

## UKLA Expected to Change Availability of “Block Listings” for GDRs Representing New Shares – Prompt Action by Companies with London Listed GDRs Might Be Necessary

We expect the UK Listing Authority to announce a significant change to the “block listing” facility for companies with GDRs listed in London. The change will make it significantly more cumbersome for those companies to issue new shares, and potentially require companies who have already issued new shares since their IPO to take prompt action. The expected policy change will effectively require companies with London listed GDRs to publish a prospectus whenever they issue new shares, including shares issued pursuant to employee incentive schemes; it may also require them to produce a prospectus as a result of them having issued new shares since their IPO.

### Background to current position

A fundamental UKLA listing rule requires all GDRs of the same class to be listed. So when new GDRs are issued they must be listed and companies need to consider whether a listing prospectus is needed in connection with each such issuance. However, companies do not always have control over the issuance of GDRs: if a shareholder deposits shares into an existing GDR facility, GDRs can be issued without the company’s involvement. To enable companies to avoid having to produce a UKLA approved prospectus each time such a deposit is made, the UKLA currently allows (and we expect will continue to allow) companies listing GDRs in London to put in place a block listing that can cover all the GDRs that could be issued if all the share capital existing at the time of the block listing were deposited into the GDR facility. The block listing effectively creates “headroom” for future deposits in an amount equal to the difference between the number of GDRs in issue at any time and the number of GDRs covered by the block listing.

The UKLA has historically been amenable to allowing this headroom to be available for *new shares* (issued after the date of the block listing) as well as *existing shares* (in issue at the date of the block listing).

### The expected change

We understand that the UKLA intends to change its policy on block listings – we expect it to continue to allow the headroom to be used for shares existing at the time of the last listing, but to prohibit the use of the headroom for **new shares** issued thereafter. In practice, however, it is unlikely to be possible for a depositary to distinguish between existing shares and new

shares once they are in the hands of a shareholder. Consequently, the expected change would significantly fetter the ability of depositaries to accept **any** shares for deposit, not just new shares.

Worked example showing impact of the expected change

Company X has 1,000,000 shares in issue at the time of its London listed initial public offering of GDRs. Its GDR facility has a ratio of one share to one GDR. Its IPO involved an offering of 100,000 GDRs. The UKLA granted a block listing for up to 1,000,000 GDRs (of which 100,000 were issued at the time of the IPO) creating headroom of 900,000 GDRs that are permitted to be listed in London without the need for a new UKLA approved prospectus. Assume for the purposes of the worked example that no deposits or withdrawals from the GDR facility, and no changes to the share capital of Company X, are made other than as specified below. The timelines set out below are purely for illustration.

Illustrative facts	Before expected change to UKLA policy	After expected change to UKLA policy
<p>1. IPO plus 60 days: shareholder deposits an additional 400,000 shares that it held at the time of the IPO into the GDR facility.</p>	<p>Company X not required to publish a UKLA approved prospectus. Depositing shareholder obtains listed GDRs upon deposit.</p> <p>Headroom = 500,000 GDRs.</p>	<p>Same result, <b>except that the headroom will only be available for shares in issue at the time of the IPO (see below).</b></p>
<p>2. IPO plus 100 days: Company X issues another 300,000 shares and offers them to institutional investors in the form of GDRs.</p>	<p>Company X should not need to produce a UKLA approved prospectus (although it might choose to do so).</p> <p>Headroom (assuming no new UKLA approved prospectus is produced) = 200,000 GDRs.</p>	<p>Company X will likely need to produce a UKLA approved prospectus to cover the new GDRs (by way of an extension to the initial block listing), because the shares underlying those GDRs were not in issue at the time of the IPO.</p> <p>Assuming that the new prospectus covers the maximum amount of GDRs possible under UKLA policy, the prospectus will cover an additional 300,000 GDRs. Headroom therefore = 500,000 GDRs, <b>but it will only be available for shares in issue at the time</b></p>

		<b>of this last block listing.</b>
<p>3. IPO plus 130 days: Company X issues another 100,000 shares in the form of <b>shares</b>.</p>	<p>Company X will be mindful that these new shares could be deposited into the GDR facility by shareholders in the future. Nevertheless, it should <b>not</b> need to produce a UKLA approved prospectus (although it might choose to do so) because headroom can be used also for GDRs representing new shares.</p> <p>Headroom (assuming no new UKLA approved prospectus is produced and assuming that all these new shares end up in the GDR facility) = 100,000 GDRs.</p>	<p>Unless the depositary will be able to distinguish these new shares from the old shares covered by the previous block listings (<b>which is very unlikely</b>), the company would effectively have to produce a UKLA approved prospectus to cover the GDRs that would be issued if these shares were deposited into the GDR facility.</p> <p>Assuming that the new prospectus covers the maximum amount of GDRs that is possible under UKLA policy, this prospectus will cover an additional 100,000 GDRs and so the headroom will be 500,000 GDRs, <b>but it will only be available for shares in issue at the time of this last block listing.</b></p>
<p>4. IPO plus 160 days: Company X issues 100 new shares pursuant to an employee share option scheme.</p>	<p>The existing headroom is sufficient to cover the GDRs that would be issued if these new shares were deposited into the GDR facility, so no new UKLA approved prospectus should be needed.</p> <p>Headroom (assuming no new UKLA approved prospectus is produced) = 90,900 GDRs.</p>	<p>For the same reasons as above, Company X will have to produce a UKLA approved prospectus to cover the GDRs that would be issued if these shares were deposited into the GDR facility.</p>
<p>5. IPO plus 190 days: shareholder deposits an additional 20,000 shares that it held at the time of the IPO into the GDR facility.</p>	<p>Company X not required to publish a UKLA approved prospectus. Depositing shareholder obtains listed GDRs upon deposit.</p>	<p>Same result, <b>except that the headroom will only be available for shares in issue at the time of the IPO (see below).</b></p>

	<p>Headroom = 70,900 GDRs.</p>	<p>Furthermore, note that if a UKLA approved prospectus had not been published under any of scenarios 2, 3 and 4 above, the depositary would have to determine whether these shares were issued after the last block listing application made by Company X, and because it is very unlikely to be able to make that determination, either it would not accept the shares for deposit OR the selling shareholder and the depositary would have to work with Company X for Company X to produce and publish a UKLA approved prospectus. This would have to be done for any deposit by a shareholder, effectively shutting down the GDR facility.</p>
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The burden and, for regular issuers, potential mitigants

The additional burden for companies with GDRs listed in London will be significant under the new, expected policy approach of the UKLA:

- With respect to new issues of shares that are accompanied by offerings, while an offering document would often be produced in any case, there will be the additional burden of UKLA prospectus review, as well as UKLA and LSE fees.
- With respect to new issues of shares that are not accompanied by offerings, for example, shares issued pursuant to employee share option schemes, the additional burden will be even greater since offering documents are not customarily produced and additional shares can be issued frequently and in small amounts.
  - For companies that will face this type of situation, we have developed and agreed with the UKLA a new type of listing document package for GDRs. First, a registration document would be prepared which provides disclosure about the company. This registration document

would be approved by the UKLA and published. Then, when new shares were issued, the company would prepare a securities note including information about the GDRs (the format and content of which would be quite stable). The securities note would need to be approved by the UKLA and published. To the extent that there had been material developments in the business of the company since the date of its registration document, related information could be included in the securities note.

- An alternative to this approach, which we have also discussed and agreed in principle with the UKLA, would be to create a GDR “programme” (similar to bond programmes created by many companies). First, a base prospectus would be prepared which provides disclosure about the company **and** the GDRs. This base prospectus would be approved by the UKLA and published. Then, when new shares were issued, the company would prepare “final terms”, including information about the GDRs (the format and content of which would be quite stable). These final terms would **not** need to be approved by the UKLA. However, to the extent that there had been material developments in the business of the company since the date of the base prospectus, related information could **not** be included in the final terms but would have to be included in a supplement to the base prospectus, which would need to be approved by the UKLA before being published. Consideration would also need to be given as to whether the publication of the supplement would give acquirors of the new securities the right to “put” those securities back to the company during a two day “withdrawal” period under the Prospectus Directive.

Which of these two options were best for any particular company would need to be considered in light of its particular circumstances.

#### Next steps for companies with GDRs listed in London

The anticipated policy change discussed in this alert memorandum has not yet been formally announced by the UKLA and, we believe, a definitive decision has not yet been taken. GDR listed companies and other market participants concerned by this potential development should consider opening a dialogue with the UKLA. In particular, market participants might consider asking the UKLA to reconsider:

- “grandfathering” for companies who already have GDRs listed with a block listing;
- allowing block listings to cover GDRs representing new shares within the headroom as long as the amount issued does not exceed 10% of the existing shares in any 12-month period (by analogy with the Prospectus Directive exemption for listed shares, which does not exist for GDRs);

- allowing an exemption for new shares issued pursuant to employee incentive schemes, as long as there is sufficient headroom under the block listing.

If the anticipated policy change is implemented by the UKLA as we currently expect:

- Companies with London listed GDRs who have already issued shares since their IPO or their last block listing will likely need to produce a prospectus as soon as possible to cover the GDRs that might be issued as a result of the deposit of those new shares (or indeed pre-existing shares, where the depositary cannot distinguish between those new shares and pre-existing shares).
- Companies with London listed GDRs who have not already issued shares since their IPO or their last block listing will need to produce a prospectus for their next issuance. Regular issuers of shares should consider one of the two options we have developed and outlined above.

If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Capital Markets under the “Practices” section of our website at <http://www.clearygottlieb.com>.

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