Form S-3 to register one or more types of securities that can be sold when desired over a 3-year period. Such a registration statement permits the incorporation by reference of the company's most recent annual and quarterly reports (as well as future filings), thus making it a shorter document compared to a registration statement on Form S-1 for an IPO. If an issuer has a public float of less than US$75 million, then certain limitations apply to the sale of securities under a "shelf" registration statement.

Given an effective "shelf" registration statement is not subject to further review by the SEC, an issuer can more quickly "take securities off the shelf" from time to time and sell them in a registered direct offering to a limited number of investors, an underwritten public offering or an ATM offering. While a "base prospectus" is included in the "shelf" registration statement, a prospectus supplement is prepared and filed with the SEC in connection with a specific public offering.

We note that ATMs are not common in Australia principally due to the requirement for an ASX-listed entity to file a cleansing notice and an Application for Quotation of Securities (Appendix 2A) in connection with each issuance of shares.

5.3 Comparison of process, time and costs

Form of offer document

Given the continuous disclosure regime discussed in section 5.1, an ASX-listed issuer generally relies upon a "low doc" regime that does not require the preparation of a prospectus or any other formal offer document.

Placements in Australia are generally marketed to sophisticated and professional investors using an investor presentation or term sheet. The entire process from engagement of a lead manager to the closing of a placement can occur within weeks (and sometimes within one week).

The retail component of an entitlement or rights offer is typically marketed to shareholders with registered addresses in Australia and New Zealand using an offer booklet (*i.e.*, not a fulsome offer document) that is not subject to review by any regulatory authority.

Similarly, a share purchase plan is typically marketed to shareholders with registered addresses in Australia and New Zealand using an offer booklet (*i.e.*, not a fulsome offer document) that is not subject to review by any regulatory authority.

In contrast, in the United States a registration statement (which includes a prospectus) must be filed with, and declared effective by, the SEC to enable shares to trade on a U.S. stock exchange concurrently with the closing or within six months of the closing. The process of preparing a registration statement (or, if the company has an effective "shelf" registration statement, a prospectus supplement) generally requires more time and cost compared to Australia's "low doc" regime.

Due diligence process

Particularly if an underwriter is involved, the closing of a follow-on capital raising by a U.S.-listed company is more document intensive compared to a follow-on capital raising by an ASX-listed company. In addition to the form of offer document discussed above, the most significant difference lies in the requirements for the due diligence process.

We note that Australian underwriters typically require management of an issuer to complete a due diligence questionnaire and investment bankers will help draft or review any investor presentation. While representatives of a working group may form a "Due Diligence Committee" for an entitlement (or rights) offer that involves retail shareholders, the Australian due diligence process for a follow-on capital raising is not as intense as the customary U.S. due diligence process.

As part of their due diligence process for a follow-on public capital raising, U.S. underwriters customarily require:

- the issuer's counsel to deliver certain legal opinions and a "10b-5" negative assurance letter in relation to non-financial information in (or incorporated by reference in) the prospectus (which requires counsel to perform legal due diligence);
- the underwriter's counsel to deliver a "10b-5" negative assurance letter in relation to non-financial information in (or incorporated by reference in) the prospectus; and
- the issuer's auditor to deliver a "comfort" letter in relation to financial information in (or incorporated by reference in) the prospectus.

This U.S. due diligence process can involve significantly more work, time and cost compared to Australia's "low doc" regime.

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What clients say

"A client praises Rimôn's "unique combination of U.S. law expertise and an understanding of Australian market practice and ASX listing rules".

Another client endorses Rimôn's "clear, commercially pragmatic advice and outstanding service within tight timeframes".