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Contributing editor
Andrew Pitts

LEXOLOGY
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
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Fax: +44 20 7229 6910

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Andrew Pitts
Cravath, Swaine & Moore LLP

Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Securities Finance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Indonesia, Monaco and Russia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Andrew Pitts of Cravath, Swaine & Moore LLP, for his continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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United Kingdom

Andrew Shutter, Raj S Panasar, Sui-Jim Ho and Ferdisha Snagg

Cleary Gottlieb Steen & Hamilton LLP

LEGAL AND REGULATORY FRAMEWORK

Laws and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

Part 6 Financial Services and Markets Act 2000

The UK Financial Services and Markets Act 2000 (FSMA) is the principal piece of legislation governing offers of securities in the UK. The general regime is supplemented by three key pieces of subordinate legislation made by the Financial Conduct Authority (FCA) under FSMA and set out in its handbook of rules and guidance (the FCA Handbook):

- the Listing Rules (LRs), which contain rules related to the admission of securities to the 'Official List', which is maintained by the FCA on its website;
- the Prospectus Rules (PRs), which implement the EU Prospectus Directive in the UK and set out the content requirements for prospectuses; and
- the Disclosure and Transparency Rules (DTRs), which implement sections of the EU Transparency Directive and make other rules concerning the transparency of and access to information in the UK financial markets including aspects of the EU Market Abuse Regulation (MAR).

The FCA is primarily responsible for administrating and enforcing these rules. The FCA may use the name UK Listing Authority to describe its activities as regulator of issuers of securities, although it is phasing out the use of the name and will instead refer to the FCA's 'primary market functions'.

Financial promotions

FSMA restricts the communication of financial promotions, defined as communications of an invitation or inducement to engage in investment activity. Issuers and others who communicate, or cause others to communicate, financial promotions of securities, including, potentially, prospectuses and other listing particulars, will need to ensure that they are authorised to make the financial promotion, that the content of the communication is approved by an authorised person, or that the communication is covered by an exemption. Breach of the restriction is a criminal offence.

Prohibition of public offers by private limited companies

A UK private limited company must not offer to the public any securities of the company, or allot or agree to allot any securities of the company with a view to their being offered to the public.

EU regulations

In addition to UK legislation, a number of EU regulations that apply directly in the UK also govern securities offerings. These include the following:

- MAR, which applies to behaviour or transactions in securities that are admitted to trading on a multilateral trading facility (MTF) or regulated market (or for which a request for admission to trading has been made) or traded on an MTF or organised trading facility (OTF), and securities whose price or value depends on or has an effect on the price or value of such securities. MAR establishes an EU-wide regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation (market abuse) as well as measures to prevent market abuse to ensure the integrity of financial markets in the EU and to enhance investor protection and confidence in those markets; and
- the EU Packaged Retail and Insurance-based Investment Products Regulation (PRIIPs), which prohibits securities within its scope from being offered or otherwise made available to retail investors in any EU member state unless a key information document has been prepared and published in accordance with PRIIPs. Securities are within the scope of PRIIPs if they constitute an investment where, regardless of its legal form, the amount repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets that are not directly purchased by the retail investor, or an insurance-based investment product that offers a maturity or surrender value that is wholly or partially exposed, directly or indirectly, to market fluctuations.

From 21 July 2019, the new EU Prospectus Regulation will be fully effective across all EU member states. Although it is planned that the UK will have exited the EU by that date, HM Treasury will likely incorporate the Regulation into UK law under proposed domestic legislation. Please see 'Update and Trends' for more information.

Exchange requirements

In addition to the legislative requirements, issuers must comply with the rules of the relevant regulated market, MTF or OTF. For instance, issuers admitted to the Main Market of the London Stock Exchange (LSE) are subject to the LSE's Admission and Disclosure Standards.

PUBLIC OFFERINGS

Mandatory filings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Prospectus

A person will be required to publish a prospectus if it makes an offer of transferable securities to the public in the UK ('public offer trigger') or applies for the securities to be admitted to trading on a regulated market in the UK ('regulated market listing trigger'). Breach of the requirement to publish a prospectus is a criminal offence.

There are exemptions from the requirement. Exemptions that apply to the public offer trigger include the following:

- the offer is made to or directed at qualified investors only;
- the offer is made to or directed at fewer than 150 natural or legal persons (other than qualified investors) per EEA state;
- the minimum denomination per unit is at least €100,000.

Exemptions that apply to the regulated market listing trigger include the following:

- the securities are fungible with securities already admitted to trading on the same regulated market provided that they represent, over a period of 12 months, less than 20 per cent of the number of securities already admitted to trading on the same regulated market; and
- shares are offered, allotted or to be allotted free of charge to existing shareholders, where the shares are of the same class as the shares already admitted to trading on the same regulated market.

Where a prospectus is required, FSMA and the PRs specify the information it must contain. The overarching requirement is that the prospectus must contain all the information necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses and prospects of the issuer and of any guarantor and of the rights attaching to the securities. The PRs require that a prospectus that is drawn up as a single document must contain, among other things:

- a business and industry section;
- risk factors;
- an operating and financial review;
- two or three years' audited financial statements (depending on the type of securities) prepared in accordance with IFRS or an equivalent GAAP;
- information about trends since the date of the last financials; and
- details about the securities.

In terms of the specific content required for each type of securities, the PRs adopt a 'building block' approach, under which separate annexes provide for different minimum disclosure requirements for different types of securities. The PRs include a road map designed to help issuers combine the annexes for the relevant type of securities being offered.

The requirements will be amended by the new Prospectus Regulation, the bulk of which will apply from July 2019 (see 'Update and Trends').

An issuer should also take account of regulatory guidance including the FCA's knowledge base and the European Securities and Markets Authority's questions and answers on prospectuses. The contents of prospectuses are also subject to market expectations, the requirements of investors and recommendations by industry bodies such as the International Capital Market Association.

An issuer issuing debt securities under a programme may publish the prospectus in the form of a base prospectus, which can be supplemented by a supplementary prospectus and final pricing document upon each additional tranche being issued.

Listing application

The LRs set out the filings to be made to the FCA by an issuer applying for admission of its securities to the Official List. Any issuer applying for admission of its securities to listing will need to submit, among other things, an 'Application for Admission of Securities to the Official List' and written confirmation of the number of securities to be issued or allotted. If a prospectus is required for the offering or the issuer is permitted and elects to draw up a prospectus for the securities, a prospectus must have been approved by the FCA. After a prospectus is approved by the FCA, it must be filed with the FCA at the same time it is made available to the public. Under the passporting mechanism of the Prospectus Directive, once a prospectus has been approved in one EEA country, it is valid throughout the EEA upon passporting. Therefore, if another EEA State is the home member state for the securities, the application for listing must include a copy of the prospectus, a certificate of approval and (if applicable) a translation of the summary of the prospectus.

Listing particulars

The LRs require listing particulars to be prepared and published for certain 'specialist' securities (securities that, because of their nature, are normally bought and traded by a limited number of investors who are particularly knowledgeable in investment matters) that are the subject of an application for listing in circumstances where a prospectus is not required. This will apply, for example, to the admission of securities to the LSE's Professional Securities Market (PSM) for specialist debt and equity-linked securities where the securities are not being offered to the public. Listing particulars also have to be approved by the FCA. The PSM is an MTF.

Offering-specific requirements

Specific filings and compliance with information requirements will also be needed depending on the type of offering. For example, applications for admission of equity shares to the premium segment of the Official List ('premium listing') are subject to 'super-equivalent' UK requirements in addition to requirements based on EU legislation. For instance, commercial companies applying for premium listing must have published or filed historic financial information that covers at least three years and represents at least 75 per cent of the company's business for the full three-year period. Premium listing applicants will also need to appoint a 'sponsor' (typically an investment bank) who will need to ensure that the issuer has complied with the applicable conditions for listing. The premium segment is divided into four categories: equity shares of commercial companies, closed-ended investment funds, open-ended investment companies and sovereign controlled commercial companies (which, uniquely, may also list global depositary receipts in the premium segment). Any other listing will be a standard listing.

Exchange requirements

The filings to be made with the exchange on which the securities are to be admitted to trading will depend on the rules of the relevant exchange. For instance, an issuer applying for admission to the Main Market of the LSE must complete an application form giving details of the number, nature and characteristics of the securities to be traded and basic details about the issuer such as a description of its business. Companies seeking admission of their securities to the LSE's AIM must produce an AIM admission document. AIM is an MTF designed primarily for emerging or smaller companies to which a higher investment risk tends to be attached than to larger or more established companies. AIM securities are not admitted to the Official List. The AIM admission document needs to satisfy the content requirements for a prospectus if a prospectus is required, or alternatively the PRs with certain carve-outs. A company applying for admission to AIM must appoint a nominated adviser ('nomad') who is responsible for assessing, among other things, the appropriateness of the company and its securities for admission to AIM. The nomad must make a declaration to AIM that, among other things, to the best of its knowledge and belief, all applicable requirements of the AIM rules and nomad rules have been complied with in connection with the application for admission.

Review of filings

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

Initial drafting of the prospectus or listing particulars is typically split between the issuer (with the help of their legal counsel) and the manager (likewise), with the issuer taking care of the disclosure portion setting out risk factors and describing the business, and the manager providing the 'front and back' technical and legal sections and the terms and conditions of the securities. The parties tend to collaborate in drafting and 'due diligence' investigations.

Once the document is drafted, it is submitted to the FCA for approval. The issuer must submit the draft prospectus to the FCA at least 10 working days before the intended approval date of the prospectus (or 20 working days in the case of a new applicant seeking admission to the Official List or a public offer by an issuer that does not have any securities admitted to trading on a regulated market and has not previously made a public offer). However, in practice, the first draft will be submitted much earlier to allow time for the FCA to comment on successive drafts and for the issuer to incorporate comments. The process is iterative – drafts of the document are reviewed until the FCA has no further comments and is satisfied that it meets all the relevant requirements. The review process can vary considerably in length, and can generally take anything from four weeks to six months.

Once approved, the prospectus (or listing particulars) must be published as soon as practicable, and in any case at a reasonable time in advance of, and at the latest at the beginning of, the offer or admission to trading (that is to say, the offer or admission to trading may not proceed without such document). In the case of an initial public offer of a class of shares not already admitted to trading on a regulated market, publication must take place at least six working days before the end of the offer. The PRs allow for a prospectus to be approved without the final offer price and amount of securities being included in the prospectus, provided that the prospectus sets out the criteria or conditions in accordance with which the missing elements will be determined and the maximum price. Where an issuer has taken advantage of this provision, the prospectus (known as a price range prospectus) is an approved, valid prospectus and the six-day period can run from the date of approval.

Issuers may also choose to publish a pathfinder or pre-marketing document, but this will not replace the requirement for a prospectus and is generally limited in circulation to institutional investors in order to exempt the publication from the public offer trigger prospectus requirement and avoid breaching the prohibitions on financial promotions. The requirement that a prospectus is available for at least six working days before the end of an offer still applies from the date on which the actual prospectus is approved. However, the FCA has confirmed that the six-day requirement does not apply to an institutional-only offer, which provides flexibility to use a pathfinder to market such offers.

The timetable for the admission of securities to trading on an exchange will depend on the rules of the particular exchange. In the case of admission to the LSE's Main Market, an applicant who proposes to admit equity securities or depositary receipts should notify the LSE no later than when it provides its eligibility letter (detailing its compliance with the applicable eligibility requirements) to the FCA. The draft application form and the draft prospectus must be submitted at least 10 business days before the day on which the issuer is requesting that the LSE considers the application. The finalised admission document must be provided to the LSE at least two business days before the intended consideration of the application for admission to trading. Where the securities are to be admitted to AIM, the issuer must provide the LSE with certain prescribed information, at least 10 business days before the expected date of admission to AIM. The AIM admission document, application form and nomad's declaration must be submitted to the LSE three business days before the proposed date of admission of the securities to trading.

Publicity restrictions

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

A prospectus must not be published until it has been approved by the competent authority.

As part of the pre-marketing of a public offering, research analysts linked to the issuer's underwriter may publish research reports on the issuer, depending on the issuer and other circumstances of the offering. This is known as 'connected research'. The aim is to circulate the research report to the underwriter's institutional clients in advance of the offering in order to provide an alternative and objective view of the offering, separate from the issuer's view.

On 1 July 2018 certain provisions that the FCA introduced to improve the range, quality and timeliness of information that is made available to market participants during the UK equity initial public offering process entered into force. The rules apply where shares or depositary receipts will be admitted to trading on a regulated market in the UK for the first time and a prospectus will be required. The rules prohibit connected analysts (ie, analysts linked to firms that are members of the underwriting syndicate) from being in communication with the issuer or its representatives unless a range of unconnected analysts are also provided with either: (i) the opportunity to join the connected analysts in any communication with the issuer team; or (ii) access to the issuer's management that results in them receiving or being given access to all of the information given to the connected analysts (and each other). In addition, the rules prohibit the dissemination of any research reports from connected analysts until at least seven days after the publication of an approved prospectus or registration document, or one day after publication if option (i) above is taken. A 'registration document' is the component of a tripartite prospectus (a prospectus chosen to be published in three parts rather than one single document) that contains certain information relating to the issuer.

Secondary offerings

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

Generally, the same rules apply to secondary offerings as apply to primary offerings. However, their application can well be different in respect of secondary offerings.

Pre-emption rights

For a company issuing new shares (or securities that can convert into shares) for cash, the pre-emption rights in section 561 of the Companies Act 2006 will apply. These require that a company offers the new shares or securities to existing shareholders on a pro rata basis before offering them to other potential investors. There is a similar requirement in the LRs for issuers with premium listings, but both can be disapplied by a shareholder vote. Neither requirement will apply to an overseas company with a standard listing.

Companies with a premium listing should also take account of the principles set out by the Pre-Emption Group (and supported by the Investment Association and Pensions and Lifetime Savings Association) on the disapplication of pre-emption rights. Companies with a standard listing or with securities admitted to AIM are also encouraged to adhere to the principles. These principles provide guidance to companies and shareholders on the factors to take into account when considering whether to disapply pre-emption rights.

Pre-emption rights are less likely to apply on selling shares on a secondary basis than on issuing shares, but this is subject to provisions in the issuer's articles and shareholders' agreement.

Prospectus

In principle, a secondary public offering could require the publication of a prospectus. However, FSMA specifically provides that a communication in connection with trading on a regulated market, an MTF or a 'prescribed market' (specified by HM Treasury in secondary legislation) will not be considered an offer to the public. Marketed secondary offerings are typically offered only to professionals to avoid having to produce an approved prospectus.

Liability in secondary offerings

The same set of rules apply to secondary offerings as to primary offerings (see question 19). However, the effect of those rules will differ in particular because, assuming the securities of the secondary offering are not being offered by affiliates, directors, or significant shareholders, there is likely to be far less information available to the seller than to an issuer in a primary offering and so less will generally be expected of a secondary seller. However it will continue to be important that the seller is not in possession of any inside information.

Settlement

6 | What is the typical settlement process for sales of securities in a public offering?

Securities may be held in either certificated or uncertificated form. Equity securities of UK companies of the latter type are held through CREST, which is the settlement system operated by Euroclear UK & Ireland Limited, the UK's central securities depository (CSD). International debt securities are generally held through the clearing systems operated by the international CSDs (ICSDs) – Euroclear Bank in Belgium and Clearstream Bank in Luxembourg. Settlement of securities within the CSD or ICSD, as applicable, is governed by the system's rules.

PRIVATE PLACINGS

Specific regulation

7 | Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

In private offerings, the requirements for a prospectus in the Prospectus Directive will generally not apply – the offer will be designed to take advantage of an exemption from the public offer trigger prospectus requirement (see question 2).

However, MAR will still apply if the securities are within its scope, as will the liability under section 90 FSMA and section 89 of the 2012 Financial Services Act (see question 19).

No special procedures are required to effect a valid private placing in the UK.

Investor information

8 | What information must be made available to potential investors in connection with a private placing of securities?

Generally (for the reasons given in question 7), neither a prospectus nor listing particulars is likely to be required in connection with a private placing of securities. However, each investor will of course require adequate information as assessed by them before they make their investment decision.

Transfer of placed securities

9 | Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

No statutory restrictions apply to the transferability of listed securities acquired in a private placing. However, in the case of unlisted shares in a private limited company, it is usual for new shareholders to enter into 'lock-up' agreements in which they undertake not to dispose of their shares within a certain period after their allotment, in order to avoid the prohibition under section 755 of the Companies Act 2006 on public offers of shares in private companies.

Price stabilisation measures can be used to enhance the liquidity of the issued securities. Price stabilisation may contravene MAR and UK domestic legislation on insider dealing and misleading statements and impressions unless conducted in accordance with certain requirements (see question 17).

OFFSHORE OFFERINGS

Specific regulation

10 | What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

The broad applicability of the legislation means that it generally does not make much difference whether an issuer offers securities inside or outside the UK, if the offering is made anywhere in the EEA. The Prospectus Directive will apply to any public offer in any EEA State. MAR will apply to in-scope securities whether or not offered in the UK.

The provisions of the Companies Act 2006 will also apply to any UK incorporated issuer, in particular the prohibition on private companies issuing securities to the public (see question 1).

PARTICULAR FINANCINGS

Offerings of other securities

11 | What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Prospectus requirement

If the issuer chooses to list the securities on the LSE's PSM rather than the Main Market, a prospectus would only be required if the securities are also being offered to the public (and no exemption applies – see question 2); a public offer is very unlikely in practice. Accordingly, listing particulars would typically be required instead.

There is no specific exemption from the public offer trigger prospectus requirement where shares are offered to existing shareholders under a rights offer and so a prospectus is likely to be required.

Prospectus content

As discussed in question 1, the content requirements for a prospectus depend upon the nature of the securities. The disclosure requirements for shares and depositary receipts are relatively onerous whereas the disclosure requirements for debt securities are generally lighter. Depending on the particular circumstances of the deal, equity-level disclosure could be required for an offering of exchangeable or convertible securities.

Companies Act 2006

On an offering by a company of shares or securities convertible into shares (in each case, wholly for cash), the issuer must consider whether the pre-emption rights referred to in question 5 will apply to the offering. There will also be corporate governance issues to take into account – the directors must be properly authorised in accordance with the Companies Act 2006 before allotting the securities.

UNDERWRITING ARRANGEMENTS

Types of arrangement

12 | What types of underwriting arrangements are commonly used?

The type of underwriting arrangement used will depend on the type of transaction. For example, most investment-grade debt issues use a fixed-price approach, where the pricing terms are all set out at the outset. Other debt issuances (for example, issues by first-time issuers or asset-backed securities) are often unpriced until after a book-building process, where potential investors notify the book-builder of their interest in the issuance. The underwriters will subsequently be able to commit to underwriting with a better idea of the level of demand for the securities.

Typical provisions

13 | What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and overallotment options?

Indemnity

Depending on the type of deal as well as the negotiating positions of the parties, the underwriting agreement may include an indemnity given by the issuer to the underwriter over all claims or losses arising out of the breach of the representations and warranties and any untrue statements or omissions in the prospectus. The issuer may also agree not to make any claims against the underwriter in respect of any losses the issuer sustains arising from the services provided by the underwriter (absent a specified level of negligence, wilful default, or breach of regulatory duties). The ultimate type of indemnity and the level of negotiations on an indemnity is generally driven by the type of transaction and the appetite of the parties for an approach that departs from what is perceived as 'standard'.

Section 678 of the Companies Act 2006 (which prohibits a public company from giving financial assistance to a person acquiring or proposing to acquire shares in the company) could be triggered if the underwriter is indemnified against losses incurred as a result of the underwriter having to purchase surplus securities. Therefore the indemnity should be specific and may exclude losses sustained through being obliged to purchase surplus securities.

Force majeure

Force majeure clauses are common, providing for the suspension or sometimes termination of contractual obligations where a party is prevented from performing its obligations under the contract by a factor outside its control. Typical events provided for include the suspension or limitation of trading on a certain market; changes in taxation; outbreak of hostilities; or the occurrence of a relevant material adverse change.

Success fees

Underwriting fees are typically expressed as a percentage of the principal raised. The underwriting fee must be disclosed in the offering document.

Overallotment options

Overallotment options are often included in equity issues as a way of facilitating price stabilisation – see question 18.

Other regulations

14 | What additional regulations apply to underwriting arrangements?

Underwriting arrangements are regulated within the FSMA framework. According to the FCA, underwriting activities will be covered by the regulated activities of dealing in investments as principal, dealing in investments as agent, and arranging deals in investments, meaning that an underwriter will likely need to be authorised under FSMA in order to provide underwriting services. Authorised underwriters are subject to a number of organisational, conduct of business and other regulatory requirements.

Additionally, sections 552 and 553 of the Companies Act 2006 require that payment of the underwriting commission be authorised by the issuer's articles of association, and that the consideration paid or agreed in respect of the underwriting must not exceed the lower of (i) 10 per cent of the price at which the shares are issued, and (ii) the amount or rate authorised by the articles. The underwriting commission must generally be disclosed in any prospectus.

ONGOING REPORTING OBLIGATIONS

Applicability of the obligation

15 | In which instances does an issuer of securities become subject to ongoing reporting obligations?

Upon having securities admitted for trading, an issuer becomes subject to ongoing reporting obligations which depend on the type of securities and the market of listing.

The LRs and the DTRs set out the ongoing reporting obligations applicable to issuers once their securities have been admitted to the Official List. The DTR requirements regarding disclosure of major holdings of voting rights also extend to UK companies with shares admitted to a prescribed market such as AIM.

Information to be disclosed

16 | What information is a reporting company required to make available to the public?

Issuers of securities that are subject to MAR are required to publicly disclose inside information relating to them as soon as possible – see question 17.

The LRs and DTRs require listed companies to publish periodic financial information, whose timing and regularity will depend on the type of securities and the market of listing. The DTRs also require a listed company to disclose information relating to trades in relevant securities by management decision makers and changes in major holdings of voting rights or changes in the reporting company's voting share capital. Other information will generally have to be disclosed on an ongoing basis, such as changes to an issuer's constitution or to the rights of the holders.

A company whose securities are traded on AIM must comply with the continuing obligation requirements of the AIM rules, which are less stringent than the DTRs and LRs.

ANTI-MANIPULATION RULES

Prohibitions

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The main rules prohibiting manipulative practices are set out in MAR, the Financial Services Act 2012 (FSA), and the Criminal Justice Act 1993 (CJA).

MAR

MAR provides that it is an offence to:

- engage or attempt to engage in insider dealing;
- recommend that another person engage in insider dealing or induce another person to engage in insider dealing;
- unlawfully disclose inside information; or
- engage in or attempt to engage in 'market manipulation'.

MAR applies in the circumstances described in question 1.

MAR requires issuers to announce inside information directly concerning the issuer, and to comply with a number of related record-keeping and procedural requirements. Inside information is defined as information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments. Information will be held to be likely to have a significant effect on the price of the instrument if it is information that a reasonable investor would use as part of the basis of their investment decision.

The general rule is that an issuer must inform the public as soon as possible of inside information which directly concerns that issuer. The circumstances under which an issuer may be able to delay disclosure are restricted. On the other hand, where an issuer is delaying public disclosure, any disclosure of inside information which is not in the normal exercise of a person's employment, profession, or duties, is prohibited.

MAR also prohibits insider dealing, where a person in possession of inside information uses that information in acquiring or disposing of relevant financial instruments. Recommending that or inducing another person to engage in insider dealing is also prohibited.

Financial Services Act 2012

There are also heads of criminal liability in the UK under the FSA. The two potentially most relevant offences under the FSA, each of which may result in the imposition of an unlimited fine or a custodial sentence of up to seven years, are as follows:

- making false or misleading statements (section 89); and
- creating false or misleading impressions (section 90).

Criminal Justice Act 1993

Under the CJA there are an additional two insider dealing offences that can be committed by individuals:

- the dealing offence (section 52(1)), where an individual has inside information and deals on a regulated market in securities whose price would be affected by that information; and
- the 'tipping off' offence (section 52(2)), where an individual has inside information and either discloses that to another person outside the proper course of their employment, office or profession, or encourages another person to deal in securities whose price would be affected by the inside information.

These offences may be punished with an unlimited fine or a custodial sentence of up to seven years.

PRICE STABILISATION

Permitted stabilisation measures

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

Price stabilisation is usually achieved by way of over-allocating additional securities to investors under the offering (in the case of equity issues, it will borrow the over-allocated stock to effectively defer the settlement obligation). This over-allocation leaves the stabilisation manager with a short position. If the price of the securities falls below the offer price, the stabilisation manager can apply upward pressure to the price by purchasing the securities in the market. If the price of the securities increases, the stabilisation manager will invariably have the benefit of an overallotment option to purchase additional securities at the offer price.

Such steps will not contravene the restrictions laid out in question 17 as safe harbour exemptions are provided in the relevant legislation. The exemption in MAR requires that the stabilisation is carried out for a limited period, that relevant information about the stabilisation is disclosed and notified to the FCA, and that certain limits as to price and volume are complied with (among other requirements).

Another commonly used method of reducing price volatility following an equity offering is to restrict the sale of further shares by the issuer's management or selling shareholders for a defined period, which is known as a 'lock-up' agreement.

LIABILITIES AND ENFORCEMENT

Bases of liability

19 What are the most common bases of liability for a securities transaction?

Misleading statements in, or omissions from, any offering document can give rise to both civil and criminal liability under English law, and such liability may arise under statute or common law. This is the main focus of potential liability for a securities transaction.

There are various UK statutory provisions relevant to liability for an inaccurate offering memorandum. These include specific investor protection statutes such as:

- section 89 FSA, covering criminal liability for false or misleading statements that induce a person to enter into an agreement or exercise (or not exercise) any rights in respect of an investment (see question 17);
- section 90 FSMA, covering civil liability to pay compensation for misleading statements or omissions where a person has acquired securities and suffered a loss in respect of those securities as a result of the misleading statement or omission; and

- section 91 FSMA, covering penalties for contravention of the prospectus requirement (see question 2).

It is a defence to liability under section 90 FSMA to show any of the following:
- that the relevant person reasonably believed the statement was not misleading or there was no omission, having made such enquiries as were reasonable (given certain conditions regarding the timing of the belief and acquisition of the securities);
- that responsibility for the statement was expressly accepted by an expert, and the relevant person believed that expert competent (given certain conditions regarding the timing of the belief and acquisition of the securities); or
- that the acquirer of the securities knew that the statement was false or misleading or knew of the omitted matter.

Some behaviour will also amount to standard fraud. Section 2 of the Fraud Act 2006 covers fraud by false representation, and section 3 covers fraud by failing to disclose information. The fraud offences can be committed by either bodies corporate or individuals. A person who is guilty of fraud is liable to an unlimited fine or to a custodial sentence lasting a maximum of 10 years.

Liability may also attach under common law. Bases of liability under common law include actions in deceit and negligent misstatement, and potentially also in misrepresentation, against the directors (and any other relevant officers) of the company. There could also be an action for breach of contract, as the prospectus will form the basis of a contract between the issuer and the acquirers – however such claims are rare or non-existent.

Market abuse rules that will confer liability on the issuer are also set out in multiple statutory sources – see question 17.

Remedies and sanctions

20 | What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

The available remedy or possible sanction will depend on the head under which liability is incurred.

Criminal offences (sections 89 and 90 FSA, and section 52 CJA) may be prosecuted by the FCA or the Crown Prosecution Service, or in some cases the CJA offences will be investigated by the Department for Business, Energy and Industrial Strategy.

The FCA also has responsibility for investigating market abuse, and has wide powers to institute proceedings against anyone it suspects of having committed an offence under the MAR.

The most directly relevant remedy available to an investor tends to be that available under section 90 FSMA, which imposes civil liability on an issuer for false or misleading prospectuses and listing particulars. Each person who had responsibility for a prospectus is liable to pay compensation to a person who has acquired securities to which the particulars apply and suffered loss in respect of them as a result of any untrue or misleading statement in the particulars, or an omission of any matter required to be included. An aggrieved investor will need to initiate civil proceedings to benefit from this potential for compensation, and will need to prove that a director knew that the statement was untrue or misleading, or was reckless as to whether it was, knew that the omission was a dishonest concealment of a material fact, or acted dishonestly in delaying the announcement of the information.

Under the common law, deceit and negligent misstatement are torts, meaning that the possible damages will be the financial loss suffered by the claimant as a result of the misstatement. If an investor is able to prove a case in misrepresentation, the remedy of rescission may be available. This remedy requires the court, as far as possible, to put the parties to a contract back in the position they were in before the making of the contract.

UPDATE AND TRENDS

Proposed changes

21 | Are there current proposals to change the regulatory or statutory framework governing securities transactions?

Brexit

On 29 March 2017, the UK invoked Article 50 of the Treaty on European Union, thereby beginning a two-year withdrawal process that is scheduled to end when the UK leaves the EU at 11pm on 29 March 2019.

At the time of writing, the terms on which the UK will leave the EU are unclear. Brexit (and Brexit uncertainty) is likely to have a considerable impact on most UK businesses, and accordingly a majority of issuers have included Brexit or related developments in their risk factors and disclosures. Brexit is likely to impact some industries more than others, in particular those which rely on frictionless import from and export to the EU.

In terms of legislation, in the event of a 'hard Brexit' or 'no-deal Brexit' where the UK and the EU do not enter into a withdrawal agreement, the UK will incorporate the body of EU law as it stands as at Brexit into UK law. The UK government also intends to incorporate the new Prospectus Regulation as discussed below. This means that Brexit should not immediately impact the UK regulatory landscape itself, but future divergence from EU law cannot be ruled out. Moreover, following a no-deal Brexit, the UK will be considered a 'third country' and will no longer be covered by the Prospectus Directive passporting mechanism.

LIBOR

In July 2017, the FCA announced that the London Interbank Offered Rate (LIBOR) benchmark will be phased out at the end of 2021. This raises a number of potential issues for issuers and investors. Many existing transactions will depend on LIBOR, and its discontinuation could, therefore, either frustrate the contracts or cause a redistribution of value upon reversion to fallback provisions. Particularly problematic will be families of related contracts with differing fallback provisions, which could mean that previously matching rates are no longer related to each other. Additionally, there is a risk of a grey period where the rate becomes problematically unrepresentative but is not yet discontinued or replaced by a contractual fallback. Issuers should ensure that current and future documentation accommodates the phase-out, and may also consider including the discontinuation as a risk factor in their disclosure.

Prospectus Regulation

The new EU Prospectus Regulation will repeal and replace the existing EU Prospectus Directive. Certain provisions of the Regulation have applied since July 2017 and July 2018; however, the majority of its provisions apply from 21 July 2019. Although it is planned that the UK will have exited the EU by that date, HM Treasury will likely incorporate the provisions into UK law under proposed legislation.

Some changes that have been or will be effected by the new legislation include several adjustments to the types of offer and issue of securities that trigger the application of the regime (including that there will be no requirement to produce a prospectus for an offer with a total value in the EU of less than €1 million, which member states may individually increase to €8 million as the UK has done); a simplification of the content requirements for secondary issuances; the ability to opt in voluntarily to the prospectus regime; and the creation of a new 'universal registration document' (a shelf registration-type document) for frequent issuers. As an expansion of the existing wholesale regime, the new Regulation permits an alleviated standard of disclosure in issuers' prospectuses for admissions to trading of non-equity securities on regulated markets to which only qualified investors have access, or, irrespective of the market, for an issuer's non-equity securities that have a minimum denomination of at least €100,000.

There is also a new requirement for the information in the prospectus to be written and presented in a concise form. Issuers will have to limit risk factors to those determined to be material and specific to the issuer. Additionally, risk factors will have to be set out in a limited number of expressly stated categories depending on their nature, with the most material listed first. Risks included in the risk factor section must be corroborated elsewhere in the prospectus. There are new summary requirements, including a limit on listing only the 15 most material risk factors and restricting the length of summaries in most cases to a maximum of seven sides of A4.

CLEARY GOTTLIEB

Andrew Shutter
ashutter@cgsh.com

Raj S Panasar
rpanasar@cgsh.com

Sui-Jim Ho
jho@cgsh.com

Ferdisha Snagg
fsnagg@cgsh.com

2 London Wall Place
London
EC2Y 5AU
United Kingdom
Tel: +20 7614 2200
Fax: +20 7600 1698
www.clearygottlieb.com

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