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Coach, Inc. Lists on the Hong Kong Stock Exchange: A Harbinger of Things to Come?

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On December 1, 2011, Hong Kong depositary receipts ("HDRs") representing common stock of Coach, Inc. began trading on the Hong Kong Stock Exchange (the "HKSE"), a marketplace that is increasingly becoming a listing destination for global companies. Coach's common stock will remain listed on the New York Stock Exchange (the "NYSE"), and the secondary listing on the HKSE will not involve a capital raise by Coach. Paul Hastings represented J.P. Morgan in its role as sponsor for the HKSE listing, depositary for the common stock underlying Coach's HDRs and liquidity provider with respect to the initial secondary trading of Coach HDRs on the HKSE. In connection with the listing of Coach HDRs on the HKSE, Coach and J.P. Morgan obtained no-action relief from the staff of the U.S. Securities and Exchange Commission ("SEC"). This relief permits Coach and J.P. Morgan to rely on Regulation S under the Securities Act of 1933 ("Securities Act"), the SEC's safe harbor for offshore transactions that are not subject to the registration requirements of the Securities Act, in connection with the offer and sale of Coach HDRs on the HKSE. This is the first time the SEC staff addressed this issue since it granted somewhat similar no-action relief to the OM Stockholm Exchange in 2001.[1]

This listing by Coach represents the first by a U.S public company on the HKSE, and may very well be the first of many U.S. companies that seek secondary listings on the HKSE. The NYSE and its principal competitor, the NASDAQ Stock Market, have historically been key listing destinations for companies around the globe due to, among other things, the prestige of listing on a U.S. stock exchange, the relative transparency of the U.S. markets and the access to deep pools of capital in the United States. Foreign companies have also been motivated to list in the United States because it has often represented a large market for their products.

In recent years, however, a variety of factors have contributed to the rise of foreign exchanges and the decreased significance of the U.S. stock exchanges. In 2010, IPO issuances in the Asia Pacific Region—particularly China, Hong Kong, India and Japan—accounted for approximately two-thirds of the global IPO capital raised.[2] North America's global share of IPO capital raised in 2010 fell to approximately 16%, the lowest on record.[3] In addition, as consumers in China and other Asian markets have increasing amounts of disposable income, U.S. public companies may desire to have a more significant presence in these markets to promote their brands. In this regard, Coach is seeking to make China its number one market for its products in the next three years and is listing its HDRs on the HKSE in an effort to raise its profile in Asia.[4]

Brazilian mining company Vale SA, which also trades on the NYSE, listed its HDRs on the HKSE in December 2010 without raising any capital. The percentage of Vale's operating revenues attributable to sales to consumers in China was 33.1% in 2010. Italian luxury goods firm Prada SpA raised US$2.5 billion in its initial public offering on the HKSE in June 2011. The fact that Prada chose to list its shares on the HKSE instead of London or its native city of Milan is a testament to where Prada believes its future growth will be. Prada Deputy Chairman Carlo Mazzi recently stated, "The top luxury market is with Asian customers today. Our confidence in the Asian market is quite strong for the future."[5] In addition, Samsonite International SA, a travel luggage company, raised US$1.25 billion in its initial public offering on the HKSE in June 2011. Samsonite International was formerly U.S.-based and was subject to the SEC's reporting requirements prior to being taken private by a Luxembourg-based private equity firm in 2007. In its IPO press release, Samsonite International stated, "The emerging high-growth Asian market, where the Company's net sales grew at a CAGR of approximately 23% between 2001 and 2010, included three of its top five markets by net sales (China, India and South Korea) in 2010, in each of which the Company was the luggage market leader."

To be sure, the maturation of foreign markets, the growth of pools of capital in foreign markets and the increased demand by foreign consumers, particularly in Asia, are major factors contributing to the decreased importance of the U.S. stock exchanges. However, the regulatory and litigation burden in U.S markets, including class action settlement costs and the expense of complying with the Sarbanes-Oxley Act of 2002, have also contributed to the decreased competitiveness of U.S. markets.[6]

We believe it is only a matter of time before additional U.S. companies seek to list their shares in Hong Kong and, perhaps, other foreign markets. Moreover, we expect that these companies may also seek to raise capital in foreign markets such as Hong Kong, as Prada and Samsonite have done. As noted above, Samsonite exited the U.S. equity market only to reemerge as a public company in Hong Kong.

Paul Hastings, on behalf of J.P. Morgan, along with counsel for Coach, sought and obtained no-action relief from the SEC staff to allow Coach and J.P. Morgan to avail themselves of the safe harbor for offshore transactions provided by Regulation S without complying with certain technical requirements of the regulation that are not compatible with electronic trading on the HKSE. Regulation S specifies the method by which issuers may offer and sell securities overseas to ensure that such transactions will be deemed to occur outside the United States and, thus, will not be subject to the registration requirements of the Securities Act. Without no-action or other relief similar to that obtained by Coach and J.P. Morgan, a U.S. company that seeks to list HDRs on the HKSE would not be able to rely on Regulation S to eliminate any concern that the issuance of HDRs would require compliance with the registration requirements of the Securities Act.

Because the Coach HDRs are equity securities and Coach is a U.S. issuer, the requirements of Category 3 of Regulation S, which are the most restrictive, may be applicable to trading in the Coach HDRs. In addition, as a result of the manner in which securities are traded and settled on the HKSE, it was determined that strict compliance with certain of the Category 3 requirements would not be feasible in connection with the issuance and secondary trading of the Coach HDRs. Specifically, it is not possible to assure compliance with the requirements of:

- Rule 903(b)(3)(iii)(B) (relating to purchaser certification, purchaser agreement regarding resale, legending and stop-transfer requirements);
- Rule 903(b)(3)(iv) (relating to distributor notification requirements); and
- Rule 904(b)(1)(ii) (relating to dealer notification requirements).

In granting the requested no-action relief, the SEC staff permitted Coach and J.P. Morgan to satisfy certain requirements of Category 3 of Regulation S by complying with certain alternative restrictions and procedures, which included the following:

- the inclusion in Coach's listing document filed with the HKSE of certain deemed representations relating to the prohibition of sales to U.S. persons (as defined in Regulation S) and the requirement that hedging transactions with respect to the Coach HDRs comply with the Securities Act;
- the agreement of the HKSE to advise its exchange participants with respect to (i) the prohibition on sales of Coach HDRs to U.S. persons, (ii) certain inquiries that must be made of certain purchasers of Coach HDRs with respect to their status as U.S. persons, and (iii) procedures that must be implemented by exchange participants in this regard;
- the inclusion of a restrictive legend (stating, among other things, that the Coach HDRs are not registered under the Securities Act) on any physical certificates representing Coach HDRs;
- representations by Coach regarding the inclusion of a description of the restricted nature of the Coach HDRs under U.S. federal securities laws in information provided to certain financial databases;
- the inclusion by the HKSE of an "RS" designation in Coach's short name ("COACH-DRS-RS") to alert investors that the Coach HDRs are restricted securities under U.S. federal securities laws (the "RS Identifier");
- the assignment by the HKSE of a numeric stock code within a range of stock codes that have been designated by the HKSE as reserved for HDRs that are restricted under U.S. federal securities laws (the "Designated Stock Code");
- the continuous publication by the HKSE of explanations of the RS Identifier and the Designated Stock Code;
- the requirement that the HKSE advise its participants that Coach's short name, including the RS Identifier, and the Designated Stock Code should be included in all trade confirmations relating to the Coach HDRs; and
- the agreement by Coach to provide notification of the Regulation S status of its securities in shareholder communications, such as annual reports, periodic interim reports, dividend notices and its notices of shareholder meetings.

Paul Hastings worked closely with the staff of the HKSE to ensure that the HKSE could implement certain of the alternative restrictions and procedures described above.

The relief granted to Coach and J.P. Morgan by the SEC staff is limited to the issuance and secondary trading of Coach HDRs in transactions that do not involve capital raising. However, prior SEC no-action letters on which the request for relief was based were not so limited. We, therefore, believe that, as matter of agency policy, there is a principled basis for the SEC staff to grant similar relief in connection with the issuance of HDRs by U.S. companies in capital raising transactions. Should such relief be pursued and granted by the SEC staff, U.S. companies will be able to raise capital through offerings of HDRs in the Hong Kong market.

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[1] *OM Stockholm Exchange*, no-action letter (October 11, 2001).

[2] Renaissance Capital, *2010 Global IPO Market Review and 2011 Outlook, China: The New IPO Capital*, January 3, 2011 (http://www.renaissancecapital.com/ipohome/review/2010review.pdf).

[3] *Id.*

[4] *Coach Hitches Its Wagon to China, The* Wall Street Journal, November 18, 2011.

[5] *Prada First-Half Profit Jumps 74% on New Stores*, Asia Growth, September 28, 2011, www.businessweek.com/news/2011-09-20/prada-first-half-profit-jumps-74-on-new-stores-asia-growth.html

[6] See *Corporate Finance and the Securities Laws*, McLaughlin and Johnson,§ 9.03,Foreign Private Issuers and The U.S. Securities Laws (online treatise, last updated October 2011).