A Guide to Cross-Border Securities Offerings
**Introduction**

In today's global economy our clients need global access to capital markets, whether they are seeking new investors in foreign markets, or reaching out to existing shareholders located in foreign jurisdictions.

Securities offerings are highly regulated in most developed jurisdictions and significant civil and criminal penalties can be incurred as a result of offerings which are not authorized by the relevant authorities or compliant with the applicable securities regime.

At Reed Smith we have extensive experience of raising capital worldwide, and providing practical legal advice which ensures that your cross-border securities offerings can proceed smoothly and meet your deadlines whilst minimising legal risk to your business.

This booklet contains summary information on the securities law regimes in the US, UK, France, Germany, Hong Kong, United Arab Emirates and Dubai International Financial Centre, including the principal restrictions on offering securities, the exemptions from those restrictions and the offering documentation required in each jurisdiction.

Please note that the information in this booklet refers generally to offerings of shares. Offerings of units in collective investment schemes are outside the scope of this publication. If you require advice on collective investment schemes please contact the Reed Smith partner with whom you usually work. This publication is meant as a guide and does not constitute legal advice. No offering of securities should be undertaken without taking specific legal advice in each case.
United Kingdom

1. Introduction

This section contains an overview of the UK regulatory system with regard to public offerings of securities and continuing obligations of public companies.

When considering a cross-border offering into the UK, whether or not the issuer is seeking a UK listing, it is essential to establish whether an offer of securities to the relevant UK recipients is lawful, and what formal requirements and documentation exist in relation to the offering.

The regulation of public offers of securities consists principally of:

1. the rules implementing European Directive 2003/71/EC (the “Prospectus Directive”); and
2. the prohibition on “financial promotions” unless made or approved by unauthorized persons.

In many cases a cross-border offering will benefit from exemptions to the requirement for a prospectus and from the prohibition on financial promotions. Where appropriate exemptions do not apply, the issuer will be required to publish a prospectus, and/or financial promotions will be required to be approved by a UK “authorized person” (e.g. an investment bank). Even where an exemption applies, certain formalities must be observed. Therefore local advice should be taken in each case.

2. Regulatory framework and markets

Securities offerings in the UK are governed by the legislative framework made up by domestic UK legislation and the implementation of various EU directives such as the Prospectus Directive, the Market Abuse Directive and the Transparency Directive. These EU directives harmonize member states’ domestic securities law.

The primary legislation is the Financial Services and Markets Act (“FSMA”). The principal provisions of the above EU directives are implemented by FSMA. The act also contains purely UK provisions. An extensive body of statutory instruments and rules has been made under FSMA including the Prospectus Rules (“PR”), the Listing Rules (“LR”) and the Disclosure and Transparency Rules (“DTR”). The PR govern the requirement to produce a prospectus and the contents and approval process for prospectuses. The LR and the DTR govern the listing of securities on the Main Market of the London Stock Exchange. Securities quoted on AIM, the junior market of the London Stock Exchange, are governed by the non-statutory “AIM Rules” of the London Stock Exchange, although some elements of the DTR apply to AIM companies.

In addition to legally binding obligations, compliance with guidelines published by various investor protection groups is important in maintaining a company’s reputation with institutional investors. In addition, regulatory guidance by the Financial Services Authority (“FSA”) and bodies such as the Committee of European Securities Regulators (“CESR”) should be followed in interpreting the legislation and rules.

The EU legislation which harmonizes securities law between EU member states introduced the concept of a “regulated market” for securities. The majority of the harmonized regulations apply only to securities traded on a regulated market. In the UK the main market of the London Stock Exchange is a regulated market, whereas AIM is not.

2.1 Regulatory Authorities

The regulatory authorities in the UK are as follows.

2.1.1 Financial Services Authority (“FSA”)  
The FSA derives its statutory powers from FSMA and is responsible for regulating the UK financial services sector. In particular, the FSA seeks to maintain market confidence, promote public awareness, protect consumers and reduce financial crime.

2.1.2 UK Listing Authority (“UKLA”)  
The UKLA is the name given to the FSA when acting in its capacity as the competent authority for the purposes of maintaining the FSA’s “Official List”.

2.1.3 London Stock Exchange (“LSE”)  
Not strictly a “regulatory authority”, London Stock Exchange plc is a publicly traded company which runs London’s principal markets.

2.2 The UK Capital Markets

2.2.1 The London Stock Exchange
1. Markets

- **Main Market** – The LSE’s primary market for listed securities. Admission to trading on the Main Market and “listing” are separate concepts. Separate applications must be made for admission to trading on the LSE’s Main Market (governed by the LSE) and listing on the Official List (governed by the UKLA). Different rules apply to primary and secondary listed securities.

- **AIM** – originally known as the Alternative Investment Market, AIM was established for the needs of smaller, growing companies. The entry criteria make it possible to gain admission without a trading record, or any minimum market capitalization. AIM, although regulated by the LSE, is not a regulated market for the purposes of the Prospectus Directive and AIM companies are not bound by the Listing Rules.

The LSE’s other, specialist markets include:

- **The Professional Securities Market (“PSM”)** – the PSM is designed for issuers of specialist securities. Although PSM securities are eligible for the Official List, it is not a regulated market for the purposes of the Prospectus Directive.

- **The Specialist Fund Market** – this platform was launched in 2007 for specialized investment entities that wish to target institutional and professional investors such as hedge funds and private equity vehicles. The Specialist Fund Market is a regulated market and issuers must comply with the Prospectus, Transparency and Market Abuse Directives.

**PLUS Markets plc**

PLUS Markets plc also operates two primary trading platforms:

- **PLUS-listed market** – this market deals with listed securities and is a regulated market.

- **PLUS-quoted market** – this trading platform deals with unlisted securities and acts as an alternative to AIM.

3. Public offers of securities

3.1 **Restrictions on Public Offers of Securities**

The principal issues to consider when offering securities into the UK are:

- whether or not a prospectus is required; and
- the financial promotions regime under FSMA.

The issuer should also consider whether any shareholder consents will be necessary, in particular to disapply statutory pre-emption rights (discussed below).

**The Requirement to publish a Prospectus (s85 FSMA/the Prospectus Rules)**

Under section 85 FSMA an FSA-approved prospectus is required:

- before transferable securities (i.e. shares and debt securities which are negotiable on the public market) are offered to the public in the UK (section 85(1) FSMA);
- before an application is made for transferable securities to be admitted to trading on a UK regulated market (section 85(2) FSMA).

A prospectus, which must be approved by the UKLA, can be passported within Europe. This may be extremely useful in a takeover where the target has significant numbers of shareholders in different EU jurisdictions.

**Offers of securities to the public**

An offer to the public is defined widely as being a communication to any person which presents sufficient information on the transferable securities to be offered, and the terms on which they are to be offered, to enable an investor to decide to buy or subscribe for the securities in question.

Key exemptions from the prospectus requirement include where:

- an offer is made to fewer than 100 people per EU Member State that are not “ Qualified Investors” as defined in s86(7) FSMA (generally financial institutions and other persons registered on the FSA’s register of Qualified Investors);
- the minimum consideration payable by any person is at least 50,000 EUR;
- the securities are denominated in amounts of at least 50,000 EUR;
- the total consideration for the securities cannot exceed 100,000 EUR;
• the securities are offered in connection with a takeover offer provided a document is available containing information which is regarded by the FSA as equivalent to that of a prospectus;
• shares already admitted to trading are offered to existing or former employees or directors, if certain information is made available.

Most AIM offerings benefit from the exemption for offers to fewer than 100 persons other than qualified investors (i.e. financial institutions).

**Offers of securities which are to be admitted to trading**

Regulated Markets are trading platforms that are authorized and function in accordance with the Markets in Financial Instruments Directive (“MiFID”).

No prospectus will be required when offering securities to be admitted to trading on a regulated market where:
• the shares offered represent, over a period of 12 months, less than 10% of the number of shares of the same class already admitted to trading;
• the securities are offered in connection with a takeover offer provided a document is available containing information which is regarded by the FSA as equivalent to that which must be included in a prospectus;
• shares already admitted to trading are offered to existing or former employees or directors, if certain information is made available;
• shares resulting from the conversion or exchange of other securities are admitted to trading (although it is not possible to use this exemption if the issue of convertibles is a ‘sham’ to avoid the prospectus requirement.).

### 3.2 Restrictions on Financial Promotions (s21 FSMA)

Section 21 FSMA contains a general restriction on financial promotions unless they are exempt or approved by authorized persons. A financial promotion is defined as the communication of an invitation or inducement to engage in investment activity. The exemptions are set out in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (“Financial Promotion Order”). Commonly used exemptions include:

- **Investment professionals (Article 19)** – this exemption applies to institutional and other professional investors and assumes that the recipients are sufficiently expert to understand the risks involved with investments and thus do not need additional statutory protection.
- **High net worth individuals (Article 48)** – this exemption was introduced to make it easier for start-up companies to raise capital from so-called “business angels”. This exemption only applies to promotions of investments in unlisted companies.
- **High net worth entities (Article 49)** – this exemption applies to communications made to entities over a certain size.
- **Certified sophisticated investors (Article 50)** – authorized persons may certify individuals as having enough knowledge to be able to understand the risks associated with the investment to which the communication relates.
- **Self-certified sophisticated investors (Article 50A)** – a self-certified sophisticated investor is an individual who has signed a prescribed statement which acknowledges the loss of regulatory protection and redress under FSMA. This exemption only applies to promotions of investments in unlisted companies.

In the event that no exemption is applicable, the financial promotion should be approved by an authorized person, who will need to be satisfied that the information given in the promotion is fair, clear and not misleading.

Any unauthorized person who communicates a financial promotion will be liable to a fine and/or up to two years imprisonment. In addition, agreements entered into as a result of an unlawful financial promotion are potentially unenforceable.

### 3.3 Shareholder consent requirements on offering securities

Section 89 of the Companies Act 1985 imposes a right of first refusal for existing shareholders over issues of new equity securities for cash. This allows shareholders to preserve their percentage shareholding in the company. Pre-emption rights may be disappplied by a special resolution.

Although the Companies Act does not apply to overseas companies, UK institutional investors will expect substantially similar rights to apply. Equivalent rights should be written into the issuer’s bylaws or articles upon a UK flotation.

Listed companies should also take note of the Pre-emption Group Statement of Principles which states that routine disapplications should be limited to 5% of ordinary share capital in any one year. Whilst the Statement of Principles is not legally binding, the Pre-emption Group consists of members representing companies, investors and intermediaries, and is supported by the Association of British Insurers, the National Association of Pension Funds and the Investment Management Association. The Statement of Principles is aimed at companies with a Main Market listing but AIM-listed companies are also encouraged to comply.
4. Documentation required for an offer to the public

4.1 Preparation and Approval of a Prospectus

A prospectus must contain certain specified information set out in the Prospectus Rules which are made under FSMA. The content requirements for a prospectus are consistent across Europe, as they are set out in the Prospectus Directive, although there is some inconsistency in interpretation. The content requirement will vary in accordance with the type of securities being offered.

The information required on an offering of shares includes the following:

- three years’ audited financial statements;
- risk factors;
- description of the issuer;
- description of the issuer’s business and principal markets;
- operating and Financial Review;
- information on material contracts, assets and intellectual property;
- information on capital resources;
- information on the directors, including their remuneration and benefits;
- information on major shareholders; and
- details of the securities offered and the terms of the offering.

There is no requirement for profit forecasts and any such forecast will require an accountant’s report. It is therefore advisable not to include any forward looking information as to profit.

The audited financial statements for a company which is incorporated in an EU member state must be prepared in accordance with IFRS. For companies incorporated outside the EU, financial statements may be prepared in accordance with IFRS, US GAAP, Canadian GAAP or Japanese GAAP.

A prospectus must be submitted to the UKLA and approved before any public offer is made. The Prospectus Rules give a timetable for approval of 20 days for a first prospectus and 10 days for a secondary offering. However, in reality the process for producing and approving a prospectus are longer than this as (a) the prospectus must be in more or less final, verified form before submission and (b) the UKLA will usually require five working days to review the first draft and three working days to review subsequent drafts.

4.2 Company and Directors’ Liabilities in Relation to Offering Documentation

If an offering document contains inaccurate or misleading information the issuer and its directors may be subject to a range of civil and criminal liabilities.

If a statement or promise is made that a director knows is misleading or false, or such a statement is made recklessly, then the director may be criminally liable. The same is true if important information is dishonestly concealed. This can result in up to 7 years imprisonment, or a fine, or both under s. 397(8) of the Financial Services and Markets Act 2000 (“FSMA”). The making of false representations or the failure to disclose information in order to make a gain or expose another to loss may also result in criminal liability under the Fraud Act 2006, for which the maximum penalty is 10 years’ imprisonment and/or a fine. Untrue or misleading statements in offering documents can lead to liability for the civil offence of market abuse.

The market abuse civil regime is created by section 118 FSMA. The lower standard of proof in civil cases makes proceeding under the market abuse regime an attractive option to the FSA. The seven types of behavior that constitute misuse of information and market manipulation are:

- insider dealing;
- improper disclosure of inside information;
- misuse of information;
- effecting manipulating transactions;
- using fictitious manipulating devices;
- disseminating information likely to give a false or misleading impression; and
- misleading behavior or market distortion.
The issuer and its directors may also incur liability at common law, for example civil liability for deceit or negligence or misrepresentation. Criminal liability may also arise for theft or fraud.

5. **UK listing applications/application for admission to AIM**

The process for applying for admission to the main market and to AIM are broadly similar. The flowchart below illustrates the timetable and procedure for a typical listing/AIM admission.

- **AIM IPO with related placing**
  - Due diligence/negotiation of key underwriting terms
  - Drafting and Verification of Admission Document and ancillary documentation
  - Board approval of draft “Pathfinder” Admission Document
  - Marketing to Institutions/Bookbuilding
  - 10 day notice to LSE
  - Board Approval of Admission Document and other transaction documentation
  - Underwriting/Placing Agreement signed
  - General meeting of shareholders if required in relation to issue of placing shares
  - Application to AIM (3 days prior to Admission)
  - Admission

- **Main Market IPO with related placing**
  - Due diligence/negotiation of key underwriting terms
  - Drafting and Verification of Prospectus and ancillary documentation
  - Submission of Prospectus to UKLA for approval
  - Receipt of UKLA comments (approx. 5 business days) and response.
  - Further rounds of comments and resubmission. UKLA response in approx. 3 working days.
  - Board approval of draft “Pathfinder” Admission Document when UKLA indicates no further comments
  - Marketing to Institutions/Bookbuilding
  - Board Approval of Admission Document and other transaction documentation
  - Underwriting/Placing Agreement signed
  - General meeting of shareholders if required in relation to issue of placing shares
  - Application to LSE on Form 1 10 days before application considered
  - Listing application to UKLA (48 hours before UKLA considers listing application)
  - Admission
6. Continuing obligations/filings

6.1 Continuing obligations under the AIM/Listing Rules and the Disclosure and Transparency Rules

All public companies quoted in the UK are subject to continuing obligations under the Listing Rules or the AIM Rules and the Disclosure and Transparency Rules, including:

- general and specific disclosure obligations including:
  - disclosure of “inside information” (non-public price sensitive information);
  - changes in the holdings of significant shareholders (creation of or change to a shareholding over 3%, or 5% for listed, non-EU companies);
  - issues of new shares; and
  - directors’ dealings.
- restrictions on directors and officers dealing in shares in “close periods” (i.e. periods in which they have access to unpublished price-sensitive information, and between the end of a financial period and release of annual or interim results);
- requirement for announcement of/or shareholder consent for, certain transactions determined by “class tests”;
- publication of annual and half-yearly financial statements;
- requirement for electronic settlement; and
- website content requirements.

Non-compliance with the relevant rules may result in fines, public censure and/or suspension and eventual cancellation of the issuer’s listing.

6.2 Other liabilities following Admission

The criminal offence of insider dealing under the Criminal Justice Act 1993 is committed when an insider deals or encourages others to deal in price-sensitive securities when in possession of inside information or when an insider discloses inside information otherwise than in the proper performance of his employment.

Misleading statements in offering documents or company announcements may expose directors to the liabilities described above in relation to public offerings. Any behavior involving misleading information or market manipulation may lead to liability for market abuse.
Germany

1. Introduction

This section contains an overview of the German regulatory system with regard to public offers of securities and subsequent obligations of public companies.

When considering a cross-border offering into Germany, whether or not the issuer is seeking a German listing, it is essential to determine whether an offer of securities to the relevant German recipients is lawful, and what formal requirements and documentation exist in relation to the offering.

The regulatory framework governing public offers of securities and subsequent obligations principally consists of:

(1) the German regulatory framework implementing the EU Prospectus Directive as well as the Markets in Financial Instruments Directive (“MiFID”); and

(2) the rules establishing the prohibition of rendering banking or financial services (e.g. brokering) in Germany without being licensed to do so.

In many cases a cross-border offering will benefit from exemptions to the requirement to publish a prospectus and to the prohibition on providing banking or financial services without being licensed to do so. Where appropriate exemptions do not apply, the issuer will be required to publish a prospectus, and/or obtain a banking or financial services license. Even where an exemption applies, certain formalities must be observed. Therefore local legal advice should be obtained in each case.

2. Regulatory framework and markets

2.1 Financial Regulatory Authorities

- German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht – “the BaFin”)
- German Federal Bank (Deutsche Bundesbank)

2.2 Banking and Financial Services Regulations (including requirement to obtain banking or financial services or other licenses for offering securities or other financial instruments)

- German Banking Act (Kreditwesengesetz)
- German Investment Act (Investmentgesetz)
- German Commercial Code (Handelsgesetzbuch)

2.3 Offering of Securities and similar financial instruments

2.3.1 Securities

- German Stock Exchange Act (Börsengesetz) and Stock Exchange Ordinances (Verordnungen)
- German Securities Prospectus Act (Wertpapierprospektgesetz – “WpPG”)

2.3.2 Investment Units

- German Investment Act (Investmentgesetz – “InvG”)

2.3.3 Financial instruments comparable to securities

- German Sales Prospectus Act (Wertpapier-Verkaufsprospektgesetz – “VerkProspG”)

2.4 The German Capital Markets

2.4.1 The German Stock Exchange (Deutsche Börse), Frankfurt

Being the principal German exchange for equity and bond trading, the German Stock Exchange allows companies to raise capital from its two main markets: the Regulated Market and the Open Market (Freiverkehr).

- Regulated Market: In general, the regulated market is a market segment highly regulated by both German statutory law, in particular the German Stock Exchange Act (“BörsG”) and the Stock Exchange Admission Regulation (“BörsZulV”), and the rules and regulations of the stock exchange. The regulated market comprises the market segments “General Standard” and “Prime Standard” which sets even higher standards and obligations. There are numerous requirements for an admission, e.g. that the company has been in existence for three years, that at least 10,000 stocks have to be issued, that the free float amounts to at least 25%, and that the capitalization amounts to at least 1.25m EUR. Moreover, there is a high standard of information to be provided on an ongoing basis (annual, semi-annual and quarterly financial statements, ad-hoc disclosures).
• **The Open Market:** In general, the Open Market was established as an answer to the capital needs of smaller, growing companies. The entry criteria make it possible to gain admission without a trading record or minimum capitalization. A special market segment within the Open Market is the Entry Standard which was established to create a segment similar to the AIM at the London Stock Exchange. The Entry Standard has stricter transparency and ongoing disclosure requirements, but shall remain attractive to smaller and mid-sized companies which cannot or do not want to be listed at the regulated market with its strict requirements.

As of today, most of the transactions are executed on XETRA by electronic trading, but floor trading still exists.

2.4.2 **Local Stock Exchanges**

There are numerous local stock exchanges like the Hamburg or Munich stock exchanges that each have certain specialties, such as derivative trading, electricity trading, etc. In principle, they are similar to the German Stock Exchange (Deutsche Börse) in Frankfurt. In Germany, the Munich stock exchange, for example, offers listing on M:access, a market segment comparable to the Entry Standard of the Frankfurt Stock Exchange.

3. **Public offers of securities and other financial instruments**

3.1 **Public offers of securities within the meaning of sec. 2 no. 1 WpPG**

3.1.1 **Applicability of the WpPG**

The German Securities Prospectus Act (WpPG), which is based on the European Directive 2003/71/EC, is applicable to the drawing up, approval and distribution of a sales prospectus for securities which shall be publicly offered or allowed for being traded on an organized market.

Sec. 2 no. 1 WpPG applies to transferable securities tradable on a securities market, in particular:

- shares and other securities comparable to shares or interests in a corporation or other legal entity as well as certificates which represent stocks;
- debt certificates, including bonds and certificates other than those listed above; and
- any other securities entitling the holder to acquire or sell such security or resulting in a cash payment which is determined by transferable securities, currencies, interest, commodities or other indices or indicators.

3.1.2 **Restrictions on Public offers of securities**

Except for certain statutory exceptions, any offeror of securities within the meaning of sec. 2 no. 1 WpPG is required to publish a prospectus for securities publicly offered or admitted to a regulated market in Germany.

The German Federal Financial Service Authority (Bundesanstalt für Finanzdienstleistungsaufsicht – “the BaFin”) is required to prohibit the offering in case of any non-compliance with the prospectus requirements or respective measures as ordered by the BaFin. Furthermore, any non-compliance may result in commission of regulatory offenses and in fines in a range between 50,000 EUR and 500,000 EUR.

3.1.3 **Principal Exemptions from the Prospectus Requirement**

In principle, no prospectus needs to be published if certain statutory exemptions apply or the offer is not deemed to be public.

(a) **Overview of statutory exemptions pursuant to sec. 3 (2) WpPG (certain kinds of offers)**

- Offer of securities addressed solely to “Qualified Investors”
- Offer of securities addressed to fewer than 100 individuals or legal entities per member state of the EEA other than Qualified Investors
- Offer of securities addressed to investors who acquire securities for a total consideration of at least 50,000 EUR per investor with respect to each separate offer of securities
- Offer of securities the denomination of which per unit is at least 50,000 EUR
- Offer of securities with consideration totaling to less than 100,000 EUR (all securities offered within a twelve months period will be accounted for)

(b) **Overview of statutory exemptions pursuant to sec. 4 WpPG (certain types of offers)**

Pursuant to sec. 4 (1) WpPG, the offeror is exempt from the prospectus requirement with respect to the issuance of certain types of securities (e.g. same class investments, securities offered in connection with a takeover, securities offered to directors and officers of the company, etc).
Under sec. 4 (2) WpPG no prospectus is required to be admitted to trading on a regulated market where, *inter alia*:

- the shares offered represent, over a period of 12 months, less than 10% of the number of shares of the same class already admitted to trading on the same regulated market
- the shares are offered in exchange for shares of the same class already admitted to the same regulated market provided the issuance does not require a capital increase
- the shares are offered in connection with a takeover offer provided a document is available containing information which is equivalent to that of a prospectus
- the shares already admitted to trading are offered to existing or former employees or directors, provided certain information is made available
- under certain conditions the shares are already admitted to another regulated market

### (c) Private Placement (vs. Public Offer)

No prospectus needs to be published if the securities are privately placed in Germany, i.e. if no public offer is made.

According to the statutory definition in sec. 2 no. 4 WpPG, a public offer is “a communication to the public in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered so as to enable an investor to decide whether to purchase or subscribe to those securities.” This does not require a legally binding offer. An invitation to provide an offer is sufficient (so-called “invitatio ad offerendum”). However, it is necessary that the invitation targets the conclusion of a purchase contract, i.e. providing a concrete opportunity for investors to purchase the securities.

As a rule of thumb, an offer is public when directed at the general public, i.e. targeting an unlimited number of potential investors. In contrast thereto, a private placement requires a personal relationship to have been established between the offeror or its representative and the investor prior to the offer. From the BaFin’s and the legal authors’ point of view securities are not offered to the public if potential investors are (i) already known to the offeror of the securities and/or (ii) selected on the basis of individual criteria.

### 3.1.4 Other considerations when making a public offer

Regardless of the prospectus requirement, an offer may trigger the requirement to obtain a banking license. Pursuant to sec. 32 (1) of the German Banking Act (“KWG”) anyone intending to conduct banking business or to provide financial services in Germany commercially or on a scale which requires a commercially organized business undertaking is required to obtain a written license from the BaFin. The term banking business comprises, *inter alia*, deposit-taking business, covered bond business, lending business, principal broking services and the custody business (sec. 1 (1) sentence 2 KWG). Financial services include, *inter alia*, investment and contract brokering, investment advice, portfolio management, and money transmission services.

In April 2005, the BaFin published a note entitled “Information on the licensing requirements pursuant to section 32 (1) KWG in conjunction with section 1 (1) and (1a) of the KWG for conducting cross-border banking business and/or providing cross-border financial services”. Anyone intending to conduct banking business or to provide financial services in Germany – either commercially or to an extent which requires a commercially organized business undertaking in Germany – requires a BaFin license. According to the note, this also applies to situations in which the provider of the services has its registered office or domicile abroad, but targets the German market in order to offer banking business and/or financial services repeatedly and on a commercial basis to companies and/or persons having their registered office or residence in Germany. Providers from non-EEA countries that intend to market their banking products or financial services products specifically in Germany must establish a subsidiary or branch in Germany to be eligible for the required license. In principle, this also applies to providers from EEA countries which cannot make use of the so-called European passport provisions for their banking and/or financial services offered in Germany. Providers from EEA countries may, under the European passport provisions, either establish a branch or conduct business on a cross-border basis without having a presence in Germany.

However, under the “freedom of utilizing provided services” (passive Dienstleistungsfreiheit), German residents as well as enterprises domiciled in Germany may request the services of a foreign entity on their own initiative. Providing services following such request is not subject to the licensing requirement.

Moreover, in its note of April 2005, the BaFin sets out examples of typical scenarios where entities provide cross-border banking and financial services for which the supervisory authority requires the service provider to obtain a license. The examples vary from visits to potential clients of a foreign institution, brokering by German institutions, their employees or (free-lance) agents, use of mail, fax or email, making internet offers, advertising and other methods of marketing.

It is of utmost importance to note that the guideline of April 2005 describes the circumstances under which the BaFin is willing to grant an exemption pursuant to section 2 (4) KWG. Exemptions are granted on a case by case basis and require, *inter alia*, that from the BaFin’s...
point of view there is no need for supervision of the foreign entity, given the nature of the business it conducts. This is generally the case if the foreign entity is subject to effective supervision in its home country by competent authorities, which cooperate with the BaFin to its satisfaction. The foreign entity will have to submit a statement from the competent authorities in its home country which confirms that the entity holds any relevant licenses, that the provision of cross-border services does not raise supervisory concerns and that information will be provided to the BaFin should such concerns arise in the future. To the extent that the non-EEA entity intends to conduct cross-border business in Germany via branch offices in other non-EEA countries, the statement must also include confirmation that no problems have arisen as regards co-operation with the corresponding supervisory authorities of the countries in which those branches are located, and that there are no supervisory concerns with regard to the business activities of the branches. The statement must set out that sufficient supervision is carried out in this respect, especially with regard to insolvency supervision and prevention of money laundering.

The applicant must appoint a process/receiving agent in Germany. The BaFin points out that the exemptions for cross-border banking transactions and financial services are granted on a case by case basis based on the circumstances of the individual transaction procedure. This may therefore result in supplementary requirements being added in individual cases for supervisory reasons and particularly for reasons relating to the prevention of money laundering.

3.1.5 Company/Director Liabilities on a public offer

In the event that a prospectus is incomplete or incorrect, a purchaser of shares may demand from the person or entity which assumed responsibility for the prospectus or from the person or entity who issued the prospectus as joint debtors to take back the shares against payment of the purchase price to the extent that it does not exceed the first issue price, as well as to pay back the acquisition costs. However, this applies only insofar as the acquisition has been closed after the publication of the prospectus and within a deadline of 6 months from the first introduction of the shares. The same applies if no prospectus has been published at all.

3.1.6 Documentation for making a public offer

An offeror is obliged to publish a prospectus in compliance with the requirements set forth in detail in sec. 5 et seq. WpPG. The prospectus must be filed with the BaFin which verifies compliance with the regulatory provisions and completeness of the prospectus. The BaFin, however, does not verify the correctness of the facts and statements made in the prospectus. Without final approval of the BaFin, the prospectus must not be published. Upon approval, the offeror or applicant is obliged to submit the prospectus to the BaFin for safe-keeping and publish it immediately thereafter.

Provided the draft prospectus submitted to the BaFin for review and approval purposes has been duly prepared and thoroughly reviewed (e.g. by a law firm), the approval process may take less than a month.

3.2 Public offering of instruments not being securities within the meaning of sec. 2 no. 1 WpPG

3.2.1 Securities to which these rules apply

Additionally the German Sales Prospectus Act (VerkProspG) is applicable to securities offered in public which are not covered by the German Securities Prospectus Act (WpPG), sec. 8f (1) VerkProspG. In principle, the provisions of the VerkProspG are intended to cover securities of the so-called “grey capital market”, in particular closed-end funds. Hence, the German Sales Prospectus Act is subsidiary to the German Securities Prospectus Act.

3.2.2 Restrictions on public offers of securities

Before offering such securities, a prospectus has to be published pursuant to sec. 8f (1) VerkProspG. The publication of the prospectus is subject to the approval of the BaFin (sec. 8i (2) 1 VerkProspG). After final approval of the BaFin, the prospectus has to be published at least one workday before the public offering takes place (sec. 9 (1) VerkProspG).

The BaFin is required to prohibit the offering in case of any non-compliance with the prospectus requirements or respective measures ordered by the financial authority. Furthermore, any non-compliance may result in administrative offenses and fines ranging from 50,000 EUR to 500,000 EUR.

3.2.3 Documentation for making a public offer

The requirements concerning the content of the prospectus are specified in sec. 8g VerkProspG. If information in a prospectus material for the assessment of the securities is incorrect or incomplete the provisions stipulated in sec. 44 to 47 of the German Exchange Act (“Börsengesetz”) will apply (see sec. 13 VerkProspG). Pursuant to sec. 13a VerkProspG the nonexistence of a prospectus gives rise to liability.

3.2.4 Principal Exemptions from the Prospectus Requirements

In principle, no prospectus needs to be published if certain statutory exemptions apply or the offer will not be made on a public basis.
Statutory exemptions are set out in sec. 8f (2) VerkProspG. Sec. 8f (2) VerkProspG exempts, among others, the following types of offers from the prospectus requirement:

- offers of interests in a company divided into 20 units maximum, offers of interest the aggregate sales price of which does not exceed 100,000 EUR, and offers of units the sales price of which is 200,000 EUR minimum per unit, and
- offers made to a limited number of potential investors including those made to employees by their employer or by companies affiliated with the employer.

With regard to a private placement (vs. a public offer), please see section 3.1.3 (c) above.

3.2.5 Other considerations when making a public offer

With regard to the requirement to obtain a banking or financial services licence as set forth in sec. 32(1) KWG, please see section 3.1.4 above.

3.2.6 Company/Director Liabilities with respect to a public offer

If a prospectus is incomplete or incorrect, the purchaser of securities may demand that the person or entity which assumed responsibility for the prospectus or from the person or entity who issued the prospectus take back the security against payment of the purchase price to the extent that it does not exceed the first issue price, as well as to pay back the acquisition costs. However, this applies only insofar as the acquisition has been closed after the publication of the prospectus and within a deadline of six months after the first public marketing effort has been made. The same applies if no prospectus has been published at all.

4. Application for listing of securities

The process for applying for admission to the Regulated Market and Open Market are generally similar. The following shall illustrate the procedure for a typical going public transaction.

4.1 Preparatory Stage (approx. 3–7 months)

- Presentation of Fact Book (presentation of enterprise, market competition, strategy, financial overview) to Potential Underwriters
- Beauty Contest (Investment Case/ Evaluation/ Structuring of Transaction)
- Selection of the Underwriters/ Negotiation of Key Underwriting Terms
- Shareholder Resolution Mandating the Leading Underwriter and Additional Banks
- Due Diligence (Management and Financial DD, Legal and Tax DD)
- Drafting of Prospectus
- Meeting with Analysts
- Submission of Prospectus to the BaFin for Approval
- Feedback within 10 days if prospectus is incomplete
- Approval by the BaFin (within 10/20 days after complete prospectus has been submitted)

4.2 Emission Stage (approx. 3 weeks)

- Structured Press Relations – Announcement of Going Public Transaction
- Distribution of Research Reports to Institutional Investors and Press
- Determination and Publication of Book Building Margin
- Roadshow
- Determination of Issuing Price
- Application to Stock Exchange for Admission

4.3 Secondary Market Stage

- First Trading Day
- Stabilizing Measures by Lead Underwriter
5. **Continuing obligations/filings**

5.1 **Stock corporations publicly listed in Germany**

Stock corporations publicly listed in Germany must comply with the requirements set out in the WpHG and the WpPG which, inter alia, comprise the following:

- The issuer of securities is required to disclose to the public any circumstances that have a direct effect on the issuer and which, when becoming publicly known, would likely have a significant effect on the stock exchange or market price of the insider security (see secs. 15, 13 WpHG).
- Legal representatives of listed companies must file the annual financial statements, the management report, report of the supervisory board, financial auditor’s statement and a compliance statement with the Commercial Register of the corporation’s domicile (see sec. 325 (1) German Commercial Code and secs. 37 et seqq. WpHG).
- The issuer must report to the BaFin if a shareholders meeting agrees on an authorization to purchase the company’s own shares (see sec. 71 (3) sentence 3 German Stock Corporation Act).
- The company and relevant persons must comply with the insider rules as set out in secs. 12 et seqq. WpHG. These rules comprise certain reporting requirements (e.g. for directors’ dealings), the maintenance of insider lists and record-keeping obligations.
- An issuer the shares/securities of which are listed on an organized stock exchange in Germany must make available to the public its financial statements at least once a year. Following such disclosure, it has to file these documents with the BaFin.

A person whose voting rights with respect to the issuer (in particular a publicly listed stock corporation) exceed or fall below 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75% (thresholds) of the voting rights of an issuer of securities (in particular a publicly listed stock corporation) due to an acquisition, disposal or otherwise, must, without undue delay, but in any event not later than within four trading days, report in writing to the issuer and the BaFin (see 21 WpHG).

Moreover, irrespective of whether the stocks of a company are listed or not, the general disclosure requirements under the German Stock Corporation Act (AktG) must be complied with. For example, an entity must inform a stock corporation with its registered office in Germany immediately and in writing upon acquisition of more than one quarter of its shares (see sec. 20 AktG). As soon as the company acquires more than one quarter of the shares in another corporation having its registered office in Germany, it must promptly inform such corporation in writing (see sec. 21 AktG).

5.2 **General principles on accounting rules**

International Financial Reporting Standards (IFRS) is the common accounting standard used in the European Union (EU). In general, German groups are required to use IFRS for their consolidated financials, when listed on a regulated stock exchange.

US GAAP, Japanese GAAP and Canadian GAAP have been recognized as equivalent to IFRS by the European Commission. Therefore, they may be used by foreign issuers in a prospectus filed in Germany.

5.3 **Consequences of non-compliance**

Any violation may result in regulatory offenses leading to fines and other measures (like the prohibition of publicly distributing investment units in Germany). Moreover, in particular in case of prohibited insider trading activities, the relevant individual may be held criminally liable.
France

1. Introduction

This section contains an overview of the regulatory system with regard to public offers of securities and continuing obligations of public companies in France.

2. Regulatory framework and markets

The main rules governing offers of securities in France are:

- the Commercial and the Financial and Monetary Codes;
- the General Rules (Règlement General) of the Autorité des Marchés Financiers (AMF), the French exchange regulator; and
- the Euronext market rules (règles de marché).

Most of these rules directly derive from European directives and regulations, in particular the Prospectus and Transparency Directives.

The French stock exchange is operated by NYSE-Euronext, which is a trading platform common to the New York Stock Exchange and Euronext, Euronext being a multi-national market organization covering France, the Netherlands, Belgium and Portugal.

In France, securities are traded on two main markets:

- the Eurolist is a regulated market and the major securities market in France, with 3 main segments (A, B, C) depending on the market capitalization of each issuer; and
- Alternext, a multilateral trading facility, is the junior market for high growth potential enterprises, with lighter listing and ongoing requirements.

In addition to the 3 main segments of the Eurolist market, a specific segment was recently created called the “professional segment”. This segment is restricted to admissions to trading without any public offer (i.e. either with no issue of securities or with an issue through a private placement), provided that the securities are not already traded on a French regulated market. Listing and ongoing requirements are lighter on the “professional segment” than on the main segments. For example, regulated information can be in English. Although this segment is designed for qualified investors (see definition below), securities traded on this segment can be resold to non-qualified investors under certain conditions.

3. Public offers of securities

Definition of a public offer under French law

According to French law, an offer of securities is a public offer in case of:

- admission to trading on a regulated market; or
- an issue or sale of securities to the public using advertising, canvassing, credit institutions or investment service providers.

Prior to launching a public offer of securities in France, the issuer must file a prospectus with the AMF for approval, except in certain specific cases (see below).

Proceeding with a public offer results in the issuer in becoming a public entity, which gives rise to a series of obligations, such as disclosure obligations (see below).

3.1 Private placements

The issuance or sale of financial instruments does not constitute a public offering if certain exemptions apply including, but not limited to, the following:

- small transactions: the size of the offer is less than 100,000 EUR or, is between 100,000 EUR and 2,500,000 EUR and does not exceed 50% of the issuer’s issued share capital; and
- private placements: the offer is made only to qualified investors and/or to a restricted circle of investors, acting for their own account.

Qualified investors are persons or entities possessing the expertise and resources required to apprehend the risks associated to transactions relating to financial instruments. French law lists categories of qualified investors, including:
institutional investors, such as credit and financial institutions, insurance companies and investment undertakings, and
entities meeting two of the three following criteria: (i) average headcount in excess of 250; (ii) total of balance sheet in excess of 43 million EUR; (iii) revenues in excess of 50 million EUR.

Individuals can also be qualified investors if they hold a significant portfolio of securities, frequently proceed with transactions in securities and/or have held a professional position such that they have a good knowledge of securities dealing.

A restricted circle of investors is defined as a group of less than 100 investors (other than qualified investors).

In the context of a private placement, it is market practice in France for the issuer to prepare an offering circular (describing the issuer and the offer), which does not have to be filed with the AMF for approval.

A private placement made by an issuer not having its registered office in France, but in the context of which securities are to be, or could be, privately placed in France, must contain specific provisions. Their purpose is to inform potential investors that they can only act for their own account, that no prospectus has been filed with the AMF and that they should not resell the shares to the public in France without any prospectus being filed and approved.

Private placements can be made alongside an admission to trading. Indeed, admission to trading on Alternext can follow a private placement with no public offering being required. Also, an admission to the “professional segment” of the Eurolist can only be made without a public offering.

It should be noted that French rules relating to public offerings may change soon. It is likely that the French definition of a public offering will be more aligned with the European Directive. This may result in 2-step offerings (i.e. a private placement followed by a resale to the public) being more clearly subject to the obligation to file a prospectus.

4. Documentation for making a public offer

4.1 Content, format and language of the prospectus

According to European regulation, prospectuses must include a summary and the main following sections:

- information about the issuer including: risk factors, business overview, organizational structure, property, plant and equipment, operating and financial review, capital resources, research and development, patents and licences, profit forecasts or estimates, administrative, management and supervisory bodies and senior management, major shareholders, related party transactions, financial information, material contracts and information on holdings;
- information concerning the offer including the reason for the offer and use of proceeds, information about the securities to be offered or admitted to trading, terms and conditions of the offer and information on dilution; and
- information concerning persons responsible for the content of the prospectus and the statutory auditors.

Generally, any prospectus relating to a simple admission to trading (i.e. with no issue or sale of securities) can be in French or in English. However, except on the “professional segment”, the summary must always be translated into French.

Conversely, any prospectus relating to an issue or a sale of securities offered to the public must be in French, when the securities are offered exclusively in France, or in several countries of the European Community (EC) or the European Economic Area (EEA) including France. However, it can be in English in some very specific cases, such as where the securities are offered by an issuer having its registered office outside the EC/EEA and are designed to be offered to the employees of its French subsidiary.

4.2 Accounting rules

International Financial Reporting Standards (IFRS) is the common accounting standard used in the European Union (EU); French groups are required to use IFRS for their consolidated financials, when listed on a regulated stock exchange.

US GAAP, Japanese GAAP and Canadian GAAP have been recognized as equivalent to IFRS by the European Commission. Therefore, they can be used by foreign issuers in a prospectus filed in France. In practice, no reconciliation to IFRS is required for the use of US GAAP in France.

Local GAAP other than US GAAP, Japanese GAAP and Canadian GAAP, when in force in the country of origin of the issuer, can also be used on Alternext in the context of a private placement or a direct admission with no public offer of securities, with a reconciliation to IFRS being required when the issuer is not located in the EEA.
4.3 Exceptions to the obligation to file a prospectus

Despite the fact that an offer is publicly made, in certain specific circumstances no prospectus needs be filed with the AMF including, but not limited to, where the securities for which the admission to trading is sought are:

- shares representing, over a period of 12 months, less than 10% of the total number of shares of the same class already admitted to trading on the same regulated market;
- dividends paid out in the form of shares of the same class, provided that a document containing certain information is made available to the public by the issuer;
- securities offered in connection with a share-for-share tender offer, a merger or a de-merger, if a document subject to AMF scrutiny and containing information equivalent to that of the prospectus, is made available to the public;
- securities granted to directors, officers or employees of the issuer or an affiliate of the issuer, under certain conditions;
- shares resulting from the conversion or exchange of other securities, provided that the said shares are of the same class as those already admitted to trading on a regulated market; and
- securities already admitted to trading on another regulated market, provided among other requirements that: (i) such financial instruments have been admitted to trading on that other regulated market for more than 18 months (ii) the admission to trading on that other regulated market was associated with the approval of a prospectus (as defined by European legislation) made available to the public (iii) the issuer applying for admission makes a summary available to the public.

5. Liabilities relating to the prospectus

The General Rules of the AMF state that the names of the persons or entities responsible for the content of the prospectus must be clearly identified in the prospectus and that their signatures must be preceded by a declaration confirming that, after taking all reasonable measures for this purpose and to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and makes no omission likely to affect its import.

In France, market practice is that the signatories to the prospectus are the legal representatives of the issuer (usually the CEO). The signatories act both on their own behalf and on behalf of the issuer. Therefore, both the signatory and the issuer can be held liable in case of any misrepresentation or omission in the prospectus.

The statutory auditors’ liability mainly derives from a completion letter they must sign and provide the issuer with, in which they confirm that they have applied their professional standards in reviewing the content of the prospectus. The investment service providers must also certify to the AMF that they have exercised customary professional diligence and found no inaccuracies or material omissions likely to mislead investors or otherwise affect their judgment.

Liability can be of civil, administrative or criminal nature.

6. The listing process

The decision to list must follow the rules governing the issuer.

When the issuer is French and the admission to trading involves an issue of securities, a decision of the shareholders is needed, with a 2/3 majority vote being required. Existing shareholders benefit from a right of first refusal for existing shareholders over issues of new equity securities for cash, which allows them to preserve their percentage shareholding in the company.

In France, the prospectus for a listing is made of a base document presenting the issuer (document de base) and a securities note (note d’opération) describing the securities and the offer.

The following chart shows key theoretical timeline events for a listing on a French market. An IPO process in France typically lasts between 4 and 6 months.
A Guide to Cross-Border Securities Offerings

- Contact with attorneys, investment service provider(s), Euronext Paris, AMF
- Amendment to the by-laws
- Preparation of the filing documentation and communication
  - Filing with Euronext
    - (90 days before target Admission date)
  - Preliminary filing of base document with AMF
    - (20 trading days before target Approval date)
  - Filing of draft securities note with AMF
    - Final filing of base document with AMF and publication
  - Approval of AMF on the final full prospectus
  - Admission by Euronext Paris
  - Offer and placement
    - Offer and placement close
      - Offer price is determined
      - Euronext issues notice with results
        - First quotation
  - Settlement and delivery
    - First trading day
7. Continuing obligations/filing

7.1 Issuers’ obligations

Once a public offering has been made by an issuer, it is subject to specific disclosure requirements.

The nature and level of information to be made available to the public depends on the market on which the securities are traded.

On the Eurolist, information to be disclosed includes:

- annual, half-yearly and quarterly financial reports;
- a corporate governance report;
- the fees paid to statutory auditors;
- information on the total number of voting rights and shares;
- a description of any share buyback program;
- any privileged information, defined as any information of a precise nature that has not been made public, relating directly or indirectly to one or more issuers of financial instruments, or to one or more financial instruments, and which, if it were made public, would be likely to have a significant impact on the market price of the relevant financial instruments or on the market price of related financial instruments;
- pro-forma financial information, in the event of any change in the scope affecting the accounts by more than 25%;
- any change in the rights attaching to the various classes of shares;
- any change to the terms and conditions of issuance that may directly affect the rights of holders of financial instruments other than equity shares; and
- any new issues of debt securities and, as the case may be, any guarantee or security in respect thereof.

On Alternext, as well as on the “professional segment” of the Eurolist, the disclosure requirements are generally lighter than on the Eurolist.

Generally, the law provides that any information disclosed must be accurate, precise and fairly presented and neither issuers or anyone else must publish any false or misleading information.

In addition to disclosure obligations, issuers have obligations imposed by the Market Abuse Directive, including the requirement to keep an updated list of ‘insiders’, i.e. persons who have access to the issuer’s inside information. This protects against ‘insider trading’ in breach of the Market Abuse Directive.

7.2 Securities holders’ obligations

Depending on the market, the securities holders (whether acting individually or in concert) must disclose the crossing of certain thresholds in terms of shareholding and/or voting rights.

The crossing of certain thresholds can trigger the obligation to launch a tender offer (e.g. when crossing the 1/3 threshold on the Eurolist).

All persons closely linked to the issuer (personnes étroitement liées à l’émetteur), notably the management, must also disclose any transaction made on the issuer’s securities.
A Guide to Cross-Border Securities Offerings

Hong Kong

1. Introduction
This section contains an overview of certain regulatory requirements regarding public offerings of securities in Hong Kong and continuing obligations of public companies in Hong Kong.

2. Regulatory framework and markets
The principal legislation governing offers of securities in Hong Kong is:
(1) the Companies Ordinance ("CO"); and
(2) the Securities and Futures Ordinance ("SFO").
The CO and the SFO specify circumstances under which a document in relation to an offer would be regarded as a prospectus. Unless an appropriate exemption applies or a specific exemption is given by the Securities and Futures Commission ("SFC"), relevant issuers are obliged to comply with the legislative and regulatory requirements as to the contents and registration formalities of a prospectus. Local advice should therefore be taken in each case.

2.1 The Hong Kong Capital Markets
The Stock Exchange of Hong Kong Limited (the “HK Exchange”) operates two markets on which companies may apply for listing of its securities: the main board (“Main Board”) and the Growth Enterprises Market (“GEM”). The Main Board is the primary securities market in Hong Kong whereas GEM offers a fund raising platform for high growth potential enterprises which may not always be able to satisfy the more onerous listing requirements under the Rules (“Listing Rules”) Governing the Listing of Securities on the HK Exchange (which rules are applicable to all issuers listed on the Main Board). Securities listed on GEM are normally associated with higher investment risk.

In addition to the legislative regime under the CO and the SFO, to the extent the offering is a Hong Kong initial public offering or otherwise involves a Hong Kong listed company, the Listing Rules or the Rules Governing the Listing of Securities on the GEM (“GEM Listing Rules”) of the HK Exchange will apply.

3. Offers of securities
When considering a cross-border offering into Hong Kong, it is essential to establish whether the proposed offer is made to the “public”, whether the document issued in connection with the offer is a “prospectus” under CO, and what formal requirements need to be complied with in relation to the offering.

3.1 Restrictions on public offer of securities
Subject to certain exceptions/exemptions, it is not lawful for any person to issue any document which offers any securities of a company to the public for subscription or purchase for cash or other consideration, or which is calculated to invite offers by the public for such securities unless that document complies with the content and registration requirements of the CO which apply to prospectuses.

The SFO provides that, subject to certain exceptions/exemptions, a person commits an offence if he issues, or has in his possession for the purposes of issue, an advertisement, invitation or document which to his knowledge is or contains an invitation to the public:

3.1.1 to enter into or offer to enter into:
(i) an agreement to acquire, dispose of, subscribe for or underwrite securities; or
(ii) a regulated investment agreement. The term “regulated investment agreement” is defined in the SFO to mean “an agreement the purpose or effect of which is to provide, whether conditionally or unconditionally to any party to the agreement a profit, income or returns calculated by reference to changes in the value of any property, but does not include an interest in a collective investment scheme”; or

3.1.2 to acquire an interest in or participate in, or offer to acquire an interest in or participate in, a collective investment scheme, unless the issue is authorized by the SFC. This SFO restriction does not apply to the issue, or the possession for the purposes of issue, of a prospectus which complies with or is exempt from the CO requirements on prospectuses.

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3.2 **Common exception to public offer of securities**

The CO excludes from its definition of a “prospectus” documents which contain specified types of offers which comply with specified requirements. For example, offers to not more than 50 persons over a 12-month period by documents which carry a specific legend are exempted.

Another common exemption to the restrictions on public offer of securities under the CO and SFO is for offers made to “professional investors”.

### 3.3 Who are “professional investors”?

“Professional investor” is defined in the SFO and generally covers most institutional investors, including recognised exchange companies, recognised clearing houses, investment intermediaries, authorized financial institutions, authorized insurers, authorized funds and government institutions.

The definition of “professional investors” has been expanded under the Securities and Futures (Professional Investor) Rules (“PI Rules”) to include the following persons:

(i) any trust corporation having been entrusted under the trust or trusts of which it acts as a trustee with total assets of not less than HK$40 million or its equivalent in any foreign currency;

(ii) any individual, either alone or with any of his associates on a joint account, having a portfolio of not less than HK$8 million or its equivalent in any foreign currency;

(iii) any corporation or partnership having (a) a portfolio of not less than HK$8 million or its equivalent in any foreign currency; or (b) total assets of not less than HK$40 million or its equivalent in any foreign currency; and

(iv) any corporation the sole business of which is to hold investments and which is wholly owned by an individual who, either alone or with any of his associates on a joint account, falls within the description in (ii) above.

SFC licensed persons are required to comply with further SFC rules and guidelines which apply to their determination of whether or not a person may be treated as a “professional investor” under the PI Rules.

### 3.4 Typical legend for private placements

If you wish to offer securities without having to comply with Hong Kong prospectus requirements and you are able to rely on a specific exemption under the CO or SFO, the private placement memorandum that you use should be individually addressed and should carry a legend in the following form, subject to appropriate modifications:-

**WARNING**: The contents of this document have not been reviewed nor endorsed by any regulatory authority in Hong Kong. You are advised to exercise caution in relation to the offer. If you are in any doubt about any of the contents of this document, you should obtain independent professional advice. This document has not been approved by the Securities and Futures Commission in Hong Kong, nor has a copy of it been registered by the Registrar of Companies in Hong Kong. Accordingly, the securities offered under this document may not be offered or sold in Hong Kong by means of this or any other document except in circumstances which fall within an exemption from registration or authorisation requirements under the Hong Kong Companies Ordinance and the Hong Kong Securities and Futures Ordinance. This document may not be reproduced in whole or in part nor may it be passed by you to any other person (and the offer in it is not capable of acceptance by any person other than the named addressee).

### 4. Documentation for making a public offer

In the absence of an exemption under the relevant legislation or given by the SFC or (as appropriate) the HK Exchange, in making a Hong Kong public offer issuers must comply with the specific requirements as to the content and registration of prospectus as set out in the CO and subsidiary legislation and, if the securities are to be listed or the issuer is listed in Hong Kong, the Listing Rules or GEM Listing Rules, as the case may be.

A typical Hong Kong IPO prospectus would cover the following topics:

- expected timetable;
- risk factors;
- information in relation to waivers from strict compliance with rules or regulations;
- industry overview;
- reorganisation, corporate structure and general corporate information;
5. **Company/directors’ liabilities in relation to offering documentation**

Every prospectus issued by any company (whether incorporated in Hong Kong or outside Hong Kong) to the public in Hong Kong must contain the information set out in the Third Schedule, CO. The company and any person (including a director) who is knowingly party to the issue, circulation or distribution of a prospectus is liable if it fails to comply with the requirements set out in the CO.

Under the CO, a director may be exposed to civil and criminal liability for any untrue statement contained in a prospectus. “Untrue statement” includes any material omission from the prospectus. A statement is deemed to be untrue if it is misleading in the form and context in which it is included in the prospectus.

The SFO also imposes criminal liability on any person who discloses, circulates, disseminates or who authorizes or is concerned in the disclosure, circulation or dissemination of information that is likely to (a) induce another person to subscribe for securities or deal in futures contracts in Hong Kong; (b) induce the sale or purchase in Hong Kong of securities by another person; or (c) to maintain, increase, reduce or stabilize the price of securities, or the price for dealings in futures contracts in Hong Kong, if

(i) the information is false or misleading as to a material fact, or is false or misleading through the omission of a material fact; and

(ii) the person knows that, or is reckless as to whether, the information is false or misleading as to a material fact, or is false or misleading through the omission of a material fact.

Further, the SFO confers upon third parties civil rights of action in respect of false or misleading information that induce transactions and for false and misleading public communications concerning securities or which may affect the price of securities.

Typically, directors of issuers are required to sign a responsibility letter in favour of the issuer and its listing sponsors under which they accept full responsibility for the accuracy and completeness of all the statements of facts relating to the Company, its subsidiaries and associated companies and any other information as set out in the prospectus. This reflects their liability at law. The HK Exchange listing rules also impose specific requirements as to due diligence to be carried out by a listing sponsor against the issuer it seeks to list. Listing sponsors will also instruct their legal advisors to conduct a comprehensive verification process to record the evidence used to support every statement of fact in the prospectus and the basis upon which every statement of opinion included is made.

6. **Accounting standards**

Accountants’ reports prepared by certified public accountants qualified in Hong Kong must be included in the listing documents of all new listing applicants. Unless exemption has been obtained from the HK Exchange, accountants’ reports set out in prospectus must include consolidated...
financial information of the applicant and its subsidiaries for the last three financial years. The latest financial period reported on by the reporting accountants for the new applicant must not have ended more than six months before the date of the listing documents.

The financial history of results and the balance sheet included in the accountants’ report must normally be drawn up in conformity with:

1. Hong Kong Financial Reporting Standards (HKFRS); or

If the listed issuers and applicants for listing adopt the IFRS, they are required to disclose and explain differences of accounting practice between IFRS and HKFRS, and to compile a statement of the financial effect of any such material differences.

Any significant departure from such accounting standards must be disclosed and explained and the financial effects of such departure must be quantified to the extent practicable. Appropriate adjustments need to be made to show profits for all periods in accordance with the current standards.

7. The Hong Kong listing process

In an IPO, it normally takes a minimum of three months for the listing division of the HK Exchange to review documentation for a typical listing application before a recommendation for listing or rejection of the application is made. If more than six months have elapsed after the date of an advanced booking form and the listing has not yet taken place, the initial listing fee will be forfeited and the applicant may have to re-submit the application with an initial listing fee if it wishes to continue with its application.

The following chart shows key timeline events for a typical Hong Kong listing (with an international placing tranche):

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<table>
<thead>
<tr>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>Submission of Advance Booking Form</td>
</tr>
<tr>
<td>(together with an advanced draft of prospectus, audited accounts for at least the first 2 years of the 3 year track record period, written submission on any proposed connected transaction of the issuer after listing, etc)</td>
</tr>
<tr>
<td>Submission of other documents - 20/15/10 days before expected hearing date</td>
</tr>
<tr>
<td>(including an advanced draft of group accounts, constitutional documents, directors’ declarations and undertakings in specified form, drafts of services contracts to be made between issuers and its directors, material contracts, application forms, document of title or certificate for the securities and corporate authorizations)</td>
</tr>
<tr>
<td>Submission of formal listing application</td>
</tr>
<tr>
<td>Recommendation or rejection by listing division</td>
</tr>
<tr>
<td>Listing hearing</td>
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</tbody>
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(CONTINUED ON NEXT PAGE)
Listing approval in principle

Issue of red herring prospectus, roadshow and bookbuilding

Execution of Hong Kong underwriting arrangements, Issue of prospectus and registration with the Companies Registry

Offer to public in Hong Kong opens and closes

Execution of international underwriting arrangements, Price determination

Formal listing approval

Dealings in securities commence

Copies of the listing application, all other disclosure documents and submissions of listing applicants to the HK Exchange are filed by the HK Exchange with the SFC. Under this system, both the HK Exchange and the SFC may, within the timeframe specified in the relevant rules, require the relevant applicant to supply further information, investigate, object or impose conditions on listing applications.

The procedure for registration of a prospectus is divided into two steps: (i) application to the HK Exchange for authorization of registration; and (ii) application to the Registrar of Companies for registration. Advance written notice must be given to the HK Exchange at least 14 days before the expected day of registration and the HK Exchange shall then provide a list of documents required to be submitted for vetting on the date of registration.

8. **Continuing obligations/filings**

Listings of shares on the Main Board and GEM are subject to different eligibility criteria, but issuers on both markets are obliged to comply with similar continuing compliance obligations after listing of their securities.

In addition to the admission criteria under the Listing Rules or the GEM Listing Rules (as the case may be), issuers are required to observe other applicable provisions of the Listing Rules or the GEM Listing Rules (as the case may be) which include the following main areas:

8.1 timely disclosure of all price sensitive information in order ensure maintenance of an orderly market;
8.2 routine disclosure of financial information: Main Board issuers are required to disclose financial information on an annual and half-yearly basis and GEM issuers are additionally required to make the relevant disclosure on a quarterly basis;

8.3 restrictions on controlling shareholders’ disposal of or creating encumbrances over interests in securities of the company: a controlling shareholder is required (i) not to dispose of any of its interests in securities of the issuer during the first six months after listing and (ii) not to dispose of its interests if such disposal would result in it ceasing to be a controlling shareholder within the second six months after listing;

8.4 share repurchases and new issues: the maximum number of shares which may be repurchased by an issuer pursuant to a general mandate granted by shareholders must not exceed 10% of its total number of shares in issue whereas the maximum number of shares which may be issued by the issuers under a general mandate granted by shareholders must not exceed 20% of its total number of shares in issue. All other specific mandates for issues of new shares or repurchases of existing shares must be approved by shareholders on a case-by-case basis. Apart from certain exceptions, a company may not issue further new shares within the first six months of its initial listing;

8.5 transactions: transactions including any acquisition, disposal or other specified transactions or arrangements, are subject to size classification which determines whether any reporting, announcement, circular and shareholders’ approval requirements are applicable;

8.6 specific disclosure requirements and shareholders’ approval requirements for transactions between issuers (including their subsidiaries) and their directors, chief executives or substantial shareholders;

8.7 regulations regarding option schemes which may be adopted by issuers;

8.8 restrictions on directors’ dealings in securities of issuers. For example:
(i) when they are in possession of unpublished price-sensitive information in the relation to those securities; or
(ii) during the period commencing from one month immediately preceding the earlier of (x) the date of the board meeting for the approval of the listed issuer’s results for any year, half-year, quarterly or any other interim period (whether or not required under the relevant listing rules); and (y) the deadline for the listed issuer to publish an announcement of its results for any year or half-year, or quarterly or any other interim period (whether or not required under the relevant listing rules) and ending on the date of the results announcement, unless the circumstances are exceptional and in compliance with the Listing Rules. No option may be granted during such period;

8.9 minimum size of independent board of directors: issuers are required to appoint at least three independent non-executive directors and it is a recommended best practice to have independent non-executive directors to represent not less than one-third of the board; at least one of the independent non-executive directors must have appropriate professional qualifications or accounting or related financial management expertise;

8.10 minimum percentage of issued securities to be held in public hands;

8.11 notification to the HK Exchange of changes with regard to a listed issuer’s constitutional documents, its directorate or supervisory committee, rights attaching to any class of listed securities, auditors or financial year end, its secretary or registered address; and

8.12 payment of an annual listing fee.

If any issuer fails to comply with the Listing Rules or the GEM Listing Rules (as the case may be), the HK Exchange has the right at any time to suspend dealings in its securities or to cancel the listing of its securities in such circumstances or with such conditions as it may consider appropriate or necessary to maintain an orderly market.
A Guide to Cross-Border Securities Offerings

**United Arab Emirates**

1. **Introduction**
   
   This section sets out the legal framework for offers of securities in “on-shore” United Arab Emirates (UAE), i.e. in Abu Dhabi or Dubai rather than in the “free zones” of the country, e.g. the Dubai International Financial Centre, which has its own separate regulatory framework.

   While the UAE is growing rapidly and developing in all business sectors, the regulations governing the issue of shares are currently not clear-cut. Similarly, there is still only a very limited system of precedent in the UAE meaning the interpretation of regulations very much depends upon the decision of the relevant authorities in the particular circumstances at the relevant time.

2. **Regulatory framework and markets**

   All onshore UAE companies are governed by Federal Law No. (8) of 1984 concerning Commercial Companies (‘Companies Law’), as amended.

   The UAE’s onshore stock exchanges are regulated by the Securities and Commodities Authority (‘SCA’). In addition each exchange has its own set of rules and regulations with which the companies listed on them must comply.

   2.1 **The UAE’s Capital Markets**

   The UAE has two onshore stock exchanges, the Abu Dhabi Securities Exchange (ADX) and the Dubai Financial Market (DFM). Located in the offshore jurisdiction of the Dubai International Finance Centre (DIFC) is the Dubai International Financial Exchange (DIFX).

   The onshore and offshore exchanges come under different legal jurisdictions. The DIFX is governed by the laws of the DIFC and the Dubai Financial Services Authority (DFSA). This note only examines the regulatory framework in relation to the onshore exchanges.

3. **Public offers of securities**

   3.1 **Restrictions on public offers of securities**

   The UAE Central Bank (‘Central Bank’) regulates the offering, marketing and sale in the UAE of non-UAE listed foreign securities, i.e. foreign securities which are not listed in the UAE.

   Marketing, sales and advisory activities relating to non-UAE listed foreign securities may only be carried out by a party holding an appropriate Central Bank licence (investment company or bank licensed by the Central Bank). There are no express provisions or regulations on marketing methods, permissible or otherwise. The offer document must have prior approval from the Central Bank and the sales process must comply with the provisions set down in the offer document.

   Only an entity which is incorporated in the UAE under the Companies Law may be licensed by the Central Bank as an investment company.

   Activities that might attract the Central Bank’s regulatory attention include:

   - publicly advertising specific securities in the general media;
   - cold calling, mail shots, or other aggressive and high-profile marketing to potential investors with whom there is no prior connection or introduction;
   - sponsoring public events or publications in a manner that calls attention to the offeror’s activities in the country;
   - announcing through general advertisement that the public may meet the offeror’s representatives at a specific place in the UAE;
   - advertisements or announcements regarding the financial products on local TV or radio or in newspapers/magazines; and
   - holding or conducting publicly advertised conferences on general subjects of interest to investors at a time when marketing of securities has commenced or is about to commence, for the purpose of assisting this marketing.

   Where the relevant offer shares will be issued, transferred and traded outside the UAE then some types of low-profile marketing activities of foreign securities have traditionally been tolerated by the Central Bank as falling below the threshold for requiring licensing by the Central Bank. Examples include:

   - responding to requests for information received from potential investors;
   - short visits with potential institutional investors known or introduced to the offeror’s representative;
   - passing information to a UAE resident through their existing financial adviser who is located abroad;
• advertisements in newspapers published abroad that circulate in the UAE, provided that no reference is made to specific presentations or meetings that will be held in the country, and provided that any specific address to which potential investors are referred for inquiries is outside the UAE; and

• inviting journalists from the UAE press to news conferences and road shows held outside the UAE.

Therefore, whether or not the ‘marketing’ of the relevant offer shares in the UAE will attract the Central Bank’s regulatory attention will be a matter of degree.

3.2 Documentation Disclaimers

If an offer of foreign securities is deemed to require approval from the UAE Central Bank, we suggest including the following legend in the offer document:

This Private Placement Memorandum has been authorized by the UAE Central Bank, as required by the UAE Central Bank Board of Directors’ Resolution No. 164/8/94. In giving this authorization, the UAE Central Bank does not vouch for the financial soundness or correctness of any of the statements or opinions expressed with regard to the Fund/Company/Shares. The [Investment Adviser][Offeror] reserves the right to withdraw the offer to participate in the Fund/Company to residents of the United Arab Emirates on the terms and conditions contained in this Private Placement Memorandum, in the event that the UAE Central Bank revokes, for any reason, its authorization of this Private Placement Memorandum. If the offer to participate in the Fund/Company is withdrawn by the [Investment Adviser][Offeror] prior to the issue of [Ordinary] Shares subscribed for, the investors’ only remedy shall be a full refund of the entire amount paid to the Fund/Company by such investors.

If an offer of foreign securities is deemed not to require approval from the UAE Central Bank, we suggest including the following legend in the offer document:

This prospectus does not constitute an offer to sell or the solicitation of an offer to buy any Shares in the United Arab Emirates to any person to whom it is unlawful to make the offer or solicitation in the United Arab Emirates or in respect of whom there may be a legal requirement to obtain prior approval of this prospectus from the regulatory authorities and/or to appoint a local broker. The distribution of this prospectus and the offer or sale of the Shares may be restricted by law in the United Arab Emirates. The Company does not represent that this prospectus may be lawfully distributed, or that any Shares may be lawfully offered, in compliance with any applicable registration or other requirements in the United Arab Emirates, nor does it assume any responsibility for facilitating any such distribution or offering. No transaction relating to the Shares will be concluded in the United Arab Emirates. Investors wishing to obtain Shares should apply to [address].

4. Listing on a UAE exchange

4.1 Abu Dhabi

The listing conditions and documentation required to be submitted vary according to what type of instrument is to be listed. However, for the purposes of this note, we set out below some of the general conditions and requirements for listing shares on the ADX for a foreign company. In order to list any shares for trading in the UAE, the company should first be licensed by the Securities and Commodities Authority (SCA). There are a number of requirements for obtaining SCA approval and subsequent listing, including the following:

• the company must submit an application for listing signed by a person or entity authorized to sign on behalf of the company;

• the company must already be listed on the stock exchange(s) of its home country and such stock exchange(s) must be subject to a regulatory authority exercising jurisdictions similar to those of SCA;

• the company should have been incorporated for at least two years; and

• the company’s capital must exceed AED 40M and the number of its shareholders should not be less than 100.

Foreign companies wishing to list their shares on the ADX must satisfy the SCA and the ADX that the financial position of the company is sound. The company should comply with International Accounting Standards or US GAAP and should present its financial statements in US dollars in addition to its local currency. Additionally, the company must issue an information memorandum in Arabic and English to interested investors in the UAE before listing, which must include such information as is necessary for potential investors to make an informed assessment of the company and its securities.

4.1.1 Documentation

Listing applications must be made to the SCA on its prescribed form. SCA will review the application and will issue preliminary approval provided that the company has complied with SCA’s listing regulations. Having obtained approval for listing the company from SCA, ADX will coordinate with the company to complete the transfer of its shareholders’ registry to the Clearing, Depository and Settlement Division of the ADX. The company must then provide information relating to its business, e.g. the number and nominal value of its issued shares and the
symbol its management wishes to use in ADX’s publications and bulletins. The company must provide ADX with an approved copy of its articles of association along with a list of names of members of its board.

Other documents which foreign companies are required to submit include:

- the company’s annual report for the two fiscal years preceding the date of submission of the application form;
- phased financial statements covering the period between the end of the fiscal year preceding the date of submission of the application form and the end of the last quarter preceding the date of that form; and
- a report issued by the company’s board, which includes items such as the following:
  - a brief description of the company, main objectives and its relation with other companies;
  - the securities previously issued by the company and those that the company intend to list in the market;
  - names of board members and chief executive officers and the securities owned by them and their next of kin as issued by the company in question or a group company, together with their membership in any other public joint-stock companies;
  - names of those who own more than five per cent of the securities issued by the company and the number of securities owned by each of them; and
  - non-nationals’ contribution to the company’s capital.

SCA and ADX may also request additional documentation as determined necessary in each individual application.

4.1.2 Company/director liabilities on a listing

The members of the board of directors of the company shall be liable for the completeness and accuracy of all the information presented to SCA and the ADX.

Neither SCA nor the ADX is responsible for the data, information, reports or documents presented by companies whether presented for the purposes of ADX or SCA or for publication. Any review or approval issued by the ADX or SCA cannot be construed as an acknowledgement of the accuracy or of the legitimacy of acts conducted by any company or person.

4.1.3 Continuing obligations/filings

ADX listed companies are required to:

- comply with all regulations and instructions issued by SCA and ADX;
- submit all data, information and statistics requested by SCA and the ADX administration;
- update SCA and the ADX of any crucial developments, which may affect the prices of the listed securities, as soon as they occur;
- publish, whenever requested to do so by the ADX or SCA, any information related to the company’s position and activities to ensure fair dealing and to provide investors with confidence;
- notify SCA and the ADX about shares held by board members within fifteen days from the date of commencement of their tenure, and at the end of each financial year, and about trades carried out by the company’s directors and executive management;
- notify and obtain permission from SCA and the ADX prior to any decision regarding distribution of profits to the shareholders or the announcement of profits and losses;
- notify SCA and the ADX immediately about the details of sale or purchase of any significant assets which may affect the financial position of the company;
- notify SCA and the ADX immediately about any changes to the company’s board of directors and executive management;
- pay the annual registration and listing fees by the relevant due dates;
- provide SCA and the ADX with all printed material designed for investors once issued;
- provide SCA and the ADX with all documentation relating to any amendments to the articles of association;
- provide SCA and the ADX with annual, semi-annual and quarterly reports regarding company activities and financial position;
- inform SCA and the ADX immediately of parties or individuals (in this instance, an individual includes his or her children) who acquire a holding that is 5% or more of the total issued share capital. Central Bank approval must be sought if the shareholder or party whose contribution reaches 5% or more is a bank or financial institution; and
- provide the ADX with their annual financial statements, including an annual report, within three months of the end of the financial year and their quarterly statements within thirty days of the end of the quarter. This data should be prepared in accordance with international accounting standards, and submitted in a hard or soft copies, and should at least include the following:
- board of directors report or summary;
- balance sheet;
- income statement; and
- cash flow statement.

5. Dubai

The listing conditions and documentation required to be submitted vary according to what type of instrument is to be listed. However, for the purposes of this note, we set out below some of the general conditions and requirements for listing shares on the DFM.

In order to list any shares for trading in the UAE, the company should first be licensed by the Securities and Commodities Authority (SCA). Please refer to the Abu Dhabi section for a list of the requirements for listing with SCA.

For foreign companies wishing to list their shares on the DFM, the company must first obtain approval for trading in the UAE from SCA and the DFM should be satisfied that the financial position of the company is sound. The company should comply with International Accounting Standards or US GAAP and should present its financial statements in US dollars in addition to its local currency. Additionally, the company must issue and offer to interested investors in the UAE, free of charge, before listing an information memorandum in Arabic and English. The information memorandum should contain such information as is necessary for potential investors to make an informed assessment of the company and its securities.

5.1 Documentation

The documents required to be submitted to SCA for companies wishing to list include the following:

- SCA licensing application signed by authorized signatory, plus the application fee;
- report from the company’s board of directors including information such as the company’s incorporation, its main objectives, and its relationship with related companies (if any), description of the securities that the company has previously issued and those it wishes to list, names of persons who own more than 5% of the securities issued by the company including the number of securities owned by each of them;
- the company’s constitutional documents (these must be attested);
- the company’s financial statements; and
- an undertaking that there are no restrictions in the company or the mother country preventing the transfer of the shares between investors, or details of any restrictions.

There are a number of documents required to be submitted to DFM for companies wishing to list on the DFM, including:

- the name of the people who are in charge of coordinating the listing process from the company;
- DFM listing application signed by an authorized signatory;
- copy of the SCA listing approval;
- details of all lawsuits held for or against the company; and
- issuing Prospectus or Information Memorandum (not less than 10 copies).

5.2 Company/director liabilities on a listing

The directors of the company will individually and collectively accept full responsibility for the completeness and accuracy of all information submitted to DFM.

DFM does not assume any responsibility for the correctness of any of the information, statements or opinions submitted to DFM.

Approval for listing at DFM may not be taken as an indication of the merits of the company or its business activities or its shares.

The DFM Board of Directors has discretionary authority to exempt a company from some of its listing requirements or submitting certain documents.

DFM may decline a listing application without assigning any reason.
5.3 **Requirements after DFM approval**

Following DFM approval, the issuer must:

- coordinate with the Clearing, Depositary and Settlement Department regarding share transfers and registry process between DFM and other relevant markets;
- publish, in two Arabic daily newspapers ten days prior to listing on DFM, the company’s annual financial statements and summary of the board of directors’ report, which were submitted with the SCA listing application. Additional publishing in one English newspaper is required if the company allows non-nationals to trade in its shares. The publication should include:
  - a general board of directors’ summary about the company;
  - an auditor’s report; and
  - financial statements including the last 2 financial years plus the interim financial period of the following:
    - balance sheet (comparison);
    - income statement (comparison);
    - statement of cash flows (comparison);
    - statement of changes in shareholders’ equity; and
    - earnings per share, and
- distribute the prospectus or information memorandum among investors and brokers.

5.4 **Continuing obligations/filings**

- The company must abide by all the rules and regulations of SCA.
- The company must abide by all the rules and regulations of DFM. However, the company may notify the DFM if it believes that it may be unable to comply with one or more provisions of the DFM rules and regulations. The DFM has discretion on a case-by-case basis, upon receipt of such notice, to grant exemptions.
- The company must provide DFM, and also publish, its audited annual financial statements within 120 days of the end of the financial year. The company must also provide DFM, with quarterly and half yearly financial statements and make them publicly available within 30 days from the end of the period. Each of the above should be accompanied by a management report on the business activities for the period under review.
- The company must immediately disclose and report to DFM any material information including information submitted with the listing application form that is likely to affect the price of the securities/units and the decision-making of investors.
- The company must satisfy any additional requirements and regulations and furnish any additional documents and/or information that SCA or DFM may require.
- Any company which fails to abide by the SCA and/or DFM rules and regulations may be suspended or de-listed after due process.
Dubai International Financial Centre

1. Introduction

This section contains an overview of the regulatory system of the Dubai International Financial Centre Free Zone (the “DIFC”) with regard to (i) the offering of securities within the DIFC and (ii) continuing obligations of public companies registered therein.

The DIFC is a separate jurisdiction from the UAE and mainland Dubai with its own securities offering rules. Unlike mainland UAE, the DIFC allows for the establishment of 100% foreign-owned companies, whether as a branch of an already existing foreign company or as a new company incorporated within the DIFC.

The DIFC currently operates its own financial market, the Dubai International Financial Exchange (“DIFX”) which market is regulated by the Dubai Financial Services Authority (the “DFSA”), the separate regulatory arm of the DIFC.

The DIFX opened on 26 September 2005, and is therefore a relatively new financial market. However, the laws and regulations governing the listing and offering of securities on the DIFX are based on the regulatory frameworks of some of the world’s leading financial markets (including markets in the US and UK), and aim to provide a secure, liquid and transparent marketplace.

2. Regulatory framework and markets

The DIFC is a Federal Financial Free Zone and was established in accordance with UAE Federal Law and local Dubai Law. The DIFC is made up of three independent bodies:

- the DIFC Authority (responsible for incorporating and registering companies, developing laws and for marketing);
- the Dubai Financial Services Authority (regulatory arm); and
- the DIFC Judicial Authority (responsible for the administration and enforcement of commercial and civil claims in the DIFC).

There are two main types of entities in the DIFC – Regulated and Non-Regulated. Non-Regulated entities are those which have core business activities that are not financial services (broadly defined under DFSA regulations), or ancillary services (essentially, legal and accounting work), as determined by the DFSA. Regulated entities are those that do offer financial services and they are regulated by the DFSA.

2.1 The Dubai Financial Services Authority

The DFSA is the independent regulator of financial and ancillary services conducted in or from the DIFC. Amongst other things, the DFSA is responsible for supervising market activities, and possesses investigative and enforcement powers in order to carry out its intended functions.

2.2 The Dubai International Financial Exchange Limited

The DIFX is a wholly owned subsidiary of the DIFC Authority, and is the only Authorized Market Institution within the DIFC. It is the marketplace for securities being publicly offered and traded in the DIFC. It is an electronic marketplace, capable of trading a wide range of financial instruments including equities, debt instruments, derivatives, and Islamic and index products, and allows companies from outside the region to be dual listed (that is, listed in their home jurisdiction and on the DIFX).

2.3 Legislation/ Regulations

The main legislation applicable to the offering of securities in the DIFC is:

- Markets Law, DIFC Law No. 12/2004 (the “ML”);
- Offered Securities Rules (the “OSR”) issued by the DFSA; and
- the DIFX Listing Rules (detailing the application procedure and continuing obligations of those entities who wish to list and trade on the DIFX).

3. Public offers of securities

3.1 Restrictions on public offers of securities

Any offer of securities in the DIFC is subject to the provisions of the Markets Law and the Offered Securities Rules. In addition, in order to offer securities on the DIFX, such securities must be admitted to its Official List of Securities (art.17 ML).

The ML provides that a person shall not make an offer of securities in the DIFC unless the offer is made by way of an Exempt Offer or Prospectus...
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Offer. Each of these types of offers is discussed in turn in greater detail below. An offer of securities is made in the DIFC if the offer is directed at or received by a person physically in the DIFC at the time of the making and is capable of acceptance by such a person.

3.2 Cross border offers into the DIFC

Cross-border offers of securities (securities issued in a foreign jurisdiction but offered outside the jurisdiction of their issuance) made to persons in the DIFC also fall within the scope of the Markets Law and the Offered Securities Rules. Any person who makes such an offer is required to comply with the relevant DIFC laws and rules regardless of whether he is established in the DIFC or elsewhere. The information below discusses the process for securities offerings in the DIFC and, where applicable, addresses rules that are particular to cross-border transactions.

3.3 Principal exemptions from the Prospectus Requirements

Exempt Offers are defined in the ML as offers of securities:

- by recognised governments or other persons on the list of Exempt Offerors;
- maintained by the DFSA in the OSR;
- made to and directed at Professional Investors (see below);
- made in connection with a takeover offer; or
- as may be prescribed by the OSR.

Professional Investors are those whose normal business activities involve them acquiring, holding, managing or disposing of investments.

The OSR lists the following entities as Exempt Offerors:

- properly constituted governments, government agencies, central banks or other national monetary authorities of the following countries or jurisdictions:
  - Organisation for Economic Co-operation and Development (OECD) member countries;
  - Member countries of the Gulf Co-operation Council (GCC);
  - The Emirate of Dubai.
- the International Monetary Fund and the World Bank; and
- any other country, jurisdiction or supranational organisation that may be approved as an Exempt Offeror by the DFSA for the purpose of that offer.

Alternatively, an offer may be an Exempt Offer under the OSR where it satisfies one of the following conditions:

- the securities are either commercial paper, certificates of deposits or bills of exchange;
- the offer is made to no more than 50 offerees in the DIFC in any 12 month period;
- the total amount paid for the securities does not exceed US$1 million; or
- the securities are debentures and the minimum paid by any person is US$50,000.

The DFSA to date has not addressed questions with respect to the potential for aggregation of related offerings for the purposes of the dollar and offeree threshold. Additionally, the definition of an Exempt Offer also includes offers that are in relation to employee share plans or intra-group capital placements.

A person making an Exempt Offer must ensure that the offeree is provided with an Exempt Offer statement. The minimum information which must be included in the Exempt Offer statement includes:

- the name of the issuer and address of its principal place of business and registered office;
- if different from the issuer, the name and address of the offeror;
- the name and address of any professional advisors in relation to the Exempt Offer; and
- the nature and rights attached to the securities.

If the offer is not an Exempt Offer, it must be made by way of a Prospectus Offer.

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1 The 30 member countries of OECD are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.

2 The 6 members are Saudi Arabia, Bahrain, Kuwait, Qatar, Oman and the United Arab Emirates.
3.4 Documentation for making a Prospectus Offer

A Prospectus Offer may be made to anyone in the DIFC.

The ML requires the prospectus to comply with the OSR, and to contain all information investors would reasonably require for the purpose of making an informed assessment of:

- the assets and liabilities, financial position, profits and losses, and prospects of the offeror or issuer or both; and
- the nature of the securities and the rights attached to those securities.

3.5 Prospectus Requirements

The OSR sets out the general requirements which must be fulfilled prior to a Prospectus Offer, which includes the following:

- the Prospectus must be in English;
- the Prospectus must be filed with the DFSA. Generally, the DFSA will require at least 3 business days to consider the basic content requirements;
- the DFSA must not have notified the issuer that they may not publish the Prospectus;
- the filed Prospectus must be published. The DFSA regards this as being done where the issuer has made the Prospectus available on the issuer’s website;
- there must be a Reporting Entity in respect of the securities to which the Prospectus relates. Generally, any person who files a Prospectus or has/ has had securities admitted to an Official List of Securities becomes a Reporting Entity (subject to the exclusions set out in the Schedule to ML); and
- the securities must be either in existence at the time of filing the Prospectus or are to be issued pursuant to the offer.

The DFSA may require that a Prospectus Offer be underwritten pursuant to OSR art 4.2.5. A sponsor must be appointed for a Prospectus Offer. The sponsor is to ensure that the issuer is aware of and complies with the requirements of the ML and OSR.

The DFSA’s “Policy Statement 1/2006 Sponsors” sets out in more detail the role of the sponsor, and the expected qualifications and expertise of a sponsor. It states that a sponsor should be a specialist corporate financial advisory firm, investment bank or a firm which provides legal, accounting or compliance services in the financial services field. Key employees of the sponsor are expected to have professional training in accounting, finance, economics or law and at least 5 years relevant experience, with specific knowledge and experience of the requirements and workings of the ML and OSR. However, it is important to note that responsibility for the regulatory obligations of the issuer is not transferred to the sponsor but remain with the issuer.

The OSR also sets out the requirements for the content of the Prospectus. The Prospectus must contain a summary at or near the beginning of the document setting out:

- the identity of the issuer;
- the nature of the securities and the rights attached to them;
- the nature of the risks involved in investing in the securities and details of all amounts payable; and
- the information specified in Appendix 1 OSR.

This information required by Appendix 1 of the OSR varies according to the type of securities being offered, and includes the corporate details of the issuer, financial statements and audited accounts, details of persons holding more than 5% of the voting rights of the issuer, and explanations of any significant matters that investors would reasonably require in relation to the issuer and the issuer’s jurisdiction.

If, during the time in which the offer is open for acceptance, there is a significant change affecting any matter disclosed in the Prospectus, or any new significant matters arise, a Supplementary Prospectus must be produced and filed with the DFSA. The Supplementary Prospectus must be made available to each offeree in the same media and through the same channels as the original Prospectus. Those who have already subscribed for or offered to purchase securities are given at least 7 days in which to retract or confirm their subscription.

3.6 Company/Director liabilities on a public offer

The OSR states that the person who filed the Prospectus is responsible for its contents. Where this person is a body corporate, each person who is a director at the time the Prospectus is filed or who has agreed to become a director either immediately or in the future is also responsible. Those persons must include in the Prospectus all information it would be reasonable for such person to have knowledge of, or acquire through reasonable enquiries.
3.7 Outline of the domestic listing process

The ML requires an Authorized Market Institution (which term currently refers solely to the DIFX) to have a set of listing rules, which must include rules for those matters set out in article 18 of the ML. Such rules include (i) applications for admissions to the Authorized Market Institution’s Official List of Securities (defined as a list of securities maintained by an AMI in accordance with the ML and Rules), and (ii) requirements to be met before admission.

The basic requirements a company must meet before applying to have its shares listed are as follows:

- the issuer must have published audited accounts for at least three years, the last not to be more than 6 months old. Start-up companies are not generally eligible for admission of their securities to listing. However, the DIFX will consider waiving this requirement where it is shown that the applicant company has experienced management and a strong business case;
- if there is a majority or controlling shareholder, the DFSA must be convinced that the issuer can operate independently of such controlling person;
- the issuer must have a free float of at least 25% of the listed securities, i.e. at least 25% of the securities must be in public hands and not held by Connected Persons (as defined below);
- the issuer must have an expected market capitalization of at least US$50million; and
- the issuer’s constitution must contain certain mandatory provisions as set out in Appendix D of the DIFX Listing Rules (see below).

The DFSA may object to an admission of securities to the Official List, or impose certain conditions or restrictions on the admission of securities. Where this occurs, the DIFX may not admit those securities to the Official List (or may not admit them without such conditions or restrictions attached).

3.8 DIFX Listing Rules

The procedure and requirements for admitting securities to listing is set out in the DIFX Listing Rules (version 1.0, published 25 September 2005). In this section, it is assumed that the securities are already admitted to listing on an international exchange, and that this is the issuer’s first application to the DIFX. The listing is therefore a secondary listing, and the requirements may differ in some respects from a primary listing (i.e., one where the securities have not yet been listed elsewhere).

An overview of the process and expected timeline is as follows:

Day 0
Meet with DIFX & appoint advisors (e.g. legal advisors, sponsor)
Consult with the DIFX on any issues which need to be resolved

8-10 weeks
Prepare documents (including Prospectus, constitutional documents, shareholders’ and board resolutions as appropriate, and the offer timetable) and submit to DIFX
Submit listing applications and ancillary documents. The DIFX to review and provide comments.

12 Business days
Make the final submission
The 12 business days final review period commences; 7 business days with the Listing Authority and 5 business days with the DFSA.
3.9 Admission to the Official List of Securities

Part 3 of the Listing Rules deals with the application process and documents required for listing on the DIFX. Applicants are encouraged to approach the DIFX at the earliest opportunity to discuss their application and requirements. Listing Rule ("LR") 14 sets out the documents required to be submitted to the DIFX prior to listing as follows:

- application form signed by a duly authorized officer of the issuer (and, where required, the sponsor);
- two copies of a listing document, comprising a Prospectus or exempt offer statement as applicable. The DIFX will accept a document that has been produced under the laws or listing regulations of another jurisdiction if it is satisfied that the document is broadly equivalent to and meets the requirements of the DIFX Listing Rules;
- a copy of the audited annual report and accounts of the issuer or group and all public disclosures made since the date of the latest audited accounts;
- a certified copy of its certificate of incorporation or equivalent document, constitution and any amendments;
- certified copies of the resolution of the issuer in general meeting authorizing the issue of securities and the resolution of the board of directors authorizing the issue and allotment of shares;
- an undertaking signed by each director and the secretary of the issuer in the form set out in Appendix C of the Listing Rules;
- evidence of the issuer’s listing on another exchange; and
- the admission fee. This varies according to the type of securities. For example, initial fees for listing equities range from US$30,000 to US$250,000 as the amount due is based on the issued capital that will be listed and traded on the DIFX.

After listing, the issuer must lodge a letter with the DIFX confirming that the distribution of securities was successful and completed in accordance with the Listing Rules, and stating the number of securities which were in fact issued (LR 15).

4. Continuing obligations/filings

4.1 The Offered Securities Rules

Pursuant to the ML, any person who has had securities admitted to the Official List, or has filed a prospectus with the DFSA, is a Reporting Entity and therefore is obliged to disclose certain information as set out in Appendix 2 of the OSR (see below).

The main obligation on a Reporting Entity is to make timely disclosure of Material Information (art 8.2.1). Material information includes price-sensitive information, such information being that which is liable to lead to a substantial movement in the price of the Reporting Entity’s securities or to affect significantly the ability of the issuer to meet its commitments.

Failure to disclose Material Information can lead to the DFSA requiring the Reporting Entity to disclose the information, or to take such other steps as it considers appropriate (art 8.2.2).

Appendix 2 OSR details the information which must be disclosed by a Reporting Entity, and which is therefore deemed to be Material Information. The list is non-exhaustive, but can be broadly categorized as follows:

- price-sensitive information (see above);
- changes to governing body (e.g. appointment of new director, changes to executive responsibilities of a director);
- changes to business (e.g. making significant investments or incurring significant debts outside the normal course of business);
- Connected Persons transaction (a connected person being defined as a director or person involved in the senior management of the Reporting Entity or an associated company; a person who owns or beneficially owns voting rights carrying more than 5% of the votes; or a director or person involved in the senior management of any person holding more than 5% of the voting rights of the Reporting Entity);
- financial information including annual and interim reports of the Reporting Entity;
- matters relating to changes in capital;
- security holders’ decision; and
- insolvency events.

Appendix 2 OSR also details the time limits for disclosure of such information. The majority of information must be disclosed “without delay”. Disclosures are made by way of an announcement on the website of the Reporting Entity, to the DIFX (which is required by the DFSA to make all announcements publicly available through on-line sources and by dissemination to the media), and to the DFSA (art 8.2 OSR). Appendix 2 may also specify other means of disclosure for certain information.
4.2 The Listing Rules

The Listing Rules also set out continuing obligations and filings required of a company once its securities have been listed on the DIFX. Disclosure of information made by an issuer must be lodged with the DIFX using the Company Announcements Platform (an electronic system), and must otherwise be kept in strict confidence by the issuer until such information is disclosed to the public. The issuer must also ensure that the DIFX is supplied with the information simultaneously with the issuer’s primary exchange.

The LR list the possible sanctions which the DIFX may impose upon an issuer which it considers to have contravened the disclosure obligations. These sanctions include:

- censure of the issuer and publication of that fact;
- cancellation of the right of the issuer to have its securities listed on the DIFX;
- imposition of a fine;
- censure of any director which it considers failed to discharge its responsibilities and publication of that fact; and
- public statement that in its opinion the retention of office by the director is prejudicial to the interests of the investor.

The DIFX may also suspend or delist securities from the Official List. Similar sanctions may be imposed by the DIFC on any person who does anything prohibited by the ML or OSR, or fails to do something which is required by the ML or OSR.

4.3 Financial Statements

The ML provides that a Reporting Entity must file an annual report and annual financial statements, as well as an interim financial statement at 6-month intervals. Each annual financial statement must be accompanied by a report of the auditor.
United States of America

1. Regulatory framework and markets

In the United States, securities transactions are subject to regulation under both federal and state law.

1.1 U.S. Federal Securities Regulation

The unifying fundamental purpose of federal securities regulation is to assure the availability of adequate reliable information about securities which are offered, or have been offered, to the public.

Securities transactions occur in two settings: (1) sales of securities to investors by issuers (for capital raising purposes), known as issuer transactions, and (2) resale transactions among investors of already-issued securities, known as secondary market transactions. In the United States, trading on secondary markets accounts for at least 90% of all securities transactions.

The Securities Act of 1933, as amended (the “Securities Act”), deals principally with setting (1) as its focus is to regulate public offerings of securities. It prohibits offers and sales of securities which are not registered with the Securities and Exchange Commission (the “Commission”), subject to exemptions for certain securities and transactions. It prohibits fraudulent or deceptive practices in any offer or sale of securities.

The Securities Exchange Act of 1934, as amended (the “Exchange Act”), focuses on setting (2) as it regulates the trading of securities which are already issued and outstanding. This act is far more comprehensive than the Securities Act as it applies to a number of distinct groups and concerns, including:

- creation of the Commission;
- regulation of stock exchanges and securities firms;
- prohibitions against manipulative stock market practices;
- requirement of periodic disclosure by public companies;
- regulation of proxy voting by shareholders in public companies; and
- regulation of insider trading in public companies.

A common misconception, both in the United States and abroad, is that the federal system merely regulates the registration of securities. Unlike registration under the Exchange Act, which covers an entire class of securities, registration under the Securities Act covers only the securities actually being offered, and only for the purposes of the offering described in the registration statement. Said in another way, securities which have been registered under the Securities Act may have to be registered again if they are being reoffered in a new transaction subject to the registration statement. In essence, a Securities Act registration covers the specific transactions only, and not the issuer, the securities, or a class of securities.

1.2 State “Blue Sky” Regulation

Every state has securities laws, known as “blue sky” laws, that regulate the offering of securities, require the licensing of certain securities professionals, and impose civil liability for false and misleading information. State securities laws are not uniform; although a majority of states have adopted the Uniform Securities Act, many states have conflicting laws. The National Securities Markets Improvement Act of 1996 ("NSMIA") was passed by Congress to impose restrictions on the ability of states to regulate offerings of certain securities. For these so-called “covered securities” states can only require notice filings, the consent to service of process, and collection of fees. NSMIA preempts state securities regulation of offerings in four categories of “covered securities”, including:

- securities listed on a national stock exchange or quoted on NASDAQ;
- securities issued by “registered investment companies”, or mutual funds;
- securities sold to “qualified persons” in private placements; and
- securities exempt from Securities Act registration under Section 4(2) and Rule 506, as well as certain secondary distributions of public reporting companies.
2. Public offers of securities

2.1 Restrictions on Public Offers of Securities

The heart of the Securities Act is Section 5, which provides that no security may be offered or sold to the public unless the offer and sale is registered (or exempt from registration) with the Commission.

2.2 Commission Documentation for Making a Public Offer

An issuer can register securities by filing with the Commission a “registration statement” containing certain information specified in the Securities Act and rules promulgated thereunder. In a registered offering, the issuer must prepare a prospectus, which forms part of the registration statement, disclosing all material information regarding the issuer’s business and financial condition so that an investor has all information necessary to make an informed investment decision as to whether or not to buy the offered securities. A prospectus must describe the issuer’s business, properties, its competition, the identity of its officers, directors, and their compensation, material transactions between the company and its officers and directors, material legal proceedings involving the company or its officers and directors, risk factors related to the company and its securities, the plan for distributing the securities, and the intended use of the proceeds of the offering. Registration statements must also include financial statements audited by a firm of independent certified public accountants that are registered with the Public Company Accounting Oversight Board. A prospectus is therefore a long, dry, detailed document that describes potential risks to the viability or growth of the issuer’s business.

The basic form for a registration statement is Form S-1, used for all offerings for which no other form is authorized. Other forms, besides the Form S-1, are available to an issuer depending on the issuer’s size, length of time it has been making public reports, and the purpose of the issuance. The time to complete the prospectus may be delayed by a rule that requires an issuer’s financial statements to be no more than 135 days old on the date that the filing becomes effective.

2.3 Blue-Sky Documentation for Making a Public Offer

Regarding the state blue sky filings in connection with a public offering, if the issuer will be listed on a national exchange, the state filings will be ministerial in nature. If the issuer will not be listed on an exchange, the issuer must comply with the requirements of each of the states in which the securities will be offered. This can be a significant burden.

2.4 Initial Public Offering

Federal securities laws classify the registration process for securities offerings, including an initial public offering (“IPO”), into three periods: the pre-filing period, the waiting period and the post-effective period. Each period has its own unique restrictions and rules.

The pre-filing period begins at the point in time a company reaches an understanding with the underwriter that will act as managing underwriter of an IPO and ends when the company makes its initial filing of its registration statement with the Commission. During the pre-filing period it is illegal for a company to make an offer to sell securities (otherwise known as “gun jumping”). The Commission has broadly defined “offer” to include communications that might indirectly arouse public interest in the security.

The “waiting period” is the time between the date of filing of a registration statement with the Commission and the date on which the registration statement becomes effective. The period varies depending on circumstances, but usually lasts at least 35 to 180 days, and can extend for many additional months if the Commission staff has comments that remain unresolved. Offers of securities are permitted during the waiting period, but no sales may be made.

With reference to an underwritten IPO, the “post-effective period” generally lasts for a period of 25 days from the date of the prospectus. This time frame is known as the prospectus delivery period. During this post-effective period, oral and written offers may be made by the issuer, but written offers must be accompanied or preceded by a final prospectus.

The importance of complying with the above rules is critical to an offering’s timing and success. The consequences of engaging in gun jumping can be serious. In particular, gun jumping can result in a mandatory delay or “cooling-off” period for the offering. Any delay in the offering may result in the company pricing its offering during less favorable market conditions.

2.5 Principal Exemptions from Registration Requirements

There are two types of Securities Act registration exemptions: (1) exempt securities and (2) transaction exemptions.

Exempt securities are always exempt from registration under Section 5. Exempt securities include government securities (such as a municipal, state, or federal notes and bonds), commercial paper, and securities of not-for-profit issuers.

Transaction exemptions focus on the nature of the offering. Under this type of exemption, only the transaction is exempt, and not the security
itself. For this reason, each time the owner desires to transact the security, a transaction exemption must be utilized to avoid registration. The party seeking a transaction exemption bears the burden to show it has met the exemption’s conditions.

2.6 Section 4(2) Exemption

The most common private placement transaction exemption is Section 4(2) of the Securities Act, which exempts from registration any offering “by an issuer not involving a public offering”. The Section 4(2) statutory exemption exempts issuers from certain Securities Act disclosure and registration requirements. To qualify for this exemption, the purchasers of the securities must:

- have enough knowledge and experience in finance and business matters to evaluate the risks and merits of the investment (the “sophisticated investor”), or be able to bear the investment’s economic risk;
- have access to the type of information normally provided in a prospectus; and
- agree not to resell or distribute the securities to the public.

In addition, the issuer may not use any form of public solicitation or general advertising in connection with the offering. The precise limits of this private offering exemption are uncertain. As the number of purchasers increases and their relationship to the company and its management becomes more remote, it is more difficult to show that the transaction qualifies for the exemption. If securities are offered to even one person who does not meet the necessary conditions, the entire offering may be in violation of the Securities Act.

2.7 Regulation D Exemptions

A regulatory safe harbor, Rule 506 of Regulation D provides clear guidance for issuers, though it mandates disclosure of particular information to certain investors. Rule 506 is often the most desirable exemption because of its speed and documentation simplicity. Rule 506 places no ceiling on the amount of money that can be raised in the transaction. General solicitations are strictly prohibited in a Rule 506 transaction. The issuer can sell its securities to an unlimited number of accredited investors and up to 35 non-accredited, yet sophisticated purchasers. The term “accredited investor” focuses on financial wherewithal and includes any natural person with a net worth of at least $1 million and any natural person with an income in excess of $200,000 in each of the two most recent years, or joint income with a spouse in excess of $300,000 for those years and a reasonable expectation of the same income level in the current year, as well as certain financial institutions, entities, and individuals.

Rule 506 does not impose specific information that must be furnished to accredited investors. This means that the offering documents may be shorter so long as the antifraud requirements are satisfied. In the case of offerings made to both accredited and non-accredited investors, the disclosure burden is raised to a more significant amount of required disclosure. The securities are also considered “restricted” securities so purchasers may not freely trade the securities in the secondary market after the offering.

Other Regulation D exemptions, as well as other exemptions under the Securities Act, are available to issuers, depending on the size of the offering and the nature of the purchasers.

Issuers that rely on the Rule 506 and Section 4(2) exemptions must file a Form D with the Commission, which is a brief notice that includes the names and addresses of the company’s executive officers and stock promoters, but contains little other information about the company. Offerings made pursuant to Rule 506 are very simple at the state law level and typically require only the filing of a Form D notification and the payment of a fee.

2.8 Rule 144A

This rule permits unlimited resales of securities that have never been registered under the 1933 Act, so long as all such sales are made to a specified class of qualified institutional buyers (“QIBs”). QIBs are defined as institutional investors with more than $100 million of investments. The exemption is available only for securities of a class that is not traded on any US securities exchange or in the NASDAQ system, and therefore is usually limited to debt securities of issuers whose equity securities are traded on the US exchanges.

2.9 Company/Director Liabilities In a Public Offering

Issuers in a public offering must be aware of potential liabilities.

Section 12(a)(1) creates a powerful remedy that permits a purchaser to rescind the transaction and get his money back with interest when securities were offered or sold in violation of Section 5 (by not being registered or exempted). The seller (anyone who solicited sales) is strictly liable to the purchaser – it is irrelevant whether or not the purchaser was aware that a Section 5 violation had occurred.

Section 11 of the Securities acts creates a civil remedy for purchasers in a registered offering if they can point to a material misrepresentation or omission in the registration statement. Potential plaintiffs include investors that purchased the securities in the offering or in post-offering secondary market trading. Joint and several liability falls on the issuer and other specified defendants associated with the distribution, subject
to a “due diligence” defense for non-issuer defendants. Section 11 lists potential defendants, including: anyone who signed the registration statement (the issuer, chief executive and financial officers), all the directors at the time of the filing, the underwriters, and certain experts who issued an opinion certifying information in the offering documents. Section 11 caps recovery at the aggregate offering price.

Section 12(a)(2) offers a similar right of action as Section 11, but its scope is different. Under Section 12(a)(2), purchasers may seek recission from “statutory sellers” if the offering was carried out “by means of a prospectus or oral communication” that is materially false or misleading. Sellers have a “reasonable care” defense if they show they did not know, and reasonably could not have known, of the incorrect information. The right of action is only available to individuals that purchased securities in the offering, and not individuals who purchased securities in secondary market transactions. Unlike Section 11, plaintiffs suing under Section 12(a)(2) must prove that the misstatement caused their loss.

Individuals and business entities that control any person liable under Sections 11 and 12 are jointly and severally liable to the same extent as the controlled person under Section 15. Control persons, such as majority shareholders, directors, and officers, have a limited defense if they did not know and had no reason to know the facts on which liability is based.

3. Continuing obligations/filings

A company can become “public” in one of two ways: (1) by issuing securities in an offering registered under the Securities Act or (2) by registering the company’s outstanding securities under Exchange Act requirements. Both types of registration trigger ongoing reporting obligations, and under the Exchange Act, a company’s officers, directors and significant shareholders also have reporting requirements. Such federal reporting obligations extend to “foreign private issuers”, with some notable differences and exceptions. A “foreign private issuer” is a company that is incorporated outside the United States and in which the following two conditions are met:

- U.S. residents do not hold a majority of the shares; and
- any of the following:
  - a majority of its directors and officers are not U.S. citizens or residents;
  - its business is administered from outside the United States; or
  - a majority of its assets are located outside the United States.

3.1 Reporting Obligations Because of Securities Act Registration

Once the staff declares a registration statement effective, the Exchange Act requires the company to file reports with the Commission. The obligation to file reports continues at least through the end of the fiscal year in which the registration statement becomes effective. The company must continue to do so until: (1) it has less than 300 stockholders of record or (2) it has less than 500 holders of record of each class of its equity securities (if more than one) and total assets of less than $10,000,000 on the last day of the Company’s three most recently completed fiscal years.

3.2 Reporting Obligations Because of Exchange Act Registration

Even if the company has not registered a securities offering, it must file an Exchange Act registration statement if: (1) it has more than $10 million total assets and a class of equity securities, like common stock, with 500 or more shareholders, or (2) it lists its securities on an exchange or on NASDAQ. If a class of the company’s securities is registered under the Exchange Act, the company, as well as its shareholders and management, are subject to the following reporting requirements:

3.2.1 annual report and Form 10-K: The company is required to file an annual report on Form 10-K with the Commission through the EDGAR system within 90 days after the end of each fiscal year, subject to certain accelerated filing deadlines. The general purpose of the Form 10-K is to keep the full range of disclosures required in the registration statement current on an annual basis. Foreign private issuers do not file a Form 10-K. Instead, they are required for file a Form 20-F within six months of the end of the company’s fiscal year. This annual information is substantially the same as that required on Form 10-K.

3.2.2 quarterly reports and Forms 10-Q: The company must also file quarterly reports on Form 10-Q with the Commission through the EDGAR system within 45 days after the end of each of the first three quarters of each fiscal year, subject to certain accelerated filing deadlines. The informational requirements of Form 10-Q are less extensive than those of Form 10-K. Foreign private issuers are not required to file quarterly reports.

3.2.3 Form 8-K: The company must file a current report on Form 8-K through the EDGAR system after the occurrence of twenty-four certain specified events (which include, among others: the entry into a material agreement; the completion of an acquisition; changes in its directors; certain executive officers and outside auditors; as well as unregistered sales of certain securities). Generally the Form 8-K is due within four business days after the occurrence of certain events. Foreign private issuers are not required to file information on Form 8-K, but they are required to submit current reports on Form 6-K.
3.2.4 Proxy Statement: The most significant element of those rules for the company in the ordinary course of business is that proxy solicitations of its shareholders must meet the requirements of Regulation 14A under the Exchange Act (including detailed disclosure about compensation on an individual basis for executive officers and directors; and about shareholder proposals). Proxy rules do not apply to foreign private issuers.

3.2.5 Beneficial Ownership Reporting and Obligations

The company’s shareholders are required to comply with certain reporting and other requirements. Although these are shareholder obligations, the company is required to include a statement in its proxy statement regarding any known non-compliance. The following reporting regulations do not apply to foreign private issuers:

- **Schedule 13D and Schedule 13G Reporting:** Persons who directly or indirectly acquire more than five percent (5%) of the outstanding shares of the issuer are required to file a report on Schedule 13D with the SEC, providing significant disclosure about the investor, the sources of funding for the acquisition and the purpose of the acquisition. Certain holders may report their ownership on Schedule 13G, which has reduced requirements compared to Schedule 13D. Both Schedule 13D and Schedule 13G filers are required to amend their filings whenever there is a material change in their ownership of securities.

- **Statement of Beneficial Ownership – Section 16 and Forms 3, 4, and 5.** Certain insiders, including executive officers, directors and investors owning over 10% of the issuer’s shares are generally required to file a disclosure report under Section 16(a) of the Exchange Act regarding their ownership of the shares. The initial filing is on Form 3 and changes are reported on Form 4 (Form 4 must be filed within two business days of the execution date). The Annual Statement of beneficial ownership of securities is filed on Form 5, although this is rarely required. The forms will contain information on the insider’s relationship to the company and on purchases and sales of such equity securities. Insiders are also subject to “short-swing profit recapture” provisions under 16(b) of the Exchange Act. Section 16(c) of the Exchange Act and the rules thereunder generally prohibit such insiders from effecting short sales and taking short positions in derivative securities with respect to an issuer’s shares.

3.3 Potential Liability For Reporting Violations

The primary two parties that enforce securities law violations are the Commission and investors.

The Commission has broad investigatory and enforcement powers. The Commission may:

- stop deceptive or illegal offerings by refusing to accept a registration statement or issuing a stop order to halt an effective registration statement;
- suspend trading in a publicly traded security;
- issue administrative cease and desist orders against any person who is committing, or who is causing, a violation of the federal securities laws, without judicial enforcement;
- discipline securities professionals; and
- seek temporary and permanent injunctive relief in federal district court for ongoing violations of the securities laws, including disgorgement, civil penalties, and barring particular officials from serving as corporate officers or directors.

The U.S. Department of Justice may also enforce criminal sanctions under the federal securities statutes for any willful violations.

The crux of securities litigation is Rule 10b-5, the securities antifraud rule promulgated under the Exchange Act. This rule may be enforced by the Commission, Department of Justice, and privately by anyone who has bought or sold a security. Rule 10b-5 has been used in the following scenarios:

- a party is induced to make a securities transaction by another party who gives false or misleading information, or does not disclose information when he has a duty to disclose;
- a corporation or a shareholder sues a corporate manager for inducing the corporation to enter into a disadvantageous transaction;
- a corporation issues false or misleading information to the public, or it remains silent when it has a duty to disclose; or
- insiders use material, non-public information to enter into securities transactions, or tip the information to others who use the information to trade on the tip.

Rule 10b-5 plaintiffs have a range of legal remedies, including recission of the transaction, disgorgement, and out-of-pocket damages.
## Regulation of securities offerings: A comparative table

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<thead>
<tr>
<th>Country</th>
<th>Restrictions</th>
<th>Principal Exemptions</th>
<th>Documentation for public offer/listing</th>
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<tr>
<td><strong>US</strong></td>
<td>No securities may be offered or sold to the public unless the offer and sale is registered (or exempt from registration) with the SEC. Rule 144A: This rule permits unlimited resales of securities that have never been registered under the 1993 Act, so long as all such sales are made to a specified class of qualified institutional buyers defined generally as including any institutional with more than $100 million of investments.</td>
<td>Section 4(2) exemption for private placements: the purchasers of the securities must have enough knowledge and experience in finance and business matters to evaluate the risks and merits of the investment (the “sophisticated investor”), or be able to bear the investment’s economic risk; have access to the type of information normally provided in a prospectus; and agree not to resell or distribute the securities to the public.</td>
<td>Registration Statement becomes effective automatically 20 days after its filing (or 20 days after any amendment) unless the SEC determines an earlier effective date. After filing, the SEC has 10 days to review it for incomplete or misleading disclosure. In practice, the registrants agree to a “delaying amendment” to give the SEC time to review it. This process can take 6 months to a year, or longer.</td>
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<td><strong>UK</strong></td>
<td>No “Public Offer” or application of securities to a regulated market without a prospectus unless an exemption applies. No “Financial Promotion” unless made or authorized by an “Authorized Person”.</td>
<td>Public offers to less than 100 persons per EU member state other than “Qualified Investors” Promotions to “Investment Professionals” and certain high net worth entities and certified individuals.</td>
<td>Prospectus or AIM Admission Document for admission to AIM if no prospectus required)</td>
<td>Officially 20 days for IPO and 10 days for other offerings. In practice, UK Listing authority requires 5 days to review 1st draft and then approximately 3 days to review each set of amendments in response to its comments. Therefore the approval process may take 2-3 weeks.</td>
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<td><strong>France</strong></td>
<td>Any financial promotion in relation to a public offer of securities must be communicated to the French Regulator (AMF) and its content is regulated. No public offer of securities, or admission to trading, can be made without a prospectus being filed with and approved by the AMF, unless an exemption applies.</td>
<td>Principal Prospectus Exemptions (public offer of securities)</td>
<td>Prospectus</td>
<td>- Submission to AMF no later than 3/5/10/20 trading days before target approval date, depending on the document filed and the issuer - Anticipate filing so as to avoid the target date having to be postponed - Usually, several rounds of comments from AMF are necessary before a prospectus is approved.</td>
</tr>
<tr>
<td><strong>Germany</strong></td>
<td>In principle, banking and financial services license required for conducting banking business or provision of financial services (e.g. brokering or providing investment advice). No public offer/ marketing of securities without a prospectus, unless an exemption applies.</td>
<td>Request by German residents as well as enterprises domiciled in Germany for services of a foreign entity on their own initiative (“freedom to provide requested services”/ “passive Dienstleistungsfreiheit”). Mere “private placement” (limited number of investors, already existing investment relationship, etc.) in particular offers to institutional investors, e.g. public offers to “Qualified Investors” only, to less than 100 persons per EU member state other than “Qualified Investors” or offers with a minimum investment of 50,000 EUR per investor.</td>
<td>Prospectus</td>
<td>Filing with the BaFin required prior to publication. In principle, the BaFin has to give notice within 10 days (for securities already listed or publicly offered in the EWR) or 20 days (for all other securities) – deadline commences with filing of the prospectus and complete information as requested by the BaFin.</td>
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| Hong Kong                     | No public offer of securities, or invitation to the public for securities, without a prospectus, unless an exception/exemption applies                                                                                                                                                                                                                                         | - Certain documents containing specified types of offers do not fall into the definition of “prospectus” under Companies Ordinance  
- Offers to “Professional Investors” as defined in the Securities and Futures Ordinance                                                                                                                   | Prospectus                                                                            | For IPOs involving a listing on the HK Stock Exchange, an advanced booking form (and related documents) must be submitted to the HK Stock Exchange at least 25 clear business days before the target listing committee hearing date. In practice, the HK Stock Exchange takes about 2 to 3 weeks to review the initial submission documents. Reviews of amended versions of the prospectus and replies to comments of the HK Stock Exchange takes about 1 to 2 weeks, depending on the issues in question. Several rounds of comments should be expected. Final clearance of the prospectus is given one to two weeks after the listing committee hearing and typically just before the bulk printing of the prospectus. |
| United Arab Emirates          | Marketing, sales and advisory activities relating to unlisted foreign securities require Central Bank licence                                                                                                                                                                                                                                                        | Certain low-profile marketing activities tolerated                                                                                                                                                                                                                                                  | Prospectus or information memorandum | 4-6 weeks                                      |
| Dubai International Financial Centre | Offer must be made by way of an Exempt or a Prospectus Offer                                                                                                                                                                                                                                                                                                                                                             | Offers of securities to Professional Investors, less than 50 offerees or below US$1 million in value. Additionally, offers by certain recognised governments, member countries of the Gulf Co-operation Council and the International Monetary Fund and the World Bank. | Prospectus                                                                            | 12 weeks                                      |