

# The Prospectus Process

Wayne McArdle

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**GIBSON, DUNN & CRUTCHER LLP**

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# The prospectus process

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# Regulatory overview

- EU Prospectus Directive (2003/71/EC) (the Prospectus Directive) is based upon the concept of maximum harmonisation of the requirements for making a public offer of transferable securities in the EU or for the admission of such securities to trading on an EU regulated market
- The Prospectus Regulation sets out detailed provisions on the contents of a prospectus
- In addition, the Committee of European Securities Regulators (CESR) has published recommendations (most recently updated in August 2008) for consistent implementation of the Prospectus Regulation

# Regulatory overview (cont.)

- Under the Prospectus Directive it is the competent authority of the issuer's home member state that will have to approve a prospectus in relation to an issue of securities
- If EU-incorporated issuer, the home member state is the one where the issuer has its registered office
- If non-EU issuer accessing the markets for the first time, its home member state will be determined by reference to where it makes an offer to the public or admits securities to trading
- Passporting
- Note that usually all member states require translations of prospectus summaries for retail offerings except Luxembourg, Austria and the Netherlands (note that some states will permit English as the language of the prospectus)

# Regulatory overview (cont.)

The primary regime governing offers of listed securities in the UK comprises:

- The Financial Services and Markets Act 2000 (**FSMA**) and its subordinate legislation
- The Listing Rules of the UK Listing Authority (**UKLA**)
- The UKLA Prospectus Rules (the **Prospectus Rules**) which implement the Prospectus Directive in the UK

# Regulatory overview (cont.)

- Listed securities in the UK are those admitted to the Official List of the London Stock Exchange and admitted to trading on an EU-regulated market
- The Main Market of the LSE is a EU-regulated market
- The AIM Market of the LSE is an exchange regulated market (i.e. not a EU-regulated market)
- However, the Prospectus Rules also apply to unlisted securities offered to the public in the UK and are therefore also relevant in the context of applications for admission of securities to trading on AIM

# Regulatory overview (cont.)

	Official List	AIM	
		If offer to the public	If no offer to the public
<b>FSA regulation</b>	Prospectus Rules UKLA Listing Rules	Prospectus Rules	AIM – Prospectus Rules (basically, Prospectus Rules with carve outs)  (replaced the Public Offers of Securities Regulations 1995)
<b>LSE regulation</b>	LSE Admission and Disclosure Standards	AIM Rules	AIM Rules

# When is a prospectus required

A prospectus is generally required where either:

- (i) transferable securities are to be offered to the public in the European Economic Area (EEA);
- (ii) an issuer makes an application for admission of transferable securities to trading on a regulated market in the EEA

An offer to the public is generally any communication presenting sufficient information about the securities and the terms on which they are offered to enable an investor to decide to buy or subscribe for the securities

# When is a prospectus required (cont.)

Some key exemptions to the obligation to publish a prospectus applying only to offers to the public:

- offers to qualified investors; or
- offers directed at fewer than 100 persons per EEA state (other than qualified investors); or
- offers where the minimum consideration payable by any person under the offer is EUR 50,000

# When is a prospectus required (cont.)

Some key exemptions applying only to admission to trading on a regulated market (typically, applying after shares have been admitted on a regulated market already):

- securities issued to employees as part of an employee share scheme; or
- shares representing less than 10% of the number of shares of the same class already in issue; or
- shares offered to existing shareholders free of charge or by way of a dividend; or
- transferable securities that have been admitted to trading on another regulated market

# Form of prospectus

- Single document
- Tripartite document
  - summary of the characteristics of, and risks associated with, the issuer, any guarantor and the securities (generally not to exceed 2,500 words)
  - securities note with details of the securities offered
  - registration document with information about the issuer (once approved, valid for 12 months unless updates by way of supplements are required)

# Information to be included in a prospectus

## General contents:

- All necessary information required to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the company and the rights attaching to the securities
- The information must be presented in a form which is comprehensible and easy to analyse and be prepared having regard to the particular nature of the securities and issuer in question

# Information to be included in a prospectus (cont.)

- A prospectus must be composed of the following parts in this order:
  - a clear and detailed table of contents
  - summary
  - risk factors linked to the issuer and the securities
  - other information items included in the schedules and building blocks according to which the prospectus is drawn up
- The schedules and building blocks are set out in Appendix 3 to the Prospectus Rules
- The level of disclosure will be determined by the identity of the issuer and the type of security involved
- Appendix 1 contains a summary of information to be included in the registration document and securities note

# Who is responsible for the content of a prospectus

- The issuer
- The issuer's directors and those named as proposed directors
- Anyone stated in the prospectus as accepting responsibility
- Any person who has authorised the contents of a prospectus (a professional adviser does not become responsible by reason only of giving advice on the contents)
- The offeror and its directors if it is not the issuer (this will not be the case if the prospectus was drawn up primarily by the issuer and the offeror is making the offer in association with the issuer)
- Responsibility statement
- Potential civil/criminal liability

# Verification

- The prospectus is prepared by the issuer or the sponsor's legal advisers with input from the issuer and the other advisers
- In view of the potential liabilities of those who are responsible for the prospectus, the accuracy of statements in the prospectus must be carefully checked
- In the UK a potential defence to statutory liability may be that a responsible person reasonably believed (having made such enquiries as were reasonable) that a statement was true and not misleading
- Verification on a line-by-line or material statement basis (i.e. the issuer verifies each relevant statement and provides evidence-based justification)
- Different approach in different jurisdictions

# Approval of the prospectus

- For issuers incorporated in an EU member state, the final form prospectus must be approved by the competent authority of the issuer's home member state (for UK, this is the UKLA)
- For securities to be listed or offered into the UK, if the UK is not the issuer's home member state, the UKLA must receive a certificate of approval issued by the competent authority of the issuer's home member state
- For foreign issuers incorporated outside the EU whose home member state is UK, the final form prospectus must be approved by the UKLA

# Prospectus vs. AIM Admission Document

- Where an offer to the public, unless an exemption applies, the company will have to publish a prospectus in accordance with the Prospectus Rules
- The AIM Rules require the production of an Admission Document which must contain the information in Schedule 2 to the AIM Rules (whether or not a prospectus is required; where a prospectus is required, it will also serve as the Admission Document)
- Where a prospectus is not required, the information to be included in the Admission Document is equivalent to that which is required by the Prospectus Directive and the Prospectus Rules but with certain carve outs

# Other points of interest

Potential issues related to listing of an issuer's securities in a number of jurisdictions:

- ensure that the relevant stock exchange rules allow shares to be traded on more than one stock exchange i.e. no issues re dual listings
- clearing and settlement

# Our offices



GIBSON, DUNN & CRUTCHER LLP

# Find Us

**London**

Telephone House  
2-4 Temple Avenue  
London EC4Y 0HB, United Kingdom  
44-20-7071-4000

**Brussels**

Avenue Louise 480  
1050 Brussels, Belgium  
32-2-554-70-00

**Los Angeles**

333 South Grand Avenue  
Los Angeles, California 90071-3197  
(213) 229-7000

**Orange County**

3161 Michelson Drive  
Irvine, CA 92612-4412  
(949) 451-3800

**Century City**

2029 Century Park East  
Los Angeles, California 90067-3026  
(310) 552-8500

**Paris**

166 rue du Faubourg Saint Honoré  
75008 Paris, France  
33-1-56-43-13-00

**Dubai**

Level 12, The Gate  
Dubai International Finance Centre  
PO Box 506654, Dubai  
United Arab Emirates  
971-4-365-0470

**New York**

200 Park Avenue  
New York, New York 10166-0193  
(212) 351-4000

**San Francisco**

One Montgomery Street  
San Francisco, California 94104-4505  
(415) 393-8200

**Dallas**

2100 McKinney Avenue, Suite 1100  
Dallas, Texas 75201-6911  
(214) 698-3100

**Munich**

Widenmayerstraße 10  
80538 Munich, Germany  
49-89-189-33-0

**Singapore**

One Raffles Quay  
Level 25, North Tower  
Singapore 048583  
65-6622-5977

**Washington, D.C.**

1050 Connecticut Avenue, N. W.  
Washington, D. C. 20036-5306  
(202) 955-8500

**Palo Alto**

1881 Page Mill Road  
Palo Alto, California 94304-1125  
(650) 849-5300

**Denver**

1801 California Street, Suite 4200  
Denver, Colorado 80202-2641  
(303) 298-5700

# Appendix 1

The registration document should contain, among others, the following details:

- who the persons responsible for the prospectus are
- details of auditors
- selected financial information (this must provide the key figures that summarise the financial condition of the issuer for the period covered by the historical financial information (generally 3 years))
- prominent disclosure of risk factors
- information about the issues
- business overview
- organisational structure
- property, plant and equipment
- operating and financial review
- capital resources e.g. details of cash flow and borrowing requirements
- research, development, patent and licences
- trend information
- profit forecasts or estimates

# Appendix 1 (cont.)

The registration document contents (cont.):

- administration, management and supervisory bodies and senior management
- directors' remuneration and service contracts
- corporate governance information including audit and remuneration committees
- employees' information
- major shareholdings information
- related party transactions
- financial information concerning the issuer's assets and liabilities, financial position and profits and losses for the latest 3 financial years and any interim financial information published since the date of the last audited accounts
- in the case of significant gross change, pro forma information
- audit report
- dividend policy
- information on significant litigation over the last 12 months
- material contracts
- details of share capital and constitutional documents

# Appendix 1 (cont.)

The securities note should contain, among others, the following details:

- who the persons responsible for the prospectus are
- prominent disclosure of risk factors
- key information e.g. working capital statement, capitalisation and indebtedness statement, material interests of any person involved in the issue, reasons of the offer and use of net proceeds
- details of the securities e.g. rights, authority for the issue, restrictions on free transferability, details of mandatory takeover bids and squeeze out rules and of recent takeover bids, information on withholding tax
- terms and conditions of the offer e.g. offer statistics, expected timetable, action required to apply for the offer, pricing, placing and underwriting
- admission to trading and dealing arrangements
- selling securities holders
- expenses of the issue
- dilution
- experts' and third party consents
- details of any advisers mentioned