Initial Public Offerings 2022

Contributing editors
Joshua Ford Bonnie and Kevin P Kennedy
Simpson Thacher & Bartlett LLP

LEXOLOGY
Getting The Deal Through

Simpson Thacher

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

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

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Initial Public Offerings*, which is available in print and online at www.lexology.com/gtdt.

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

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

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

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Joshua Ford Bonnie and Kevin P Kennedy of Simpson Thacher & Bartlett LLP, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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United Kingdom

Clare Gaskell, Deborah Harris and Lucy Gillett

Simpson Thacher & Bartlett LLP

MARKET OVERVIEW

Size of market

1 What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

During 2020, there were 30 IPOs on the London Stock Exchange (LSE), raising a total of approximately £6 billion, with volumes increasing by 11 per cent on 2019 volumes, according to information released by PricewaterhouseCoopers. The LSE retained its position as Europe's most active market in 2020 (by value) and contributed approximately one-third of total European IPO proceeds. The largest IPO on the LSE during 2020 was by The Hut Group, with a total raise of £1.9 billion and a total market capitalisation of £5.4 billion on admission.

The London IPO market experienced a significant rise in IPO activity during the first quarter of 2021, with 21 IPOs on the LSE during this time, according to information released by the LSE, compared to nine during the first quarter of 2020. The largest IPO in terms of market capitalisation during the first quarter of 2021 was by Dr. Martens, with a total market capitalisation of £3.7 billion on admission and the largest IPO in terms of offer size during that period was by Deliveroo, with a raise of £1.5 billion.

Issuers

2 Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

The UK IPO market attracts issuers from a wide variety of sectors. As of 30 April 2021, there were 1,121 issuers on the LSE's Main Market, of which 908 were UK issuers and 213 were international issuers. A UK issuer may choose to list overseas where it has a closer connection with a particular jurisdiction or where it is seeking to attract a specific category of investors.

Primary exchanges

3 What are the primary exchanges for IPOs? How do they differ?

The primary exchange for IPOs in the UK is the LSE. The LSE is the principal London exchange for equity trading and is a recognised investment exchange for the purposes of the Financial Services and Markets Act 2000, as amended (FSMA). It has a number of markets, including the Main Market and AIM.

The Main Market is the LSE's flagship market and its principal market for UK and overseas listed companies. It is a regulated market for the purposes of the UK Markets in Financial Instruments Regulation. Admission to the Main Market requires an issuer's securities to be admitted to listing on the Official List maintained by the Financial Conduct Authority (FCA). As a result, an issuer is required to submit two separate applications: to the FCA for admission to listing on the Official List; and to the LSE for admission to trading on the Main Market. A commercial company may choose to apply for a premium listing or a standard listing of its shares on the Official List. A standard listing requires compliance with minimum standards that were originally imposed under EU law, whereas a premium listing requires compliance with more onerous or super-equivalent listing requirements imposed by the FCA. A premium listing is a prerequisite for inclusion in the FTSE UK Index Series. Of the total shares listed on the Main Market as at 30 April 2021, approximately two-thirds were listed on the premium listing segment in the commercial companies category. In July 2018, the FCA introduced a new category of premium listing for sovereign controlled commercial companies.

AIM is the LSE's junior market for smaller and growing companies and is not a regulated market under the UK Markets in Financial Instruments Regulation. Securities admitted to AIM are admitted to trading on an exchange regulated market and are subject to a lower level of regulation, both at the time of admission and, in certain areas, on an ongoing basis.

In March 2013, the LSE launched a further Main Market segment: the high growth segment (HGS). The HGS is a regulated market under the UK Markets in Financial Instruments Regulation but sits outside the FCA's listing regime. It is aimed principally at high growth, trading businesses that intend, in due course, to seek admission to the Official List but may not yet meet the eligibility criteria for a premium or standard listing. However, to date, issuers have largely ignored this option.

Unless indicated otherwise, this chapter focuses solely on IPOs on the Main Market and principally an application for a premium listing (commercial company).

REGULATION

Regulators

4 Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The principal statute governing securities offerings in the UK is the Financial Services and Markets Act 2000 (FSMA), pursuant to which power is given to the Financial Conduct Authority (FCA), in its capacity as competent authority, to make rules relating to the admission of securities to the Official List, certain continuing obligations for listed issuers, the enforcement of such obligations and the suspension and cancellation of listing. The principal regulation governing the document to be published in connection with an offer of securities to the public or an application for admission of securities to trading on a regulated market is Regulation (EU) 2017/1129, which was onshored to become part of UK domestic law on 31 December 2020 (the UK Prospectus Regulation). Where relevant, the FSMA cross-refers to provisions of the UK Prospectus Regulation.

When exercising its functions in relation to the admission of securities to the Official List, the FCA has historically used the name the UK Listing Authority (UKLA). However, the FCA has confirmed that it is in the process of phasing out the UKLA name and instead refers to the FCA's 'primary market' functions.

The principal rules for an IPO applicant are found in the Listing Rules and the Prospectus Regulation Rules (which form part of the FCA Handbook); the Prospectus Regulation Rules contain relevant extracts from the UK Prospectus Regulation. Parts of the FCA's Supervision manual, the Decision Procedure and Penalties manual, and the Enforcement Guide cover the FCA's related supervision and enforcement policies and procedures. In addition, the FCA's Fees Manual contains details of fees charged by the FCA in relation to an application for listing, annual fees for listed issuers and fees for certain transactions by listed issuers. Following an IPO, a premium-listed issuer will be required to comply with articles 17, 18 and 19 (the Disclosure Requirements) of the EU Market Abuse Regulation (Regulation (EU) No. 596/2014), which was onshored to become part of UK domestic law on 31 December 2020 (UK MAR), and will be subject to the continuing obligations regime set out in the Listing Rules and the Transparency Rules (which form part of the FCA Handbook). The Disclosure Guidance, which also forms part of the FCA Handbook, provides guidance on certain aspects of the Disclosure Requirements and related issues. The FCA Knowledge Base, which can be found on the FCA's website, contains certain technical and procedural notes designed to provide guidance on the application of the Listing Rules, the Prospectus Regulation Rules, the Transparency Rules and the Disclosure Requirements.

The London Stock Exchange (LSE) regulates admission of securities to trading on the Main Market and has its own set of rules, which include the Admission and Disclosure Standards and the Rules of the London Stock Exchange.

In addition, there are several institutional shareholder bodies that publish guidelines on good practice for UK-listed companies. Although the guidelines are generally not legally binding, the shareholder bodies may exert significant influence on institutional shareholder voting and, as a result, on the actions of UK-listed issuers.

Authorisation for listing

5 | Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

Issuers apply to the FCA for admission to the Official List and to the LSE for admission to trading on the Main Market.

The Listing Rules provide details of the eligibility requirements and the documents to be provided by issuers in connection with an application for listing. Certain eligibility requirements apply to applications for a premium or standard listing of shares, and a further set of more stringent requirements apply solely to applications for a premium listing of shares. The key eligibility requirements for an application for a premium or standard listing of shares of a commercial company are as follows:

- an issuer must be duly incorporated or otherwise validly established according to the relevant laws of its place of incorporation or establishment, and operating in conformity with its constitution;
- the shares must conform with the law of the issuer's place of incorporation, be duly authorised according to the requirements of the issuer's constitution and have any necessary statutory or other consents;
- the shares must be freely transferable, fully paid and free from all liens, and an application for listing must relate to all the shares of the class to be listed;
- the shares must be admitted to trading on a UK regulated market for listed securities that is a recognised investment exchange;
- the shares must have an expected aggregate market value of at least £700,000; and
- at least 25 per cent of the issuer's shares of the class to be listed must be held in public hands on admission. Shares considered not to be 'held in public hands' include, among others, the interests of directors of the issuer or any of its subsidiary undertakings and interests of 5 per cent or more held by persons in the same group or persons acting in concert. The FCA also has the discretion to accept a percentage lower than 25 per cent if it considers that the market will operate properly with a lower percentage in view of the large number of shares of the same class and the extent of their distribution to the public.

The key additional eligibility requirements for an application for a premium listing of shares of a commercial company are as follows:

- the issuer must appoint a sponsor in relation to its application for admission. This will typically be an investment bank or a corporate broker approved for such purposes by the FCA;
- the issuer must have published or filed audited, consolidated historical financial information that covers at least three financial years and includes a balance sheet date that is no more than six months before the date of publication of the prospectus and no more than nine months before the date of admission to the Official List. The historical financial information must represent at least 75 per cent of the issuer's business for the full three-year period and must demonstrate that the issuer has a revenue-earning track record and put prospective investors in a position to make an informed assessment of the business for which admission is sought;
- the issuer must satisfy the FCA that it and its subsidiaries have sufficient working capital available for the group's requirements for at least the next 12 months from the date of publication of the prospectus;
- the issuer must be carrying on an independent business as its main activity;
- the issuer must exercise operational control over the business it carries on as its main activity; and
- where an issuer will have a controlling shareholder on admission it must demonstrate that, despite having a controlling shareholder, it is able to carry on an independent business as its main activity. The issuer and its controlling shareholder must enter into a written and legally binding 'relationship' agreement that complies with certain independence provisions set out in the Listing Rules. The issuer's constitution must also allow for a dual voting structure in relation to the election and re-election of independent directors. A controlling shareholder for these purposes is a person who exercises or controls on their own, or together with any person with whom they are acting in concert, 30 per cent or more of the voting rights in the issuer, subject to certain exceptions.

An issuer will need to submit an eligibility letter and checklist to the FCA, demonstrating how the relevant requirements have been met. Further correspondence with the FCA may be required before the FCA is satisfied that the eligibility criteria have been met. The eligibility review is typically undertaken in parallel with the FCA's review of the draft prospectus. In addition, the relevant prospectus checklists, other supporting documents and FCA fees must be submitted at the same time as the draft registration document or prospectus. During the course of the listing application process, an issuer is required to submit further documents including a completed Application for Admission of Securities to the Official List. The Admission and Disclosure Standards set out the documents to be provided to the LSE, which include a completed Form 1, an electronic copy of the final prospectus and the announcement relating to admission. A provisional application is required to be submitted to the LSE no later than 10 business days before the application is to be considered.

Prospectus

6 What information must be made available to prospective investors and how must it be presented?

An issuer is required to publish a prospectus in connection with an IPO. The prospectus requirement is triggered where an issuer either makes an offer of securities to the public or seeks admission of securities to trading on a UK regulated market, subject to certain exceptions. The prospectus must be approved by the FCA and may be in the form of a single document or a tripartite form comprising a summary, a registration document and a securities note. The Prospectus Regulation Rules set out detailed content requirements for a prospectus, which are divided into separate requirements for each of the summary, the registration document and the securities note. A prospectus drawn up as a single document must include a table of contents, a summary that must satisfy specific content and formatting requirements, the risk factors specific to the issuer and/or to the securities and that are material for taking an informed investment decision, and further information items. The further information items are set out in a combination of schedules to the Prospectus Regulation Rules, containing minimum disclosure requirements for shares and building blocks covering additional requirements such as the presentation of pro forma financial information. Together with each draft of the document to be vetted, issuers will need to submit checklists to the FCA, cross-referring each minimum disclosure requirement to the relevant page in the document.

The overriding principle under the UK Prospectus Regulation is that the prospectus must contain the necessary information that is material to an investor for making an informed assessment of the assets and liabilities, profits and losses, financial position and prospects of the issuer, the rights attaching to the securities, and the reasons for the issuance and its impact on the issuer.

Publicity and marketing

7 What restrictions on publicity and marketing apply during the IPO process?

Throughout the IPO process, all information disseminated internally and externally by an issuer and other parties to the IPO must be strictly controlled to comply with UK and other legal and regulatory requirements. It is customary for publicity guidelines to be put in place at an early stage to ensure adherence to the relevant restrictions on pre-prospectus publicity and marketing. All IPO-related materials must be vetted to ensure consistency with the prospectus, and information should be limited to factual matters and should not include any projections, estimates or forecasts about the issuer's performance. Information contained on the issuer's website and any information released to the press must also be carefully controlled. Non-IPO-related communications, such as typical product advertising and ordinary course communications with customers and employees, are permitted, provided that they contain no references to the IPO or the issuer's prospects and are consistent with past practice.

All information disclosed in an oral or written form must be consistent with the information contained in the prospectus. Specifically, no information may be disclosed that contradicts anything in the prospectus, refers to information that contradicts the information in the prospectus, presents the information in the prospectus in a materially unbalanced way or contains alternative performance measures unless they are contained in the prospectus. A communication relating to a specific offer of securities to the public or to an admission to trading on a regulated market that aims to specifically promote the potential subscription for or acquisition of securities will also be caught by the advertisement regime under the Prospectus Regulation Rules. Certain offering and marketing materials, including press announcements, are likely to constitute advertisements and will be required to contain specific rubrics.

The financial promotion regime will apply to the communication of an invitation or inducement to engage in investment activity that is made in the course of business and capable of having an effect in the UK. These rules seek to limit the promotion of investments by persons who are not authorised by the FCA, unless the promotion is made within specified parameters and in accordance with specified procedures to clearly defined categories of investors. If an IPO-related communication constitutes a financial promotion, either it must be made by an FCA-authorised person or its content must be approved by an FCA-authorised person, or the communication must be covered by an exemption.

Enforcement

8 What sanctions can public enforcers impose for breach of IPO rules? On whom?

Under the Listing Rules, the FCA may not grant admission unless it is satisfied that the requirements of the Listing Rules are complied with (including any special requirements it deems appropriate to protect investors) or if it considers that it would be detrimental to investors' interests. It may also refuse to grant admission for securities already listed in another country, if it considers that the issuer has failed to comply with any obligations in respect of that listing, and it will not admit shares of a non-UK company that are not listed in either its country of incorporation or the country in which the majority of its shares are held, unless satisfied that the absence of the listing is not due to the need to protect investors. The LSE has similar powers to refuse an application for admission to trading in specified circumstances.

The FCA has information-gathering powers to verify compliance with the Listing Rules or to enable it to decide whether to grant an application for admission. It has a number of enforcement powers available to it where an issuer has made an offer of transferable securities to the public in the UK or an application for the admission of transferable securities to trading on the LSE. These powers include requiring the withdrawal or temporary suspension of the offer, requiring the temporary suspension of the application for admission or the prohibition of trading in the securities, and private or public censure of the issuer. The FCA may also impose unlimited financial penalties on an applicant for breaches of the Listing Rules or if any applicant has contravened a provision of, or made in accordance with, the UK Prospectus Regulation under section 91 of the FSMA or on a director of the applicant who was knowingly involved in such a breach.

The FCA has power to bring charges under the offences of making a false or misleading statement or creating a false or misleading impression pursuant to sections 89 and 90 of the Financial Services Act 2012 (as amended by the Financial Services Act 2021). Penalties may include a fine or imprisonment (or both). The FCA also has disciplinary powers in relation to the market abuse civil regime, and sanctions include financial penalties and public censure. Criminal liability may arise pursuant to section 19 of the Theft Act 1968 for directors who make false or misleading statements with intent to deceive shareholders or creditors, or the Fraud Act 2006 for dishonestly making a false representation with the intent to make a gain or cause a loss, resulting in fines or imprisonment (or both) for those found guilty of such an offence.

TIMETABLE AND COSTS

Timetable

9 Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

The timing of an IPO will depend on a number of factors, including the complexity of the transaction, the issuer's financial reporting timetable and current market conditions. An issuer is likely to require at least four to six months for the process, particularly where a premium listing is sought. A typical IPO timetable may be split into the below key stages (assuming a bookbuilding process).

Preparatory

An issuer will need to select a number of advisers, including the lead bank or banks and the other banks in the syndicate, a sponsor (in the case of a premium listing), legal advisers, reporting accountants, registrars and financial printers. An engagement letter may be entered into between the lead bank or banks (typically referred to as the global coordinator or joint global coordinators) and the issuer, particularly in the context of a dual-track process, where IPO and sale processes run concurrently at the outset. The initial stages of the IPO will include a due diligence exercise, preparing a draft disclosure document (as discussed in more detail below) and drafts of the key transaction documentation, and highlighting any issues that may affect the eligibility and disclosure processes. At this stage, the lead banks may recommend limited 'early look' marketing to provide management with an opportunity to warm up, and seek initial feedback from, key potential investors, subject to relevant legal and regulatory constraints. Once the draft disclosure document is in a fairly advanced form, the sponsor will clear any eligibility issues with the Financial Conduct Authority (FCA) and initiate the disclosure document review exercise.

Where independent pre-deal research reports will be produced by connected research analysts (ie, analysts in the research divisions of the underwriting syndicate banks), there is a requirement for the issuer to publish an FCA-approved disclosure document prior to the publication of the pre-deal research reports. This is to ensure that there is a minimum level of issuer-approved information available in the market prior to the publication of the connected analyst research reports. The FCA-approved disclosure document may be either a prospectus or, more likely given the stage in the IPO process, a registration document. A registration document is one element of a tripartite prospectus and comprises those parts of the prospectus containing information about the issuer, its prospects, risk factors and financial information, but without the summary or the securities note, which contains the details about the offering. In addition to the required press release confirming the publication of the registration document, the issuer is likely to publish at this stage a press release confirming its expected intention to proceed with an IPO.

Management will be involved in briefing the connected research analysts with key facts about the issuer in connection with the preparation of pre-deal research reports. An issuer has the option of a combined presentation to connected and unconnected research analysts (ie, research analysts from banks not part of the underwriting syndicate) or the more usual route of split presentations to connected and unconnected research analysts.

In the case of split research analyst presentations, the unconnected research analysts will either be briefed by management following the publication of the registration document or will be provided with access to the same materials already shared with the connected analysts. In that case, the connected research analysts are required to wait seven days following the publication of the registration document before publishing pre-deal research reports. At the same time, the issuer is likely to publish an 'intention to float' (ITF) press announcement to signal to the market its intention to proceed with an IPO. The seven-day delay is designed to create a level playing field for connected and unconnected research analysts. In the case of a combined research analyst presentation, the publication of an FCA-approved registration document may be followed 24 hours later by the publication by the connected research analysts of their pre-deal research reports. The issuer would typically publish the ITF at the same time.

Prior to the publication of the registration document, management may participate in more detailed discussions with key potential investors in the form of 'pilot fishing' meetings and possibly a 'deep dive' investor day. The investor education process commences once the preparatory work has been completed and the ITF has been published.

Marketing

For a book-built offering, the formal marketing stage is likely to take the form of a one- to two-week management roadshow comprising a series of management presentations and one-to-one meetings with key potential investors. This is typically done on the basis of an FCA-approved price-range prospectus or an unapproved draft 'pathfinder' prospectus. The choice of document will depend on a number of factors, including the type of offering and the target investors, and this will have certain legal and timing implications for the process. In each case, where an issuer has already published a registration document, it has the option of publishing a composite prospectus or the remaining parts of the tripartite prospectus; namely, the summary and the securities note. However, for the purposes of the marketing process, issuers tend to elect to publish a composite prospectus incorporating the previously published registration document with any amendments or updates, together with the summary and the securities note. Where the price-range route is followed, the price-range prospectus will require FCA approval and certain transaction documentation will be signed at the time of publication of the price-range prospectus.

Pricing and closing

At the end of the book-building process, the price of the shares and size of the offering will be determined and the transaction documentation will be signed. Where a price-range prospectus was used, this will comprise the outstanding transaction documentation not previously executed. The price will be announced and the FCA-approved composite prospectus published or, where a price-range prospectus was previously published, a pricing statement will be published containing all outstanding price-related information. Conditional dealings in the shares may commence at this stage.

Closing is typically on a T+3 basis, that is on the third business day following the announcement of the price. On closing, admission to the Official List of the FCA and to trading on the Main Market will occur, unconditional dealings in the shares will commence, the shares will be issued to investors and the issuer and, where relevant, the selling shareholders will receive their respective net IPO proceeds.

Costs

10 What are the usual costs and fees for conducting an IPO?

The transaction fee payable to the FCA is currently £15,000 for both a standard and a premium listing, and covers the review by the FCA of the issuer's eligibility. In addition, a new issuer with a market capitalisation that is equal to or more than £500 million and less than £5 billion must pay a fee of £20,000 for the FCA to review its prospectus or, for a new issuer applying for a premium listing with a market capitalisation equal to or in excess of £1.5 billion, this fee is increased to £50,000. Where an issuer submits a registration document and a prospectus for approval, an additional fee will be payable in respect of the filing of the second document.

The admission fee payable to the London Stock Exchange (LSE) is calculated on a sliding scale depending on the market capitalisation on admission up to a maximum fee of £656,000.

Where applicable, the issuer must also pay value-added tax (VAT) on both the FCA and LSE fees. As at 30 April 2021, the standard rate of VAT was 20 per cent. The amounts included in this section are the fees payable as at 30 April 2021.

The underwriters typically receive an amount equal to a percentage of the proceeds of the underwritten portion of the offering. This may comprise a fixed and a discretionary or success element and occasionally there may also be a transaction fee payable to the lead banks. In addition to underwriting fees, the issuer will be responsible for the fees and expenses of its legal counsel and typically the banks' legal counsel, and other advisers such as the reporting accountants and the registrars. There will also be costs associated with the marketing of the offering, including the roadshow, and printing costs, which will typically be borne by the issuer.

CORPORATE GOVERNANCE

Typical requirements

11 | What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

The key guidelines relating to corporate governance standards for premium-listed companies are set out in the UK Corporate Governance Code (UKCGC). A premium-listed issuer is required under the Listing Rules to state in its annual financial report how it has applied the principles and whether it has complied with the provisions set out in the UKCGC and, if not, it must explain the provisions it has not complied with, the period during which it has not complied and its reasons for non-compliance (known as the 'comply or explain' requirement). An applicant for a premium listing is required to include a similar statement in the prospectus.

In terms of board composition, the UKCGC stipulates that at least half the board, excluding the chair, should comprise independent non-executive directors. The roles of chair and chief executive should be exercised by different individuals, and all directors should be subject to annual re-election by shareholders.

The board should establish a nomination committee for the purposes of recommending board candidates, an audit committee for the purposes of monitoring financial reporting, risk management and internal financial controls, and a remuneration committee for the purposes of determining executive directors' remuneration. The UKCGC contains requirements relating to the composition of each of these committees. In particular, in relation to the audit committee, at least one member should have recent and relevant financial experience and the committee as a whole should have competence relevant to the sector in which the issuer operates. In relation to the remuneration committee, the chair should have served on a remuneration committee for at least 12 months prior to his or her appointment. Each committee should have formal terms of reference, which should be published on the issuer's website.

As well as the board composition requirements described above, the UKCGC also sets out various standards of good practice in relation to financial reporting and general board practices and emphasises the importance of aligning the issuer's culture with its purpose, values and strategy. To this end, effective engagement with stakeholders is encouraged and workforce policies and practices should be consistent with the issuer's values. In order to effectively engage with the workforce, issuers should use one or a combination of the following methods: appoint a director from the workforce, establish a formal workforce advisory panel or designate a non-executive director for this purpose.

A standard-listed issuer is required to include a corporate governance statement in the directors' report in its annual financial report. This will include details of any corporate governance code to which it is subject or that it has voluntarily decided to apply and a 'comply or explain' statement in relation to such code. An applicant for a standard listing will be required to include a similar statement in the prospectus.

New issuers

12 | Are there special allowances for certain types of new issuers?

Given the 'comply or explain' nature of the UKCGC, there is no hard requirement for issuers to comply fully with all of its standards. If a new issuer is initially non-compliant in certain areas of corporate governance, for example, board composition, it would need to disclose this in the prospectus (as well as annually as part of its ongoing reporting requirements).

Separately, many smaller or growth companies may choose to be quoted on AIM, where there is no express requirement for the issuer to comply specifically with the UKCGC. However, an issuer quoted on AIM is required to publish details on its website of the recognised corporate governance code that it has decided to apply and how it complies with that code and, if the issuer is incorporated in England and Wales and meets certain thresholds, it will be required to include a similar corporate governance statement in its annual report. Many issuers quoted on AIM choose to adopt the Quoted Companies Alliance Corporate Governance Code, which sets lower corporate governance standards than the UKCGC.

Anti-takeover devices

13 | What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?

Anti-takeover devices are much less common in the UK than in the United States, for example, for a number of reasons.

The City Code on Takeovers and Mergers (the Takeover Code) provides that during the course of a takeover offer, or beforehand if the board of the target company has reason to believe that a bona fide offer may be imminent, the board must not, without shareholder approval, take any action that may result in any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits. In particular, the target company cannot, without specific shareholder approval and subject to limited exceptions:

- issue shares, options or securities convertible into shares;
- dispose of, or acquire, assets of a material amount (generally where the value of the consideration represents 10 per cent or more of the target company's market capitalisation or the assets or operating profits represent 10 per cent or more of the target company's assets or operating profits, as applicable); or
- enter into contracts other than in the ordinary course of business.

The Takeover Code restrictions do not apply before a target board is aware of a potential offer, but the director of a listed company incorporated in England and Wales will at all times need to take into account his or her duties under the Companies Act 2006. These include a duty to act in a way the director considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. Directors are also required to consider a range of other interests, including those of employees and other stakeholders. Devices with the primary purpose of deterring or frustrating any offer for the company might not, depending on the circumstances, be consistent with the target directors' duties. On the other hand, action taken in order to produce a higher offer may well be consistent with those duties.

In practice, issuers may publish defence documents setting out arguments against a bid, release new information or declare and pay increased dividends (provided they can be justified by the company's finances) to encourage target shareholders to reject an unwelcome takeover bid. They may also seek out and encourage an alternative, more welcome bid or other alternative corporate transaction. US-style poison pills, effected through a listed company's share rights, are rarely adopted. UK institutional shareholders are usually hostile to such measures and weighted voting structures are rarely utilised because the Listing Rules require that all equity shares in a class that has been admitted to premium listing carry an equal number of votes and that, where a premium-listed company has more than one listed class of shares, the aggregate voting rights of each class should be broadly proportionate to the relative interests of the classes in the company's equity.

FOREIGN ISSUERS

Special requirements

14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?

A foreign or third country issuer, that is a non-UK issuer, looking to list shares in the UK will need to decide which market is most appropriate for it. Key to any decision will be the entry requirements of each market, ongoing post-admission obligations and the type of investor base the issuer is targeting. Admission to the Main Market may be seen as the best way to boost an issuer's status and profile, whereas an issuer admitted to AIM will benefit from a lighter-touch post-admission regime. For a Main Market admission, a third country commercial company will have the choice between a premium listing, with its more stringent eligibility requirements, and a standard listing. If inclusion in the FTSE UK Index Series is important, a premium listing will be necessary, alongside other requirements for inclusion.

The requirements for a third country issuer to admit shares to the Main Market in connection with an IPO are broadly the same as those that apply to a UK issuer, subject to certain limited exceptions. A third country issuer will be required to produce a prospectus in accordance with the Prospectus Regulation Rules that will be vetted by the Financial conduct Authority (FCA). A prospectus drawn up in accordance with the national laws of the third country issuer may also be an option subject to certain conditions, including equivalence considerations. The FCA will admit the shares of an issuer that are not listed either in its country of incorporation or in the country in which a majority of its shares are held only if it is satisfied that the absence of the listing is not because of the need to protect investors.

The third country issuer's accounts included in the prospectus must have been independently audited or reported on in accordance with international financial reporting standards (EU-adopted IFRS), UK adopted-International Accounting Standards (UK IAS) or in accordance with national accounting standards if these have been declared equivalent to UK IAS. A third-country issuer with a premium listing will be required to comply with the UK Corporate Governance Code (or explain any non-compliance) in the same way as a UK issuer with a premium listing and must also comply with similar provisions relating to pre-emption rights in connection with further issues of shares for cash.

Selling foreign issues to domestic investors

15 Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?

There are a number of situations where a foreign or third country issuer may offer shares in the UK without the need to publish a UK Prospectus Regulation-compliant prospectus, assuming no application is being made for admission to trading on a regulated market in the UK. These include offers made solely to qualified investors and offers made to fewer than 150 persons, other than qualified investors, in the UK. Where a third-country issuer is relying on one or more exemptions from the requirement to produce a prospectus, it will still need to consider the financial promotion regime in relation to any offering or marketing materials.

TAX

Tax issues

16 Are there any unique tax issues that are relevant to IPOs in your jurisdiction?

The issue of new shares as part of an IPO will not give rise to a liability to stamp duty or stamp duty reserve tax (SDRT). Any transfer of shares, whether subsequent to the IPO or as part of a secondary offering, will generally attract stamp duty or SDRT at a rate of 0.5 per cent. In the case of a secondary offering, this liability is typically met by the selling shareholders. Where shares are transferred into a depositary or clearance service, a higher charge to stamp duty or SDRT of 1.5 per cent can arise, subject to some limited exceptions. Selling shareholders in a secondary offering will also trigger a disposal of their shares for tax purposes and a charge to tax on any gain realised may arise.

INVESTOR CLAIMS

Fora

17 In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?

To seek redress under any of the civil liabilities, the IPO investor would need to file a claim with the courts of England and Wales, and follow the process through the courts unless the matter is settled.

While an investor can submit a complaint against an issuer to the FCA for non-compliance with the Listing Rules, the Prospectus Regulation Rules and the Disclosure Guidance and Transparency Rules, the FCA does not act as an ombudsman, rather considering confidentially whether there has been a contravention of the rules in respect of which sanctions should be imposed on the issuer. The FCA can then publish notice of any enforcement taken.

Class actions

18 Are class actions possible in IPO-related claims?

English law does not generally have an equivalent to the 'opt-out' class action procedure in the United States. While the first 'opt-out' class actions in the UK were launched during 2016 in relation to competition law, such actions are currently permitted only in the Competition Appeal Tribunal, and it is not envisaged that English courts will follow suit. However, should a group of investors wish to bring a claim against an issuer following an IPO, there are options under English law to 'opt in' to a collective claim.

First, a number of investors may file a claim together on a single claim form, in the event that it would be convenient to dispose of each of the investors' claims in the same proceeding. If other investors wish to join the claim at a later stage, they would need to seek the court's permission. This is likely to be impractical in an IPO situation, where the number of potential claimants could be high.

Second, if impractical for all affected investors to be a party to the claim, the court may order one or more persons to act as a representative, provided that each investor can be shown to have the 'same interest' as the representative. Any decision made in such proceedings will be binding on all those represented, but anyone other than the representative may enforce the judgment only with the court's permission. In reality, representative actions are rare, as the courts have taken a restrictive approach to the meaning of 'same interest'.

Finally, the investors may apply for a group litigation order (GLO), where their claims give rise to common or related issues of fact or law. This test is more flexible in comparison with representative actions and, as such, claimants have tended to favour the GLO. If the court grants the GLO, a register will be set up listing the issues to which a claim needs to relate to be added to the GLO. Unless the court directs otherwise, any judgment relating to the GLO will be binding on all parties on the register at the time of the judgment.

Claims, defendants and remedies

19 | What are the causes of action? Whom can investors sue? And what remedies may investors seek?

Under section 90 of the Financial Services and Markets Act 2000 (FSMA), if an investor has acquired shares in the issuer and has suffered a loss in respect of those shares as a result of an untrue or misleading statement in or omission from the prospectus, they may be entitled to seek compensation from those persons responsible for the prospectus. The persons deemed responsible for the prospectus include the issuer, its directors at the time the prospectus was submitted to the FCA, any persons named in the prospectus as current or future directors (and who have authorised themselves to be so named) and anyone who has accepted responsibility for, or authorised the contents of, the prospectus or a part thereof (and such acceptance is stated in the prospectus).

The FSMA sets out a number of defences against liability, including where such persons can show that they reasonably believed the information to be true and not misleading or properly omitted at the time of publication and either had continued to believe this until the shares were acquired by the investor, or had taken all reasonable steps to correct the statement or omission.

The prospectus will form the basis of a contract between the issuer and the IPO investor. If the prospectus is inaccurate or misleading, the IPO investor may be able to rescind the contract and claim for damages.

The IPO investor may also be able to claim damages for liability in tort, including the tort of deceit (if the investor proves fraud) or negligent misstatement (on the basis that those persons responsible for the prospectus owe a duty of care to investors), or claim damages or the right to rescind (or both) for misrepresentation, including negligent misrepresentation pursuant to the Misrepresentation Act 1967.

UPDATE AND TRENDS

Key developments

20 | Are there any other current developments or emerging trends that should be noted?

Recent IPO trends and outlook

Notwithstanding the impact of the escalation of the global pandemic and continued uncertainty about the future UK-EU relationship, the London IPO market, although unsettled at times, was seen as more resilient than European markets and retained its position as the top exchange by value in 2020. There was a slowdown in sponsor-backed IPO activity but the consumer goods sector was particularly strong at a time when the UK was subject to a number of lengthy lockdowns. The UK IPO market reached impressive levels in the first quarter of 2021 with strong anchor and cornerstone demand and there is cautious optimism for the second quarter.

Focus on early investor engagement

The focus on de-risking ahead of launch and the trend of an increasing number of pilot fishing, deep dive and other early marketing investor communications continued throughout 2020 and the start of 2021. A desire for more meaningful market feedback during the preparatory stages of an IPO, often combined with the initiation of a search for potential cornerstones, can put more pressure on companies to settle the equity story and key selling messages and make available stable financial information at an earlier stage. The global pandemic and the switch to a virtual format for communications with potential investors has tended to result in condensed marketing timetables, particularly following launch. It is too early to tell whether these will become, albeit to a lesser extent, a permanent feature in UK IPO practice or whether there will a pressure to resume in person investor communications when the pandemic restrictions ease.

UK Listing Review

In late 2020, the UK government initiated a review into the UK listing regime, in part as a response to Brexit. The primary aim was to boost London's profile as a market of choice and to make it more attractive to high-growth companies, including technology start-ups and founder-led businesses, looking to list. The focus was on more dynamic and flexible regulation without sacrificing London's high standards of corporate governance, shareholder rights and transparency. Lord Hill was asked to chair an independent review on a wide range of issues including dual-class share structures, free float and track record requirements, the dynamic between a premium and a standard listing, prospectus requirements and the current obstacles to special purpose acquisition companies (SPACs) or 'blank cheque' companies seeking a London listing.

The UK Listing Review was published in the first quarter of 2021 and presents a number of recommendations in relation to UK IPO practice. These include permitting companies with a dual-class share structure to seek a premium listing. Currently, a company with a dual-class share structure is not eligible to list on the premium segment. Moving away from the 'one share one vote' principle has been viewed to date as inconsistent with the high investor protection standards attaching to a premium-listed company. The UK Listing Review proposes the introduction of a number of conditions for a premium-listed company with a dual class share structure. These conditions include a maximum duration and weighted voting ratio, and certain other limitations with the aim being to provide founders with a transition period during which they are able to ensure that control is retained. There is also a proposal to recognise SPACs as an important part of the listing toolkit given their recent popularity in the US and, more recently, in Amsterdam, by removing the requirement for a SPAC listing to be suspended on announcement of an acquisition for SPACs above a certain size, subject to certain safeguards.

The UK Listing Review recommends a reduction in free float minimum requirements from 25 per cent to 15 per cent and flexibility for companies of different sizes to use alternative measures of liquidity. A fundamental review of the prospectus regime is recommended both in terms of the contents requirements, including the provision of forward-looking information by amending the liability regime for issuers and their directors, and prospectus exemption thresholds. There is also a proposal to relax the requirement to provide historical financial information covering 75 per cent of a company's business for three years while retaining the requirement for a three-year track record for the premium listing segment.

For those parts of the UK Listing Review where implementation of the proposals requires Financial Conduct Authority (FCA) rule changes, the FCA has confirmed its intention to publish a consultation in summer 2021 with a view to introducing new rules in late 2021. Ahead of that, the FCA published in April 2021 its proposals to fast track rule changes relating to SPACs by providing an alternative route to market for SPACs demonstrating higher levels of investor protection. The proposals, which include a minimum size threshold, ringfenced funds, a redemption option and requirements for shareholder approval and adequate investor disclosure, would align the UK framework more closely with standards in other international markets, including, in particular, the US.

Direct listings

There is continued focus on whether direct listings could represent a viable alternative for companies seeking a premium London listing. This lower-cost route to listing utilised by Spotify and Slack in the US may benefit from a shorter execution timetable and potentially more limited liability issues. Introductions by new applicants involving no underwritten offer or sale of shares are rare in the London market and examples tend to be limited to demergers. Any appetite for the direct listing route could depend on a number of factors including whether the company has a sufficiently broad shareholder base to satisfy the FCA's free float requirements and which can generate liquidity from admission. As part of the current UK Listing Review the existing free float requirements are being reassessed to provide a better measure of liquidity at and following IPO. Specifically, the Review has recommended that the FCA reduce the required level of shares in public hands from 25 per cent to 15 per cent.

Other relevant considerations include additional capital requirements and whether the company has sufficient market recognition to proceed without reliance on an extensive marketing campaign and price discovery process or the customary IPO-related after-market support. Companies undertaking a direct listing have often benefitted from multiple rounds of private capital raising.

ESG reporting

Environmental, social and governance (ESG) factors continue to be an investor focus and companies are increasingly aware that a failure to address these satisfactorily is likely to have a detrimental effect. Better ESG management is seen as having the potential to generate more value given its role in the investment process and the importance attached to it by investors in identifying material risks and growth opportunities. The London Stock Exchange has published guidance for companies on the integration of ESG into investor reporting and communication. The aim of the guidance is to make companies more aware of the importance of providing high-quality ESG information and engaging investors on sustainability-related issues.

The FCA has introduced a new rule and guidance for climate-related disclosures. Commercial companies with a premium listing will be required to include a compliance statement in their annual report, stating whether they have made disclosures consistent with the recommendations of the Taskforce on Climate-related Financial Disclosures or providing an explanation of the reasons for non-compliance. The new rule will apply for accounting periods beginning on or after 1 January 2021. The FCA intends to consult in the future on extending the rule to a wider category of listed issuers.

Simpson Thacher

Clare Gaskell
cgaskell@stblaw.com

Deborah Harris
deborah.harris@stblaw.com

Lucy Gillett
lucy.gillett@stblaw.com

CityPoint
One Ropemaker Street
London EC2Y 9HU
United Kingdom
Tel: +44 20 7275 6500
Fax: +44 20 7275 6502
www.stblaw.com

Coronavirus

21 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

A number of both primary and secondary pieces of legislation have been implemented in the UK that contain emergency powers relating to coronavirus and health protection. Specifically from a corporate law perspective, the Corporate Insolvency and Governance Act 2020 (CIGA) came into force in June 2020 and introduced temporary measures in response to the pandemic, alongside certain permanent measures in relation to restructuring and insolvency.

The key temporary measures introduced by CIGA were (1) restrictions on the ability of creditors to threaten to wind up a company; (2) temporary changes to wrongful trading rules; and (3) relaxations concerning the conduct of certain meetings and filing requirements, to give companies greater flexibility. While the temporary relaxations of meeting requirements were intended to ensure that meetings could be held in a manner consistent with the need to prevent the spread of covid-19, for example, by allowing meetings to be held using virtual means, they have also prompted an increased focus on the law and practice around shareholder meetings and, in particular, the annual general meeting (AGM), in the UK more generally. Numerous organisations have published guidance with a variety of perspectives on future development opportunities. Certain bodies are considering recommendations for legislative change and looking to propose alternative means to achieve some of the flexibilities introduced during the pandemic, while maintaining the integrity and objective of the AGM.

However, in the past, investor bodies have expressed concerns with virtual meetings on the basis that the AGM is the only opportunity that shareholders (particularly retail shareholders) have to meet and address the entire board, and that virtual-only formats may hinder meaningful shareholder engagement. Against this context, in terms of best practice in this area, clients should consider practical solutions to allow shareholder engagement to be undertaken through alternative means, for example through question and answer processes, live streaming or town hall events.

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