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Review

Corporate Strategy & Finance

AIM Rules: what the new Rules say

On 1 June 2009, the London Stock Exchange (the Exchange) published a new version of the AIM Rules for Companies (the AIM Rules), which incorporated the changes relating to investing companies referred to in AIM Notice 33, as well as:

- the new AIM Note for Investing Companies; and
- a revised AIM Note for Mining and Oil and Gas Companies.

These Rule changes (together with both AIM Notes referred to above) took effect on 1 June, subject to some transitional provisions for existing investing companies.

The AIM Rules also:

- reflect the changes to the regime relating to rights issue subscription periods which came into force on 10 February 2009 in accordance with AIM Notice 31; and
- include, with slight amendment, the changes to the regime relating to significant shareholder notifications set out in AIM Notice 32. These changes also took effect on 1 June 2009, subject to some transitional arrangements.

The Exchange emphasises that AIM should not be used as a market for complex funds.

HOW ARE INVESTING COMPANIES AFFECTED?

The AIM Rules outline various changes and clarifications to the previous regime for both the admission of investing companies to AIM and their continuing obligations once on the market.

The changes have been made by way of amendment to the AIM Rules and also through the issue of a new AIM Note for Investing Companies. The amendments to the AIM Rules make it clear that this new Note, and other Notes published by the Exchange, form part of the AIM Rules themselves and will no longer operate merely as guidance, thereby strengthening the hand of the regulator.

The new regime seeks to ensure that AIM is not used as a market for complex funds, which are considered to be more appropriate for the Main Market of the Exchange or the Specialist Fund Market.

WHAT ARE THE PRINCIPAL CHANGES AND CLARIFICATIONS RELATING TO INVESTING COMPANIES?

They include the following:

AREA	NEW RULE OR CLARIFICATION?	WHAT THE RULE OR NOTE SAYS
"Investing Company" definition	Clarification	The definition is broadened and the Note states that it does not include a holding company for a trading business but would include, for example, cash shells, blank cheque companies and special purpose acquisition companies.
Appropriateness of certain investment entities	Clarification	An investing company on AIM should be straightforward in terms of corporate structure, securities issued and investing policy followed. The company's Nomad should consider the exposure to risk, if the investing company has any cross-holding and the impact on investing policy, if the company is a feeder fund. In particular, the Exchange would expect an investing company to issue primarily ordinary shares, or the equivalent.
Minimum £3 million fundraise	Clarification	Fundraising should be independent and not involve any related parties (ie directors, substantial shareholders or associate of such persons), unless the related party is a substantial shareholder only and an authorised person. The fundraising should be completed on the same day as admission.
Investment manager "Any person external to the investing company, who, on behalf of that investing company, manages their investments. This may include an external adviser who provides material advice to the investment manager or the investing company."	New	Safeguards must be put in place to ensure that the directors maintain sufficient control of the business. The investment manager is expected to be independent from the investing company's board and the Nomad. The investment manager (and its group companies and key employees) should be treated as a director when applying the lock-in, related party, close period dealing and disclosure of dealing Rules. The appointment, dismissal or resignation of any investment manager (or any relevant key personnel) would generally have to be announced to the market without delay. An investment manager may maintain an investing company's website on its behalf, although the investing company must continue to have a separately identifiable and announced web address.
Admission document disclosures	Clarification	The disclosure requirements of Annex XV of the Prospectus Rules should be applied, in place of Annex I (such disclosures are supplemental to the disclosure requirements of Schedule 2 of the Rules).
Admission document disclosures	New, but reflects existing market practice.	The disclosure requirements of Annex XV of the Prospectus Rules supercede the requirements of Annex I for the purposes of Schedule 2 of the AIM Rules as it applies to investing companies.

Investing Policy	New	An investing company should now have a precise and detailed "Investing Policy" as opposed to an "Investing Strategy", which must be regularly announced and outlined in its annual accounts.
Material changes to investing policy	New	Now require prior consent of shareholders in a general meeting (i.e. by way of ordinary resolution for a UK company).
Implementation of investing policy	New	An investing company admitted to AIM will have 18 months to substantially implement its investing policy. If this does not happen, it must seek the consent of shareholders for its investing policy on an annual basis, until it is substantially implemented. If over 50% of all funds available to it are invested in accordance with the investing policy, the policy will usually be deemed substantially implemented.
Disclosure of price sensitive information	Clarification	Regular periodic disclosures should be announced as appropriate and do not negate the need to have regard to the general obligation to disclose price sensitive information prescribed by AIM Rule 11.
Substantial transactions	Clarification	Investments made in line with the investing policy which only breach the 10% threshold on the profits and turnover class tests would not generally require announcement, unless required by AIM Rule 11.
Reverse takeover transactions	Clarification	Acquisitions made within the investing policy which only breach 100% on the profits and turnover class tests and do not result in a fundamental change in business, board or voting control will not be considered a reverse takeover.
Fundamental changes of business	Clarification	An investing company making a disposal within its investing policy which goes through 75% in the class tests does not have to obtain shareholder approval for such a disposal. However, a disposal of all or substantially all assets by an investing company will require it to implement its current investing policy within 12 months.

DO EXISTING INVESTING COMPANIES HAVE TO DO ANYTHING?

As mentioned, the changes to the AIM Rules have immediate effect, subject to some transitional provisions for existing investing companies.

Investing companies already admitted to AIM are expected to update their existing investing strategy so that it meets the new investing policy requirements as soon as practically possible and in any event within 6 months of 1 June 2009. Shareholder approval will not be required for non-material changes to the investing policy arising solely from these rule changes, unless the revisions are considered to materially change the overall objective and risk profile of the existing strategy. The revised policy should be announced when finalised and published in the company's next annual accounts and on its website.

To the extent an AIM company does not comply with the independence requirements for its investment manager, this should be announced within 3 months. In addition, the information required by paragraph 4.2 of the Note (further disclosures on admission) should be announced within 3 months, if this has not previously been done.

WHAT HAS HAPPENED TO THE REGIME FOR MINING, OIL AND GAS COMPANIES?

The Guidance on Mining, Oil and Gas Companies (first published in March 2006) is renamed the Note for Mining and Oil and Gas Companies and, like the new AIM Note for Investing Companies, forms part of the AIM Rules, with similar implications for monitoring and enforcement.

WHAT ARE THE CHANGES TO THE REGIME ON THE DISCLOSURE OF SIGNIFICANT SHAREHOLDINGS?

To recap: since 20 January 2007, AIM companies incorporated under the Companies Act or which are incorporated and have their principal place of business in the United Kingdom (DTR Companies) have been subject to Chapter 5 of the Financial Services Authority's Disclosure and Transparency Rules (DTR5).

DTR5 requires disclosure where a person has direct or indirect control of voting rights above a threshold of 3% including where a person is entitled to acquire voting rights as a result of holding certain financial instruments.

All categories of AIM company must comply with AIM Rule 17 which, among other things, requires the disclosure of significant shareholdings. As mentioned, DTR Companies are also required to comply with the provisions of DTR 5.

The guidance note to AIM Rule 17 (updated in February 2007) contains the disclosure obligations for those companies incorporated in a jurisdiction which does not have a similar shareholder disclosure regime to the DTRs (Non-DTR Companies). The guidance note:

- requires Non-DTR Companies to use all reasonable endeavours to comply with AIM Rule 17; and
- recommends that Non-DTR Companies should include provision in their constitutional documents to require significant shareholders to notify them of relevant changes.

DTR5 did not require disclosure of cash settled derivatives such as contracts for difference (CfDs). However, as from 1 June 2009, DTR5 has been amended so that holdings of long positions in CfDs or other similar financial instruments should, subject to certain exemptions, be aggregated with other share positions when determining whether a significant shareholding disclosure threshold has been exceeded.

WHAT IS THE IMPACT OF THE AMENDMENTS TO DTR 5 ON THE AIM RULES?

In response to the changes to DTR5, the AIM Rule definition of "holding" has been amended to the same effect. This will bring the AIM Rules into line with DTR5 so that DTR Companies will continue to meet the requirements of AIM Rule 17.

The amendment to the AIM Rule definition of "holding" will also have an impact on Non-DTR Companies given that they must use all reasonable endeavors to comply with AIM Rule 17. Accordingly, for example, where such a company is informed of any relevant change to a significant shareholding resulting from a CfD or other financial instrument position it should announce this without delay.

WHAT ARE THE NEW DEFINITIONS IN THE AIM RULES?

The new definitions are as follows:

- "Financial instrument" means any financial instrument requiring disclosure in accordance with DTR 5.3.1, with the addition that, for the purposes of this definition, all AIM companies shall be treated as if they are DTR companies regardless of their country of incorporation.
- "Holding" – the previous definition remains with the following wording added: "In addition, when determining whether a person is a significant shareholder, a holding also includes a position in a financial instrument".
- "Significant shareholder" means any person with a holding of 3% or more in any class of AIM security (excluding treasury shares).

HOW ARE SIGNIFICANT SHAREHOLDINGS THROUGH LONG CFD POSITIONS TO BE CALCULATED?

AIM Notice 32 advises that a shareholding represented by a holding of a long position in a CfD, or other similar financial product, should be calculated on the following basis:

DTR Companies: shareholders may calculate their holdings on a nominal or delta-adjusted basis until 31 December 2009, after which time only delta-adjusted assessment will be permitted.

Non-DTR Companies: Non-DTR Companies should encourage the disclosure of shareholdings to them on the same basis as DTR Companies to ensure consistent market notification of these positions. Therefore, disclosure on a nominal or delta-adjusted basis is acceptable until 31 December 2009, after which time shareholders should be encouraged to disclose their holdings on a delta-adjusted basis. However, disclosure on this basis will not be mandatory.

ARE ANY TRANSITIONAL PROVISIONS APPLICABLE TO THE NEW REGIME ON DISCLOSURE OF SIGNIFICANT SHAREHOLDINGS?

Yes: as mentioned, the guidance to AIM Rule 17 recommends that Non-DTR Companies should include provisions in their constitutional documents to require significant shareholders to notify them of relevant changes.

The revisions to the definition of holding may mean that such constitutional documents need amendment. The Exchange expects a Non-DTR Company to make any necessary amendments at the company's next annual general meeting ("AGM"), unless this meeting is within the next six months, in which case the amendments should be made by, or at, the following AGM.

FURTHER INFORMATION

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