



#### Dewey & LeBoeuf London

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## Latest Issue of LIST! Published by the UK Listing Authority

19 June 2009

*The UK Listing Authority ("UKLA") has published the latest edition of its newsletter, LIST! As is always the case, this edition indicates the UKLA's position on a very wide range of detailed issues relating to listings, prospectuses, disclosure and transparency. The key issues discussed in this edition are summarised below.*

### Disclosure of Risk Factors in Prospectuses

The UKLA notes that risk factors in prospectuses are coming under increasing scrutiny due to the challenging financial environment issuers are currently facing. The UKLA urges issuers to avoid generic, boilerplate and irrelevant risk factors. It also:

- reminds issuers of the provisions of the Prospectus Directive<sup>1</sup> which require equity and debt issuers to explain risk factors that are "specific to the issuer or its industry" and that are "material to the securities being offered and/or admitted to trading in order to assess the market risk associated with those securities". Risk factors in relation to debt issues must also explain factors that "may affect the issuer's ability to fulfil its obligations under the securities to investors";
- notes that there has been an increasing tendency for "generic, standardised risk factors, which do not appear to be directly relevant for the company or the issue that is the subject of the document" to be included in prospectuses;
- reminds issuers that Section 87A(3) of the Financial Services and Markets Act 2000 requires information "to be presented in a form that is comprehensible and easy to analyse";
- requests that risk factors are grouped together in a coherent manner, with the most immediate and significant factors being given "due prominence at the beginning of each section or group within the risk factors section"; and
- notes that it does not routinely request risk factors to be substantially redrafted or removed from a prospectus, on the

<sup>1</sup> Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC. References herein to the Prospectus Directive also include Commission Regulation (EC) No. 809/2004 implementing Directive 2003/71/EC.

basis that issuers are best placed to assess the relevant material risks, but it will challenge risk factors in certain situations as part of its vetting procedure.

When drafting risk factors, care should be taken to ensure that:

- disclosures in risk factors do not conflict with or undermine other rule requirements (e.g. by qualifying the working capital statement with references to requirements for further additional funding in the near future);
- disclosures do not conflict with an issuer's eligibility or continuing obligations (e.g. detriment to investors, free float requirement);
- disclosure is not contradictory to the Listing Principles (e.g. Listing Principle 2 which requires issuers to maintain adequate systems, procedures and controls);
- sufficient prominence is given to material risks;
- where there is disclosure elsewhere in the prospectus that seems to clearly present a risk to the issuer, that risk is included in the risk factors section; and
- the risk factors are not simply statements of fact but include an explanation of the risk in the context of the issuer's business or the issue of the securities in question.

### **Property Valuation Reports in Prospectuses**

The UKLA addresses preparation of property valuation reports against the background of falling property values. Guidance issued by The Committee of European Securities Regulators ("**CESR**")<sup>2</sup> provides that a property valuation report, prepared by an independent expert, can be up to one year old, provided the issuer can confirm that there has been no material change since the report. If there has been a material change, a new report must be prepared. The UKLA notes current concern that, with property values falling, an issuer cannot confirm that there has been no material change even where the valuation report is relatively recent. It has therefore adopted the view that, while property prices remain highly volatile, issuers who cannot declare there has been no material change since the property valuation report may, instead, confirm in the prospectus that the effective date of the valuation is "the latest date it can practicably be ahead of the publication". The UKLA expects:

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<sup>2</sup> *CESR's recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses No. 809/2004.*

- the prospectus to make clear the market conditions the issuer is experiencing;
- the issuer to consider carefully its disclosure obligations; and
- the valuation to be no more than six weeks prior to the document (its experience suggesting that it should not take longer than this to revalue a portfolio).

### **Segmentation and Labelling of Securities on the Official List: Impact of the Listing Regime Review**

In the context of its review of the listing regime, the UKLA has proposed changes to the labelling of securities admitted to trading on the Official List in order to improve clarity and transparency. The UKLA notes that, if the categorisation of listed securities is revised, it is likely that it will need to contact all listed issuers later this year to validate the proper categorisation of their listed securities. It encourages issuers to contact the UKLA now to verify that it holds the most appropriate and recent contact information and to discuss whether the Official List gives an accurate record of the securities which the issuer believes to be officially listed.

### **LR 6.1.19(4)(e) (Shares in Public Hands) in Light of the Extended DTR 5 Disclosure Regime**

The UKLA clarifies the scope of LR 6.1.19(4)(e) in light of the changes to Chapter 5 of the Disclosure and Transparency Rules requiring disclosure of contracts for difference ("CFDs") and other similar instruments effective since 1 June 2009. It notes that:

- LR 6.1.19(4)(e) states that shares are not held in public hands if they are held, directly or indirectly, by any person or persons in the same group, or persons acting in concert, who have an interest in 5 per cent or more of the shares of the relevant class. LR 9.2.15 requires issuers to comply with LR 6.1.19 at all times. The UKLA has previously stated that the regulatory purpose of LR 6.1.19(4)(e) is to ensure sufficient liquidity within the secondary market in the shares rather than to encourage wide public participation in an initial public offer. The rule is intended to ensure that persons or concert parties "do not control significant holdings of shares that are not available for trading on the secondary market" and "is less interested in who may be the ultimate beneficiary of the shares, but rather who controls the investment decision in relation to those shares";
- the extended DTR 5 disclosure regime now includes any financial instrument giving a long economic interest in the shares

of an issuer (such as CFDs). Financial instruments giving a long economic exposure to shares, but not control of the buy/sell decision in respect of the shares, "should not count as an interest for the purpose of the public hands threshold"; and

- where a CFD writer has chosen to hedge its position by acquiring a long position in shares underlying the CFD, they would count against the shares in public hands threshold if in their own right, or when aggregated with other shares held, they exceeded 5 per cent of the relevant class of shares.

### **Interim Management Statements**

The UKLA has recently reviewed issuers' compliance with the requirements under the Transparency Directive<sup>3</sup> to produce interim management statements (implemented in the UK by DTR 4.3 with effect from 20 January 2007). The review concluded that a significant number of issuers are failing to meet the basic requirements to produce interim management statements, either at all, or within the prescribed timeframe, or in accordance with the relevant contents requirements. The UKLA remains of the view that individual issuers are best placed to consider the approach that they should take to meeting their interim management statement obligations and does not propose to take a more prescriptive approach. Issuers that fail to comply with the requirements should be aware that they risk possible enforcement action.

### **Rights Issues**

The UKLA reports that it is proposing to publish a consultation paper later this year to progress the remaining issues coming out of the Report by the Rights Issue Review Group published in November 2008. This consultation is expected to cover:

- technical issues relating to compensatory open offers providing compensation for non-accepting shareholders;
- accelerated rights issues, possibly modelled on the Australian RAPIDS model;
- conditional rights issues; and
- changes to the UKLA's vetting fee tariffs in respect of shelf registration for equity issuers.

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<sup>3</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of the transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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## Sponsors: Identifying and Managing Conflicts

The UKLA summarises key points which have arisen in its recent discussions with sponsors regarding the requirements in Chapter 8 of the Listing Rules regarding identification and management of conflicts of interest. The types of transaction which have generated the most discussion with the sponsor community are those where the sponsor or its group has an interest in the issuer (e.g. through an existing loan facility or other interest in the issuer) and the issuer is:

- in financial distress and the transaction has a rescue element; or
- taking pre-emptive action with regards to its current financing structure (perhaps seeking to increase headroom or restructuring to meet banking covenants).

The UKLA sets out factors which a sponsor should take into account when assessing application of the LR 8 conflicts provisions in such contexts and encourages consultation with the UKLA at an early stage in relation to any concerns, particularly, e.g., where the issuer is in severe financial distress and the transaction will provide the sponsor group with an exit.

Issue No.21 of *LIST!* is available at:

[http://www.fsa.gov.uk/pubs/ukla/list\\_may09.pdf](http://www.fsa.gov.uk/pubs/ukla/list_may09.pdf)

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