

May 2020

The Public Offer of Securities in the United Kingdom

Simon Gleeson

Harold S. Bloomenthal

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Simon Gleeson & Harold S. Bloomenthal, The Public Offer of Securities in the United Kingdom, 27 Denv. J. Int'l L. & Pol'y 359 (1999).

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

THE PUBLIC OFFER OF SECURITIES IN THE UNITED KINGDOM*

SIMON GLEESON** AND HAROLD S. BLOOMENTHAL***

I. INTRODUCTION

The use of a statutory prospectus in connection with the public offering of securities in the United Kingdom long preceded the adoption of the Securities Act in the United States. The prospectus provisions of the English Companies Act with antecedents that go back to 1844¹ were the model on which the Securities Act of 1933 prospectus was based.² A new prospectus regimen became effective in the United Kingdom in July of 1995, applicable to all securities being publicly offered for the first time in the United Kingdom.³ The new regimen completes the process of in-

* This article is based on materials that appeared as a Chapter in *EMERGING TRENDS IN SECURITIES LAW* (1998-99 ed. West Group) and is reprinted with the permission of the West Group in substantially the same form.

** Simon Gleeson is a Partner at Allen & Overy, London, England. He specializes and practices in all aspects of financial and banking law with particular reference to international securities law issues. Mr. Gleeson is an editor of *TOLLEY'S COMPANY LAW*, co-author of *INTERNATIONAL BANKING REGULATION* (Sweet & Maxwell 1995) and author of *PERSONAL PROPERTY LAW* (Sweet & Maxwell 1997). He also contributes regularly to specialist periodicals on matters relating to financial services law. He is a Member of the British Institute of International and Comparative Law and of the Institute of Advanced Legal Studies.

*** Harold S. Bloomenthal is Counsel to the firm of Holme Roberts & Owen, L.L.P. in Denver, Colorado. He has practiced securities law in Denver for over 30 years. He has taught securities law as a member of the faculty at the University of Wyoming College of Law, University of Denver College of Law, and Northwestern School of Law of Lewis and Clark College, and as a Visiting Professor at Duke Law School, the University of Colorado, the University of Arizona and Hastings College of Law.

1. The Companies Act 1844, 7&8 Vict. C 110, was the first English Act to require the production of a disclosure document to accompany an issue of shares.

2. See SELIGMAN, J., *THE TRANSFORMATION OF WALL STREET* (1982) 62-63. The unique contribution of the Securities Act of 1933 was to provide a waiting period between the filing of a prospectus as part of the registration statement and the effective date after which the securities could be offered. *Id.* The Securities Act, in contrast to the Companies Act, also contemplated that during the waiting period the regulatory authority (now the SEC) would review the registration statement (including the prospectus) and could issue a stop order before or after the effective date if it were deficient. Schedule A to the Securities Act, prescribing the content of the prospectus, also drew on the prospectus requirements of the then much maligned New York Stock Exchange. *Id.* at 57.

3. Public Offers of Securities Regulations 1995 (hereinafter "POS"). SI 1995 No. 1537. The POS Regulations were amended March 9, 1999, effective May 10, 1999. Public

roducing the European Community's securities legislation program, and is best understood in the context of that program. The offering of securities, however, has two aspects: the legal and institutional framework within which a distribution of securities is completed, and the regulatory framework governing the firms engaged in the distribution of securities.

The Financial Services Act of 1986 provides the regulatory framework that governs those engaged in the investment business.⁴ The FSA was the product of a compromise reached in the late 1980s between a government committed to statutory regulation of the securities industry and an industry determined to maximize its own influence over its own government, whose aim was, as far as possible, to retain the concept of self regulation within the statutory system. The result of this compromise was the creation of a single statutory regulator, known as the Securities and Investments Board ("SIB").⁵ Although the SIB is a statutory body, it was given the ability to delegate many of its powers (including those involving authorization, supervision, surveillance and enforcement), and it did so to a group of industry self-regulators that were, at least initially, heavily practitioner based. The cumbersome ar-

Offers of Securities (Amendment) Regulations 1999 (hereinafter "POS" 1999 Amendments). SI 1999 No. 734. Corresponding amendments to the Financial Services Act of 1986 were made in Section 3 of the same Statutory Instrument. The POS amendments and the amendments to the Financial Services Act are available on the Internet at <http://www.hm-treasury.gov.uk/pub/html/docs/posame02.pdf>. The amendments are of limited significance with four exceptions. First, the restriction on sales literature (investment advertisements) relating to the exemption for an offering of Euro-Securities is made more specific, and, perhaps, liberalized somewhat in the process. *See infra* note 135. Second, the liability of an offeror other than an issuer for misrepresentations in a prospectus is limited if the prospectus is prepared primarily by the issuer. *See infra* note 309. This may also have eliminated the generally unrecognized possibility that offeror liability may extend to an underwriter acting as principal. *See infra* note 314. Third, the exemption for offerings limited to offers to 50 persons was amended to clarify what or who constitutes a single person for this purpose. *See infra* note 122. Fourth, a prospectus prepared in another EU member state entitled to recognition under the EU Prospectus Directive no longer requires translation into English and no longer requires disclosure of UK tax ramifications. *See infra* note 171. Although not part of the POS amendments, HM Treasury in connection with release of the amendments provided general guidance to the effect that an offering not within a specific exemption does not have to comply with the POS Regulations if not a public offer as that term is defined by the Regulations. *See infra* note 98.

4. Financial Services Act 1986 (hereinafter "FSA"). The FSA received the Royal Assent on November 7, 1986.

5. The DTI may delegate certain powers to the Designated Agency (FSA § 114(1)) upon satisfaction that the rules and regulations of the Designated Agency afford investors an "adequate level of protection." FSA § 114(9). Schedule 8 of the FSA sets forth principles applicable to The Designated Agency's rules and regulations. The DTI may resume previously delegated functions at the request or consent of the Designated Agency. FSA § 115(1). If the Designated Agency is unable to discharge the transferred functions or its rules do not meet the statutory standards, the DTI may resume the transferred functions without consent. FSA § 115(3)-(5).

rangement of multiple self-regulatory organizations (SROs) the FSA produced is to undergo a radical revision, the initial stages of which were underway in mid-1998, but are dependent upon the enactment of a new statutory regime. All of the SROs are to be merged into the SIB, which on October 28, 1997 became the Financial Services Authority (the Authority). At the request of Chancellor of the Exchequer appointed by the then recently elected Labor Government, the then Chairman of the SIB on July 29, 1997 transmitted an outline of the new regulatory structure. The precise framework, however, is the subject of much discussion and speculation and will not be known until enabling legislation is proposed and adopted.⁶ This Chapter therefore focuses on the public offering of securities, which, although it will be impacted by the new structure, is not likely to be drastically changed.⁷

The regulation of securities business in the UK is affected by the fact that London is both the center of the UK domestic equity and bond markets (for historical reasons there is no substantial domestic corporate bond market in the UK, so the latter is confined to UK sovereign issues, known as "gilts") and the center of the global bond market known as the "Euromarket [PLM1]." The Euromarket developed in the era of exchange controls and the U.S. Interest Rate Equalization Tax, which effectively prevented non-U.S. entities borrowing dollars in the U.S. domestic markets and international U.S. entities from using capital raised in the United States for their multinational operations. There therefore developed an offshore market in dollar balances held by non-U.S. institutions (known initially as the Euro-dollar market), and this market, through a series of historical accidents, came to be based in London. The market remained small until the early 1970s, when, as a result of the oil price increases of those years, the oil exporting countries found themselves holders of massive dollar balances that needed to be reinvested. These balances were recycled through the Euromarket, which became almost overnight one of the largest and most liquid

6. On June 1, 1998, Alistair Darling, Chief Secretary to the Treasury, announced that the Treasury would be publishing draft Financial Services legislation sometime during the summer of 1998. On June 1, the new Banking Act went into effect giving the Financial Services Authority supervision over the Banking system. Mr. Darling made clear that there was broad consensus on the need for a single regulator, referring to "a new regulator for the new millenium." See HM Treasury News Release 84-98, June 1, 1998, available on the Internet at <http://www.hm-treasury.gov.uk>.

7. This is true notwithstanding speculation that the power to review disclosure documents will be vested in the Authority. In that event, however, the Authority is likely to delegate its responsibilities at least for a period of time to the Stock Exchange. Alistair Darling, Chief Secretary to the Treasury, let it be known that the London Stock Exchange will continue to be responsible as the listing authority. He also noted, however, that the contemplated Financial Services Bill "will allow the Government to transfer all or part of the London Stock Exchange's function to the Financial Services Authority should that prove necessary in the future." See HM Treasury News Release 16-98, Feb. 6, 1998, available on the Internet at <http://www.hm-treasury.gov.uk>.

debt markets in the world. This boost seems to have given the Euro-market "critical mass," and it subsequently developed into a capital market that for size, depth, flexibility and product innovation compares favorably in a number of respects with the U.S. domestic market. The classical Euromarket instrument is still a fixed-term, fixed-interest US\$-denominated debenture, but the market has expanded to embrace a variety of different currencies (notably Euro-Yen, although there are now Euro- markets in most major currencies) and products, extending to convertible bonds and, to an increasing extent, to equities.

The Euromarket is in principle offshore everywhere. It has no central organization, trading floor or even rules. The fact that most of the major players in the market are located in London is the result of a congeries of accidents. Indeed, during the negotiation of the implementation of the Financial Services Act 1986, the threat that the Euromarkets might emigrate from London to Zurich was taken sufficiently seriously by the UK government that several concessions to the Euromarkets themselves were added to the Act. UK regulation is, therefore, to some extent bifurcated. To some degree, it must address both the ordinary issues that arise out of domestic securities issuance and the very different issues that arise out of the regulation, or absence thereof, of the Euromarkets.

II. DISTRIBUTION OF SECURITIES IN THE UNITED KINGDOM

A. *Offers of Sale, Placings, and Other Offerings*

The distribution of securities in the United Kingdom has its own distinctive characteristics. The institutional framework for distributing securities in the United Kingdom is similar in some respects to that in the United States. The major distinction between the two systems is to be found in the use of the word "underwriter." In the U.S., an "underwriter" is an investment bank that agrees to purchase an issue at a discount from the price it offers the securities through an underwriting syndicate to the public. The objective of the underwriting syndicate is to distribute the securities to public investors, not to purchase the unsold portion of a public offering, although in rare instances it may be required to do so. In the UK, by contrast, an "underwriter" is an investing institution that agrees to purchase the offered shares at a discount price if placees cannot be found at the full price. In exchange for taking on this obligation, the underwriter receives a "commission" (classically equal to 2.5 percent of the amount of securities that he has undertaken to accept). Distributions in the UK therefore differ in many respects from the underwriting syndicates that have been an indispensable part of the arrangement for the distribution of most publicly offered securities in the United States for over a century.

The rules of the London Stock Exchange (the "Stock Exchange")

largely dictate in broad outline the manner of distributing securities in the United Kingdom. This in part is a reflection of the fact that most initial offerings by companies are undertaken concurrently with (and subject to) either a listing on the Stock Exchange or admission to dealings on the Alternative Investment Market ("AIM"). AIM is a second tier trading system that is under the supervision of the Stock Exchange. The principal types of offerings contemplated by the Stock Exchange Rules are as follows:⁸

An offer for sale. This is an offer to the public by an issuing house or broker of securities that has agreed to purchase the issue from the issuing company. This is the most common form of offer. The primary distinction between a UK-style offer for sale and a U.S.-style underwritten offer is that in an offer for sale the issuing house does not depend upon other dealers to sell to the public. The issuing house will make the offer directly to the general public, having arranged sub-underwriting (in the English sense) from institutions for its own benefit. There are prescribed procedures for such offers, as described below. The Stock Exchange Listing Rules describe such offers as follows: "An offer for sale is an invitation to the public by, or on behalf, a third party to purchase securities of the issuer already in issue or allotted."⁹ The third party refers to the issuing house. The reference to "already in issue" is not as one might conclude to securities that have entered the trading market, but to the fact that at the time of the offer (or before completion of the offer) the securities will have been issued to the third party underwriter.

An offer for subscription is a variation of the offer of sale that differs in that the issuer is offering the securities directly to the public.¹⁰ In an offer for subscription, the issuer arranges underwriting (in the English sense) directly for its own benefit. The underwriter agrees to purchase any securities not purchased by the public.

An intermediaries offer is an offer by an issuer to intermediaries (brokers or underwriters) who in turn offer the shares to their clients.¹¹ This type of offering permits a public offering to be made without affording the general public an opportunity to subscribe to or purchase the shares. Such an offering, accordingly, is somewhat comparable to the manner in which securities are publicly offered in the United States.

A placing, which is an offering of securities by a single issuing house (or a small group of them acting together) primarily to their own

8. Listing Rules, Ch. 4.

9. Listing Rules ¶ 4.4.

10. See Listing Rules ¶ 4.5.

11. See Listing Rules ¶ 4.10.

clients that does not involve an offer to the public.¹² A placing of already listed securities cannot be made at a price that is more than ten percent below the market price absent exceptional circumstances.¹³

An invitation to tender is an offer for sale or subscription that is not made at a fixed price, but rather where prospective subscribers indicate the number of shares they want to subscribe to and the price range they are willing to pay for the shares. Based on the subscriptions, the offeror determines the striking price that will result in the highest price at which all of the shares are subscribed for. The Listing Rules provide that an invitation for tender must provide for a stated minimum price.¹⁴

A placing tends to place an issue primarily with a few long-term investors. An offer for sale opens the offer to the general public and is more conducive to an active market. The Stock Exchange Listing Rules are designed to assure a public distribution prior to the listing of a security, although they provide considerable latitude with respect to placings. The Stock Exchange at one time required that offerings of a certain size be made by an offer for sale. This was because the use of the placing mechanism tended to result in the sponsoring broker-dealer and the co-sponsors placing "hot" issues with their favored clientele, thereby preventing members of the public from subscribing. The market-making system has now been abolished, and the only requirement now is that there be a sufficient number of shares in the hands of the public in order for the security to be listed.¹⁵ Trading on the exchange rather than relying on market-makers is now an order driven system referred to as SETS (Stock Exchange Trading System).

An offer for sale or an offer for subscription typically involves opening the subscription books to all would-be subscribers during a limited time frame and, in the event of an over-subscription, allocating (allotting) the shares to subscribers on a fair basis. The basis of allotment has to be disclosed in the Listing Particulars as a material matter relating to the offer, and the Stock Exchange would not accept a document that contained an unfair basis of allotment.¹⁶ This does not pre-

12. Listing Rules ¶ 4.7.

13. Listing Rules ¶ 4.8.

14. Listing Rules ¶¶ 4.4-4.5.

15. Listing Rules ¶ 3.18.

16. This does not necessarily mean *pari passu*. In some of the 1980s privatisations the government's policy objective of securing wider retail holdings of shares was met by adopting a "bottom-up" allocation, in which small applications were filled in full and large applications were reduced according to their size. This resulted in institutional investors being left short of stock and obliged to buy in the retail allocations at a substantial profit to the retail investors. Retail application for privatisation issues became so popular that one member of Parliament was obliged to resign his seat when it was demonstrated that he had made multiple applications for small numbers of shares in the names of a number of other people, including his dog.

clude the underwriters, who purchased the shares (offer of sale) or agreed to purchase the unsubscribed shares (offer for subscription), from allocating a part of the offering to institutional investors who act as sub-underwriters (sub-underwriters, although unusual, are not unknown).

The contrasting philosophies between the U.S. and the UK is an interesting one. In the United States, a public offering is not made to the public at large, but to the customers of the members of the underwriting and selling groups. The underwriters and members of the selling group by and large are free to sell the securities to whomever they please. The National Association of Securities Dealers' (NASD) "free-riding" rules preclude allocating shares in a "hot issue" (one in which the market opens at a premium) to certain categories of restricted persons,¹⁷ but otherwise does not preclude a firm allocating shares to its own customers on whatever basis it chooses. The Commission and NASD have expressed some concern about the practice of allocating shares of a hot issue to executive officers of other companies whose corporate finance business the underwriter is seeking.¹⁸

B. Pre-Emption and the Distribution of Securities in the United Kingdom

The right of a company's existing shareholders to have the first opportunity to subscribe to any further equity that is issued for cash is enshrined in UK company law.¹⁹ As a matter of company law, pre-emptive rights can be disappplied, but the power to do so is limited.²⁰ The rules of the London Stock Exchange, therefore, provide that companies listed thereon must in principle offer new securities to the existing holders.²¹ Overseas companies, however, are exempt from this requirement.²² The Pre-Exemption Group, a committee composed of representatives from the Stock Exchange, industry, corporate treasurers, pension funds, and insurance companies, has proclaimed the sanctity of pre-emptive rights:²³ "The retention of this pre-emptive right is a major point of principle to investors and without shareholders' approval

17. See IM-2110-1, NASD Manual (CCH) ¶ 4111.51. The Listing Rules ¶ 4.3 preclude allocating shares to a securities firm participating in the offering unless placed with a market maker or fund manager.

18. See Michale Siconolfi, Spin Desk Underwriters Allocate IPOs. For Potential Customers, WALL ST. J. (Interactive Ed.), Nov. 12, 1997.

19. See CA 1985 §§ 89-96 for the present position.

20. CA 1985 § 95. Pre-emption rights cannot be abolished once for all in a UK company, but the power to allot without regard to existing holders must be renewed every five years.

21. Rule 6.18 and 6.19.

22. Rule 17.8.

23. Pre-Exemption Group, "Shareholders' Pre-Emptive Rights" (Oct. 20, 1987) (hereinafter "PE Group Guidelines").

in general meeting, the right cannot be varied." Academic economists have regularly demonstrated that the existing holders do not benefit in any way from a new issue made on a "rights" basis, but this view has made little headway amongst London-based investing institutions. The LSE and the new London capital market, however, increasingly take into account the need of issuers and underwriters for an efficient distribution process. Pre-emptive rights are foreign to the experience of many of the new players (including U.S. securities firms) in the flotation of securities. The American experience is that a rights offering is the exception rather than the rule because it is inefficient and the existence of rights is routinely denied in the articles of incorporation of U.S. public corporations. The Stock Exchange, recognizing the need to accommodate diverse interests within the existing legal framework, formed the Pre-Emption Group, which has published a number of guidelines that will have the support of the IPCs (the investment committees of the Association of British Insurers ("ABI") and the National Association of Pension Funds ("NAPF")).²⁴ Under the guidelines, the IPCs will recommend that their members support shareholder approval of resolutions for an annual disapplication of pre-emptive rights if restricted to shares not exceeding five percent of the outstanding ordinary shares and provided that such disapplication over a three-year rolling period does not exceed 7.5 percent of outstanding ordinary shares. The discount (price at which shares are purchased by the underwriter) at which shares are issued for cash other than to shareholders should not exceed five percent of the market price immediately prior to the announcement of the issue. The issuer is to file with the Stock Exchange reports reflecting the amount of the discount.²⁵

Subject to applicable company law, and to obtaining the consent of its own shareholders, a listed company is free to act outside of the guidelines; however such companies are encouraged to consult with the IPCs before doing so.

III. OVERVIEW OF THE PROSPECTUS REGIMEN

A. *The Companies Act and Unlisted Securities*

A new prospectus regimen became effective in the United Kingdom in July of 1995, applicable to all securities to be offered to the public for the first time in the United Kingdom. The adoption of the new regimen, although it took several years to implement, was prompted by the adoption by the European Union of the Public Offer Prospectus Directive in

24. PE Group Guidelines.

25. PE Group Guidelines.

1989.²⁶ Relatively little was required in this regard vis-à-vis listed securities, other than to deal with the terminological confusion as between "listing particulars" and "prospectus," which in certain contexts are one and the same. The problem in adapting to the Prospectus Directive related largely to unlisted securities. The European Union (then the European Community) in 1980 adopted the Listing Particulars Directive,²⁷ which, among other things, prescribed the minimum content for a prospectus (referred to, however, as listing particulars) of securities officially listed on a stock exchange in a member state. The standards of the Listing Particulars Directive already had been built into the Rules of the London Stock Exchange. The Financial Services Act of 1986 introduced a comprehensive scheme for the regulation of the investment business (securities business) in the UK adopting a largely new regulatory framework for securities professionals. The Act, however, built on what was in place in terms of disclosure in connection with public offerings. Schedule 3 of the Companies Act of 1985,²⁸ which set forth the prescribed content of a statutory prospectus,²⁹ was replaced in 1987 by the provisions of Part IV of the Financial Services Act in respect of offers the subject of an application for listing on the Stock Exchange. The Companies Act provisions, however continued to govern offers of securities not the subject of an application for listing. It was not until 1995 and enactment of the Public Offers of Securities Regulation ("POS") and related amendments to the Financial Services Act that the scheme of the 1989 Prospectus Directive was brought fully into force in English law. *See* Section V.

Prospectuses in respect of unlisted securities were not subject to any form of scrutiny under the Companies Act. Delivering a document meeting the statutory prospectus requirements to the Registrar of Companies satisfied the prospectus requirements of the Companies Act.³⁰ The Registrar is a ministerial official who is authorized to refuse registration of the prospectus only if (1) it is not dated, or (2) not signed in accordance with the requirements of the Act, or (3) it does not have attached documents required by the Act.³¹

B. The Stock Exchange and Listed Securities

In order to go public and to be listed on the Stock Exchange, a company must meet the listing requirements of the Exchange, one of which

26. Directive 89/298, 1989 OJL 124 (May 5, 1989) (hereinafter the "Prospectus Directive").

27. Directive 80/390, Mar. 17, 1980, O.J. 1990 L100/1 (hereinafter "Listing Particulars Directive").

28. CA 1985, Pt. III, consisting of §§ 56-79.

29. CA 1985 § 56(1).

30. CA 1985 § 64(1).

31. CA 1985 § 64(5).

is that it have an acceptable sponsor.³² One of the principal responsibilities of a sponsor is to make an appropriate investigation of the company and advise the Stock Exchange that in its opinion the company "is an appropriate entity to be admitted to listing."³³ Some issuers, including issuers of Eurobonds, covered warrants and other asset-backed securities, may dispense with the requirement for a sponsor and appoint a listing agent instead. The role of a listing agent is similar to that of a sponsor, but, unlike a sponsor, the listing agent is not required to make a declaration to the Stock Exchange that it is satisfied that the company for whom it acts is a suitable candidate for listing.³⁴ Sponsors ordinarily are investment banks and are not precluded from acting as an underwriter or otherwise participating in the offering. If a company is able to meet the admission requirements of The Stock Exchange and an appropriately qualified person is prepared to act as a sponsor, the process of going public (or going to market) in the United Kingdom and the process of listing on the Exchange are intertwined and basically the same. For many years Appendix 34 to the Yellow Book prescribed in detail the information to be included in a prospectus that overlapped the information required in the Listing Particulars. The Adoption by the European Community or EC (now the European Union or EU, although also still known for some purposes by its former name of the European Community) of the Listing Particulars Directive,³⁵ specifying in Schedules A and B the minimum content standards for listing particulars, resulted in a revision to the content of the listing particulars. The provisions of the Yellow Book relating to the content of the listing particulars were moved from Appendix 34 to the body of the Listing Rules where, after amendments and revisions, they reside today.³⁶ Although referred to as listing particulars, the listing particulars did double duty prescribing the disclosure required in order to be listed and the disclosure document used in connection with the public offering. The listing particulars and the prospectus in effect became one and the same document for an issuer going public and concurrently applying for admission of the securities being offered to the Official List of the Stock Exchange.

C. The Financial Services Act and Listed Securities

Part IV of the FSA essentially left this process undisturbed with respect to securities publicly offered subject to admission to listing. The

32. Listing Rules ¶ 2.3(a). A sponsor must be an authorized person under the Financial Services Act and satisfy the Exchange that it is competent to discharge its responsibilities as such. Listing Rules ¶ 2.1.

33. Listing Particulars ¶ 2.7[b].

34. Listing Particulars ¶ 2.19.

35. Directive 80/390, Mar. 17, 1980, O.J. 1990 L100/1 (hereinafter "Listing Particulars Directive").

36. Listing Rules, Chapter 6.

Act, following the Listing Particulars Directive, prohibits the admission of any security to the Official List of the Stock Exchange unless it complies with the listing rules of the "Competent Authority."³⁷ The Council of The Stock Exchange is designated by the FSA as the Competent Authority.³⁸ In addition, the FSA imposes a separate statutory duty upon those responsible for the prospectus that it "[s]hall contain all such information as investors and their professional advisors would reasonably require." Compliance with the disclosure prescribed by the Yellow Book may not discharge this responsibility.³⁹ The FSA also requires that before the Listing Particulars are published as required by the listing rules of The Stock Exchange that a copy of the Particulars be delivered to the Registrar of Companies and a statement to that effect must be included in the particulars.⁴⁰ The Prospectus Directive, which, in effect, incorporates the Listing Particulars Directive under these circumstances, adds little, if anything, to this basic process other than requiring that the Particulars be referred to as a Prospectus when being used to satisfy the requirements of the Prospectus Directive. The Prospectus Directive merely requires for securities offered subject to being listed that "the contents of the prospectus and the procedures for scrutinizing and distributing it shall, subject to adaptations appropriate to the circumstances of a public offer," conform to the standards of the Listing Particulars Directive.⁴¹ If securities that are the subject of an application for listing comply with the requirements described above in the UK and the notice⁴² and publication requirements⁴³ of the Prospectus Directive in the other member states in which the securities are to be offered, the prospectus is entitled to the benefit of the mutual recognition provisions of the Prospectus Directive.⁴⁴

D. Unlisted Securities — The Road to the POS Regulations

When the FSA was originally enacted, in addition to Part IV it included Part V, consisting of Sections 157-171, which dealt with offers of securities that were not to be listed. The FSA contemplated that Parts IV and V together would completely replace the prospectus provisions of

37. FSA § 142.

38. FSA § 142(6).

39. FSA § 146. ("[L]isting Particulars . . . shall contain all such information as investors and their professional advisers would reasonably require, and reasonably expect there, for the purpose of making an informed assessment of — (a) the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the securities; and (b) the rights attaching to the securities.")

40. FSA § 149.

41. Prospectus Directive, Art. 7.

42. *Id.*, Arts. 14 and 17.

43. *Id.*, Arts. 15-16.

44. *See* § 1.09.

Part III of the Companies Act 1985.⁴⁵ Part IV was implemented in 1987, and Part III of the Companies Act was thereby repealed as to securities offered subject to listing on The Stock Exchange.⁴⁶ Part V was never brought into force and the prospectus provisions of the Companies Act continued to govern the offering of unlisted securities until 1995.

The implementation of Part V as to unlisted securities is a study in administrative delay. After the adoption of the European Union Prospectus Directive in 1989,⁴⁷ the implementation of Part V as to unlisted securities became not only a matter of implementing the FSA, but also of harmonizing it with the Prospectus Directive. On July 12, 1990, the Department of Trade and Industry (DTI) published a Consultative Document outlining and discussing in broad terms the implementation of Part V of the Financial Services Act and harmonization of the Part V prospectus with the requirements of the Prospectus Directive.⁴⁸ The expectation was that the DTI would propose draft regulations by the end of 1990 implementing Part V and permitting compliance with the Prospectus Directive by April 17, 1991, the date by which Member States were to have adopted measures necessary to comply with the Prospectus Directive.⁴⁹ The draft regulations contemplated by the Consultative Document were not published⁵⁰ and the prospectus requirements relating to an offering of securities not to be admitted to the official list continued to be governed by Schedule 3 to the Companies Act of 1985. In June of 1992, the authority to implement those provisions of the FSA that interface with European Union listing and disclosure directives was transferred to HM Treasury.⁵¹ The Treasury in July of 1994 issued a consultation document seeking views on draft regulations that would implement Part V and belatedly satisfy the requirements of the EC Directive.⁵² In July of 1994, the Treasury proposed "The Public Offers of Securities Regulations 1994," which with some revisions were adopted effective June 19, 1995 as "The Public Offers of Securities Regulations 1995 (POS)."⁵³ Concurrently with the adoption of the POS, Part V of the

45. FSA § 212(3), Sch. 17, pt. I.

46. SI 1986 No. 2246.

47. Directive 89/298, 1989 OJL 124 (May 5, 1989) (hereinafter the "Prospectus Directive").

48. DTI, Consultative Document on Listing Particulars and Public Offer Prospectuses: Implementation of Part V of the Financial Services Act 1986 and Related EC Directives.

49. Prospectus Directive, Art. 26.

50. Cook, *Likelihood of a Simplified Route to Public Listing Remains Elusive*, FIN. TIMES, Mar. 28, 1991, at Section I, p.31.

51. See Transfer of Functions (Financial Services) Order 1992, SI 1992, No. 1315, June 4, 1992.

52. UK: HM Treasury — Revised Implementation of the Prospectus Directive, Hermes — UK Government Press Releases, July 20, 1994.

53. SI 1995 No 1537 (June 14, 1995), adopted pursuant to the European Communities Act 1972, § 2(2).

FSA and Schedule 3 to the Companies Act were repealed. The POS belatedly brings the UK into compliance with the Public Offers Prospectus Directive.

IV. THE EU PROSPECTUS DIRECTIVE

The UK prospectus regimen is understood best in the context of the EU Prospectus Directive. The European Community adopted the Prospectus Directive on April 17, 1989 to coordinate the requirements for the "drawing-up, scrutiny and distribution" of a prospectus to be used when securities are offered to the public.⁵⁴ The Directive contemplated that each of the member states would adopt implementing legislation by April 17, 1991. The purpose of the Directive is to encourage "the creation of a genuine European capital market."⁵⁵ The Directive applies to securities offered to the public for the first time in a member state if such securities are not already listed on a stock exchange in that state.⁵⁶ Member states must ensure, absent an exemption, that any offer of securities to the public "within their territories" is subject to the publication of a prospectus by the offeror.⁵⁷ The prospectus must be published or made available no later than the time when an offer is made to the public.⁵⁸

The Directive is expressly inapplicable to certain types of offers, including, without limitation, offers of securities to a "restricted circle of persons."⁵⁹ Various types of securities also are excluded, such as certain government securities; securities offered in connection with a takeover bid or merger; certain debt securities;⁶⁰ and "Eurosecurities which are not the subject of a generalized campaign of advertising or canvassing."⁶¹ The provision for Eurosecurities, which includes both Euro equity and Eurobonds, excludes from regulation in the EU large amounts of securities issued annually in the Euromarket.⁶² "Eurosecurities" are

54. Prospectus Directive, *supra* N. 47.

55. *Id.*, Preamble.

56. *Id.*, Art. 1.

57. *Id.*, Art. 4.

58. *Id.*, Art. 9; Art. 16.

59. *Id.*, Art. 2, no. 2.

60. *Id.*, Art. 5(a) (debt securities issued by certain financial institutions); *id.*, Art. 5(b) (certain debt securities guaranteed by a member state or subdivision thereof); *id.*, Art. 5(c) (certain other debt securities considered by national law as debt securities issued or guaranteed by the state).

61. *Id.*, Art. 2, no. 2. "Eurosecurities" are transferable securities which are to be underwritten and distributed by a syndicate at least two of the members of which have their registered offices in different states; are offered on a significant scale in one or more states other than that of the issuer's registered office; and may be subscribed for or initially acquired only through a bank or other financial institution. *Id.*, Art. 3.

62. See Warren, *Regulatory Harmony in the European Communities: The Common Market Prospectus*, 16 *BROOKLYN J. INT'L L.* 46, n.167 (1990).

not, however, exempted from the Prospectus Directive if they are the subject of "a generalized campaign of advertising or canvassing." The exemption for Eurosecurities appears to have been born of competitive considerations.⁶³ The definition of Eurosecurities has raised some concerns among participants in the Eurobond market that are discussed at § 1.07. Securities already listed in a member state are not subject to the Directive even if publicly offered in the state for the first time.⁶⁴

The Prospectus Directive approaches public offerings on the basis of whether the securities in question will be listed in a member state. If securities are not to be listed in the state in which offered or another member state, the content of the prospectus must conform with the minimum standards established by Article 11.⁶⁵ If a public offer of transferable securities is made in a member state and at the time of the offer the securities are the subject of a listing application in the same state⁶⁶ or another member state,⁶⁷ prospectus requirements must be determined in accordance with the Listing Particulars Directive. The Listing Particulars Directive requires considerably more disclosure than Article 11 of the Prospectus Directive. In the case of securities being listed concurrently with the offering, the Listing Particulars Directive is applicable to both the prospectus content requirements and the procedures for reviewing and distributing the prospectus, subject to "adaptations appropriate to the circumstances of a public offer."⁶⁸

In the case of the first public offerings of other securities (*i.e.*, securities not subject of a listing application and not already listed in that state) in a member state, the prospectus must contain information necessary in order to enable investors⁶⁹ to make an informed investment

63. *Id.* at 38-41. "From the beginning, an all-pervasive fear of the Eurobond market taking flight to Zurich or elsewhere outside the EC dictated opposition to the [Prospectus] Directive." *Id.* at 39. "The United Kingdom and Luxembourg were concerned 'that the [Euromarket] would be driven offshore to Zurich rather than submit to the prospectus obligation.'" *Id.*, n.132, quoting *See Rules Requiring Detailed Prospectuses Adopted by EC; Will be Effective 1991*, 20 SEC. REG. & L. REP. (BNA) 1975 (Dec. 23, 1988). "Once it became clear . . . that a Eurobond exemption could be secured, the goal was expanded to include Euroequities as well." *Harmony, id.* at 41.

64. Prospectus Directive, *supra* N. 47, Art. 1. This can occur, for example, when an issuer became a public company in one member state and listed its securities because of trading interest in another member state. The issuer, of course, would have had to comply with the rules of the exchange relating to listing particulars in that member state, which would be based upon the Listing Particulars Directive.

65. Prospectus Directive, Art. 11.

66. Prospectus Directive, Art. 7.

67. Prospectus Directive, Arts. 7 and 8.

68. *Id.*

69. This appears to be a lesser requirement than that which applies in the case of listing particulars, where the requirement is that the document contain sufficient information to enable investors *and their investment advisors* to make an informed assessment of the prospects of the issuer. The omission of the italicized words from the prospectus directive may be significant, but the point has never been considered by any judicial

decision.⁷⁰ Without limiting the foregoing, Article 11 of the Prospectus Directive sets forth the minimum prospectus disclosure requirements member states must apply to prospectuses for a public offer of securities not to be officially listed on an exchange in a member state.⁷¹ Prospectuses for unlisted securities must be published or made publicly available pursuant to procedures established by each member state.⁷² The member states may provide, however, that the person making the offering may prepare the prospectus, in terms of its content, and subject to appropriate adaptation, in accordance with the Listing Particulars Directive, even though the securities in question are not subject of a listing application.⁷³ In such event, authorities designated by the appropriate Member State make prior scrutiny of the prospectus.⁷⁴ A prospectus so prepared and approved by a Member State in the three months preceding application for listing must be recognized, subject to translation, as listing particulars in the member states in which application for listing is made.⁷⁵ Such a prospectus must also be deemed to satisfy the prospectus requirements of other member states in which the same securities are, simultaneously or within a short time period, offered to the public.⁷⁶

A member state is not compelled to give issuers not proposing to list the alternative of complying with the more stringent disclosure standards of the Listing Particulars Directive, but may limit those standards and procedures to securities for which an application for listing is to be made. This, of course, would require that the issuer be able to satisfy the conditions to listing. Under the Prospectus Directive, a member state has no obligation to recognize a prospectus meeting the requirements of another member state that satisfies only the Article 11 requirements. Thus, if an issuer wishes to make an offer to the public in more than one member state without obtaining a listing in any of them,

authority.

70. *Id.*, Art. 11(1).

71. *Id.*, Art. 11(2). Member states may allow the omission from the prospectus of otherwise required information under certain circumstances, such as if the disclosure of the information would be "contrary to the public interest." *Id.*, Art. 13(1)(b). The member state also may permit omission of information if the disclosure thereof would be "seriously detrimental" to the issuer, if omission would not be likely to mislead the public. *Id.* Similar accommodation may be made in the case of sellers other than the issuer or an agent thereof, in respect of information not normally in the possession of the seller. *Id.*, Art. 13(2).

72. *Id.*, Art. 15.

73. *Id.*, Art. 12(1).

74. *Id.*, Art. 12(2).

75. Listing Particulars Directive, Art. 24b. This is one of the world's more obscure provisions, as why an entity incorporated in one country would wish to submit a prospectus to its own authority and then demand mutual recognition of another exchange when it could simply submit the prospectus directly to that other exchange is not clear.

76. Prospective Directive, Art. 21(1).

he may either (a) comply with the disclosure requirements of the Listing Particulars Directive and have the document approved by his selected Competent Authority, or (b) comply with the local implementation of the Article 11 requirements in each country in which it is intended to make a public offer. Presumably, issuers contemplating a multi-member state offering will be motivated to comply with the more stringent disclosure standards relating to securities to be listed, if that alternative is available to an unlisted security in an appropriate member state, in order to have the benefit of the multi-prospectus recognition provision. Some may conclude, however, that the cost of meeting the more stringent disclosure standards outweighs the mutual recognition benefit. The UK as discussed below authorized the Stock Exchange to adopt rules to implement Article 12 and permit unlisted securities to conform with the disclosure requirements and procedures applicable to listed securities. *See* Section IX(B).

The Prospectus Directive requires a member state to recognize, subject to translation if necessary, a prospectus prepared in accordance with the content requirements of the Listing Particulars Directive approved in another member state in accordance with the Directive. If public offers are made within short intervals of one another in two or more member states, a public offer prospectus prepared and approved in accordance with the content requirements of the Listing Particulars Directive must be recognized as a public offer prospectus in such member states.⁷⁷ The member states may not impose any approval requirement or require additional information to be included in such prospectus, other than certain country-specific information and translation.⁷⁸ Article 21 of the Prospectus Directive permits EU companies prepared to satisfy the disclosure requirements of the Listing Particulars Directive to sell securities, simultaneously or within a short time period, in several EU countries on the basis of one prospectus. The Directive permits member states to limit this reciprocity requirement to issuers having their registered offices in a member state.⁷⁹ *See* Section IX for the mutual recognition provisions adopted by the UK.

The EU may negotiate agreements with non-EU countries pursuant to which it would recognize, for purposes of the Prospectus Directive, prospectuses prepared and reviewed in accordance with the foreign law of non-member countries, provided such foreign law gives equivalent protection, even if it differs from the Directive.⁸⁰ This possibility, however, is subject to "reciprocity,"⁸¹ meaning subject to acceptance by the particular foreign country of prospectuses prepared in accordance

77. *Id.*, Art. 21.

78. *Id.*

79. *Id.*, Art. 21, no. 4.

80. *Id.*, Art. 24.

81. *Id.*

with EU law. Although no negotiations of this nature between the SEC and the EU have been publicly reported,⁸² it is possible that at some future date this provision may serve as a basis for negotiating a multijurisdictional disclosure system between the United States and the EU.

V. THE PUBLIC OFFERS OF SECURITIES REGULATIONS 1995

The Treasury proposed and on June 14, 1995 adopted (effective June 19, 1995) the Public Offers of Securities Regulations 1995 ("POS"). The objective was to prescribe the content of the prospectus for unlisted securities contemplated by Part V of the Financial Services Act and to implement the provisions of the European Union Public Offers Prospectus Directive. The POS is not applicable to securities that are officially listed or securities that are the subject of a listing application.⁸³ Securities in these categories continue to be regulated by the Stock Exchange in accordance with Part IV of the FSA. *See* Sections XII-XIII. The Regulations follow the Prospectus Directive in that the prospectus requirements are applicable only to the first offer to the public of the securities in the United Kingdom. The first public offering of the securities may be by the issuer (which would be the usual situation) or by someone other than the issuer (a secondary distribution).⁸⁴ The POS is applicable to stock, corporate debt securities, warrants to purchase such securities or certificates representing them.⁸⁵ POS does not apply to government securities (issued by any government) or to "Units in Collective Investment Schemes" (mutual funds and the like).⁸⁶

The POS provides two alternatives for satisfying the prospectus requirements in connection with the first offering of unlisted securities, tracking respectively Article 11 of the Prospectus Directive, establishing minimum prospectus requirements, and Article 12, applying the Listing Particular requirements and Stock Exchange scrutiny to the prospectus. The prospectus requirements are satisfied either by complying with the specific disclosure requirements set forth in Schedule 1 of POS⁸⁷ or by complying with the requirements applicable under Part IV of the

82. It is believed that bilateral negotiations took place in the late 1980s between the SEC and the London Stock Exchange. However, the reciprocity provisions of the various EC Directives would (probably) have prevented the Stock Exchange from entering into such an agreement on anything other than a Europe-wide basis, and the discussions were discontinued.

83. POS § 3(1)(a).

84. POS § 4(1).

85. POS § 3(1)(b). The securities included are by reference to "investments" as defined by Schedule 1 to the FSA, paragraphs 1, 2, 4, and 5. Debentures with a maturity of less than one year from date of issue are specifically excluded. POS § 3(2)(a).

86. POS § 3(1)(b) in describing the securities to which the POS is applicable omits those described in ¶ 3 (government and public securities) and ¶ 6 (units in collective investment accounts) of Schedule 1 to the Financial Services Act.

87. POS § 8(1).

FSA for securities officially listed and submission of the document to the Stock Exchange for approval.⁸⁸ Under the latter provision, the securities, although unlisted, are required to comply with a selective list of the disclosure requirements applicable to applicants for admission to listing that omits for the most part those that go beyond the minimum disclosure required by Schedule A (for equity securities and Schedule B (for debt securities) to the Listing Particulars Directive as incorporated into the Listing Rules of the London Stock Exchange. *See* Section XIII(B). Such securities do not thereby become officially listed securities, but the prospectus is subject to pre-vetting review by the appropriate Stock Exchange Committee. This alternative is designed to permit an offeror of unlisted securities to take advantage of the mutual recognition provisions of the Prospectus and Mutual Recognition Directives. The Stock Exchange rules and procedures to accommodate this type of offering are discussed at § 1.13[2].

Schedule 1 to the POS sets forth the content of disclosure for issuer's electing to comply with the POS prospectus disclosure requirements. The financial statements required are divided according to the jurisdiction of incorporation of the offeror. For a UK company, the requirements are those of the Companies Act 1985 relating to annual accounts and reports of public companies.⁸⁹ For companies incorporated outside the UK, the requirement is for accounts prepared in accordance with the applicable local law, and either audited in accordance with such law or accompanied by a statement that such law does not require an audit.⁹⁰ The prospectus must be delivered to the Registrar of Companies before the securities are offered.⁹¹ Those complying with the POS requirements are not entitled to the mutual recognition provisions of the EU Prospectus Directive, whereas those complying with the prospectus requirements of Schedule A/B of the Listing Particulars Directive have the benefit of the mutual recognition provisions of the EU Prospectus Directive. *See* Section IX.. The POS also introduces a new regime of liability and responsibility for misrepresentations in a prospectus relating to unlisted securities.⁹²

VI. LISTED SECURITIES — CONFORMING TO THE PROSPECTUS DIRECTIVE

As noted above (*see* Section III(C)), the contents requirements for disclosure documents relating to securities being listed in conjunction with a public offering of securities have been governed prior to and since the adoption of the Financial Services Act by the rules and proce-

88. POS § 4(3), FSA § 156A.

89. POS Sch. 1, pt. 7. *See* § 1.13[3].

90. POS Sch. 1 ¶ 45.

91. POS § 4(2).

92. POS §§ 13-15.

dures of the Stock Exchange. The Stock Exchange is the designated competent authority under Part IV of the FSA to determine the content of the listing particulars/prospectus, the minimum standards for which are set forth in the Listing Particulars Directive.⁹³ Since the Prospectus Directive in effect defers to the Listing Particulars Directive as to securities being listed in conjunction with the first public offer of the securities, only a modest number of amendments to the FSA were required to prescribe the prospectus to be used in connection with such offerings. Those amendments were made at the same time as the effective date of the POS in order to coordinate the Act with the POS and fully implement the EU Prospective Directive. Section 142 of the FSA was amended by adding a new paragraph 7A that defines what constitutes an offer of securities for purposes of the Act and incorporates a Schedule 11A that determines "whether a person offers securities to the public in the United Kingdom." Schedule 11A then creates a number of exemptions from the prospectus provisions. Schedule 11A provides that any offer made to any person in the United Kingdom is made to the public unless to the extent made in the United Kingdom it falls within one of the safe harbors provided by the Schedule. This list corresponds with the exemptions from the POS.⁹⁴ Thus, under this scheme of things, substantially identical exemptions from the use of a prospectus are included in Section 7 of the POS for unlisted securities and in Schedule 11A to the FSA for securities to be listed. Section 144(2) of the FSA was amended to provide that securities "which are to be offered to the public in the United Kingdom for the first time before admission" shall be subject to the condition that a prospectus meeting the requirements of the rules of the Stock Exchange as to form and content be submitted, approved, and published in accordance with the rules of the Exchange. A new Section 156B was added to the FSA making it unlawful to offer listed securities subject to Section 144(2) in the UK before the publication of the prospectus. Thus, the FSA obligation to publish a prospectus in connection with securities to be listed (as under the POS in connection with unlisted securities) is limited to the first public offering of the securities in the UK. A new Section 156A also was added authorizing the Stock Exchange to prescribe the content of a prospectus for issuers not seeking to list their securities, but attempting to obtain Stock Exchange approval of an offer document in order to utilize that document in another EC member state through the mutual recognition procedure.⁹⁵ The same section incorporates substantial portions of Part IV of

93. Directive No. 80/390, Mar. 17, 1980, O.J. 1990 L100/1 (hereinafter "Listing Particulars Directive").

94. See respectively, *supra* Ns. 59, 85 and related text. The differences between Schedule 11A and reg. 7(2) of POS are entirely drafting matters, and the substance of the two exemptions is identical. The exemptions for the most part correspond to those allowed by the Prospectus Directive.

95. See *supra* N. 88 and related text.

the FSA with appropriate modification in terminology to make them applicable to a prospectus issued pursuant to this Section. Documents that are submitted to the Stock Exchange for approval under this mutual recognition regime are sometimes hereinafter referred to as Section 156A documents and the specific listing disclosure rules applicable as Schedule A/B of the Listing Particulars. The Stock Exchange has amended its Listing Rules to accommodate the changes described above. *See* Section XIII(A)-(B).

From the perspective of a UK issuer, therefore, the potential content requirements may be set out in tabular form as follows:

<i>Document</i>	<i>Disclosure Requirements</i>
Application for listing on the London Stock Exchange and concurrent public offering. Can also be used as listing particulars to be listed and/or as a prospectus for offering in another member state.	Listing Rules of the London Stock Exchange ("Yellow Book").
Prospectus to be used for UK offering of unlisted security and to be used for more or less concurrent offering and/or listing in another EU member state.	§ 156A regime — LSE Rules for Approval of Prospectuses Where No Application for Listing is Made (equivalent to Schedule A/B of the Listing Particulars Directive ⁹⁶ plus approval from the Stock Exchange).
Prospectus to be used for an unlisted public offer in the UK.	Schedule 1 of the POS Regulations (loosely equivalent to Schedules A/B of the Listing Particulars Directive).

VII. EXEMPT OFFERINGS

The POS only requires that a prospectus be prepared in the event of an offer "to the public" in the UK Reg. 7(2) of the POS sets out a series of safe harbor provisions in respect of offers that are "deemed not to be an offer to the public in the United Kingdom."⁹⁷ Paragraph 3 of Schedule 11A to the Financial Services Act, applicable to securities to be listed, contains a number of the same exemptions phrased in precisely the same manner. The exemptions follow generally those allowed

96. *See* Art 2 of the Second Mutual Recognition Directive 90/211/EEC.

97. POS § 7(2).

under the EU Prospectus Directive. See Section IV. There are, however, some potentially significant differences, suggesting that UK regulators and practitioners had some concern about the phraseology and, in some instances, scope of those set forth in the Prospectus Directive. There is a basic difference in how the UK regulatory framework and the Prospective Directive address the exemptions/exclusions from the prospectus requirements. The Prospectus Directive in Article 1 provides that the Directive applies “to transferable securities which are offered to the public for the first time in a Member State” if not already listed on a stock exchange in that member state. It then in Article 2 lists in paragraph 1 the type of offers to which the Directive does not apply and in paragraph 2 the types of securities to which the Directive does not apply. Presumably, the lists were intended to establish by implication “securities which are offered to the public” by setting forth those that are not deemed “offered to the public.” It does not, however, define when securities are deemed to be offered to the public or specifically purport to have set forth an exclusive list of what are not deemed offered to the public. The POS in Section 4, very much like the Prospectus Directive, limits the application of the POS to “[w]hen securities are offered to the public in the United Kingdom for the first time.” In Section 5, the POS defines what constitutes an offer and in Section 6 it defines in very general terms when a person offers securities to the public in the United Kingdom. In Section 7 it then sets forth the circumstances under which “an offer of securities shall be deemed not be an offer to the public in the United Kingdom.”⁹⁸ In the process some of the Prospectus Directive exemptions/exclusions are modified and a number of additional specific situations are deemed not to involve an offer to the public. The following table compares the language of a number of relevant UK exemptions with the language of the Prospectus Directive and sets forth some of the UK exemptions that have no precise Prospectus Directive counterpart.

<i>POS Section 7 except as otherwise indicated</i>	<i>Prospectus Directive Art. 2(1)</i>
Box 1: (a) the securities are of-	(a) where transferable se-

98. HM Treasury in publishing the POS Amendments in March of 1999 set forth “Guidance” making clear (1) that whether an offer is to the public under the general language of Section 6 is a question of fact in each instance, (2) the specific exemptions of Section 7 are not necessarily exclusive, and (3) offerors may rely on Section 6 if the offering in fact is not to the public. See HM Treasury, *Guidance Note -Public Offers of Securities Amendment Regulations* (March 1999), available at <http://www.hm-treasury.gov.uk/docs/1999/78.htm>. Offerors, presumably, ordinarily will rely on the safe-harbor of the specific exemptions.

<i>POS Section 7 except as otherwise indicated</i>	<i>Prospectus Directive Art. 2(1)</i>
<p>ferred to persons—</p> <p>(i) whose ordinary activities involve them in acquiring, holding, managing or disposing of investments (as principal or agent) for the purposes of their businesses; or</p> <p>(ii) who it is reasonable to expect will acquire, hold, manage or dispose of investments (as principal or agent) for the purposes of their businesses;</p> <p>or are otherwise offered to persons in the context of their trades, professions or occupations⁹⁹</p>	<p>curities are offered to persons in the context of their trades, professions or occupations,</p>
<p>Box 2:</p> <p>(d) the securities are offered to a restricted circle of persons whom the offeror reasonably believes to be sufficiently knowledgeable to understand the risks involved in accepting the offer;¹⁰⁰</p> <p>(7) In determining for the purposes of paragraph (2)(d) whether a person is sufficiently knowledgeable to understand the risks involved in accepting an offer of securities, any information supplied by the offeror shall be disregarded, apart from information about —</p> <p>(a) the issuer of the securities, or</p> <p>(b) if the securities confer</p>	<p>(b) where transferable securities are offered to a restricted circle of persons,</p>

99. Reg. 7(2)(a).

100. POS § 7(2)(d); FSA § 142(7A), Sch. 11A, ¶ 3(1)(d).

101. POS § 7(7); FSA § 142(7A), Sch. 11A, ¶ 4.

<i>POS Section 7 except as otherwise indicated</i>	<i>Prospectus Directive Art. 2(1)</i>
the right to acquire other securities, the issuer of those other securities. ¹⁰¹	
Box 3 (b) the securities are offered to no more than 50 persons; ¹⁰²	No counterpart
Box 4 (c) the securities are offered to the members of a club or association (whether or not incorporated) and the members can reasonably be regarded as having a common interest with each other and with the club or association in the affairs of the club or association and in what is to be done with the proceeds of the offer.	No counterpart
(e) the securities are offered in connection with a bona fide invitation to enter into an underwriting agreement with respect to them; ¹⁰³	No counterpart
(g) the securities are offered to a government, local authority or public authority, as defined in paragraph 3 of Schedule 1 to the Act; ¹⁰⁴	No counterpart
(h) the total consideration payable for the securities cannot exceed ECU 40,000 (or an equivalent amount); ¹⁰⁵	(c) where the selling price of all the transferable securities offered does not exceed ECU 40,000, and/or
(i) the minimum consideration which may be paid for securities acquired pursuant to	(d) where the transferable securities offered can be acquired only for a consideration

102. POS § 7(2)(b); FSA § 142(7A), Sch. 11A, ¶ 3(1)(b).

103. POS § 7(2)(e); FSA § 142(7A), Sch. 11A, ¶ 3(1)(e).

104. POS § 7(2)(g); FSA § 142(7A), Sch. 11A, ¶ 3(1)(f).

105. POS § 7(2)(h); FSA § 142(7A), Sch. 11A, ¶ 3(1)(g).

<i>POS Section 7 except as otherwise indicated</i>	<i>Prospectus Directive Art. 2(1)</i>
the offer is at least ECU 40,000 (or an equivalent amount); ¹⁰⁶ (j) the securities are denominated in amounts of at least ECU 40,000 (or an equivalent amount) ¹⁰⁷	of at least ECU 40,000 per investor;
(k) the securities are offered in connection with a takeover offer; ¹⁰⁸	(2)(d) to transferable securities offered in connection with a take-over bid;
(l) the securities are offered in connection with a merger within the meaning of Council Directive No. 78/855/EEC; ¹⁰⁹	(2)(e) to transferable securities offered in connection with a merger;
(n) the securities are shares, or investments falling within paragraph 4 or 5 of Schedule 1 to the Act relating to shares, in a body corporate and are offered in exchange for shares in the same body corporate, and the offer cannot result in any increase in the issued share capital of the body corporate; ¹¹⁰	(2)(g) to shares or transferable securities equivalent to shares offered in exchange for shares in the same company if the offer of such new securities does not involve any overall increase in the company's issued shares capital;
(s) the securities offered are Euro-securities and are not the subject of advertising likely to come to the attention of persons who are not professionally experienced in matters relating to investment; ¹¹¹ "Euro-securities" means investments which —	(2)(l) to Euro-securities which are not the subject of a generalized campaign of advertising or canvassing. (3)(f) Euro-securities shall mean transferable securities which: — are to be underwritten and distributed by a syndicate

106. POS § 7(2)(i); FSA § 142(7A), Sch. 11A, ¶ 3(1)(h).

107. POS § 7(2)(j); FSA § 142(7A), Sch. 11A, ¶ 3(1)(i).

108. POS § 7(2)(k); FSA § 142(7A), Sch. 11A, ¶ 3(1)(j).

109. POS § 7(2)(l); FSA § 142(7A), Sch. 11A, ¶ 3(1)(k).

110. POS § 7(2)(n); FSA § 142(7A), Sch. 11A, ¶ 3(1)(m).

111. POS § 7(2)(s); FSA § 142(7A), Sch. 11A, ¶ 3(1)(r).

112. POS § 2(1), incorporating ¶ 3 of FSA, Sch. 11A; FSA § 142(7A), Sch. 11A, ¶ 3(2).

<i>POS Section 7 except as otherwise indicated</i>	<i>Prospectus Directive Art. 2(1)</i>
<p>(a) are to be underwritten and distributed by a syndicate at least two of the members of which have their registered offices in different countries or territories;</p> <p>(b) are to be offered on a significant scale in one or more countries or territories other than the country or territory in which the issuer has its registered office; and</p> <p>(c) may be acquired pursuant to the offer only through a credit institution or other financial institution;</p> <p>“financial institution” means a financial institution as defined in Article 1 of Council Directive No 89/646/EEC;¹¹²</p>	<p>at least two of the members of which have their registered offices in different States, and</p> <p>— are offered on a significant scale in one or more States other than that of the issuer’s registered office, and</p> <p>— may be subscribed for or initially acquired only through a credit institution or other financial institution.</p>
<p>Section 3(2)(a) debentures having a maturity of less than one year from their date of issue shall be deemed to be excluded from paragraph 2.¹¹³</p>	<p>No counterpart</p>
<p>Excluded from coverage of the POS regulation.¹¹⁴</p>	<p>(2)(b) to units issued by collective investment undertakings other than of the closed-end type.</p>
<p>(o) the securities are issued by a body corporate and offered</p> <p>— (i) by the issuer;</p> <p>(ii) only to qualifying persons; and</p>	<p>(h) to transferable securities offered by their employer or by an affiliated undertaking to or for the benefit of serving or former employees;</p>

113. POS § 3(2)(a); FSA § 142(7A), Sch. 11A, ¶ 3(1)(t).

114. Section 3 of the POS regulations provides that it is applicable to securities described in specific paragraphs of Schedule 1 of the FSA and excludes units in a collective investment scheme by not referencing paragraph 6 of such schedule that in turn references such securities.

<i>POS Section 7 except as otherwise indicated</i>	<i>Prospectus Art. 2(1) Directive</i>
<p>(iii) on terms that a contract to acquire any such securities may be entered into only by the qualifying person to whom they were offered or, if the terms of the offer so permit, any qualifying person.¹¹⁵</p> <p>(12) For the purposes of paragraph (2)(o), a person is a "qualifying person," in relation to an issuer, if he is a bona fide employee or former employee of the issuer or of another body corporate in the same group or the wife, husband, widow, widower or child or stepchild under the age of 18 of such an employee or former employee.¹¹⁶</p>	
<p>Excluded by Section 3 of the POS regulations.¹¹⁷</p>	<p>(c) to transferable securities issued by a State or by one of a State's regional or local authorities or by public international bodies of which one or more Member States are members;</p>
<p>An offering of securities issued pursuant to conversion rights where a prospectus relating to the convertible securities was published previously pursuant to Part IV of the FSA (listed securities), the POS (unlisted securities post-POS),</p>	<p>(i) to transferable securities resulting from the conversion of convertible debt securities or from the exercise of the rights conferred by warrants or to shares offered in exchange for exchangeable debt securities, provided that a public of-</p>

115. POS § 7(2)(o); FSA § 142(7A), Sch. 11A, ¶ 3(1)(n).

116. POS § 7(12); FSA § 142(7A), Sch. 11A, ¶ 8(a).

117. Section 3 of the POS regulations provides that it is applicable to securities described in specific paragraphs of Schedule 1 of the FSA and excludes government and public securities by not referencing paragraph 3 of such schedule that in turn references such securities.

<i>POS Section 7 except as otherwise indicated</i>	<i>Prospectus Directive Art. 2(1)</i>
or the Companies Act of 1985 (listed securities pre-POS). ¹¹⁸	fer prospectus or listing particulars relating to those convertible or exchangeable debt securities or those warrants were published in the same Member State.

The exemption in Box 1 expands on without otherwise restricting the in the context of their trades, professions, or occupations exemption of the Directive to make it clear that it encompasses institutional investors, money managers, and other professional investors. This as discussed below in part may have been to assuage concerns of investment banking firms marketing eurobonds and other Eurosecurities. On the other hand, the exemption in Box 2 relating to an offering to a restricted circle of investors limits the Directive counterpart to persons who are "sufficiently knowledgeable to understand the risks" of the investment. This appears to be out of concern that a restricted circle might be a limited identifiable group that knew little about the issuer and/or investments. For purposes of the exemption for an offering to a restricted circle of persons sufficiently knowledgeable to understand the risks, it is specifically provided that any information provided by the "offeror" shall be disregarded except "information about the issuer of the securities."¹¹⁹ A similar proviso is not tacked on to the counterpart Prospectus Directive exemption for an offering to a restricted circle of persons.¹²⁰ The reason for this restriction apparently is that otherwise it would be possible to argue that any person who had been provided with sufficient preliminary material by the offeror would be sufficiently knowledgeable to understand the risks. The exemption would widen to include all offers in respect of which full disclosure is made, whereas the exemption is intended to be a narrow one. What is intended in this context is that the offering be limited to a restricted group who because of their relationship to the company or their involvement in the industry or otherwise have sufficient knowledge of the risk without more to evaluate the company. This does, however, require reading the phrase "information about the issuer" in the narrow sense of identifying the company making the offer.¹²¹

118. POS § 7(2)(p); FSA § 142(7A), Sch. 11A-3(1)(o).

119. POS § 7(7), FSA, § 142(7A), Sch. 11A-3(4).

120. See Prospectus Directive, Art. 2, 1(b).

121. It is also mindful of the position taken by the Fifth Circuit prior to adoption of Rule 506 in construing the Section 4(2) exemption under the Securities Act of 1933 for transactions not involving a public offering. See *SEC v. Continental Tobacco Co.*, 463 F.2d 137, 160 (2d Cir. 1972) (private placement memorandum cannot furnish the knowledge

Box 3 and Box 4 set forth two exemptions not specifically included in the Prospectus Directive. The Box 3 exemption to offers to not more than 50 persons, presumably, is to provide a reliable criterion that, if followed, provides assurance the exemption is available.¹²² The exemption for offers to members of a club having a common interest in the club and what is to be done with the proceeds appears to be a narrow one. It should be noted that the 50-person exemption is based on offers and not purchases. A person is deemed to make an offer if "it would give rise to a contract" if accepted or if he "invites a person to make such an offer."¹²³ There is an interesting provision as to what is deemed to constitute the offering for the purpose of the exemption for offerings to not more than 50 persons.¹²⁴ For this purpose, securities of the same class offered by the same person in reliance on that exemptions within any 12-month period are deemed to be a single offering.¹²⁵

It is interesting that the POS restricts the restricted circle exemption and at the same time adds a 50-person exemption. The POS, unlike the Prospectus Directive, which is silent in this regard, provides with limited exceptions part of the offering may be within one of the exemptions and the other part within another exemption.¹²⁶ Thus one could offer an unlimited amount of securities to a restricted circle of knowledgeable persons and also offer securities to 50 other persons without being involved in an offer "to the public." The exceptions for exemptions that must pertain to the entire offering include the exemption for Eurosecurities, the total offering cannot exceed 40,000 ECU, and the minimum investment is at least 40,000 ECU. This, presumably, does not preclude reliance on more than one exemption for the entire offering if otherwise applicable.

The definition of Eurosecurities warrants extensive discussion as much of the Eurobond market is centered in the UK.¹²⁷ The Prospectus

required to make one a knowledgeable investor for purpose of private offering exemption).

122. The POS amendments provide that for purposes of determining the number of persons to whom offers are made offers to a trust, to a partnership, to a joint venture, or to two or more persons jointly are to be deemed an offer to one person. POS 1999 Amendments, § 2(g).

123. POS § 5; FSA § 142(7A)(a).

124. What constitutes a single offering is determined in the same manner in relation to the exemption for offerings not aggregating more than 40,000 ECU equivalents.

125. POS § 7(6); FSA § 142(7A), Sch. 11A-3(3).

126. POS § 7(3)-(4); FSA § 142(7A), Sch. 11A-4.

127. The UK fortuitously had an exemption going back to the Companies Act of 1948 that made London an attractive market for Eurobonds and played an important role in London becoming the centre of the Eurobond market. Section 423(2) of the Companies Act 1948 provided that "an offer of shares or debentures for subscription or sale to any person whose ordinary business is to buy or sell shares or debentures, whether as principal or agent, shall not be deemed an offer to the public" [and therefore shall not require a prospectus] as long as the offer pertained to securities of a company incorporated outside of the UK. Thus, when the Euromarket emerged the UK provided a friendly unregulated

Directive exemption reads as follows:¹²⁸ “[I]nvestments which — (a) are to be underwritten and distributed by a syndicate at least two of the members of which have their registered offices in different countries or territories; (b) are to be offered on a significant scale in one or more countries or territories other than the country or territory in which the issuer has its registered office; and (c) may be acquired pursuant to the offer only through a credit institution or other financial institution.” Beyond that, for the exemption to be available the offering must not be “the subject of a generalized campaign of advertising or canvassing.”¹²⁹ On the positive side, it embraces both bonds and equity securities, although the so-called Euromarket is largely a market for debt securities. It conforms with the definition used by the OECD for statistical purposes to identify Eurobonds, except the OECD uses as a reference point the currency in which denominated rather than the registered office of the issuer and makes no reference to being purchased only through credit or other financial institutions. The OECD classifies as Eurobonds offerings by an international syndicate with significant portions of the offering sold in two or more countries other than the country of the currency in which the bond is denominated.¹³⁰ Thus bonds of a U.S. issuer denominated in dollars and sold by an international underwriting syndicate in the United Kingdom and on the continent are Eurobonds under this definition. Similarly, securities of a Japanese issuer denominated in dollars or yen and sold by an international underwriting syndicate in the UK and Switzerland are Eurobonds. The how acquired part of the definition aside, they are also Eurosecurities under the Prospectus Directive definition. The Prospectus Directive definition is also

market as Eurobonds could be sold unrestricted by prospectus regulations in the UK. Ironically, for many years it had the effect of locking out UK companies from raising capital in the Euromarkets, although it promoted the development of London as the center of the European capital market. This provision became Section 79 of the Companies Act 1985. This may explain in part the concern of the City that the Prospectus Directive definition of Euro-securities might be construed more restrictively.

128. Prospectus Directive, Art. 3(f).

129. Prospectus Directive, Art. 2, par. 2(l).

130. The *Institutional Investor* was the keeper of the statistics for many years on international bond offerings, which it divided into two categories — foreign bonds and eurobonds. Foreign bonds were defined as bonds of foreign issuers “sold primarily within one country in that country’s currency and by a syndicate of that nationality.” Eurobonds consisted of “deals done by international syndicates with a significant portion sold in two or more countries other than the country of the currency in which the issue is denominated.” See, for example, *Sweepstakes*, INSTITUTIONAL INVESTOR (Int’l ed.), Mar. 1996, at 119. The Directorate for Financial Fiscal and Enterprise Affairs of the OECD took over the task of maintaining the statistics and in 1996 published *International Capital Markets Statistics, 1950-1995* and thereafter periodically published detailed statistics relating to international offerings in *Financial Market Trends*. Unfortunately, for a period of time it referred to eurobonds as international bonds and eurobonds together with foreign bonds as external bonds. In February of 1996 it returned to the *Institutional Investor* terminology, referring to eurobonds and foreign bonds as the two categories that together constitute international bonds. See OECD, FINANCIAL MARKET TRENDS, Feb. 1996.

broad enough in some instances to cover a relatively new phenomenon, the global offering, since the exemption is not limited to offerings made exclusively in member states. U.S. issuers often looked to the Eurobond market not only because of more favorable interest rates, but also because of perceived savings in offering costs by avoiding registration with the SEC. During the decade of the 1990s, global offerings made in the U.S. and registered with the SEC or made pursuant to Rule 144A, but with significant tranches sold in countries all over the world, were not uncommon. Literally, even a global offering by a U.S. issuer meets at least the first part of the definition of the Eurosecurities test although it may not meet the restriction against a generalized campaign of advertising and canvassing. The possibility of meeting this test is more likely if the offering is made in the U.S. pursuant to Rule 144A, which is often the case particularly in a global offering by a non-U.S. issuer.

Some concern existed among UK practitioners about, among other things, the requirement that Euro-securities be acquired only through a credit institution or other financial institution. A credit institution by the Prospectus Directive is defined in effect as a bank. Financial institution is not defined in the Prospectus Directive and is variously defined in other EU Directives. "Financial institution" can have a very narrow meaning.¹³¹ It is broadly defined in the Second Banking Directive and the POS¹³² and the related amendment to the FSA setting forth exemptions¹³³ both incorporate as part of the definition of Euro-Securities the Second Banking Directive definition of financial institutions. That definition includes the following: (1) portfolio management and advice; (2) providing services relating to and participation in share issues; (3) advising and services relating to on mergers and acquisitions; (4) advising companies on capital structure and industrial strategy; and (5) trading for one's own account and for customers in transferable securities.¹³⁴ In addition, the UK exemption differs in one other significant respect from the Prospectus Directive. The UK exemption substitutes for the Directive language, "are not the subject of a generalized campaign of advertising or canvassing," the words, "are not the subject of advertising likely to come to the attention of persons who are not professionally experienced in matters relating to investment."¹³⁵

131. For example, under the Securities Exchange Act of 1934, § 3(a)(46), it is limited to domestic banks, foreign banks, and saving associations.

132. POS Regulation § 2(1), incorporating FSA, Schedule 11A ¶ 3 (sic). Although the cross-reference is to ¶ 3 of Schedule 11A, the definition of a financial institution appears in ¶ 2 of Schedule 11A.

133. FSA, Schedule 11A ¶ 2(c).

134. Directive 89/646, Art. 1, ¶ 6 incorporating Annex ¶¶ 2-12, 1989 OJL 386 (Dec. 15, 1989).

135. The 1999 amendments in lieu of this generalized language incorporate by reference provisions of two statutory instruments specifying persons to whom investment ad-

The variations between the UK exemption and the Prospectus Directive exemption should allay most concerns. The POS and related amendment to the FSA also expands the Prospectus Directive exclusion for offerings "to persons in the context of their trades, professions or occupations"¹³⁶ to exclude all offers made to "persons whose ordinary activities [in the context of their trade, profession, or occupation] involve them in acquiring, holding, managing or disposing of investments (as principal or agent) for the purposes of their businesses."¹³⁷ This latter exemption as noted above goes beyond the offering of Euro-market securities, but also provides a fall back exemption for an offering of Euro-securities. Investment banking firms involved in Euro-market offerings generally use a prospectus meeting relatively high disclosure standards.¹³⁸ The prospectus, however, generally does not conform to any specific regulatory regimen and the Euromarket would like to keep it that way.

VIII. PUBLICATION AND REGISTRATION OF THE PROSPECTUS

The POS requires as to unlisted securities that a copy of the prospectus be delivered to and registered with the Registrar of Companies prior to publication of the prospectus.¹³⁹ The POS requires that a prospectus prepared thereunder be made available free of charge at an address in the UK from the time of the first offer and so long as the offer remains open.¹⁴⁰ An advertisement or other notice of an offering for

vertisements can be sent without violating general restrictions on the use of investment advertisements under Section 57 of the Financial Services Act. These provisions take a fairly liberal view of persons who are deemed professional investors for this purpose, including the following: (1) persons authorised to engage in the investment business in the UK; (2) European investment firms authorised by another Member State operating in the UK under the EU passport for investment service companies; (3) corporations with 20 or more shareholders and a paid in share capital or net assets of not less than £500,000; (4) any other corporation or an unincorporated association that has share capital or net assets of not less than £5 million; (5) the trustee of a trust with net assets of £10 million or more; (6) persons whose ordinary business involves them in acquiring investments for purposes of the business, (7) persons whose ordinary business involves managing investments for others. The amendment also permits the offering, which pursuant to the terms of the exemption has to be made through credit or financial institutions, to be made to customers of such credit or financial institutions who effected a transaction through such institution within the 12 months preceding the commencement of the offering. See POS 1999 Amendments, § 2(e) amending POS § 7(2)(s) and incorporating Article 8 of the (Investment Advertisements)(Exemption Order) (2) (1995), SI 1995 No. 1536 and Article 11 of the (Investment Advertisements)(Exemption Order) (1996), SI 1996 No. 1586.

136. Prospectus Directive, Art.2, 1(a).

137. POS Reg. § 7(2)(a).

138. Because of the possibility that the fraud provisions of the federal securities laws may follow them offshore, U.S. investment bankers participating in such syndicates often require from counsel a so-called Rule 10b-5 opinion relating to the prospectus.

139. POS § 4(2). The Financial Services Act § 149 is a similar provision with respect to a Part IV prospectus.

140. *Id.* at § 4(1).

which a prospectus is required by the POS must state that a prospectus is available and the address at which available.¹⁴¹ The publication requirements of the POS also are applicable to a 156A document.¹⁴² The POS requirement relating to delivery of the prospectus to the Registrar is not applicable to a 156A prospectus,¹⁴³ but Section 156A of the FSA, adopted contemporaneously with the POS,¹⁴⁴ specifically incorporates those provisions of the FSA requiring the prospectus/listing particulars be delivered for registration to the Registrar of Companies.¹⁴⁵

The EU Public Offer Prospectus Directive requires as to securities being listed in conjunction with the first public offer that the prospectus be made available either by publication in a newspaper or in the form of a brochure available at the registered office of the person making the offering and at the offices of the company's paying agent.¹⁴⁶ A notice must be published in a designated newspaper stating where the prospectus has been published and where a copy may be obtained.¹⁴⁷ The Listing Rules include similar requirements with respect to the public offering of securities in conjunction with an application for listing.¹⁴⁸

IX. MUTUAL RECOGNITION OF PROSPECTUS/LISTING PARTICULARS APPROVED IN OTHER EU MEMBER STATES

A. *The EU Directives*

The POS amends the FSA in a number of respects so as to allow listing particulars and/or a prospectus approved in a Member State to be recognized, subject to translation, without further review and approval. The operation of the mutual recognition provisions requires an understanding of the mutual recognition provisions of the applicable directives. Assuming the first public offer of the securities in a Member State, the Prospectus Directive establishes four category of offerings. First, securities that are not to be listed in any Member State that are to be offered in accordance with legislation embodying the minimum standards set forth in Article 11.¹⁴⁹ Second, securities being offered in the Member State for which an application has been filed for listing on a stock exchange in that state (Article 7 offering).¹⁵⁰ Third, securities

141. *Id.* at § 12.

142. POS § 4.

143. POS § 4(3).

144. *See supra* N. 95 and related text.

145. FSA § 156A(3) incorporating §§ 146-152 and 154 of the FSA. Section 149 of the FSA provides for registration of the listing particulars/prospectus.

146. Prospectus Directive, Art. 10(3).

147. *Id.* at Art. 10(4).

148. *See* Listing Rules, ch. 8.

149. Prospectus Directive, Art. 11.

150. *Id.* at Art. 7.

being offered in a Member State that are not being listed in that state but for which an application has been filed for listing in another Member State (Article 8 offering).¹⁵¹ Fourth, the securities being offered that are not to be listed in a Member State, but as to which, as permitted by Article 12, the prospectus conforms with all the prospectus requirements and procedures applicable to a listed security.¹⁵² Securities complying with legislation of a Member State implementing Articles 7, 8, or 12 of the Prospectus Directive are entitled to the mutual recognition provided for by Article 21 of the Prospectus Directive.¹⁵³ Securities offered under legislation embodying the Article 11 standards are not.¹⁵⁴

The EU scheme of things, in addition to providing for mutual recognition of prospectuses, provides under appropriate circumstances for mutual recognition of listing particulars in connection with the listing of securities. The Listing Particulars Directive established the minimum standards as to the content of the listing particulars and procedures for processing the listing particulars.¹⁵⁵ Those standards and procedures, with appropriate modifications for a public offering, are incorporated into the Prospectus Directive for securities being concurrently listed with the public offering either in the Member State in which the offering is being made or another Member State.¹⁵⁶ The Listing Particulars Directive also has its own mutual recognition provisions requiring under the circumstances set forth that the listing particulars of a company listed in one Member State be accepted as the listing particulars when the company applies for listing in another Member State.¹⁵⁷ Article 24 provides that if application for listing is made simultaneously or within a short interval in two or more Member States, the listing application shall be prepared in accordance with the legislation of and approved by the competent authority of the state in which it has its registered office. If it does not have its registered office in any of the states in which application for listing is made, the listing particulars must be drawn and approved in accordance with the legislation of the Member State in which it is applying for listing that it selects. Under Article 24a, if the listing particulars have been drawn and approved as provided in Article 24, the listing particulars subject to translation must be accepted without further approval by any other Member State in which application for listing is made simultaneously or within a short interval. After the adoption of the Prospectus Direc-

151. *Id.* at Art. 8.

152. Prospectus Directive, Art. 12.

153. Prospectus Directive, Art. 21.

154. *Id.* at Art. 20.

155. Directive No. 80/390, Mar. 17, 1980, O.J. 1990 L100/1 (hereinafter "Listing Particulars Directive").

156. See Prospectus Directive, Arts. 7 and 8, respectively. See also *supra* Ns. 66, 67 and related text.

157. Listing Particulars Directive, Arts. 24, 24a, 24b.

tive, the Listing Particulars Directive was amended to require a Member State on application for listing to recognize as the listing particulars a public-offer prospectus under the circumstances set forth. If such application is made within three months of the approval of the prospectus in another Member State under Article 7, 8 or 12 of the Prospectus Directive, the prospectus must be recognized as listing particulars in the state in which application for listing is made without further approval.¹⁵⁸ There is no similar obligation with respect to a prospectus approved pursuant to legislation conforming with Article 11.¹⁵⁹

Article 21 of the Prospectus Directive (incorporating Article 20) provides in substance that subject to translation if securities are offered to the public simultaneously or within a short interval of one another in more than one Member States, all Member States in which the offering is made must recognize a prospectus drawn up in accordance with Article 7, Article 8, or Article 12. All three of these articles as noted above require compliance with the disclosure requirements of and review by the competent authority passing upon applications for the listing of securities under the Listing Particulars Directive.¹⁶⁰ Under Article 20, assuming concurrent offerings in more than one Member State, if the offering is being made or an application for listing is being made in the Member State in which the issuer has its registered office, the competent authority of that state is the competent authority for approval of the prospectus. If neither the offering nor the application for listing are being made in the Member State in which the issuer has its registered office, then the person making the offering is to choose from among the competent authorities of the states in which the offering is being made the competent authority that is to scrutinize the prospectus.

The Member States generally have elected to make the grant of mutual recognition subject to a requirement for translation into the local language. As a result, in practice the mutual recognition procedure is seldom used. For a small offering as the cost of translation of an entire prospectus can be prohibitive. In the case of a large offering, if retail distribution is considered desirable in multiple jurisdictions then it is usual to seek listings on the appropriate stock exchange of each Member State in which the offering is being made. Although the mutual recognition provisions as discussed above extend to listing particulars, the applicant for listing must still satisfy the admission conditions of the stock exchange in each country in which listing is sought. A number of offerors apparently have concluded that there is no substantial downside to having the listing particulars/prospectus also reviewed by the local stock exchange authority as part of the process. Companies are not precluded from listing in their home country (the UK, for example) and

158. Listing Particulars Directive, Art. 24b.

159. See *supra* note 149 and related text.

160. See *supra* notes 66-67 and related text.

offering the securities in other Member States without listing in those states. In that event, the mutual recognition provisions subject to translation and other limited localized disclosure requirements would come into play without the necessity of review by the regulatory body in which the offering is being made. *See* Section IX(B) immediately below for the manner in which the UK implements this requirement. The predilection for listing in the EU countries in which the offering is being made may be influenced by the fact that the European “passport” for carrying on the investment business under the Investment Services Directive can be restricted to securities dealt in on a regulated market in that country.¹⁶¹

B. UK Implementing Provisions

The UK gives effect to the above as to securities for which application for listing is to be made by defining a European Document to include (1) listing particulars it is required to recognize under Article 24a of the Listing Particulars Directive in connection with an application for admission to listing, (2) a prospectus it is required to recognize under Article 24(b) of the Listing Particulars Directive in connection with an application for admission to listing, and, subject to the qualification noted immediately below, (3) a prospectus it is required to recognize under Article 21 of the Prospectus Directive in connection with the public offer of securities.¹⁶² The prospectus referred to in (3) above, however, is within the definition of a European Document only if it relates to securities that are subject to an application for listing the United Kingdom.¹⁶³ In connection with an application for listing without a concurrent offering of the securities in the UK, a European Document is in effect deemed to constitute the listing particulars for purposes of Part IV of the FSA without further approval.¹⁶⁴ If securities are to be offered for the first time in the UK in conjunction with the application for listing, a European document that is a prospectus is deemed to constitute the prospectus and listing particulars for purposes of Part IV of the FSA without further approval.¹⁶⁵

The foregoing provisions of Schedule 4 with respect to the recognition of a prospectus are applicable only to the situation in which a listing application is being made in the UK. Separately provision is made for the recognition of a prospectus approved in another Member State without regard to listing in the UK if recognition is required under Ar-

161. *See* Directive 93/22 on Investment Services. 1993 OJL 141 (May 10, 1993), Art. 14(3).

162. *See* POS (SI 1995 No. 1537), § 20, Schedule 4, ¶ 1(c).

163. *Id.* at ¶ 1(c)(3).

164. *Id.* at ¶ 3(a) and ¶ 4.

165. *Id.* at ¶ 3(a) and ¶ 4.

ticle 20 of the Prospectus Directive.¹⁶⁶ Article 20 references a prospectus conforming with Article 7,¹⁶⁷ 8,¹⁶⁸ or 12¹⁶⁹ of the Prospectus Directive.¹⁷⁰ With respect to securities approved under the appropriate Article but not to be listed with the Stock Exchange, however, the translation of the prospectus into English must be certified in a prescribed manner and additional disclosures, including the following, are required: (a) tax information relevant to a UK resident, (b) name and address of paying agent, if any, in the United Kingdom, (c) a statement of how notice of meetings and other notices will be given to UK residents.¹⁷¹ Further, the offer in the UK must be made simultaneously or within three months of the offer in the Member State in which the prospectus was approved.¹⁷²

The mutual recognition provisions of the Prospectus Directive¹⁷³ and of the Listing Particulars Directive¹⁷⁴ provide that a Member State does not have to afford recognition to a company that does not have its registered office (*i.e.*, not incorporated under the laws of) a Member State. If the securities being offered are to be listed in the UK, a European Document in each instance is defined by the UK mutual recognition legislation not only to include listing particulars or prospectus, as appropriate, that it is required to recognize, but those that it is permitted to recognize.¹⁷⁵ The latter appears to be an awkward way of saying that the UK foregoes its right under the relevant EU Directives to not recognize European documents as defined above involving an issuer that has its registered office in a non-Member State. A U.S. issuer, for example, could list securities and/or offer securities for the first time in a Member State other than the UK in compliance with the applicable legislation of that state. If the securities are then listed and offered for the first time in the UK, the UK would recognize the listing particulars and/or the prospectus to the same extent it is required to recognize similar documents of issuers that have their registered offices in a Member State.

If the securities are to be offered in the UK, but are not to be listed, there is no reference to a prospectus that the UK is permitted to recog-

166. POS, Schedule IV, Pt. 2.

167. *See supra* note 150 and related text.

168. *See supra* note 151 and related text.

169. *See supra* note 152 and related text.

170. *See supra* note 154 and related text.

171. POS, Schedule 4, ¶ 8. NOTE: The 1999 amendments, revoked those provisions of Schedule 4 requiring the translation of a prospectus into English and disclosure relating to tax information relevant to a UK resident. See POS 1999 Amendments, § 2(q) revoking POS Schedule IV, ¶¶ 8(1)(a) and 8(1)(c)(i).

172. POS, Schedule IV, ¶ 8(1)(b).

173. Prospectus Directive, Art. 21, ¶ 4.

174. Listing Particulars Directive, Art. 24a, ¶ 5; Art. 24b, ¶ 2.

175. POS Schedule 4, ¶ 1(c).

nize.¹⁷⁶ This may be accounted for by a drafting quirk. Schedule 4, in referring to the effect to be given to a prospectus scrutinized and approved by the appropriate regulatory authority in another member state if a listing application is made in the UK in connection with a public offering in the UK, refers to Article 21 of the Prospectus Directive as the relevant provision.¹⁷⁷ In referring to the effect to be given to a prospectus scrutinized and approved by the appropriate regulatory authority in another member state if a public offering is to be made in the UK, but there is no application for listing in the UK, reference is made to as approved by Article 20 of the Prospectus Directive.¹⁷⁸ This is two ways of saying the same thing except paragraph 1 of Article 21 provides that such a prospectus must be recognized and paragraph 4 of Article 21 says, however, a Member State “may restrict the application of Article 21” to issuers whose registered office is located in a Member State. This may explain why in referring to Article 21 in the first instance, the draft person in addition to the reference what the UK is required to recognize added “or which paragraph 4 of that Article permits to be recognised.” The reference in the other instance to Article 20 is a reference to the manner in which the prospectus was approved not to what is required to be recognized, which, perhaps, accounts for the lack of any reference to paragraph 4 of Article 21.

X. ADMISSION TO LISTING ON THE LONDON STOCK EXCHANGE

Chapter 3 of the Listing Rules sets forth the conditions for listing on the London Stock Exchange. The margins include annotations to the related provisions of the EU Listing Conditions Directive, establishing minimum conditions for admission to the official list of a Stock Exchange in the member states.¹⁷⁹ The conditions are minimal in terms of market capitalization (£700,000) of the class of shares to be listed.¹⁸⁰ The company, however, must have published audited financial statements covering a period of at least three years,¹⁸¹ although the Exchange may accept a lesser period if deemed appropriate.¹⁸² The published financial statements must have been prepared in accordance with the applicant’s national law and “in all material respects” conform to Generally Accepted Accounting Principles of the United Kingdom, or the United States, or the International Accounting Standards.¹⁸³ The

176. POS Schedule 4, Pt. 2.

177. POS Schedule 4, Pt. 1, ¶ 1(c)(iii).

178. POS Schedule 4, Pt. 2, ¶ 8(1).

179. Directive 79/279 on conditions for admission to official stock exchange listing, 1979 OJL 66 (Mar. 5, 1979).

180. Listing Rules ¶ 3.16.

181. Listing Rules ¶ 3.3(a).

182. Listing Rules ¶ 3.4(a).

183. Listing Rules ¶ 3.4(c).

statements must have been independently audited in accordance with the auditing standards of the United Kingdom, the United States, or International Standards on Auditing.¹⁸⁴ If a new applicant, the accountant's opinion must be an unqualified one.¹⁸⁵ The applicant must have carried on as its main activity a revenue producing business for the period required to be covered by the financial statements.¹⁸⁶ This leaves little room for start-up companies, and the Stock Exchange takes the view that such companies are generally unsuitable for listing.

There are, however, special rules governing application for listing from companies in a number of different categories as set forth in the accompanying footnote.¹⁸⁷ Generally each of these incorporate the provisions of Chapter 3 setting forth the conditions to admission and then make limited dispensation for companies in the specific categories and/or add additional conditions. In the case of natural resource companies (mining, oil, and natural gas), for example, it is provided that the Exchange *may* list securities of such companies that cannot comply with paragraph 3.3(a), which is the provision requiring three years of audited accounts, or paragraph 3.6, which requires a three-year history as a revenue-producing business.¹⁸⁸ The Chapter also, however, requires the company to have proven reserves sufficient to maintain an operation on a commercial scale for at least two years.¹⁸⁹ Further, if paragraphs 3.3(a) and 3.6 are not complied with, the corporate insiders must agree not to dispose of their stock, except among themselves, until two years after trading on the exchange commences.¹⁹⁰ In the case of a scientific research based company, there is no dispensation for three years of financial statements, but the company does not have to meet the requirements of paragraph 3.6 requiring three years or revenue producing activity.¹⁹¹ The company, however, must satisfy a number of enumerated requirements including a demonstrated ability to attract funds from sophisticated investors, seek to raise at least £10 million with a view to bringing an identified product to a revenue producing stage and demonstrated significant commercial achievements in its re-

184. Listing Rules ¶ 3.4(d).

185. Listing Rules ¶ 3.4(e).

186. Listing Rules ¶ 3.6.

187. Non-UK Companies, Listing Rules, Chapter 17; Property Companies, Listing Rules, Chapter 18; Mining, Oil and Natural Gas Companies, Listing Rules, Chapter 19; Scientific Research Based Companies, Listing Rules, Chapter 20; Investment Companies, Listing Rules, Chapter 21; Public Sector Issuers, Listing Rules, Chapter 22; Debt Securities, Bonds, Asset-Backed Securities and Covered Warrants, Listing Rules, Chapter 23; Ordinary Warrants and other Certificates Representing Securities, Listing Rules, Chapter 24; Single-Project Companies, Listing Rules, Chapter 25; Venture Capital Trusts, Listing Rules, Chapter 26.

188. Listing Rules ¶ 19.3(a).

189. Listing Rules ¶ 19.3(c).

190. Listing Rules ¶ 19.3(g).

191. Listing Rules ¶ 20.2.

search development as evidenced by certain enumerated factors such as clinical trials of pharmaceutical products if a pharmaceutical company.¹⁹² It seems apparent that the conditions to listing are intended to attract quality companies.

The company making application for listing must have adequate working capital prior to admission, and the issuer must make a representation to this effect.¹⁹³ In the case of an application for the listing of further securities by an applicant with shares already listed the statement of working capital may be prospective — *i.e.*, may be expressed in the form that the issuer, although not having sufficient working capital as at the date of the prospectus, has made proposals for the provision of sufficient working capital that are satisfactory to The Stock Exchange.¹⁹⁴ In strict theory it seems that the exchange will refuse an application for first listing by a company that needs the proceeds of the issue to satisfy its requirement for working capital. This is not as absurd as it seems, since the requirement may be rephrased that capital must be first raised and then employed, and not *vice versa*. The shares must be freely transferable; the Exchange may in “exceptional circumstances” allow the issuer to disapprove of transfers if such restriction “would not disturb the market in those shares,”¹⁹⁵ but it is unlikely that such permission would be given. This does not preclude an issuer from contractually obtaining a commitment not to transfer shares for a certain period of time, as in the case of Regulation S restrictions, for example. The company, however, would have to enforce the restriction by enforcing the contract rather than imposing transfer restrictions on the shares. This may raise serious problems for U.S. issuers offering shares in the United Kingdom in reliance on Regulation S that attempts to list those shares on the London Stock Exchange. Rule 905¹⁹⁶ provides that such securities are restricted securities as defined by Rule 144 and can be resold by an offshore purchaser only if registered, exempt from registration, or in accordance with Regulation S.¹⁹⁷ Such restrictions generally are embodied in the form of a legend on the stock certificate that requires submission of documentation to the issuer before the shares can be transferred. Although a resale on a Designated Overseas Securities Market (DOSM) is permitted under Rule 904, and the London Stock Exchange is a DOSM, such resales are subject to certain albeit limited conditions.

A sufficient number of shares must be distributed to the public in EU member states. The holding of shares by the public that are listed

192. Listing Rules ¶ 20.3.

193. Listing Rules ¶ 3.10.

194. Listing Rules ¶ 3.10.

195. Listing Rules ¶ 3.15.

196. 17 C.F.R. § 230.905.

197. 17 C.F.R. § 230.905.

in non-member states also will be taken into account.¹⁹⁸ There is deemed an adequate public float if 25 percent of the class of shares to be listed are held by the public and a lesser percentage may be acceptable if a large number of shares of the class are outstanding.¹⁹⁹ The Exchange may impose other conditions to admission to listing if it deems it appropriate to protecting investors, but must inform applicant of same.²⁰⁰

In order to be listed on the Stock Exchange, a company must have an acceptable sponsor.²⁰¹ One of the principal responsibilities of a sponsor is to make an appropriate investigation of the company and advise the Stock Exchange that in its opinion the company "is an appropriate entity to be admitted to listing."²⁰² Some issuers, including issuers of Eurobonds, covered warrants and other asset-backed securities, may dispense with the requirement for a sponsor and appoint a listing agent instead. The role of a listing agent is similar to that of a sponsor, but, unlike a sponsor, the listing agent is not required to make a declaration to the Stock Exchange that it is satisfied that the company for whom it acts is a suitable candidate for listing.²⁰³ The functions of the sponsor and listing agent are discussed below in the context of preparing the prospectus/listing particulars for a company going public and concurrently listing the security on the Stock Exchange. See Section XIII(A)(8).

XI. ADMISSION TO TRADING ON THE ALTERNATIVE INVESTMENT MARKET

The Alternative Investment Market (AIM) has superseded the Unlisted Securities Market (USM) as a trading market supervised by the Stock Exchange for securities not admitted to the official list. The conditions for admission to trading on AIM are set forth in Chapter 16 of the Rules of the London Stock Exchange (the "AIM Admission Rules") as distinguished from the Listing Rules. In order to apply for admission to AIM, the applicant is required to prepare a prospectus in accordance with the POS regulations.²⁰⁴ There are no market capitalization requirements for AIM. AIM itself has no minimum periods for which the company must have published financial statements or earned revenues, but the POS regulations require that any prospectus produced must contain the company's last three year's accounts if it has existed for that long. The company must be duly incorporated under the laws of the

198. Listing Rules ¶ 3.18.

199. Listing Rules ¶ 3.19. See ¶ 3.20 for shares deemed part of the public float.

200. Listing Rules ¶ 3.1.

201. Listing Rules ¶ 2.3(a). A sponsor must be an authorized person under the Financial Services Act and satisfy the Exchange that it is competent to discharge its responsibilities as such. Listing Rules ¶ 2.1.

202. Listing Particulars ¶ 2.7[b].

203. Listing Particulars ¶ 2.19.

204. AIM Admission Rules ¶ 16.10.

place of organization and the shares must be freely transferable.²⁰⁵ To the extent the issuer has published financial statements, the published financial statements must have been prepared in accordance with the issuer's national law and with the accounting standards of the United Kingdom, or the United States, or International Accounting Standards.²⁰⁶ Such statements must be audited if that is required by the law of the place of incorporation of the company. Under provisions applicable generally in the United Kingdom, operating companies are required to publish annual accounts and the accounts must be audited.²⁰⁷ The issuer must have a nominated adviser²⁰⁸ and a nominated broker.²⁰⁹ The same firm, however, may perform both roles.²¹⁰

The nominated adviser must be an authorized person under the FSA or a member firm of the Stock Exchange, independent of the issuer, and acceptable to the Exchange.²¹¹ The Stock Exchange maintains a list of nominated advisers who have completed the required application forms and meet the general and any special eligibility criteria.²¹² The responsibilities, among others, of the nominated adviser include assuring that the directors are aware on an ongoing basis of their responsibilities to ensure compliance by the issuer with the AIM Admission Rules and to confirm to the Stock Exchange that the issuer and the securities are appropriate for admission to trading on AIM.²¹³

Although the AIM Rules are considerably less extensive than those applicable to listed securities, they are not inconsequential. The Rules, among other things, impose obligations to timely disclose major developments,²¹⁴ report certain transactions,²¹⁵ notify the Exchange of insider transactions in its shares,²¹⁶ and the like. The Exchange may impose sanctions on the issuer,²¹⁷ directors,²¹⁸ and nominated adviser²¹⁹ for non-compliance with their respective responsibilities. The Exchange may suspend or discontinue trading in the security on AIM. There is a separate Chapter 17 to the Rules of the Stock Exchange (hereinafter the "AIM Trading Rules") governing trading in AIM securities. The Trading Rules provide for registering member firms to act as market maker in

205. AIM Admission Rules ¶ 16.1(a)-(b).

206. AIM Admission Rules ¶ 16.2.

207. CA 1985 § 235.

208. AIM Admission Rules ¶ 16.1(d)(i).

209. AIM Admission Rules ¶ 16.1(d)(ii).

210. AIM Admission Rules ¶ 16.1(d).

211. AIM Admission Rules ¶ 16.28.

212. AIM Admission Rules ¶ 16.29.

213. AIM Admission Rules ¶ 16.30.

214. AIM Admission Rules ¶ 16.14.

215. AIM Admission Rules ¶ 16.22.

216. AIM Admission Rules ¶ 16.17.

217. AIM Admission Rules ¶ 16.32.

218. AIM Admission Rules ¶ 16.37.

219. AIM Admission Rules ¶ 16.38.

specific AIM securities and only such market makers can display quotations in the trading system.²²⁰ The nominated broker must furnish the trading system with relevant information relating to the company and if there is no registered market maker in the security use its "best endeavours" when requested to find "matching business" in the security.²²¹ AIM has also adopted the Model Code governing dealings in the company's securities by directors and employees.²²²

There were 298 companies admitted for trading on AIM with a market capitalization of approximately £5,354,000,000 as of October 31, 1997.²²³ Since its launch on July 19, 1995 through October 31, 1997, approximately £1,456,890,000 had been raised by AIM companies.²²⁴ Information Technology companies form a significant component of the market, approximately 60 such companies with a market capitalization of approximately £1 billion traded on the AIM market in October of 1997.²²⁵

XII. THE LISTING RULES AND THE NEW PROSPECTUS REGIMEN

The Stock Exchange for years has regulated the public offering of securities of companies going public in conjunction with their admission to listing. See Section III(B). The Stock Exchange made minimal changes in The Listing Rules to accommodate the new prospectus regimen. Paragraph 5.1(a) of Chapter 5, which continues to be titled "Listing Particulars" (see Section VI), provides that an issuer applying for listing of securities to be offered to public in the United Kingdom for the first time must submit "a prospectus prepared in accordance with the provisions of this chapter." Paragraph 5.1(b) provides that in any other application for listing, listing particulars or a prospectus is to be prepared and submitted in accordance with the provisions of this chapter. Paragraph 5.1(c) provides that a prospectus and listing particulars must be published in accordance with the provisions of Chapter 8. Paragraph 5.1(d) provides that the contents of and procedures for submission for the prospectus are the same as those applicable to listing particulars, "subject to adaptations appropriate to the circumstances of a public offer." Paragraph 5.1(e) provides with some enumerated exceptions that references in the listing rules to listing particulars unless the context otherwise requires are applicable to a prospectus "as if any reference to listing particulars or supplementary listing particulars was a reference to a prospectus or supplementary prospectus as appropriate."

220. AIM Trading Rules ¶ 17.5.

221. AIM Trading Rules ¶ 17.4(b).

222. Stock Exchange Rules, Appendix 12.

223. Stock Exchange, *AIM Market Statistics* (Oct. 1997).

224. *Id.*

225. See Stock Exchange, *AIM News* (Oct. 1997), at 1.

The Listing Rules otherwise, with limited exceptions, refers only to listing particulars, although such references are to both when the document is a prospectus for purposes of the offering.²²⁶ For convenience of exposition, reference herein generally will be to listing particulars/prospectus to indicate the dual role of the same document under the Listing Rules.

Paragraph 5.9 provides that the listing particulars/prospectus must be submitted in draft form to the Exchange (attention Listing Department) at least 14 days prior to the expected publication date. Paragraph 5.10 requires that it be submitted earlier in the case of a new applicant or if there are complex issues to be resolved "to allow proper consideration by the Exchange and consequent amendment and resubmission by the issuer." Paragraphs 5.11 through 5.23 set forth what is to be included in the "filing" and details such as annotated margins to indicate compliance with specific requirements and redlining of amendments (¶ 5.11). With a bow to "plain English," ¶ 5.7 provides that the particulars/prospectus must be written "in as easily analysable and comprehensible form as possible." Chapter 6 details the content of the listing particulars/prospectus, supplemented by Chapter 12 as to the form and content of financial statements and Chapters 18-23 as to specific industries (*e.g.*, Chapter 19, Mineral Companies) and specific types of securities (*e.g.*, Chapter 21, Investment Entities).

A supplement to the Listing Rules, unnumbered but titled "Rules for Approval of Prospectuses Where No Application for Listing Is Made," is added at the end of Chapter 26 (the last of the chapters). These Rules are sometimes hereinafter referred to as the 156A Rules. The 156A Rules set forth the content of a prospectus and procedures to be followed if no application for listing is being made in connection with the offering.²²⁷ The requirements of this section are to be followed in connection with a first public offering by an issuer electing pursuant to Section 156A the alternative of complying with the disclosures and procedures required of listing companies, although the securities are not to be listed. This part has the effect of disapplying for the most part the parts of the Listing Rules that are over and above the requirements of schedule A/B of the Listing Particulars Directive. *See* Section XIII(B). The prospectus and other documents are to be submitted in draft form to the Exchange at least 14 days prior to the expected publication date or such longer period necessary to allow proper consideration and consequent amendment and resubmission.²²⁸ An Appendix to this section

226. Chapter 8, titled "Publication and Circulation of Listing Particulars," although also applicable to a prospectus, consistently refers to listing particulars with limited exceptions, although under appropriate circumstances the reference is to a prospectus.

227. Since this part of the Listing Rules has no official designation, it will be referred to as the 156A Rules.

228. 156A Rules ¶ 6.

sets forth those portions of Chapter 6 relating to the content of listing particulars that apply to the prospectus.

XIII. CONTENT OF THE PROSPECTUS

A. *Contents of Prospectus for Offering of Securities to be Listed*

1. Introduction

The assumption made in this section is that the prospectus relates to the first public offer of shares by a company that has not previously listed shares and that the shares are to be listed in conjunction with the public offering of the securities. Table 1 to Appendix 1 to Chapter 5 of the Listing Rules sets forth seven categories of information that are to be included in the prospectus and specifically references the applicable portions of Chapter 6 prescribing the content of the information to be included in the prospectus. The specific items referenced in Chapter 6 reference other provisions of the Rules; in particular, those relating to financial information that are set forth in Chapter 12. Reference often is made in the Listing Rules to the "group" and to "undertakings," which are respectively "British speak" for the consolidated entity and subsidiaries. For convenience of exposition, the consolidated entity is referred to herein as the issuer or the company. To avoid unduly extensive footnoting, the applicable paragraph of the Listing Rules sometimes is set forth in parenthesis after the description of the specific prospectus disclosure required by the Listing Rules.

2. Description of Business

An extensive description of the company's business is called for including the following:

A description of the company's principal activities that sets forth the main products sold and/or services provided. (6.D.1). Description of any recent (last 12 months) unfavorable development ("interruption") in the company's business that has a significant effect on the company's financial position. (6.D.9)

Information relating to significant new products and/or activities, if any. (6.D.2)

Net turnover (revenue) for the last three years by business segments and geographical markets. (6.D.3)

A description by location, size, and manner held of the principal properties of the company. A principal property is defined in terms of one that accounts for ten percent of net revenues or production. (6.D.4).

Description of substantial expenditures being made for new facilities or otherwise, noting where being undertaken (at home or abroad) and how financed. (6.D.12-6.D.13)

The occurrence during the relevant period of non-representative events (“exceptional factors”) that materially impacted the company’s principal business activities, products, revenues, or plants. (6.D.5)

A description of the company’s research and development policies during the past three financial years. (6.D.5). Description of substantial expenditures being made or contemplated on research and development, noting where being undertaken (at home or abroad) and how financed. (6.D.12-6.D.13)

A description of substantial investments made in acquisition of other enterprises during the past three fiscal years and the current fiscal year, setting forth the amount invested and the interests acquired. (6.D.11)

A description of legal proceedings that had or may have a significant impact on the company’s financial position. (6.D.7)

The average number of employees over the last three fiscal years, by segments of the company’s business activities, if possible, noting material changes occurring during the period. (6.D.10)

Summary information on the extent the company is dependent, if at all, on patents, licenses, material contracts, or new manufacturing processes if of “fundamental importance” to the company’s profitability. (6.D.6.)

If the company is engaged in mining, oil and gas exploration and development, or similar activities, information relating to mineral reserves and other relevant information relating to the exploitation of same called for separately in Chapter 19 relating to mining companies. (6.D.16)

3. Financial Statements

a. The Annual Accounts and the Companies Act

The provisions relating to financial information requires some understanding of the financial reporting required of substantially all companies incorporated as public limited liability companies (plc) in the United Kingdom as well as the requirements for admission of a stock to the official list. The Companies Act, with some exceptions for small companies and so-called private companies, requires all corporations (“companies”) to prepare audited annual accounts.²²⁹ The United King-

229. CA 1985 § 226 *et. seq.*

dom, in accordance with the Fourth Company Law Directive of the European Union,²³⁰ requires all corporations ("companies") to maintain adequate accounts and to prepare for each fiscal ("financial") year a balance sheet and a profit and loss statement, with accompany notes.²³¹ The format of the financial statements ("annual accounts") and the accompanying notes are prescribed in some detail following generally the requirements of the Fourth Directive. The directors must prepare an annual report²³² and independent auditors must report on the financial statements. The auditors' report must express an opinion that the financial statements are "properly prepared" in accordance with the requirements of the Act and "whether a true and fair view is given" of the state of affairs at the end of the year and the profit or loss for the year.²³³ The notes, among other things, must include information relating to the shareholdings, compensation ("emoluments"), and pensions of the directors.²³⁴ Detailed information relating to subsidiaries, joint venture arrangements, and the like must be included in the notes for companies required to file consolidated financial statements ("group accounts"). Similar information must be included in the notes to financial statements of companies not required to file consolidated statements but which have subsidiaries. Companies within the medium size category as defined by the statute are allowed to include somewhat less information and small companies as defined are allowed to have the auditors' report prepared by someone meeting lesser standards than required of other companies.²³⁵ The auditor, however, in each instance must meet the independent requirements established by statute and must undertake the "investigation" prescribed by statute.²³⁶ The annual accounts, directors' report, and auditors' report must be sent to all shareholders ("members"), debenture holders, and other persons enti-

230. Fourth Council Directive on the Annual Accounts of Certain Types of Companies, Directive 78/660 (July 25, 1978).

231. The provisions relating to preparing and publishing financial statements are found in Part VII of the Companies Act of 1985 (§§ 221-262 and related schedules) and were extensively amended by Part I of the Companies Act of 1989 (§§ 1-23). Schedule 4 to Part VII, as amended prescribes the format of the financial statements and the basic contents of the accompanying notes. Schedule 5 to Part VII, as amended, sets forth the information to be included in the notes relating to subsidiaries. Schedule 6 to Part VII, as amended, prescribes the information to be included in the notes relating to the directors (shareholders, compensation, pensions, etc.). In principle the requirement to prepare Company Accounts to UK standards extends to non-UK companies with established places of business in the UK (§ 700 of the Companies Act 1985), but the Companies Act of 1989 amendments with limited exceptions do not apply to such companies. See the Overseas Companies (Accounts) (Modifications and Exemptions) Order 1990 SI 1990 No. 440.

232. CA 1985 § 234.

233. CA 1985 § 235.

234. CA 1985 § 232.

235. CA 1985 § 248.

236. CA 1985 § 249D.

tled to notice of the general meeting.²³⁷ The annual accounts, directors' report, and auditors' report must also be filed with the Registrar.²³⁸ The failure to comply with specific provisions constitutes an offense for which directors who fail to assert an adequate defense under the statutory provisions can be imprisoned or fined.²³⁹ The Secretary of State (head of the Department of Trade) also has authority to initiate proceedings to assure compliance with the statutory provisions.²⁴⁰

b. Financial Reporting History Required for Admission to Listing

In order for a company to have its equity securities admitted to the Stock Exchange, absent special dispensation from the Exchange, the company must have published or filed consolidated financial statements covering a period of at least three years. The statements must have been prepared in accordance with the company's national law and "in all material respects" in accordance with United Kingdom or United States Generally Accepted Accounting principals, or the International Accounting Standards formulated by the International Accounting Standards Committee.²⁴¹ The company during the minimum three-year period covered by the financial statements must have been carrying on as its main activity a revenue-earning business.²⁴²

c. Comparative Table vs. Audited Report

The Listing Rules assume that any company applying for admission of the securities for listing has three years of financial statements that have been published and are available.²⁴³ The financial statements, therefore, do not have to be included in the prospectus, but a comparative table of financial information based thereon is included in lieu thereof.²⁴⁴ A comparative table, however, cannot be used in lieu of an audited report under the following circumstances:²⁴⁵

A material change to the company's business or structure occurred, including material acquisitions or dispositions, during the period covered by the financial statements or during the interim from the end of the periods covered to the date of application for listing.

A material change has been made in accounting policies or a mate-

237. CA 1985 § 238.

238. CA 1985 § 242.

239. CA 1985 § 233.

240. CA 1985 § 245B.

241. Listing Rules ¶¶ 3.3-3.4.

242. Listing Rules ¶ 3.6.

243. Listing Rules ¶ 12.17(b).

244. Listing Rules ¶ 12.1.

245. Listing Rules ¶ 12.1.

rial adjustment has been made or is required to be made to the published audited accounts.

The auditors' report for the last three years "has been qualified or refers to a matter of fundamental uncertainty."

Notwithstanding none of the foregoing may be applicable, an auditor's report may be required if the Exchange decides for any reason not to accept the auditors' report of the published statements "or that an additional report is necessary."

d. The Comparative Table

If a comparative table may be used, it must cover at least three years to the end of the latest audited financial period. The comparative table must extract from the audited accounts without material adjustment appropriate profit and loss, balance sheet, and cash flow statement items.²⁴⁶ The cash flow statement may pose some problems as the annual accounts required of all companies does not specifically require a cash flow statement, although it may be required by generally accepted accounting principles. *See* Section XIII(A)(3)(a). The Listing Rules specifically require a table showing the changes in financial position either in the form of a source and application of funds statement or a cash flow statement. Rule 6.E.10. Accounting policies should be set forth as well as notes to the last two balance sheets and for the period covered by the accountant's report for the profit and loss and cash flow statements. The presentation must be consistent with the issuer's annual accounts. Rules 12.19-12.20. In the case of an offering of previously unlisted securities, a letter from the issuer's auditors or reporting accountants, as appropriate, must be submitted to the Exchange. The letter must state that in their opinion the issuer's annual accounts were prepared and audited in accordance with the standards established by the exchange and that the comparative financial table was "properly extracted without material adjustment from the audited accounts." Rule 12.18. The accounting standards acceptable to the Exchange are United Kingdom or United States Generally Accepted Accounting principles, or the International Accounting Standards established by International Accounting Standards Committee. Rule 3.3(c). The annual accounts must have been independently audited in accordance with the auditing standards required in the United Kingdom, the United States, or the International Standards of Auditing established by the International Auditing Practices Committee of the International Federation of Accountants. Rule 3.3(d). The statements must be prepared in accordance with United Kingdom or United States Generally Accepted Accounting principals, or the International Accounting Standards. Rule 12.14(d).

246. Listing Rules ¶ 12.17.

e. The Accountant's Report

If an accountant's report is required, it must cover the same period and the same financial statements and related information covered by a comparative table. Rules 12.19-12.20. The accountant's report must be prepared by independent accountants qualified to act as auditors under the Listing Rules. Rule 12.14(c). The rule on independence provides that the "auditors must be independent of the applicant and comply with guidelines on independence issued by their national accountancy bodies." Rule 3.5. The financial statements must be prepared in accordance with United Kingdom or United States Generally Accepted Accounting principals, or the International Accounting Standards. Rule 12.14(d). There are limited circumstances under which the Exchange will accept financial statements of overseas companies (companies organized under the laws of a country other than the United Kingdom) not prepared in accordance with such standards. Rule 17.3. The Report must contain an opinion of the accountants as to whether or not the financial statements "give[] a true and fair view of the financial matters set out." Rule 12.14[e]. If the opinion is qualified, the opinion must refer to "all material matters" as to which the accountants have reservations, the reasons therefor, and, if practicable, quantify the effect thereof. Rule 12.14(f). If the company has not previously listed securities on the Exchange, the opinion cannot "contain any qualification or reference to a matter of fundamental uncertainty which relates to a matter of significance to investors." Rule 12.14(g).

The accountant's report can contain "only such adjustments to the previously published figures" as the accountants consider necessary. The accountants must prepare and submit to the Exchange a written statement of the adjustments in sufficient detail to show how the reported figures reconcile to the corresponding information in the published accounts. Rule 12.15.

f. Earnings Per Share

If the issuer includes its own accounts (as distinguished from consolidated accounts) in the comparative table or the accountants' report, as appropriate, it must include the profit or loss per share from ordinary operations ("ordinary activities"), after tax, for each of the last three financial years. Rule 6.E.4(a). If the issuer includes consolidated annual accounts, the corresponding figure on a consolidated basis must be set forth. Rule 6.E.4(b). Dividends paid per share for the last three financial years must also be included. Detailed specified information must be included in the notes relating to each company in which the issuer owns a significant direct or indirect participating interest, the consolidation principles applied, the indebtedness of the subsidiaries included in the consolidation, and the aggregate contingent liabilities (including guarantees) of the consolidated entity. Rules 6.E.11-6.E.13,

6.E.15.

g. Working Capital

The prospectus must include a statement by the issuer that in its opinion the working capital available to the consolidated entity is sufficient for its "present requirements." Rule 6.E.16. Such statement, made after "due and careful enquiry" is also a condition to admission for listing. Rule 3.10. In the case of an issuer with securities already listed, if it can not give such opinion, the prospectus may state how it propose to provide the additional working capital necessary to meet its present requirements. Rule 6.E.16. In such case, the securities may be admitted to listing if the Exchange is satisfied that the provision for additional working capital is satisfactory. Rule 3.10.

h. Interim Period

If more than nine months have elapsed since the end of the last financial year for which annual accounts have been published, interim statements covering at least six months must be included in the prospectus. Such interim statements can be unaudited if it is so stated. Rule 6.E.7. If there has been any significant change in the financial position or business ("trading activities") of the issuer since the end of the last financial period for which either audited financial statements or interim financial statements were published, such changes must be described. Rule 6.E.8.

4. Material Trends and Forecasts

The prospectus must include "general information" as to the trends in the issuer's business since the last published yearly financial statements with emphasis on significant recent trends in production, sales, inventories ("stocks"), backlog ("order book"), costs and prices. Rule 6.G.1(a). Information as to the issuer's prospects relating "at least" to the current financial year must be set forth. This should include any material information relating to such prospects. Specifically, "special trade factors or risks (if any)" that "could materially affect the profits" if not otherwise disclosed in the prospectus and if "unlikely to be known or anticipated by the general public." Rule 6.G.1(b). Statements relating to future prospects "must be clear and unambiguous." Rule 12.22. The prospectus does not have to include a profit forecast or estimate, but if one is included certain limitations are applicable. Rules 6.G.2, 12.22. The issuer must determine with its sponsor in advance whether statements relating to its future prospects will constitute a forecast or estimate. Rule 12.22. An estimate pertains to a financial period that has expired, but for which results have not yet been published. Rule 12.21. Any words that expressly or by implication state a minimum or maxi-

imum likely level of profits for a period subsequent to the published audited accounts or contain data from which “an approximate figure for future profits or losses may be made” is, as appropriate, a profit forecast or estimate. This follows whether or not the word “profit” is used. A dividend forecast may also be a profit forecast if “the issuer has a known policy of relating dividends to earnings” or because of the level of retained earnings or otherwise such dividend forecast “implies a forecast of profits.” Rule 12.23. The forecast or estimate normally should be to the end of the issuer’s accounting period. The forecast or estimate normally should be before tax. If the tax charges are expected to be abnormally high or low that should be disclosed separately as well as any exceptional item. Rule 12.26.

The principal assumptions upon which the issuer based its profit forecast or estimate must be set forth in the prospectus. Rule 6.G.2. A profit forecast or estimate must be reported on by the auditors or reporting accountants and by the sponsor. Rule 12.24. The prospectus must include a report of the accountants setting forth their opinion as to whether the profit forecast has been properly complied on the stated basis and that the accounting basis for such forecast or estimate is “consistent with the accounting policies of the issuer.” Rule 12.24 and Rule 6.G.2. The report of the sponsor must confirm that the profit forecast, if included, “has been made after due and careful enquiry by the directors.” Rules 6.G.2. The sponsor’s report included in the prospectus must also state “that it has satisfied itself that the forecast or estimate has been made after due and careful enquiry by the issuer.” Rule 2.15. It is interesting that the UK in contrast to the U.S. places more emphasis on assuring that appropriate care is employed and procedures adopted for making profit forecasts than surrounding the forecast with cautionary statements designed to protect against liability. This may be explicable by virtue of the fact that there are no class actions as such in the UK and to date few entrepreneurial lawyers making a career out of bringing private actions alleging securities fraud.

5. Persons Responsible for the Prospectus

The prospectus must set forth information relating to the persons responsible for the prospectus, the auditors, and other advisers. Rule 6.A. This information is of particular significance since it is closely related to the provisions imposing civil liability. *See* Section XIV(B). The information in this category includes a prescribed declaration of the directors. The declaration of the directors is to the effect that they assume responsibility for the information in the prospectus. To the best of their knowledge and belief (taking “reasonable care to ensure that such is the case”) the information set forth in the prospectus “is in accordance with the facts and does not omit anything likely to affect the import of such information.” Rule 6.A.3. This is consistent with the provisions of Section 152(1)(b) of the FSA, which includes the directors of the issuers

among the persons responsible (and, hence, potentially liable under Section 150) for untrue or misleading statements in the prospectus. It is also consistent with the defense of a responsible person under Section 151(1) that "he reasonably believed, having made such enquiries (if any) as were reasonable, that the statement was true and not misleading or that the matter whose omission caused the loss was properly omitted." The directors' declaration can be limited to specific parts of the prospectus if so indicated (Rule 6A.2), but, presumably, can only exclude parts for which someone else has primary responsibility such as portions attributed with their consent to experts. The name and home or business address of each of the directors must be set forth in the prospectus. Any statement or report included in the prospectus and attributed to a person as an expert must set forth that such statement or report was included with the consent of such expert in the form and context in which it appears in the prospectus and that such person has authorized the contents of such part of the prospectus for purposes of section 152(1)(e) of the FSA. Rule 6.A.9. Section 152(1)(e) imposes responsibility and potential liability on any person "who has authorised the contents of, or any part of" the prospectus. The inclusion of such report of an expert with the expert's consent would also appear to be covered by Section 152(d) imposing responsibility on persons who accept responsibility for any part the prospectus, which seems apropos since 152(1)(e) is applicable to any person not otherwise responsible under Section 151. This appears to include the accountants who furnish the accountants' report if required by Rule 12.1[a]-[d]. It is not clear, however, whether it is applicable to the accountant's opinion required by Rule 12.18 relating to the comparative financial table, since it is furnished in the form of a letter to the Stock Exchange rather than as part of the listing particulars/prospectus. *See* Section XIII(A)(3)(c). Section 152, however, would apply to the accountants' report required under Rule 12.2 if an accountant's report is presented in substitution for a comparative table or the published accounts. Similarly, it appears applicable to the accountants' report required under Rule 12.24 if the prospectus includes a profit forecast or estimate. *See* Section XIII(A)(4). There may, of course, be other reports of experts included in the prospectus with consent (*e.g.*, mineral or hydrocarbon reserves (Rules 19.12 to 19.16)), in which event an appropriate statement relating to their consent and authorization must be included. The prospectus must also include the names and addresses of the reporting accountants and of any other expert to whom a statement or report in the prospectus is attributed. Rule 6.A.8. The prospectus must include a statement that the issuer's annual accounts (financial statements) have been audited for the last three years (Rule 6.A.5) and the names, addresses, and qualifications of the auditors who audited such statements (Rule 6.A.4). A statement of what other information audited by the auditors and included in the prospectus must also be set forth. Rule 6.A.6. If any audit reports have been refused by the auditors on any of the above referred to financial statements or con-

tain qualifications, such refusal or qualification must be set forth "in full and the reasons given." Rule 6.A.5. If during the last three financial years auditors have resigned, been removed, or not re-appointed, additional disclosure may be triggered. In such event, if they delivered a statement to the issuer of circumstances they believe should be brought to the attention of the shareholders or creditors of the issuer, the prospectus must set forth such information, if material. Rule 6.A.7.

6. Legal Advisers

The prospectus must also include the names and addresses of the issuer's legal advisers and of the legal advisers to the issue. This appears to be for informational purposes rather than liability purposes, except to the extent the prospectus may include an opinion of such legal adviser as an expert. Section 152(8) of the FSA specifically provides that no person shall be deemed responsible for the prospectus "by reason of giving advice as to their contents in a professional capacity." The names and addresses of the issuer's bankers must also be set forth in the prospectus. This also appears to be for informational purposes only.

7. Sponsor

The prospectus must also set forth the name and address of the sponsor. Rule 6.A.8. The sponsor (who also may be and usually is the underwriter) as sponsor plays a unique role and its responsibility for the prospectus or portions thereof is not clear beyond the fact that there is no specific reference to the sponsor as a person responsible for the prospectus in Section 152 of the FSA. The Listing Rules set forth a number of responsibilities of the sponsor (Rules 2.1-2.18), but specifically provides that "[T]hese responsibilities are owed solely to the Exchange." Rule 2.5. Failure of the sponsor to carry out its responsibilities may result in censure and publication of such censure and removal from the Exchange's register of qualified sponsors and publication of such removal. Rule 2.25. The obligations imposed on the sponsor generally require it to play an important role in the preparation of the prospectus, including "seeking the Exchange's approval of the listing particulars [prospectus]." Rule 2.16(c). Some of those rules relate to specific information to be included in the prospectus. For example, the sponsor must obtain written confirmation from the issuer that its working capital is sufficient for its present requirements and that such confirmation of the issuer was "given after due and careful enquiry by the issuer" and that the financial institutions providing working capital "have stated in writing" that relevant financing arrangements exist between the issuer and the financial institution. ¶ 2.14. The issuer in turn has to make appropriate representations as to the adequacy of the working capital in the prospectus, but no specific reference is made to the role of the sponsor in that regard. *See* Section XIII(A)(3)(g). The one area in which the

sponsor has to submit a report to be included in the prospectus pertains to a profit forecast or earnings estimate if such forecast or estimate appears in the prospectus. In that event, a report from the sponsor must be included in the prospectus stating that "it has satisfied itself that the forecast or estimate has been made after due and careful enquiry by the issuer." Rule 2.15. *See also* Section XIV(C). Under these circumstances, arguably, the sponsor is the person responsible for such report under the provisions of Section 152(d) imposing responsibility on persons who accept responsibility for any part the prospectus. The Exchange also has authority to require a responsibility statement from persons other than directors. Rule 5.4. This might be utilized, for example, in the case of shadow directors or control persons who exercise the functions of a director without formal appointment as such.

8. Distribution Arrangements

The Listing Rules specifically call for limited information relating to the nature of the offering and the distribution terms. The prospectus must set forth the number of shares offered (6.B.15(b)); the offering price (6.B.15(d)(i)); the method of payment of the price (6.B.15(d)(iii)); the period during which the offering will remain open (6.B.15(f)); the names, addresses and description of the underwriters and the amount of the offering being underwritten (6.B.15(h)); an estimate of the aggregate and per share expenses of the offering payable by the issuer (6.B.15(i)); the total remuneration of the underwriter, including underwriting commissions or similar compensation of the financial intermediaries (6.B.15(i)), and the estimated net proceeds to be received by the issuer. (Rule 6.B.15(f)). If a tranche of the offering is being reserved for marketing in other countries, details relating to same must be set forth. If securities of the same class concurrently are being placed privately details relating to such placing must be set forth. Rule 6.B.22. Details of the aggregate number of shares reserved for allocation to existing shareholders, directors, employees and past employees of the issuer or its subsidiaries and any other preferential allocation arrangements have to be included in the prospectus. Rule 6.B.26. The date the securities are expected to be admitted to listing and on which dealings is to commence is to be set forth. Rule 6.B.18. If listed on another stock exchange or traded in a regulated recognized securities market, such information should be included. Rules 6.B.19-6.B.20. The prospectus also must set forth the intended application of the net proceeds from the offering. Rule 6.B.15(j).

9. Management of the Company

This part provides for disclosure of information about the persons having the management control of the company and, in particular, the following:

(i) An indication of the main activities of the directors outside the group where such activities are significant with respect to the group, together with a description of any other relevant business interests or activities they may have. Rule 6.F.1-6.F.2.

(ii) Details of directors' remuneration and benefits (of whatever description) in the last financial year. Rule 6.F.3.

(iii) Details of the beneficial and non-beneficial interests of any directors in the shares or debentures, or in rights to subscribe for shares or debentures, in the issuer, any subsidiary or holding company and any subsidiary of any holding company (including, in the case of interests in the shares or debentures themselves, the interests of the spouse and children of the director). If a director does not have any such interest, it must be so stated. Rule 6.F.4.

(iv) Particulars of the interests of any director in transactions which were either unusual in their nature or conditions or significant to the business of the group and were effected by the issuer in the current or preceding financial year or remain in any respect outstanding or unperformed. If there have been no such transactions, there must be a statement to that effect. Rule 6.F.6.

(v) Details of any employees' share or share option schemes.

(vi) Details of the directors' service contracts (including unexpired term, notice periods, remuneration, commissions or profit sharing arrangements and any other matters necessary to enable investors to estimate the possible liability of the company on early termination). However, it is not necessary to give such details if the service contract in question was available for inspection in accordance with paragraph 16.9 before the last annual general meeting and that service contract has not subsequently been varied. There must also be an estimate of the amounts payable to the issuer's directors by the group in the financial year current as at the date of the listing particulars. Rules 6.F.10-6.F.12.

10. Basic Information

Certain basic information about the issuer is required: its name, place of incorporation and basic information about its capital and changes to its capital over the preceding three years. Information must be included about persons having preferential subscription rights; convertible debt securities; options; shareholdings exceeding three per cent of share capital and potential controlling interests. Rules 6.C.1-6.C.6, 6.C.10-6.C.16. The following also must be included.

(i) *Availability of documents for inspection.* Paragraph 6-C.7 requires that various documents be made available for inspection for at least 14 days at a named place in or near the City of London (or such other place as the Stock Exchange may determine), at the issuer's regis-

tered office and (if any) the offices of its paying agents in the United Kingdom. The most important of the documents which are to be displayed include the following:

(a) Material contracts (see below) and directors' contracts;

(b) Reports, letters, balance sheets, valuations and statements prepared by any expert, which are extracted or referred to in the listing particulars;

11. Material Contracts

A summary must be given of the principal contents of each material contract (not being a contract entered into in the ordinary course of business) entered into by any member of the group in the two years immediately preceding the publication of the listing particulars.²⁴⁷ The summary must include particulars of dates, parties, terms and conditions and any consideration passing to or from the issuer or any other member of the group, unless such contracts have been on view during the two years preceding publication, when a statement referring to them collectively as being on view will suffice. Paragraph 5.22, following section 148 of the Act, lays down a procedure under which the Stock Exchange may allow all or part of a material contract to be withheld from public inspection. A written request must be made to the Stock Exchange setting out the ground upon which the request is made. This ground must be one of the three set out in the Listing Rules (¶ 5.18); the most likely ground will be "detriment" to the issuer by reason of trade competitors obtaining access to sensitive commercial information.

It is often difficult to determine whether a contract is material and whether it was entered into in the ordinary course of business. The Listing Rules do not provide (and neither did the Companies Act 1985 from which the phrase was derived) a definition of "material contract." The relevant case law dates to the 19th century. It would seem to indicate that materiality should be looked at from the point of view of the investor rather than the company. In *Sullivan v. Mitcalfe*,²⁴⁸ the court considered that a material contract is one that "upon a reasonable construction of its purport and effect would assist a person in determining whether he would become a shareholder of the company".²⁴⁹ It has been held that a director who knows of the existence of a contract cannot escape liability for nondisclosure of that contract by professing ignorance of its content or materiality. Quite apart from the specific requirements of the Listing Particulars, it may be necessary to disclose any other con-

247. Listing Particulars § 6.C.20.

248. (1880) 5 CPD 455.

249. See also *Twycross v. Grant*, (1877) 2 CPD 469, and *Broome v. Speak*, (1903) 1 Ch. 586.

tract that is material, *e.g.*, a vital long-term supply contract that is about to expire, even if it was entered into in the ordinary course of business and/or more than two years before publication of the particulars.²⁵⁰

12. Dealings with Promoter(s)

Details must be given of any payment or benefit made or given to a promoter of the company to the extent that disclosure is required by law. In addition The Stock Exchange may require to be included in the listing by name of any promoter of the company or any of *its subsidiaries* and the amount of any cash, securities or benefits that are proposed to be or have been, within the two years preceding publication, paid, issued or given to any promoter and the consideration given therefor.²⁵¹

A "promoter" has been defined as a person who "undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose."²⁵² This definition might appear to limit the term to persons who are involved in the formation of the company. If that were so, the consequences could be overcome by purchasing a ready-made company. In fact, this is not a complete definition and it is submitted that the relevant factor is the promotion of a project with a company as the vehicle, so that the purchaser of the ready-made company would be a promoter if he also promoted the project. Thus, a parent company floating off a subsidiary would usually be a promoter as would an initial subscriber or director who has taken the initiative in setting up the company. An issuing house, on the other hand, will not usually be a promoter simply by virtue of its responsibilities as an underwriter, although it may cross the line if it actively participates in setting up the company, has representatives on the board and is otherwise significantly involved in the decision to float the company.

13. Supplementary Prospectus

If, between the time when the prospectus/listing particulars have been formally approved by the Stock Exchange and commencement of dealings in those securities, the persons responsible for the listing particulars become aware of any significant change regarding any matter included in the listing particulars/prospectus or any significant new matter, the inclusion of which would have been required in the listing particulars if it had arisen at that time, the Stock Exchange must be informed immediately and supplementary listing particulars/prospectus

250. FSA § 146.

251. Listing Rules ¶ 6.C.21.

252. *Twycross v. Grant*, (1877) 2 CPD 469.

submitted for approval and, when approved, published (FSA § 147). The Listing Rules (¶ 8.20) set out how supplementary listing particulars are to be published; this includes circulation to shareholders if the listing particulars were themselves circulated. A significant change or a significant new matter for purposes of section 147(2) of the Act refers to such information as specified in section 146 of the Act that investors reasonably require for the purposes of making an informed assessment. *See* Section XIII(A)(15) below.

14. General Duty of Disclosure

Quite apart from the listing rules, section 146 of the Act imposes on the persons responsible for, the listing particulars a duty to disclose in the listing particulars all such "information as investors and their professional advisers reasonably require, and might reasonably expect to be included for the purpose of making an informed judgment about the value of the securities as an investment. The information to which the duty applies is that which is within the knowledge of the persons responsible for the listing particulars or which it would be reasonable for them to ascertain by making enquiries. The Listing Rules (¶ 5.5) now require as part of the listing application procedure that the issuer must provide the Stock Exchange with a letter signed by or on behalf of each director of the issuer confirming that the listing particulars contain all such information.

15. Verification

Directors in the UK, like directors in the United States, must exercise appropriate diligence to avoid liability for misrepresentations in a prospectus by verifying to the extent reasonable representations set forth therein. Obviously, each director of a company cannot be expected to know every fact relating to the company. With respect to some statements it may be proper for a director to rely on other people, including the company's advisers, to check particular parts of the prospectus or listing particulars. Reliance on an appropriate person to carry out a detailed verification should afford a director reasonable grounds for his belief that a particular statement is true, provided that it was reasonable to rely on that person in the circumstances and the director believes on reasonable grounds that he has in fact verified the statement. *See* further discussion of director's liability at Section XIV.

It is often very difficult to impress on directors the extent of their individual responsibility for the prospectus and the significance in terms of limiting potential liability. To assist directors and others to show that reasonable care has been taken in the preparation of the prospectus or listing particulars, and thereby minimize the risk of liability under section 150 of the Act or under Regulation 14 of the POS Regulations (*see also* section 151(1) and Regulation 15(1), and the conditions

thereto discussed at Section XIV(E)), should it subsequently be found to be untrue or misleading, the practice has grown up of preparing verification notes as part of the verification process. This process as a whole should involve:

(a) the identification of at least one source for the verification of every statement of fact;

(b) the recording in writing of that source;

(c) the recording in writing of a reasonable basis for each statement of opinion;

(d) each of the directors having sufficient time to consider and comment on the prospectus and the notes (so that they may be corrected and/or amplified if necessary); and

(e) the notes, including copies of documents resulting from the verification process, being presented to the board meeting at the time when the prospectus is finally approved.

It is obviously desirable that a full board meeting attended by every director should consider the prospectus substantially in its final form while it is still possible to incorporate any amendments considered necessary. It must be emphasized that the responsibility for statements in the prospectus does not end with its issue but continues for a period of time (section 150(1) of the Act or Regulation 14(1) of the POS Regulations). See Section XIV(C).

16. Timetable for Listing Application

The timetable for an application for listing is as follows:

Applications for listing are considered on Wednesday and Friday of each week. Not later than 14 days prior to the intended publication date of the listing particulars/prospectus, three copies of the following documents must be submitted to the Stock Exchange in draft:²⁵³

Listing particulars and cover;

Application forms to purchase or subscribe shares;

Formal notices of the offer;

Mini-prospectus (if used);

Summary particulars (if used);

Text of the accountant's report (if any);

Sponsor's working capital letter;

Text of the directors' letter confirming that to their knowledge the prospectus contains all relevant information;

253. Listing Rules ¶ 5.9.

The text of any relevant letter of application for any derogation from the listing rules. The two most important of these letters are the "non applicable letter" — a letter specifying all information required by the listing rules but not contained in the prospectus, along with an explanation as to why not — and the "omission" letter, requesting the Exchange to authorize the omission of any required information.

The Exchange will not permit an application for listing to proceed until it has reviewed and accepted all these documents. However, except in the case of the application letters the Exchange has very limited discretion in that it (probably) cannot reject a prospectus that complies with the listing requirements on grounds not related to the content of the document. In practice, however, the Exchange has been able to discourage inappropriate applicants from listing without having to test this point.

Forty-eight hours before consideration of the application for listing, the following documents must be delivered to the exchange:²⁵⁴

The application form for listing;

Two copies of the listing particulars;

A copy of the national newspaper advertisement (if any) containing listing particulars, mini-prospectus, offer notice, formal notice or other such document;

A copy of the board resolution allotting the securities;

In the case of a new applicant, various constitutional documents of the company.

No later than 9:00 a.m. on the day the application for listing is to be considered, the following must be delivered to the exchange:²⁵⁵

Payment of the listing fees;

A statement of the total shareholdings in the company broken down by class;

Where no prospectus has been published, a letter confirming that the securities have not been offered to the public.

17. Publication of the Listing Particulars/Prospectus

Chapter 8 of the Listing Rules sets forth the publication requirements applicable to Listing Particulars. The same provisions are made applicable subject to adaptation appropriate for a public offer to a prospectus when an issuer applies for listing in connection with the first offer of the securities to the public in the United Kingdom.²⁵⁶ The listing

254. Listing Rules ¶ 7.5.

255. Listing Rules ¶ 7.7.

256. Listing Rules ¶ 5.1(a)-(d).

particulars/prospectus cannot be published until formally approved by the Stock Exchange²⁵⁷ and cannot be circulated or made available publicly until published in accordance with the procedures described immediately below.²⁵⁸ The listing particulars/prospectus is published by making printed copies thereof available to the public free of charge at the Company Announcement Office of the Exchange, the issuer's registered office in the UK (if any), and the offices of any paying agent of the issuer in the United Kingdom.²⁵⁹ A notice of the availability of the listing particulars/prospectus must be published in at least one national newspaper no later than the next business day following publication.²⁶⁰ Copies of the listing particulars/prospectus must be available at the registered office of the issuer and the offices of its paying agent for at least 14 days, commencing in most instances with the day on which the notice of availability is published.²⁶¹ In addition, at least 30 copies and such additional copies necessary to satisfy public demand must be available at the Company Announcement Office of the Stock Exchange for at least the first two of the 14 days.²⁶²

B. Contents of Prospectus for 156A Securities

The Exchange has adopted Rules for Approval of Prospectuses Where No Application for Listing is Made (hereinafter the "156A Rules"). The 156A Rules follow Chapter 26 and have no Chapter designation. Strictly speaking, the 156A rules apply to an issuer who is not applying for a listing that proposes to offer securities to the public in the UK for the first time AND the securities are to be offered to the public or are to be the subject of an application to the official list in another member state simultaneously or within a short time (normally within three months) of the offering in the UK.²⁶³ There, of course, is little reason for an issuer to comply with the 156A Rules unless it intends to offer and/or list the securities in another member state, but, presumably, this does not require the issuer to go forward with the offering and/or listing application in another member state. The approach of the 156A Rules as to the content of the prospectus is to identify and disapply those of the Listing Rules that are over and above the disclosure standards set by Schedules A/B of the Listing Particulars Directive. The Listing Particulars Directive establishes minimum standards

257. Listing Rules ¶ 8.1.

258. Listing Rules ¶ 8.2. Draft listing particulars/prospectus clearly marked as a draft, however, can be circulated by to approval and prior to publication for purpose of arranging a placing or syndication or underwriting. See Listing Rules ¶ 8.3.

259. Listing Rules ¶ 8.4.

260. Listing Rules ¶ 8.7. For content of such notice, see Listing Rules ¶¶ 8.10-8.11.

261. Listing Rules ¶ 8.5.

262. Listing Rules ¶ 8.6.

263. 156A Rules ¶ 1.

that each Member State must adopt. Schedule A of the Listing Particulars Directive sets forth the disclosure required in for the admission of shares to the official list and Schedule B sets forth the disclosure required for the admission of debt securities to the official list. The London Stock Exchange has incorporated comparable standards into the Listing Rules, but has added a number of additional requirements that go beyond Schedules A/B. Those that are required by Schedules A/B are identified in the Listing Rules by an annotation referencing the relevant provision of Schedules A/B being followed. Article 12 of the Prospectus Directive requires as to a prospectus seeking the benefit of the mutual recognition provisions that it meet the standards established by the Listing Particulars — *i.e.*, by Schedules A/B. The 156A Rules require that the prospectus contain the information set out in Chapter 6 (which prescribes the content of the listing particulars/prospectus for a company applying for listing) to the extent required by the Appendix to the 156A Rules. Paragraph 3 of the 156A Rules Appendix lists the provisions of Chapter 6 that are not applicable to a 156 prospectus and by this process for the most part leaves only those items required by Schedule A/B as applicable to a 156A prospectus. There are a few instances, as indicated below, in which the prospectus goes beyond Schedule A/B. This leaves a document consisting of the following:

Business Activities. Identical to prospectus for securities to be listed. *See* Section XIII(A)(2).

Financial Statements. The financial information can be presented in the form of a comparative table in lieu of the accountants' report.²⁶⁴ The issuer's auditors or reporting accountants, as appropriate, must deliver a letter to the Stock Exchange to the effect that the comparative table of financial information was extracted from the issuer's annual accounts and that the annual accounts were prepared and audited in accordance with the appropriate accounting standards.²⁶⁵ This letter, however, is not part of the prospectus. The circumstances under which the accountants' report has to be used are not applicable. The prospec-

264. 156A Rules, Appendix, ¶ 3 excludes ¶ 6.E.2 of the Listing Rules from the information to be included in an 156A prospectus. Paragraph 6.E.2 sets forth by incorporating relevant provisions of Chapter 12 the requirements as to the financial statements to be included in and the form of the accountant's report. An applicant for listing, except under specified circumstances or unless it elects to file an accountant's report, can use a comparative financial table meeting the requirements of ¶ 6.E.1 of the Listing Rules instead of an accountant's report. *See* § 1.13[1][c][iii]. Paragraph 6.E.1 incorporates by reference the relevant provisions of Chapter 12 setting forth the content and form of the comparative table. Since the Appendix to the 156A Rules provides that the prospectus of a 156A filer "shall not include information required by paragraph . . . 6.E.2" the assumption is made that such filers are to use a comparative table meeting the requirements of ¶ 6.E.1 rather than an accountant's report.

265. *See* 156A Rules, Appendix ¶ 3 incorporating Listing Rules ¶ 6.E.1, which in turn incorporates ¶ 12.18.

tus, therefore, should include a comparative financial table similar with limited exceptions to that required in the case of securities to be listed. See Section XIII(A)(3)(c). Since there is no requirement that the issuer have been in business for at least three financial years, specific provision is made for including information relating to the company's accounts for such shorter periods, if any, that are applicable.²⁶⁶ The most significant other exception is that a statement as to the adequacy of the working capital otherwise required by Rule 6.E.16 is not required.²⁶⁷

Material Trends and Forecasts. The general requirements as to the discussion of trends in the company's business since the end of the last financial years as to which its financial reports relate and information relating to its prospects for the current financial year are the same as in the case of a company making application for listing (see Section XIII(A)(4)). If, however, the company chooses to include a profit forecast or estimate it is not required as is the company applying for a listing to set forth (a) the principal assumptions on which it is based; (b) the forecast or estimate does not have to be examined and reported on by the reporting accountants or auditors; and (c) the sponsor does not have to confirm that the forecast was made after due and careful inquiry by the auditors.²⁶⁸ A company as a matter of disclosure, however, should consider doing so. See Section XIII(A)(4).

Persons Responsible for the Prospectus. There are a number of significant differences. No disclosure has to be made relating to the resignation, removal, or failure to re-appoint the auditors during the last three financial years.²⁶⁹ No obligation to disclose information such as auditors regarded warranting the attention of shareholders or creditors.²⁷⁰ No statement required as to reports of experts included in the prospectus that such reports were included with the consent of the experts who authorized the inclusion for purposes of section 152(1)(e).²⁷¹ Of lesser significance, names and addresses of the issuer's bankers, legal advisers and sponsor, legal advisers to the issue, and the reporting accountants do not have to be included.²⁷² The omission of these specific requirements is consistent with the general approach under the 156A Rules of requiring disclosure mandated by Schedules A/B of the Listing Particulars Directive since they go beyond what Schedule A/B require. See

266. 156A Rules, Appendix ¶ 4.

267. 156A Rules, Appendix ¶ 3.

268. 156A Rules, Appendix ¶ 3 excludes ¶ 6.G.2, which includes such limitations on profit estimates or forecasts by a company applying for listing.

269. 156A Rules, Appendix ¶ 3 excludes ¶ 6.A.7, which requires such information be included if the company is applying for a listing.

270. *Id.*

271. 156A Rules, Appendix, ¶ 3 excludes ¶ 6.A.9, which requires such information be included if the company is applying for a listing.

272. 156A Rules, Appendix, ¶ 3 excludes ¶ 6.A.8, which requires such information be included if the company is applying for a listing.

Section XIII(A)(6) for discussion of the requirements in the case of securities to be listed. Notwithstanding the foregoing, by virtue of Section 156A(3) the prospectus relating to 156A securities is subject to Sections 146, 150, and 152 of the FSA. Section 146 provides that any FSA Part IV prospectus, which a 156A prospectus is, in addition to the information called for by the Stock Exchange "shall contain all such information as investors and their professional advisers would reasonably require, and reasonably expect to find there, for the purpose of making an informed assessment of — (a) the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the securities." Derogatory information from former auditors would seem to fall into this category. The question who may have civil liability for the failure to comply with § 146 in this regard is a complex one. *See* Section XIV(e).

Distribution Arrangements. No significant differences. *See* Section XIII(A)(9).1.13[1][i].

Management. There are substantially lesser requirements in that directors' relevant business interests and activities do not have to be described,²⁷³ considerably less information is included relating to directors' remuneration and service contracts with the issuer.²⁷⁴ *See* Section XIII(A)(10) for description of requirements relating to securities to be listed.

Promoters: The prospectus must include the name of any promoter of the company or any of *its subsidiaries* and the amount of any cash, securities or benefits that are proposed to be or have been, within the two years preceding publication, paid, issued or given to any promoter and the consideration received for same. This provision, which is applicable to companies applying for listing, is one of the few instances in which the disclosure of a 156A company goes beyond Schedule A/B.²⁷⁵ *See* Section XIII(A)(13).

Material Contracts: The Listing Rules require that in the case of a company applying for a listing that the listing particulars/prospectus set forth that it will make available for inspection for 14 days from the date the prospectus is published or for the period of the offer, if longer, at a designated place in or near the City of London a long list of documents, including all material contracts entered into within two years of the date of publication of the prospectus.²⁷⁶ *See* Section XIII(A)(12). The listing particulars/prospectus must also include a summary of each such

273. 156A Rules, Appendix, ¶ 3 excludes ¶ 6.F.2, which requires such information be included if the company is applying for a listing.

274. 156A Rules, Appendix, ¶ 3 excludes ¶ 6.F.10-6.F.13, which requires such information be included if the company is applying for a listing.

275. 156A Rules, Appendix, ¶ 3 does not exclude ¶ 6.C.21, which requires such information be included if the company is applying for a listing.

276. Listing Rules ¶ 6.C.7(c), incorporating ¶ 6.C.20.

material contract.²⁷⁷ The 156A Rules do not require that the issuer make the material contracts available for inspection,²⁷⁸ but do require that the listing particulars/prospectus include a summary of the material contracts entered into within two years of the date of publication.²⁷⁹ This is another of the few instances in which the 156A Rules go beyond what is required by Schedules A/B.

The Issuer and Its Capital. Substantially the same information required of securities to be listed with the exception noted below. See Section XIII(A)(11). The requirement that documents be available for inspection for not less than 14 days at a named place in or near the City of London (6.C.7) and that the availability of such documents be set forth in the prospectus is not applicable to the following documents: (a) Articles of Association of the issuer; (b) any trust deed referred to in the prospectus; (c) written statement of the auditors or accountants of adjustments made by them to the annual accounts, and (d) the audited accounts of the issuer for each of the two financial years preceding publication of the listing particulars.²⁸⁰ The absence of the statement of adjustments follows from the fact that no auditors or accountants report is included in the prospectus. The absence of the audited accounts from the list of documents to be available for inspection seems lax since the required comparative financial table is based on them.²⁸¹ Presumably, they are available at the office of the relevant Registrar since if a company organized under the laws of the UK such annual statements have to be filed with the Registrar. See Section XIII(A)(3)(a). Any report, balance sheet, valuation or other statements made by an expert included or referred to in the prospectus must be made available for inspection during normal business hours for not less than 14 days from the date of the prospectus or for the duration of the offer, if longer, at a named place in or near the City of London.²⁸²

The 156A prospectus cannot be published until formally approved

277. Listing Rules ¶ 6.C.20.

278. 156A Rules, Appendix, ¶ 3 excludes ¶ 6.C.7(c), which requires such material contracts be made available for inspection if the company is applying for a listing.

279. 156A Rules, Appendix, ¶ 3 does not exclude ¶ 6.C.20, which requires such information be included if the company is applying for a listing.

280. 156A Rules, Appendix, ¶ 3 excludes ¶ 6.C.7(a), (b), (f), and (g), which require such documents be referenced and be made available for inspection if the company is applying for a listing.

281. The Rule 156A prospectus, however, does have to reference and the issuer must make available for inspection reports and balance sheets included in or referred to in the listing particulars/prospectus. 156A Rules, Appendix, ¶ 3, does not exclude ¶ 6.C.7(e), which require such documents be referenced and be made available for inspection if the company is applying for a listing. Since the comparative financial table at least indirectly has to reference the published balance sheet; perhaps, this requires that it be made available for inspection by a 156A issuer.

282. 156A Rules ¶ 14.

by the Stock Exchange²⁸³ and cannot be circulated or made available publicly until published in accordance with the procedures described immediately below.²⁸⁴ The publication requirements are the same as those applicable to a POS prospectus (*see* Section VIII) with the qualification noted immediately below.²⁸⁵ Any announcement of the public offer must be submitted to the Stock Exchange for approval prior to use and must state that a prospectus has been or will be published and the addresses and the times at which copies are available to the public.²⁸⁶ A press release that merely includes a reference to the public offer, however, does not have to be submitted for approval.²⁸⁷

C. Content of Prospectus of Other Unlisted Securities Not Traded on AIM

The content of the prospectus of securities not to be listed and as to which reliance is not being placed on Section 156A is determined by Schedule 1 to the POS Regulations. Schedule 1 to a significant degree, although numbered differently, follows the principal categories of information called for by the Listing Particulars for a first offering of shares. The following description lists the significant similarities and differences from the prospectus for shares to be listed.

Business Activities. Schedule 1, Part VI. Somewhat less information is required than is required of securities to be listed. *See* Section XIII(A)(2). For example, there is no requirement to furnish revenue by products or by geographical areas. The specific requirements include (a) a description of the company's business and "exceptional factors" that impact the business; (b) dependence on contracts, licenses, patents, and intellectual property of "fundamental importance" to its business; legal proceedings, pending or threatened, that "may have a significant effect on the issuer's financial position," and (d) information relating to significant "investments in progress."

Financial Statements. Schedule 1, Part VII. In some respects, the requirements appear to be more onerous than in the case of securities to be listed or the 156A requirements. If, as is generally the case for an UK issuer, the company has been required to publish its annual accounts under Part VII of the Companies Act of 1985 (*see* Section XIII(A)(3)(a)), the following requirements are applicable: Three years'

283. Listing Rules ¶ 8.1 as incorporated into 156A Rules ¶ 13.

284. Listing Rules ¶ 8.2 as incorporated into 156A Rules ¶ 13. Draft prospectus clearly marked as a draft, however, can be circulated prior to approval and prior to publication for purpose of arranging a placing or syndication or underwriting. *See* Listing Rules ¶ 8.3 as incorporated into 156A Rules ¶ 13.

285. 156A Rules ¶ 12.

286. 156A Rules ¶ 16.

287. 156A Rules ¶ 17.

annual accounts (covering a continuous period of at least 35 months) must be set out together with a statement by the directors that the accounts have been prepared in accordance with the law and that they accept responsibility for them. "Annual accounts" has the same meaning as in the Companies Act 1985 and so, by section 261(2) of that Act, must include the notes to those accounts. The name and address of the auditors has to be given together with a copy of the auditors' report on those accounts. The prospectus is required to include a statement by the auditors that they consent to the inclusion of their reports in the prospectus and accept responsibility for them, and have not become aware, since the date of any report, of any matter affecting the validity of that report at that date. As an alternative to the foregoing, it is possible to include a report by a person qualified to act as an auditor with respect to the state of affairs and profit and loss shown by the issuer's annual accounts for the last three years. If the company has been in existence for less than three years, the requirement is qualified so that the prospectus must contain the accounts that have actually been prepared for financial years during its existence (disregarding a financial year that ended less than three months before the date on which the offer is first made). If more than nine months have elapsed at the date on which the offer is first made (*i.e.*, the date of publication of the prospectus) since the end of the last financial year, the prospectus is also required to include interim accounts. The interim accounts need not be audited but must be prepared to the standards required for annual accounts. The prospectus must state the name and address of the person responsible for the interim accounts, and a statement by him that the interim accounts have been properly prepared in accordance with the law and that he consents to the inclusion of the accounts and a statement in the prospectus to that effect. Alternatively, a report covering that period with respect to the state of affairs and profit and loss of the issuer, by a person qualified to act as an auditor, may be included. If such alternative is utilized, the name and address of the person who audited the accounts must be included. In addition, the prospectus must include a statement by the person preparing the report "that in his opinion the report gives a true and fair view of the state of affairs and profit or loss of the issuer and its subsidiary undertakings, and that he consents to the inclusion of his report in the prospectus and accepts responsibility for it; or a statement why he is unable to make such a statement."

It is interesting to note that neither the prospectus for securities to be listed nor the 156A rules require the consent of the auditors who prepared the annual accounts to be included in the prospectus. Neither require someone to specifically accept responsibility for the interim statements. Neither specifically require the directors to accept responsibility for the financial information. See Section XIII(A)(3)(c)-(e). In the

case of a 156A prospectus, no statement accepting responsibility for the financial information (which is included in the form of a comparative table) included in the prospectus is required.²⁸⁸ See Section XIII(B).

Recent Developments. Profit forecasts and estimates. Schedule I, Part IX. See Section XIII(A)(4) as to securities to be listed. There are no requirements relating to profit forecasts and estimates. The issuer, however, must include information relating to "the issuer's prospects for at least the current financial year of the issuer." In addition, "significant recent trends concerning the development of the issuer's business" must be included. Such information, however, is limited to developments since the end of the financial year.

Distribution Arrangements. Schedule 1, Part IV. See Section XIII(A)(1) as to listed securities. The Schedule calls for limited information relating to the nature of the offering and the distribution terms. The prospectus must set forth the number of shares offered (§ 19); the offering price, or, if applicable, the procedure, method and timetable for fixing the price (§ 26); the method of payment for the shares and timetable for delivery of the shares (§ 27); the period during which the offering will remain open (§ 25); the names of the underwriters (the procedure, method and timetable for fixing the price); an estimate of the expenses of the offering and by whom payable (§ 23); commissions payable to the underwriter (§ 23), total proceeds expected from the offering and net proceeds after deducting expenses to the issuer (§ 20). The prospectus must also state whether (a) the securities being offered have been admitted to dealings on a recognized investment exchange; or (b) an application for such admission has been made.

(2) If no such application for dealings has been made, or such an application has been made and refused, a statement as to whether or not there are, or are intended to be, any other arrangements for there to be dealings in the securities and, if there are, a brief description of such arrangements. Whether the securities are admitted to or application for admission to dealings has been made on a "recognised investment exchange." If not, a brief description of the market in which it is expected such securities will trade (§ 16).

The purposes for which the securities are being offered must be set forth (§ 17). If the offer is by subscription, the following information must be set forth concerning the use of the proceeds (§ 21):

(a) The minimum amount which, in the opinion of the directors of

288. 156A Rules, Appendix § 3 does incorporate Listing Rules § 6.E.1, which in turn incorporates § 12.18. Paragraph 12.18 requires a letter to the Exchange from the issuer's auditors or reporting accountants as appropriate to the effect that the comparative table of financial information was extracted from the issuer's annual accounts and that those were prepared and audited in accordance with the appropriate accounting standards. This letter, however, is not part of the prospectus.

the issuer, must be raised by the issue of those shares in order to provide the sums (or, if any part of them is to be defrayed in any other manner, the balance of the sums) required to be provided in respect of each of the following—

(i) The purchase price of any property purchased, or to be purchased, that is to be defrayed in whole or in part out of the proceeds of the issue;

(ii) Any preliminary expenses payable by the issuer and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the issuer;

(iii) The repayment of any money borrowed by the issuer in respect of any of the foregoing matters;

(iv) Working capital; and

(b) The amounts to be provided in respect of the matters mentioned otherwise than out of the proceeds of the issue and the sources out of which those amounts are to be provided.

In many respects this is considerably more specific than what has to be disclosed concerning the use of proceeds as to securities to be listed. *See* Section XIII(A)(1).

Management. Schedule 1, Part VIII. *See* Section XIII(A)(10) as to securities to be listed. This part of Schedule 1 requires a concise description of the directors' existing and proposed service contracts of more than one year's duration. Details also have to be given of the aggregate remuneration paid and benefits in kind granted to the directors of the issuer during its last completed financial year together with an estimate for the current year. The prospectus must also set out the interests of each director in the share capital of the issuer, distinguishing between beneficial and non-beneficial interests. For this purpose it is assumed that the provisions of sections 324 to 328 of the Companies Act 1985 are relevant for determining the interests of the directors.

Persons Responsible. Schedule 1, Part III. *See* Section XIII(A)(6) as to securities to be listed. The prospectus must set forth the names and addresses of the persons responsible for the prospectus, specifying the portions for which they are responsible. The persons responsible are those on whom responsibility is imposed by Section 13 of the POS Regulations, which is comparable in most respects to Section 152 of the FSA. *See* Section XIV(C). In some respects this is more specific than what is required in connection with a prospectus relating to securities to be listed. A statement of the directors must be set forth in the prospectus that "to the best of their knowledge the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect the import of such information." There is no specific reference to the statement being made after enquiry

as in the case of the declaration required in a prospectus of securities to be listed. *See* Section XIII(A)(6). The provisions of the POS Regulations imposing liability for untrue statements or misleading statements, however, require, as in the case of securities to be listed, that directors established that they exercised due care and made appropriate inquiries to avoid liability. *See* Section XIV(E). The prospectus must also include "a statement by any person who accepts responsibility for the prospectus, or any part of it, that he does so." This is without prejudice to the provisions of ¶ 45 imposing responsibility on certain persons with respect to the financial information included in the prospectus. *See* Section XIV(C).

Securities to Which the Prospectus Relates. Schedule 1, Part IV. *See* Section XIII(A)(11) as to securities to be listed. The securities being offered must be described and a detailed summary of rights attaching to those securities must be included in the prospectus. Particulars must be given of tax on income from the securities withheld at source, including tax credits.

General Information. Schedule 1, Part II. A number of general items of information are required to be included in the prospectus, including such fundamental matters as the name of the issuer and the address of its registered office. If the offeror is different from the issuer, the name and address of the offeror must be given. The date of publication of the prospectus is required to be stated and a statement must be included that the prospectus has been drawn up in accordance with the POS Regulations.

The preparation of the prospectus for unlisted securities is not in fact significantly less onerous than securities to be listed. The significant difference, however, is that there is no review of the prospectus. The prospectus for unlisted securities is filed with the Registrar who has limited authority not to accept it for filing and the prospectus is not reviewed by anyone.

D. Contents of Prospectus for Securities to be Admitted to Trading on AIM

A company making a public offering and applying for admission to trading on AIM in connection therewith must comply with the prospectus requirements of the POS.²⁸⁹ The company, however, must include the additional information prescribed by the AIM Admission Rules;²⁹⁰ in other words, a working capital adequacy statement, a statement of the basis of any profit forecast, a notice to the effect that application has been made for listing on AIM; some further disclosure as to directors;

289. AIM Admission Rules (AIM Rules) ¶ 16.10.

290. AIM Rules ¶ 16.11.

the name and address of the nominated advisor, and the names of any persons who are interested in more than three percent of the issuers capital, along with a statement of the amount of their holding. If the main business of the company has not realized revenues for at least two years prior to admission, the directors, employees, and their associates, other than those owning less than two percent of the outstanding shares, must agree, and the prospectus must disclose, that for a period of one year from the date trading commences such persons will not dispose of their shares except in the event of death and under other limited circumstances.²⁹¹ The prospectus must include on the first page (excluding the cover, if any) in prominent lettering a prescribed legend that notes the company has applied for admission to trading on AIM, that AIM is primarily for emerging or smaller companies with a "higher investment risk" than established companies, prospective investors should take the risks into account and "invest only after careful consideration and consultation with his or her own independent financial adviser." The legend must also note that AIM has less demanding rules than the Official List, that no application has been made for admission to the Official List, and "the Exchange itself has not approved the content of the document."²⁹² The prospectus is submitted as part of the application procedure, and in the case of a new applicant must be delivered to the AIM office of the Stock Exchange not less than five business days prior to the date the issuer wishes the securities to be admitted.²⁹³ The document is not reviewed by the AIM office, which relies entirely upon the statement by the nominated adviser to the effect that the document complies with all relevant rules. A company applying for admission to AIM must publish a prospectus conforming with the POS regulations whether or not it is making an offer of its securities to the public.²⁹⁴ The prospectus is an Article 11 prospectus for purposes of the Public Offers Prospectus Directive, not entitled to mutual recognition by other member states. *See* § 1.09. Presumably an issuer could follow the Section 156A procedures, in which event the Stock Exchange would review the prospectus and it would be entitled to mutual recognition. *See* § 1.13[2].

E. Acceptance of Applications and Allotment of Shares

A prospectus will usually invite the public to apply for shares by returning an application form. The prospectus will state the time by which the application forms must be received (normally the time when the subscription lists open and immediately afterwards close) and to

291. AIM Rules ¶¶ 16.9(c), 16.11(d).

292. AIM Rules ¶ 16.11[c].

293. AIM Rules ¶ 16.4C(c).

294. AIM Rules ¶ 16.10.

whom they should be sent. In the case of large issues, they will normally be sent to receiving bankers who are appointed specifically to receive and deal with applications. Usually, the application must be accompanied by a check and the issuer or vendor will probably reserve the right to clear all checks. The prospectus or listing particulars will contain detailed terms and conditions on the basis of which applications will be made. For example, the issuer or vendor will reserve the right to reject any application and, if it is considered appropriate, to aggregate multiple applications (or perhaps prohibit multiple applications by including a warranty made by signing and submitting an application form that it, the application form being signed, is the only application form that has or will be made by the applicant).

Allotments and the treatment of applications in respect of unlisted securities offered for sale or subscription are regulated by Companies Act 1985.²⁹⁵ Applications made pursuant to a prospectus issued generally (*i.e.*, issued to persons other than existing members or debenture holders) may not be accepted until the beginning of the third working day after the prospectus is first issued or until such later time as is specified in the prospectus.²⁹⁶ The period during which the offer is open must be stated in the prospectus.²⁹⁷ The word "issue" is given a special meaning for this purpose if the prospectus is issued as a newspaper advertisement. If it is so issued before the third day after it is issued in some other manner, the date of issue is the date on which it first appears as a newspaper advertisement. In any other case the date of issue is the first date on which the prospectus was issued in any manner.²⁹⁸ This provision ensures that applicants have a reasonable opportunity to consider the prospectus and return the application before the subscription lists open.

The Companies Act 1985 does not specify a date by which the subscription lists must be closed and it is theoretically possible for a company to issue a prospectus and seek applications for its shares on the basis of that prospectus over a long period of time. The burden on the

295. Part IV. (The Financial Services Act 1986 prospectively repealed sections 81 to 83, 86 and 87 and certain parts of CA 1985 § 84 and CA 1985 § 85. Under the Financial Services Act 1986 (Commencement) (No. 3) Order 1986 (SI 1986 No. 2246) the repeal of those sections was brought into force "to the extent to which they would apply in relation to any investment which is listed or the subject of an application for listing in accordance with Part IV of the [Financial Services] Act." By contrast, the Financial Services Act 1986 (Commencement) (No. 13) Order 1995 (SI 1995 No. 1538), which has effect to repeal CA 1985, Part III relating to prospectuses, does not bring the repeal of sections 81 to 87 of that Act into force; indeed, a saving is made in the repeal of Part III of, and CA 1985, 3 Sch. to the extent necessary for the purpose of giving meaning to sections 81 to 87 (and various other sections).)

296. CA 1985 § 82(1).

297. POS Regulations, Sch. 1, ¶ 25.

298. CA 1985 § 82(3).

directors and other persons responsible for the prospectus of ensuring that the information in the prospectus remained accurate during that period, however, would be very arduous. The prospectus, therefore is likely to set forth a closing date. In addition, the Companies Act provides that where there is an offer to the public for subscription of shares, no allotment of shares can be made unless the minimum amount that in the opinion of the directors must be raised after the expenses of the offering for any proposed acquisition and for working capital has been subscribed. If this minimum amount has not been raised within 40 days after the first issue of the prospectus, all money that has been received from applicants has to be repaid to them forthwith without interest or, if it is not repaid within 48 days after the issue of the prospectus, with interest.²⁹⁹ A prospectus under the POS Regulations is required to include a statement of the minimum subscription required to close the issue.³⁰⁰ Section 82(7) provides that applications made pursuant to a prospectus issued generally will not normally be revocable until after the expiration of the third working day after the opening of the subscription lists. Accordingly, applications, which in contractual terms are offers, should be accepted by the issuer before the end of that third day. Within one month of making an allotment of shares, a return must be made to the Registrar of Companies on Form 88(2).³⁰¹

XIV. CIVIL LIABILITY FOR LISTING PARTICULARS AND PROSPECTUSES

A. Introduction

The issue of civil liability for misrepresentations in a prospectus can arise in connection with a prospectus prepared in conformity with the POS regulations (POS prospectus), a prospectus prepared in conjunction with a listing application on the London Stock Exchange (listing particulars/prospectus), and a prospectus prepared in accordance with Section 156A (a 156A prospectus). Liability relating to a listed prospectus and a 156A prospectus (hereinafter collectively sometimes referred to as "Part IV prospectuses") is governed by Part IV of the Financial Services Act. Sections 146, 147, and 150-152 of the FSA, as amended by Section 154A, are the critical provisions of the FSA determining liability for misrepresentations in connection with listing particulars/prospectus of listed companies. Section 156A of the FSA specifically extends these provisions with variations in terminology as appropriate to a 156A prospectus. Liability for misrepresentations in a POS prospectus is determined under §§ 13-15 of the POS. There are

299. CA 1985 § 83.

300. POS, Sch. 1, ¶ 21. That paragraph equates with CA 1985, 3 Sch. 2 which is incorporated into CA 1985 § 83(1).

301. See Companies (Forms) (Amendment) Regulations 1988 (SI 1988 No. 1359).

many similarities, but also some apparent and, perhaps, real differences in the relevant provisions governing persons liable for misrepresentations relating to POS prospectuses and Part IV prospectuses. There may also be difference in application of Part IV to listing particulars/ prospectus and a 156A prospectus as the former play a dual role as listing particulars and as a prospectus. The absence of authoritative judicial interpretations of these provisions leaves some important issues unresolved.

Section 150 of the FSA (POS Regulation 14) provides a remedy to an investor who acquires securities or an interest in securities and suffers loss by reason of false or misleading information in the listing particulars/prospectus. This remedy is in addition to any other statutory or common law remedy available to the injured party. There are two aspects of liability as follows:

Any person responsible for the listing particulars/prospectus (*see* § 1.14[3]) will be liable to compensate anyone who has acquired any of the securities in question, and suffered loss in respect of them, as a result of any untrue or misleading statement in them or the omission of any matter required to be included under section 146 (Regulation 9) (general duty of disclosure) or section 147 (Regulation 10) (supplementary listing particulars or supplementary prospectus) (section 150(1)). For the purposes of this provision, if the listing rules or the POS Regulations require a statement either as to the existence of a matter or, if there is none, a negative statement, the omission of the information is treated as a statement that there is no such matter (section 150(2) and Regulation 14(2)).

Any person who fails to issue supplementary listing particulars/prospectus when they are required or otherwise fails to comply with section 147 (Regulation 10) will be liable to pay compensation to anyone who has acquired the securities and suffered loss as a result of the failure (section 150(3) and Regulation 14(3)).

B. Who May Assert a Claim for False or Misleading Statements in a Prospectus or Listing Particulars?

Section 150 of Part IV as amended by Section 154A creates a private action "in any person who has *acquired any of the securities in question* and suffered loss in respect of them as a result of any untrue or misleading statement in the particulars or the omission from them of any matters required to be included in them by Sections 146 and 147." The antecedent of "in the particulars" is "listing particulars" and "supplementary listing particulars." Section 154A makes this provision applicable to a prospectus and supplemental prospectus issued in connection with a public offer of securities by a company concurrently applying for listing and Section 156A makes it applicable to a 156A prospectus. Section 14 of the POS Regulations creates a private action in "any per-

son who has *acquired the securities to which the prospectus relates* and suffered loss in respect of them as a result of any untrue or misleading statement in the prospectus or supplementary prospectus or the omission from it of any matter required to be included by regulation 9 or 10.” A potential issue is whether the cause of action is limited to those who purchase in the offer to which the prospectus relates or whether those who buy in the trading market also can assert a claim. The only difference in Section 150 vis-à-vis a prospectus or supplemental prospectus and Regulation 14 pertains to the italicized phrases. In *Possfund*, a lower court by way of dicta, since neither provision was involved, concluded that the Regulation 14 language “securities to which the prospectus relates” limits the cause of action to those who purchase in the offering, whereas the language of Section 150 “any of the securities in question” refers to the listed securities and is applicable whether purchased in the offering or after trading has commenced.³⁰² The latter is a tenable assumption as at the time Section 150 was adopted it was applicable only to listed securities and listing particulars and the securities in question had to be the listed securities.³⁰³ Section 150 is now applicable to 156A securities as well and such securities will not be listed and the reference to the securities in question has to be to the securities described in the prospectus. The POS language establishing a right of action for misrepresentations in a prospectus was taken from Section 166 of Part V of the FSA. Since Part V never became effective (*see* Section III(D)), Section 166 was never applied although *Possfund* alludes to

302. *See* *Possfund Custodian Trustee Ltd. v. Diamond*, (1996) 2 All ER 774. The court, nonetheless, with respect to a prospectus relating to unlisted shares refused to grant a motion to dismiss as to those who purchased the securities in the trading market. The court acknowledged that in the seminal case of *Peek v. Gurney*, (1873) LR 6 HL 377, the House of Lords held that under the law of deceit an after market purchaser could not assert a claim based on misrepresentations in a prospectus. The court regarded it as “at least arguable” that “in the light of changed market practice and philosophy” that the issuer intended that the prospectus be relied upon not only by those who purchased in the offering, but those who purchase in the after market. This was suggested by the fact that the prospectus referenced that the securities would be dealt in after the offering closed on the Unlisted Securities Market (USM). In the court’s view, it should be determined at trial whether it was intended that the prospectus could be relied upon by purchasers in the after market. *See* further discussion of *Peek v. Gurney* at § 1.14[6][c].

303. The court in *Possfund* in concluding that after market purchasers of a listed security could assert a claim also relied on “the listing rules (which the Act required to be complied with) required listing particulars to be constantly updated in respect of any information affecting, *inter alia*, the value of the listed securities.” It is not entirely clear what the court is referencing vis-à-vis a duty to update after the offering is completed. The Listing Rules do require that a listed company notify “without delay” the Stock Exchange’s Company Announcement Office of price sensitive “major new developments.” Listing Rules ¶¶ 6.1-6.2. These Rules are not phrased in terms of updating the Listing Particulars and are not specifically required by the FSA. Schedule 4 to the FSA, however, does require the Stock Exchange as a Recognized Investment Exchange to require issuers of securities dealt with on the Exchange to provide “persons dealing in the investments [securities] proper information for determining their value.”

it as limiting the cause of action to those who purchase in the offering. The reference in Regulation 14 to "securities to which the prospectus relates," although susceptible to the interpretation adopted by the court,³⁰⁴ describes the securities but doesn't definitively resolve whether they have to be purchased in the offering. The prospectus describe a security and it describes an offering. The prospectus relates to a specific class of shares of a specific issuer and in that sense one who purchased them in the trading market also acquired the securities to which the prospectus relates. Regulation 14 is not specifically limited "to the offering to which the prospectus relates." Regulation 14 as to such unlisted securities supplants Section 67(a) of the Companies Act of 1985, which created a private action in "all those who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage which they may have sustained by reason of any untrue statement included in it." This provision in contrast by the use of the term of art "subscribe for" makes it clear that it related to purchasers in the offering.

The defenses discussed below available to prospective defendants also have some subtle differences between Part IV prospectuses and a POS prospectus. For this purpose, it is necessary to distinguish between the accuracy at the time the listing particulars/prospectus and supplemental listing particulars/supplemental prospectus are approved by the London Stock Exchange from any general duty to update after completion of the offering, which is not addressed by the referenced provisions. The Listing Rules require that before dealings on the exchange have commenced the listing particulars/prospectus must be updated with a supplemental listing particulars/prospectus if there have been any significant changes. Under Section 151(1), the speaking date as of which liability is determined for false or misleading statements is the dates as of which the listing particulars/prospectus and the supplemental listing particulars/prospectus were or should have been submitted to the Exchange. Under Section 151(1)(d) of Part IV of the FSA defendant (1) must reasonably believe that same were not false or misleading at such speaking date, (2) defendant continued in that belief after commencement of dealings on the exchange, and (3) "the securities were acquired after such a lapse of time that he ought in the circumstances to be reasonably excused." The latter proviso suggests that after an appropriate lapse of time, whatever that may be, the defendant no longer has liability even though prior to the acquisition of the shares he no longer had reason to believe that the representations were not false or misleading at the time as of which the document spoke. The negative implication of

304. The plaintiffs apparently did not challenge this view, relying instead on the argument that the changes in marketing of the securities warranted extending responsibility for misrepresentations under the law of deceit so as to protect purchasers in the after market if the prospectus was intended to influence their decision to purchase the security.

this is that one who purchases securities after trading commences on the exchange can assert a claim based on false or misleading representations in the prospectus at the relevant date provided an unreasonable period of time has not elapsed since the securities commenced trading.

Section 10 of the POS Regulations requires after the POS prospectus has been delivered to the Registrar that so long as the offering remains open that in the event of any significant change or significant inaccuracy in the prospectus, the offeror is to deliver to the Registrar a supplemental prospectus appropriately updating and/or correcting the prospectus. The speaking date of the prospectus for determining liability of prospective defendants that the prospectus is not false or misleading under Regulation 15 is the time the prospectus and supplemental prospectus were or should have been delivered to the registrar. To avoid liability, defendant under § 15(1)(a) must have continued in that belief until the securities were acquired or under § 15(1)(d) "that the securities were acquired after such lapse of time that he ought in the circumstances to be reasonably excused." If only persons who bought in the offer can assert a claim, the latter provision is a redundancy unless it is designed to preclude a person who purchases in the offering that has remained open for a long period of time to be precluded from recovery because of the time that had elapsed since the offering commenced. This appears unlikely, particularly in view of the fact that the offeror at least has an obligation to file a supplemental prospectus to update the prospectus for significant developments and/or correct significant errors in the prospectus as long as the offering remains open. Section 15(1)(d) adds, if the securities are dealt in on an approved exchange (which would be AIM presently, *see* Section XIII(D)), defendant must have continued to believe that the prospectus or supplemental prospectus at the relevant date was not false or misleading "after commencement of dealings on that exchange." This does not limit the applicability of the lapse of time provision to securities admitted to dealings on the exchange. Further, with respect to such securities that are admitted to dealings, this provision suggests that purchasers of the securities dealt on AIM after the offering closed can assert a claim and that defendant can avoid liability only by proving that after dealings commenced on AIM he continued to hold the reasonable belief that the prospectus and supplemental prospectus were not false or misleading at the relevant date. Since the AIM prospectus is a POS prospectus, it is subject to the "to which the securities relate" limitation of § 14(1) of the POS. If that language limits the plaintiffs to those who purchased in the offering, it is at odds with the implication of § 15(1)(d) as to securities dealt on the Alternative Investment Market after completion of the offering.³⁰⁵

305. The prospectus involved in *Possfund* was issued in April 1992 in connection with a flotation of shares on the Unlisted Securities Market (USM). The USM is a market for dealings in unlisted securities on the London Stock Exchange that has since been dis-

In the case of the 156A prospectus, the relevant provisions are those pertaining to a listed security except the language relating to continuing to believe following admission of the securities to the official list is deleted and the identical language discussed above relating to § 15(1)(d) of the POS Regulations is added.³⁰⁶ The same conclusion appears to follow, that these provisions suggests that one who purchased after completion of the offering can assert a claim as these provisions otherwise would serve no purpose.

C. Against Whom May a Claim be Asserted?

The provisions in Part IV of the Act and Part II of the POS Regulations as to liability and responsible persons are very similar. The term listing particulars/prospectus will be used to include any supplementary listing particulars or supplementary prospectus. Under section 152 of the Financial Services Act, there are five categories of person responsible for listing particulars/prospectus, as follows:

(i) The issuer of the securities;

(ii) The directors of the issuing company at the time the listing particulars/prospectus are submitted for approval (or, in the case of POS Regulation 13, at the time the prospectus is published);

(iii) Each person who is named in and has authorized himself to be named in the listing particulars/prospectus as a director or as having agreed to become a director either immediately or at a future time;

(iv) Any person who accepts and is stated in the listing particulars/prospectus as accepting responsibility for the particulars or any part thereof (but only for that part); and

(v) Any other person who has authorized the listing particulars/prospectus or any part thereof (but only for that part).

Under Regulation 13 of the POS Regulations, two additional categories of person may be responsible for a prospectus:

The offeror of the securities, where he is not the issuer; and

Where the offeror is a company, but is not the issuer and is not making the offer in association with the issuer, each person who is a director of that company at the time when the prospectus is published.

placed by AIM. The plaintiffs did not raise the issue of the resolution of its status under Section 166 of Part V of the FSA, since it never went into effect and was clearly inapplicable. The court, however, in concluding that the "to which the securities relate" limitations of Section 166 would have limited claims thereunder to purchasers in the offering failed to take into account why it would have been necessary, if the provision were applicable, for the defendant to continue reasonably to believe after securities commenced trading on the USM that the prospectus was not false or misleading.

306. FSA § 156A(3)(d).

The additional provisions were necessary as the Prospectus Directive on which it is based adopted a somewhat different approach from the FSA to the use of the prospectus as the requirement is phrased in terms of the first offer to the public of a security in the member state. The first offer to the public in a specific EU country may be by someone other than the issuer. It is the offeror of POS securities that must publish the prospectus and that must file the prospectus with the Registrar.³⁰⁷ This is likely to be the issuer, but it is not necessarily the issuer. A person, for example, may have acquired securities in circumstances that did not involve an offer to the public, but subsequently offers them to the public. In that event, it is that person, and not the issuer of the securities, who must publish the prospectus and file the prospectus with the Registrar.³⁰⁸ The apparent reason for imposing liability on the offeror is in view of the eventuality that the prospectus requirement might be triggered by an offeror who is not the issuer. In such a case, provided the issuer has not authorized the offer, neither the company that issued the securities nor the directors of that company have any liability for the contents of the prospectus.³⁰⁹

Since the FSA was enacted before the Prospectus Directive was adopted, it did not anticipate the first public offer approach of the Prospectus Directive. It is not surprising, therefore, that Section 152 does not refer to the offeror as a person responsible for this purpose. The distinction, however, may only be apparent. Section 154A was added to the FSA at the same time the POS regulations were adopted. Section 154A is designed to make the relevant provisions of the FSA governing preparation of the listing particulars applicable to the prospectus required in connection with the offering for the first time in the United Kingdom of listed securities. Section 154A provides that the reference in Section 152(1)(a) to the issuer of the securities, notwithstanding Section 142(7) (the definition of an issuer), is also "a reference to the person offering or proposing to offer them." Section 152(1)(a) is the provision that imposes responsibility (and, hence, liability) on the issuer of the securities for the listing particulars/prospectus. Section 156A was added to the FSA at the same time as the POS regulations was adopted. Section 156A is designed to apply the relevant provisions of Part IV of the FSA relating to listing particulars the 156A prospectus. See Section VI. Section 156A(3)(e) also provides that the reference in Section 152(1)(a)

307. POS § 4(1)-(2).

308. POS § 4(1)-(2).

309. POS § 13(2). Under the 1999 amendments, however, if the issuer has authorized the offering an offeror who is not an issuer is not subject to the prospectus related civil liability provisions if (a) the issuer has responsibility for the prospectus under the regulations (which is ordinarily the case if it has authorized the offering), (b) the prospectus was drawn up primarily by the issuer or persons acting on behalf of the issuer, and (c) the offeror is making the offer in association with the issuer. POS 1999 Amendments, § 2(n) adding to the POS § 13(2A).

to the issuer of the securities is also "a reference to the person offering or proposing to offer them." Notwithstanding the somewhat awkward language and convoluted manner of doing so, the offeror appears also to be a responsible person with respect to the civil liability provisions applicable to listed securities and 156A securities. This, of course, as in the case of a POS prospectus, was necessary to impose liability for the prospectus on the person who makes the first public offer of the security when it is not the issuer.

Only the issuing company itself may apply for listing of securities, so that liability as to listed securities can only arise in respect of listing particulars/prospectus prepared by the company itself. It appears, therefore, that the issuer and its directors continue to be responsible persons even if the first public offer in the United Kingdom is made by someone other than the issuer. This tends to be confirmed by the fact that unlike the POS³¹⁰ Section 152 does not include a provision to the effect that the issuer and its directors are not responsible persons with respect to an offer made by someone without its authorization. A 156A prospectus has to be submitted to and approved by the London Stock Exchange. See Section XIII(B). Unlike a prospectus or listing particulars pertaining to securities to be listed, the provisions of the Stock Exchange governing a 156A prospectus provide that "the prospectus may be submitted by the issuer, or with the consent of the issuer, by the offeror to the Exchange for approval."³¹¹ Section 156A(3) incorporates those provisions of Section 152 that make the issuer and directors of the issuer responsible persons vis-à-vis the 156A prospectus without the POS provision absolving them from responsibility with respect to a first public offer by a person other than the issuer. The apparent reason for such exclusion is that even though the 156A prospectus can be submitted by the offeror, the offeror must have the issuer's authorization to do so. One suspects that an issuer would not be inclined to grant such authorization without provision for indemnification against liability. Further, even though the offeror is responsible for submitting a POS prospectus to the Registrar and for its publication, it would be difficult for it to obtain much of the information it needs to meet the POS requirements without the participation of the issuer. The POS does provide that an offeror who is not the issuer and is not acting pursuant to an agreement with the issuer may omit information not available to him because he is not the issuer.³¹² He, however, is excused from furnishing such information only if is unable to obtain it after "making such efforts (if any) as are reasonable, to obtain the information."³¹³

310. POS § 13(2).

311. Rules for Approval of Prospectuses Where No Application for Listing Is Made, ¶ 2.

312. POS § 11(2).

313. POS § 11(2)(c).

Query, if the issuer furnished such information, does it constitute an authorization of the offer, making the issuer and its directors responsible persons? An issuer under these circumstances would be well advised not to cooperate with the offeror absent indemnification and/or compelling reason to do so.

The need to impose offeror liability is apparent in view of the structure of the prospectus regime imposed by the EU Prospectus Directive, although the Directive itself includes no liability provisions and does not require a country to impose civil liability for a false or misleading prospectus. The imposition of liability on the offeror under the POS Regulations and the FSA as amended may have some unforeseen and apparently unintended consequences. The civil liability provisions of the Directors Liability Act of 1890 was designed to impose liability in connection with a prospectus that went beyond the law of deceit as reflected in *Derry v. Peek*. That Act is the precursor of civil liability for false or misleading prospectuses both in the UK and the United States. That Act did not impose liability on the underwriter and the successor provisions in the Companies Act of 1985 and Section 152(a) of the FSA also do not make underwriters qua underwriters responsible persons. Section 11 of the Securities Act of 1933, notwithstanding the outspoken opposition at the time of Wall Street, specifically imposes liability on the underwriters in connection with misrepresentations in a registration statement filed under that Act. The unanswered and generally unasked question is whether Section 13 of the POS Regulation and Section 152 of Part IV as amended by Sections 154A and 156A, inadvertently or otherwise, impose liability in certain types of offerings on the underwriter(s). Do these provisions make the underwriter a responsible person in connection with an offer of sale or any other type of offering in which the underwriter purchases the securities from the issuer and offers them as principal? See Section II. Section 142(7A) of the FSA, added at the same time as the POS regulations, provides that for purposes of Part IV of the Act "(a) a person offers securities if, as principal — (i) he makes an offer which, if accepted, would give rise to a contract for their issue or sale (which for this purpose includes any disposal for valuable consideration) by him or by another person with whom he has made arrangements for their issue or sale; or (ii) he invites a person to make such an offer, but not otherwise; and, except where the context otherwise requires, 'offer' and 'offeror' shall be construed accordingly." Section 5 of the POS Regulations includes a substantially identical definition of offer and offeror. These provisions may fit the underwriter in certain types of offerings. See Section II(A). If construed in that fashion, underwriters could have offeror liability. A possible escape from such construction is that the definition of offer and offeror are qualified by the language, "except where the context otherwise re-

quires."³¹⁴

Interestingly, the Listing Rules of the London Stock Exchange impose considerable responsibility on the sponsor, and the sponsor ordinarily is the underwriter. Those responsibilities include, among others, assuring that the issuer is "properly guided" in complying with the listing rules, that all the relevant requirements of the listing rules have been complied with in preparing the listing particulars, that all the directors are aware of their responsibilities and obligations as directors of a listed company, obtain written confirmation from the issuer and those providing the issuer with financing facilities that the issuer's working capital is sufficient to meet its present needs, and confirm in writing that any profit forecast or estimate that appears in the listing particulars "has been properly complied."³¹⁵ The sponsor must submit as part of the listing application and procedure for approval of the listing particulars/prospectus that it has "discharged all of its responsibilities set out in Chapter 2 of the listing rules with due care and skill."³¹⁶ The only "report" of the sponsor, however, that must appear in the listing particulars/prospectus is that pertaining to any profit forecast or estimate, as to which it may be a responsible person for civil liability purposes. See Section XIII(A)(8). The Listing Rules take care to provide that the responsibilities of the sponsor "are owed solely to the Exchange."³¹⁷ If the Exchange determines that the sponsor has failed to carry out its responsibilities, it may impose sanctions in the form of a censure, publication of such censure, and/or removal from the register of sponsors maintained from the Exchange. The latter could seriously impact the firm's investment banking business. The Stock Exchange, fortuitously, is a recognized investment exchange and not a recognized self-regulatory organization.³¹⁸ A breach of its rules, unlike the rules of a self-regulatory organization,³¹⁹ is not within Section 62 of the FSA. Section

314. The 1999 amendments to the POS Regulations and counterpart amendments to the Financial Services Act may have alleviated this problem. Under the 1999 amendments, an offeror who is not an issuer is not subject to the prospectus related civil liability provisions if (a) the issuer has responsibility for the prospectus under the regulations (which is ordinarily the case if it has authorized the offering), (b) the prospectus was drawn up primarily by the issuer or persons acting on behalf of the issuer, and (c) the offeror is making the offer in association with the issuer. POS 1999 Amendments, § 2(n) adding to the POS § 13(2A). The reference to offers made in association with the issuer appears concerned with situations in which the issuer and selling shareholders may both be making an offering or the issuer is facilitating an offering by a large shareholder. The reference to an offer made in association with the issuer, however, may be broad enough to cover the underwriter acting as principal. In any event, this could raise some interesting questions as to by whom the prospectus was primarily drawn up.

315. See Listing Rules ¶¶ 2.6-2.17.

316. Listing Rules ¶ 2.8 and Schedule 4A.

317. Listing Rules ¶ 2.6.

318. FSA § 36.

319. See FSA § 62(2).

62 permits under limited circumstances a private action to be brought by a person who suffers a loss as a result of a breach of a rule of a self-regulatory organization.³²⁰

It is interesting to note that if a comparative chart of financial information is used in lieu of an accountants' report, the accountants who reported on the financial statements extracted in the chart do not accept responsibility for the financial statements upon which the chart is based or the chart. The accountants who prepare the chart and submit a letter to the Stock Exchange to the effect in their opinion the referenced statements were properly prepared and that the table properly extracts such information also assume no responsibility for the prospectus and apparently have no liability under Part IV of the Exchange act. *See* Section XIII(A)(3). This leaves the issuer and the directors as responsible for the financial information and they are not in a position to claim reliance on an expert since the financial statements have not been included with the consent of the accountants.

Part IV of the FSA, in a concession to the market in Eurobonds, excludes from the persons responsible for the listing particulars/prospectus directors of "an issuer of international securities."³²¹ There is no comparable provision applicable to a POS prospectus. An offering of Eurobonds generally is exempt from the requirement that a prospectus be used in connection with a first public offer of securities as Euro-securities or otherwise. *See* Section VII. It is the general practice, nonetheless, for Eurobonds to be listed on at least one stock exchange within the European Union even if the securities are not going to be traded on the exchange. The provision exculpating directors of an issuer of international securities comes into play primarily with respect to the listing particulars relating to Eurobonds. The definition of "international securities," however, although vague in some respects, is broader. International securities are defined as listed debt securities that are denominated in a currency other than sterling or are otherwise associated with a country outside the United Kingdom and are of a kind likely to be dealt in by corporations and persons resident in a country other than the United Kingdom.³²² The securities must also be of a class of debt securities that the Listing Rules of the Stock Exchange provide are suitable "for persons of the kind who may be expected normally to buy or deal in the securities."³²³ Chapter 23 of the Listing Rules of the London Stock Exchange include specific and somewhat less stringent requirements as to the content of the listing particulars of specialist securities, including Eurobonds. Specialist securities are defined by the Listing Rules as "securities which, because of their nature are normally

320. *See* FSA § 62 as amended by § 62A.

321. *See* FSA § 152(5).

322. FSA § 152(6).

323. FSA § 148(1)(c) as incorporated into § 152(5).

bought and traded by a limited number of investors who are particularly knowledgeable in investment matters.”³²⁴ If Eurobonds are listed on the London Stock Exchange, the issuer is a responsible person vis-à-vis the Listing Particulars, but the directors of the issuer are not.

D. What Must Plaintiff Prove

The question of when plaintiff must have purchased the security and the speaking date of the prospectus and supplementary prospectus are discussed at § 1.14[2]. Assuming an appropriate plaintiff, plaintiff must prove at the speaking date of the prospectus or the supplementary prospectus that the prospectus or supplementary prospectus, as appropriate, contained an untrue or misleading statement or omitted information required to be included therein.³²⁵ Plaintiff must prove his loss was a result of the untrue or misleading statement or the omitted information. The relevant provisions do not specifically require that the misrepresentations or omissions relate to a material fact, but it would be necessary to establish materiality to prove that the plaintiff's loss resulted from the misrepresentations. There is no specific provision as to how such loss is to be computed, which leaves it to the analogous measure of damages under common law in an action of deceit. *See* Section XIV(F)(3).

E. What Are the Defendants' Defenses?

A defendant with respect to statements not made on the authority of an expert can defend by carrying the burden of proof that “having made such enquiries (if any) as were reasonable” “he reasonably believed” at the relevant times “that the statement was true and not misleading or that the matter whose omission caused the loss was properly omitted.”³²⁶ If the statement was made on the authority of and with the consent of an expert, defendant can avoid liability by carrying the burden of proof that at the relevant times “he believed on reasonable grounds” that the expert “was competent to make or authorise the statement and had consented to its inclusion in the form and context in which it was included.”³²⁷ The speaking date of the listing particulars/prospectus and defendant's belief at the time of the acquisition of the shares by the plaintiffs is discussed at § 1.14[2] in connection with the discussion of who may assert a claim for a misrepresentation in the prospectus.

In addition, a defendant may defend vis-à-vis a particular plain-

324. Listing Rules ¶ 23.1(a).

325. POS Regulations § 14(1); FSA § 150(1).

326. POS Regulations § 15(1); FSA § 151(1).

327. POS Regulations § 15(2); FSA § 151(2).

tiff(s) on the ground that it was not “reasonably practicable” to bring a correction of the statement³²⁸ (or the fact that an expert relied upon was not competent or had not consented)³²⁹ “to the person likely to acquire the securities.” Alternatively, it is a defense if defendant carries the burden of proof that he took all reasonable steps to “secure that a correction [of the statement] was [forthwith, under the POS Regulation] brought to the attention” of such persons.³³⁰ It is a defense that defendant took all reasonable steps “to secure” that the fact that the expert relied upon was not competent or had not consented to the use of his report [if such was the case] “was forthwith brought to the attention” of prospective purchasers.³³¹ Note that both the POS and the FSA require as to correcting the statements relating to the competence and consent of the expert, that it be brought to the attention of prospective purchasers “forthwith,” whereas only the POS provision includes the word “forthwith” with respect to the correction of misrepresentations generally. It is also a defense if the correction of misrepresentations or the fact that the expert was not competent or had not consented is “published in a manner reasonably calculated to bring it to the attention of persons likely to acquire the securities” before plaintiff acquired the securities.³³² Similarly, it is a defense that defendant took reasonable steps “to secure such publication and reasonably believed that it had taken place before the securities were acquired.”³³³ Defendant can also defend by carrying the burden of proof that plaintiff knew at the time he acquired the securities that the statement was false or misleading.³³⁴

There are some additional defenses, but the foregoing and those discussed at § 1.14[2] are the defendant’s principal defenses applicable to POS prospectus, listing particulars and prospectus of a listed or to be listed company, and to 156A prospectus.

F. Common Law Liability for Listing Particulars and Prospectuses

Apart from the specific remedies provided by the Financial Services Act 1986 and the POS Regulations, a person suffering loss by virtue of any untrue or misleading statement (or omission) in a prospectus or listing particulars may have remedies in contract and tort. In this section the term “prospectus” includes listing particulars.

328. POS Regulations § 15(1)(b); FSA § 151(1)(b).

329. POS Regulations § 15(2)(b); FSA § 151(2)(b).

330. POS Regulations § 15(1)(c); FSA § 151(1)(c).

331. POS Regulations § 15(2)(c); FSA § 151(2)(c).

332. POS Regulations § 15(3)(a); FSA § 151(3)(a).

333. POS Regulations § 15(3)(b); FSA § 151(3)(b).

334. POS Regulations § 15(5); FSA § 151(5).

1. Negligent Misstatement

The principles enunciated in obiter dicta in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*³³⁵ established a remedy for loss suffered as a result of a negligent misstatement, provided that the person making the statement owed a duty of care to the person suffering loss in reliance on it. Such a duty of care will arise when there is a special relationship between the parties (*i.e.*, a relationship between the function that the defendant was requested to perform and the transaction in relation to which the plaintiff said he had relied on proper performance); *see*, for example, the discussion of the duty of care owed by auditors generally in *Caparo Industries plc v. Dickman and others*,³³⁶ *Al Saudi Banque and others v. Clark Pixley*,³³⁷ *Berg Sons & Co. Ltd. and others v. Adams and others*,³³⁸ *Galoo Ltd. and others v. Bright Grahame Murray and another*.³³⁹ It has been held that such a relationship exists between the persons putting their names behind a prospectus and persons who subscribe or purchase shares in reliance on that prospectus; *Al-Nakib Investments (Jersey) Ltd. and another v. Longcroft and others*.³⁴⁰ However, the case still stands as authority for the proposition that any duty of care that is owed in relation to a prospectus is owed only to the initial subscribers and not to subsequent purchasers. By contrast, in *Morgan Crucible Co. PLC v. Hill Samuel & Co. Ltd. and others*,³⁴¹ a profit forecast was made in a contested take-over. The bidder claimed to rely on this. On a preliminary point it was held arguable that there was a relationship that was sufficient to give rise to a duty of care, but the point was never brought to trial.

2. Contract and the Misrepresentation Act 1967

Actions for damages for breach of contract will be available only against persons who have privity of contract with the claimant. Thus only the actual vendor of the shares to the claimant would be liable in contract. However, an incorrect statement in a prospectus will not give rise to a breach of contract unless the statement became a term of the contract; the courts are not usually prepared to regard statements in prospectuses as other than mere representations that induce a subscriber to apply for shares to be allotted to him.

If the prospectus contains an untrue or misleading statement, or there is an omission that renders a statement in the prospectus mis-

335. (1964) AC 465.

336. (1990) 2 AC 605.

337. (1990) 1 Ch. 313.

338. (1992) BCC 661.

339. (1995) 1 All ER 16.

340. (1990) 1 WLR 1390.

341. (1991) Ch. 295.

leading, the injured party may have a remedy under the Misrepresentation Act 1967.³⁴² The remedies provided by the Misrepresentation Act are rescission of the contract and/or damages. The remedy of rescission will be lost if the subscriber or purchaser affirms the contract by failing to act within a reasonable time of discovering the truth. Furthermore, the right of rescission only extends to the original purchaser or subscriber and not to a subsequent purchaser. As in the case of an action founded on breach of contract, a claim under the Misrepresentation Act lies only against another party to the contract, *i.e.*, the issuer in an offer for subscription or the vendor in an offer for sale. It is a defense to a claim for damages, but not rescission, for the defendant to prove that he believed on reasonable grounds, up to the time the contract was made, that the statement complained of was true.

Formerly, under the rule in *Houldsworth v. City of Glasgow Bank*,³⁴³ a subscriber (by contrast with a purchaser under an offer for sale) was only able to maintain an action for damages if he rescinded the contract. A subscriber lost the right to rescind if he affirmed the contract or the company went into liquidation before he had rescinded (since the intervention of third party rights is a bar to rescission). However, CA 1985, § 111A (inserted by the Companies Act 1989) has in effect abolished that rule. Section 111A states as follows:

A person is not debarred from obtaining damages or other compensation from a company by reason only of his holding or having held shares in the company or any right to apply or subscribe for shares or to be included in the company's register in respect of shares.

3. Deceit

The prospectus action originally developed out of the action in the tort of deceit. This action was originally a satisfactory remedy for defective prospectuses since it lay for any inaccuracy and might be brought by any person to whom the deceitful representation had been made. It was robbed of its usefulness by two late-nineteenth century decisions, *Peek v. Gurney*,³⁴⁴ in which it was held that only a subscriber might sue in deceit, and not a market purchaser, and *Derry v. Peek*,³⁴⁵ in which it was held that "deceit" embraced only a deliberate intention to deceive, and did not encompass a negligent failure to inform. However, it should be noted that the statute that was passed to reverse the effect of *Derry v. Peek*, the Directors Liability Act 1890, was the direct ascendant of the

342. The Act is not applicable to Scotland, but see section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

343. (1880) 5 App. Cas. 317.

344. (1873) LR 6 HK 377. *But see* discussion of Possfund Custodian Trustee Ltd. v. Diamond, (1996) 2 All ER 774 at § 1.14[2].

345. (1889) 14 App. Cas. 337.

§ 150/Reg. 14 provisions imposing statutory liability upon directors for defective prospectuses. Consequently, it is clear that the measure of damages in any case brought on a breach of § 150/Reg. 14 will be the deceit measure (*i.e.*, all consequential loss without regard to questions of mitigation or remoteness) rather than the ordinary tortious measure.³⁴⁶

XV. PUBLIC REMEDIES

Section 47 of the FSA makes it an offense, hence a crime punishable by imprisonment up to seven years or to a fine, or both, to knowingly or recklessly make a statement, promise or forecast that is misleading, false, or deceptive or knowingly "dishonestly conceals any material facts" to induce the purchase or sale of a security. The same section makes it unlawful to create "a false or misleading impression as to the market in or the price or value of a security" for the purpose of inducing others to purchase or sell a security.³⁴⁷ Although no private action is provided for violations of Section 47, the SIB can apply to an appropriate court for a restitution order directing one who has violated Section 47 or any rule of an SRO to pay over profits or make restitution for loss to persons who were the victims of the violations.³⁴⁸ The court may order payment by the defendant into court of such amounts as it deems just, which the court is to distribute among the persons from whom the defendant realized the profit or the persons suffering loss as a result of such violations.³⁴⁹

XVI. CONCLUSION

The adoption of the Public Offers of Securities Regulations in 1995 and the amendment of those regulations in 1999, brings to a close a process that commenced with the adoption of the Financial Services Act in 1985. There is now in place in the United Kingdom an overall regulatory scheme for determining when a prospectus must be used, what it must contain, who is to review it, how it is to be delivered, and liability for any prospectus misrepresentation. The scheme of things to some extent was delayed because of the adoption of the European Union Prospectus Directive in 1989 and the need to conform to that Directive. The EU has provided member state companies with a road map for com-

346. *Clark v. Urquhart*, (1930) AC 228, *and see* *Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd.*, (1996) 4 All E.R. 769.

347. Section 47(2) is similar to Section 9(a)(4) of the Exchange Act which makes it unlawful to effect transactions in a listed security "creating actual or apparent active trading . . . or raising or depressing the price . . . for the purpose of inducing the purchase or sale of such security by others."

348. FSA § 61.

349. FSA § 61.

pleting a Union-wide public offering using a single prospectus prepared in compliance with the laws of any member state that conform with the Directive. There have been few offerings to date, however, that have taken advantage of the mutual recognition of prospectuses among the member states. The 1999 amendments to the POS regulations attempt to encourage such offerings by eliminating the translation of the prospectus requirement permitted by the Directive. It remains to be seen whether other member states will follow this lead and how effective it may be in encouraging multiple member state offerings.

