FINANCIER WORLDWIDE corporatefinanceintelligence

JONES DAY

REPRINT

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REPRINTED FROM

North American Middle Market Review 2006 | a financier worldwide supplement

US companies AIMing for the UK

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AIM, a market operated by the London Stock Exchange (LSE), was established in 1995 to encourage the admission in the UK of growth companies, usually with a market capitalisation of under $500m. While initially AIM attracted primarily UK companies, in recent years it has seen a growth in foreign companies seeking admission. There are currently over 1,400 companies admitted to AIM, and the market is growing extremely rapidly with approximately 400 companies joining the market in 2005 alone. One of the drivers for this rapid growth has been the increase in non-UK companies coming to the market – there are now approximately 220 non-UK companies, including about 30 US companies (19 of which joined the market in 2005).

US companies come to AIM for various reasons including avoidance of costs and burdens associated with US listing and regulatory requirements, relative speed of timetable, suitability for size and level of development of the company, favourable valuations for the company, an increase in the company's profile in Europe and access to sophisticated international investors. What makes admission to AIM particularly attractive to growth companies is the avoidance of the costs associated with a full US registration with the US Securities and Exchange Commission (SEC). For example, the cost for a company in complying with the Sarbanes-Oxley Act of 2002 alone is estimated to be between $500,000 and $2m annually. While admission to AIM certainly has its advantages for US companies, it also brings with it certain challenges unique to US issuers.

Comparison with a US Listing

The process for admission to AIM has components similar to an IPO registered in the US, such as publicity restrictions, due diligence requirements, employee matters and marketing concerns. However, there are also some corporate governance and shareholding considerations distinctive from SEC registration requirements.

As in the US, any company embarking upon an IPO will require a team of advisers which will usually include underwriters, lawyers, accountants, registrars and public relations consultants. In addition to those advisers, AIM requires the appointment of a Nominated Adviser (Nomad), a role normally fulfilled by one of the investment banks. The Nomad is responsible for determining the company's suitability for admission, as well as overseeing the preparation of the offering document (an AIM admission document) itself and performing an ongoing role of advising and guiding the company on the rules applicable to AIM. This is distinctive from the US, where the SEC directly oversees the offering process, including a time consuming review of the offering document. The Nomad has direct obligations which it owes solely to the LSE.

Compared with a US listing, there are limited restrictions on the ability of a company to have its shares admitted to trading on AIM. There is no requirement for a minimum historic trading record, no minimum amount of shares of the company that must be in public hands, no minimum per share bid price and no minimum market capitalisation. There are, however, some conditions that the LSE imposes under the AIM rules which are different from those in the US including a mandatory lock-up of one year from admission for directors, employees and significant shareholders where the company does not have a two year revenue earning record, free transferability of shares, a requirement that all shares of the class admitted to AIM must be admitted and working capital requirements (basically a public statement that the company has sufficient working capital for at least one year from admission). US companies seeking admission to AIM should also anticipate an increased cost in terms of time and money in managing a UK investor base.

Although it is not a requirement for AIM companies to comply with the English corporate governance recommendations set out in the Combined Code (which applies to companies whose shares are admitted to the main market in the UK), in practice, most AIM companies do adopt some of the recommendations. As a result, it may well be necessary to re-constitute the board of directors to include a minimum number of independent non-executive directors, to appoint remuneration and audit committees and to adopt sound systems of internal control. The Nomad will advise on the requirements it considers appropriate for the success of the IPO in greater depth.

An advantage to seeking admission to AIM versus listing on NASDAQ or the NYSE is the considerably lower listing fees – around $7,000 flat fee on AIM compared with a $100,000 minimum on NASDAQ.

It is worth noting that with proper planning, US companies may simultaneously carry out a private placement to institutional investors in the US without the need to register the shares with the SEC.

The AIM admission document is the principal selling document and the document on the basis of which investors will invest. Its contents are prescribed by the AIM rules and in addition to the specific content requirements, it must contain all information necessary for a potential investor to make an informed assessment of the assets, liabilities and prospects of the company so as to enable it to determine whether or not to invest in the company's shares. The admission document also serves as the prospectus as opposed to a registration statement plus prospectus in the US. Provided that the offering involves only qualified investors (essentially ▸▸

sophisticated investment professionals) which is the normal way of conducting an AIM IPO, the company, guided by the Nomad and its other advisers, prepares this document, and thus the company avoids the extended time frame associated with the US registration process – usually an AIM listing takes three to four months versus six months or more for a US registration. However, if the offering involves more than 100 retail investors, UK and EU law requires a full prospectus and UKLA approval, a more time-consuming process.

Another distinction of the AIM process is the somewhat laborious 'verification process' under which each statement in the admission document will be confirmed (with back up evidence as to matters of fact) to ensure that it is true, accurate and not misleading and does not omit anything material. This is a cumbersome and time consuming process that does not exist in the US. Although a substantial amount of the work involved can be delegated to the lawyers the direct involvement of the directors is required as the verification process is gone through in order to give the directors a defence that they reasonably believed the admission document to be true and accurate and not misleading should an investor subsequently allege that the admission document was misleading. This is important given that each director has personal unlimited liability to investors.

Post-AIM admission reporting requirements

After admission to AIM, the company will be required to publish financial reports semi-annually, in contrast with the SEC's quarterly reporting requirements. The content and preparation of the reports is also less burdensome than the extensive requirements of their SEC counterparts. The company must disclose any trading in its shares by the directors, and the directors may not trade during the two-month period immediately preceding publication of a financial report. As in the US, the company must also publicly disclose any developments in its business or financial conditions that are likely to materially affect the share price.

Overview of Regulation S, category 3 sales of shares

One of the difficulties for any US company planning an AIM listing is compliance with the safe harbour from US registration pursuant to Regulation S under the Securities Act of 1933. As a domestic issuer under US securities laws, any US company is a category 3 issuer for the purpose of Regulation S, and therefore subject to cumbersome restrictions as to how shares must be sold and traded. In particular, this involves the implementation of a one-year distribution compliance period, which includes a prohibition on sales to US persons and restrictions on methods and mechanics of transfers of shares. The specific requirements and restrictions that apply are in Rule 903 of Regulation S:

- The transaction must occur in an 'offshore transaction', meaning outside of the US, which is not an issue for AIM as the trades will be made in the UK.
- No 'directed selling efforts' may be made in the US. Directed selling efforts means any activity that could condition the US market.
- Offering restrictions must be implemented, including: (a) a written agreement with the distributor where they agree to comply with the requirements of Regulation S; and (b) appropriate legends regarding the Regulation S restrictions on all offering materials and documents (other than press releases).
- The offer or sale, if made prior to the expiration of the one-year distribution compliance period, must be made pursuant to the following conditions: (a) the offer may not be made to a US person; (b) certification by the purchaser that, among other things, it is not a US person, that it will resell the shares only in accordance with Regulation S and other US securities laws; (c) legends on shares with appropriate language regarding Regulation S and other US securities laws; and (d) the company must refuse to register any transfer of the shares not made in accordance with Regulation S and other US securities laws.

US securities laws still require that the shares have legends for an additional one-year period beyond the termination of the one-year distribution compliance period. These requirements prevent the shares from entering into the UK's electronic trading system, CREST, during that period since CREST specifically prohibits electronic trading of any shares with legends. Despite this restriction preventing electronic trading, in practice these restrictions do not seem to affect the marketability of these shares to the AIM investor base.

US reporting requirements and Sarbanes-Oxley

US companies seeking admission to trading on AIM should be aware that while they may initially avoid SEC reporting requirements and compliance with Sarbanes-Oxley, if they exceed 500 shareholders worldwide, the Securities Exchange Act of 1934 will make them subject to these regulations. Therefore, any US company seeking admission to AIM should be mindful to monitor its shareholder register as once it crosses this 500 shareholder threshold it will become subject to the increased costs of compliance referred to above.

AIM: are you on target?

Admission to AIM may not be appropriate for all US companies, however, it does offer a viable option for growing companies seeking an alternative to a listing on a US exchange. A US company must evaluate itself on an individual basis regarding its suitability for AIM, which may provide it with access to an international market and save costs in terms of both time and money compared with the US alternatives. In addition, some US companies seeking admission to AIM see it as a stepping stone towards an eventual dual listing in the US. No one can doubt that there is an ever increasing flow of foreign companies to AIM, and that US companies will be part of the next wave of those wishing to access the UK market. ■

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