1. REGULATORY FRAMEWORK

1.1. Background

The current regulatory framework in the United Kingdom has diverse roots - it derives partly from English domestic law and practice as developed over an extended period of time (there were fraudulent prospectus provisions in the Companies Act 1867\(^1\)); and embodied in legislation such as the Companies Act 1948\(^2\) and the Prevention of Fraud (Investments) Act 1958\(^3\) (both now repealed); and partly (and increasingly) from European Community ("EC") Directives implemented as United Kingdom national law.\(^4\)

1.2. General Philosophy

The philosophy of investor protection in the past in the United Kingdom was to protect the public by disclosure. Thus, offers or sales of shares or debentures were prohibited unless a prospectus complying with certain statutory disclosure requirements was prepared and published. In addition, limits were placed on the distribution of documents in the United Kingdom calculated to lead to the purchase of securities by the recipient. Breach of this legislation was a criminal offense with imprisonment and/or fines as the penalty. These laws did not prohibit offers or circulation of offering material to "professionals."\(^5\) As a result, a market for the borrowing by companies and states from professionals through the issue of securities denominated in offshore currencies (originally dollars) sprang up in London, and became the Euromarkets.

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\(^1\) Companies Act, 1867, 30 & 31 Vict., ch. 131 (Eng.).
\(^2\) Companies Act, 1948, 11 & 12 Geo., 6 ch. 38 (Eng.).
\(^3\) Prevention of Fraud (Investments) Act, 1958, 6 & 7 Eliz., ch. 45 (Eng.).
\(^5\) See infra section 3.1.1.
The current law departs from its traditional base to give effect to several EC Directives.

1.2.1. The Admissions Directive

The Admissions Directive\(^6\) deals with the conditions for admission of securities to listing on a Member State's stock exchange.

1.2.2. The Listing Particulars Directive

The Listing Particulars Directive\(^7\) deals with the contents of documents to be published in connection with a listing on a Member State's stock exchange.

1.2.3. The Interim Reports Directive

The Interim Reports Directive\(^8\) deals with regular reporting information for companies with listed securities.

1.2.4. The Mutual Recognition Directive

The Mutual Recognition Directive\(^9\) deals with mutual recognition of listing particulars approved by another Member State.

1.2.5. The Public Offers Directive

The Public Offers Directive\(^10\) deals with the requirement for and contents of a prospectus when unlisted but transferable securities are first offered to the public.

1.2.6. The Mutual Recognition Amendment Directive


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Broadly, the pattern of these directives is to specify the circumstances in which securities must be offered by means of a prospectus and the minimum content of any such prospectus. This pattern is derived from the Commission's desire to harmonize the requirements in each Member State, an objective now replaced by the desire to achieve mutual recognition of certain basic standards.

1.3. Current Regulatory Framework

The regulatory framework affecting the offering and distribution of securities in the United Kingdom is contained in the following legislation (together with subordinate legislation and various Bank of England Notices with which it is customary for the market to comply).

1.3.1. The Financial Services Act 1986

The Financial Services Act 1986\(^{12}\) (the "FSA") regulates all aspects of carrying on an investment business in the United Kingdom, and deals with both listed and unlisted securities (although the provisions relating to unlisted securities are not yet in force).

1.3.2. The Companies Act 1985

The Companies Act 1985 (as amended by the Companies Act 1989)\(^{13}\) (the "CA") regulates the issue of shares or debentures to the public both by English companies and by foreign companies (the relevant provisions of which will be repealed after the unlisted securities provisions of the FSA are implemented).

1.3.3. Admission of Securities to Listing

The Admission of Securities to Listing\(^{14}\) (the "Yellow Book") sets out the listing requirements for listings of debt and equity on the International Stock Exchange of the United

\(^{12}\) Financial Services Act, 1986, ch. 60 (Eng.).

\(^{13}\) Companies Act, 1985 (as amended by Companies Act 1989), 1989, ch. 40 (Eng.).

\(^{14}\) Issued by authority of the Council of the Stock Exchange.
Kingdom and the Republic of Ireland Limited (the "London Stock Exchange").

1.3.4. The Banking Act 1987

The Banking Act 1987\(^{15}\) (the "BA") regulates the acceptance of sterling deposits and the issue of other sterling denominated instruments.

1.4. Key Regulators

The key regulators under the applicable legislation in the United Kingdom follow.

1.4.1. Financial Services Act

The key regulator under the FSA is the Securities and Investments Board Limited (the "SIB"). An important role is also played by four self-regulating organizations ("SROs"). The most important SRO for securities purposes is the Securities and Futures Authority Limited (the "SFA"). The SFA is the result of a merger of The Securities Association and the Association of Futures Brokers and Dealers. With respect to particular sections of the FSA, H.M. Treasury also plays a key regulatory role.

1.4.2. Companies Act

For the CA, the key regulator is the Department of Trade and Industry (the "DTI").

1.4.3. Banking Act

For the BA, the key regulator is the Bank of England (the "Bank").

1.4.4. Yellow Book

For the Yellow Book, the key regulator is the London Stock Exchange. The London Stock Exchange also handles listings.

\(^{15}\) Banking Act, 1987, ch. 22 (Eng.).
2. CONCEPT OF PUBLIC OFFERINGS

There are two distinct (but inter-related) regimes currently in effect for public offerings in the United Kingdom.

2.1. Companies Act

The CA regulates the use of documents in connection with offers to the public of shares or debentures issued by companies incorporated in the United Kingdom and incorporated outside the United Kingdom ("foreign companies"). Breach of these provisions can result in a fine and liability for the directors of the issuer.\(^\text{16}\)

2.1.1. Applicability

The CA applies if certain conditions are satisfied. It does not apply if any one or more of the following circumstances are present:

(i) only oral offers are made (i.e., no document is used);
(ii) the issuer is not an incorporated company (e.g., a sovereign);
(iii) the offer is not of shares or debentures (e.g., warrants); and
(iv) the offer is not an offer to the public.\(^\text{17}\)

2.1.2. Requirements

If the CA provisions apply, a U.K. company offering shares or debentures will need to comply with the requirements of the CA, including preparation of a prospectus complying with Schedule 3 (Mandatory Contents of Prospectus). For a foreign company, it is unlawful to issue or distribute in the United Kingdom any prospectus offering for subscription shares in or debentures of that foreign company unless the prospectus includes certain information from the same Schedule 3.\(^\text{18}\)

The Schedule 3 requirements are not especially onerous, although they do require disclosure of matters not required by

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\(^{16}\) Companies Act, 1985 (as amended by Companies Act 1989), 1989, ch. 40, §§ 56-79 (Eng.).

\(^{17}\) Id. at § 759.

\(^{18}\) Id. sched. 3 (Mandatory Contents of Prospectus).
the London Stock Exchange. For example, they require five years of audited financial statements as opposed to three years for the London Stock Exchange (and two years for the Luxembourg Stock Exchange). The prospectus must also be signed by or on behalf of all the directors (who may appoint an attorney) and registered with the U.K. registrar of companies.

2.1.3. Foreign Issuers

For a foreign company which has issued a prospectus in another Member State and which complies with the requirements of the Public Offers Directive, the Companies Act 1985 (Mutual Recognition of Prospectuses) Regulations 1991 deems it to comply with the prospectus requirements of the CA, provided that it is translated into English, the offer to which the prospectus relates is made simultaneously with or within a short interval of the making of the offer in that other Member State, and it contains certain additional information (relating to U.K. tax treatment, U.K. paying agents, and notice provisions). The non-U.K. prospectus must also be registered with the U.K. registrar of companies. This Regulation implements the requirement for the United Kingdom to give effect to the Public Offers Directive pending the implementation of Part V of the FSA (which will apply to offers of securities for which application is not being made for listing on the London Stock Exchange ("unlisted securities").

2.1.4. Public Offerings

The term "offer to the public" is not defined as such but includes offers to any section of the public, whether selected as members or debenture holders of the company concerned, or as clients of the persons issuing the prospectus or in any other

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19 Id. sched. 3, para. 16.
20 Id.
22 Id.
23 Id.
24 Companies Act, 1985 (as amended by Companies Act 1989) (Mutual Recognition of Prospectuses), 1989, ch. 6, reg. 1991 (Eng.).
manner. There are specific exceptions.\textsuperscript{25}

2.1.5. Definitions

"Share" means share in the share capital of a company, and includes stock (except where a distinction between shares and stock is express or implied). "Debenture" includes debenture stock, bonds and any other securities of a company, whether or not it constitutes a charge on the assets of the company. "Prospectus" means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares in or debentures of a company.\textsuperscript{26}

2.2. Interrelationship between the Companies Act and the Financial Services Act

The provisions of the CA relating to prospectuses have been repealed 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 FSA.\textsuperscript{27} Typically the application for admission is made as early as possible so that the CA provisions no longer apply. In relation to unlisted securities, once Part V of the FSA is brought into effect (expected to be sometime in 1993), the prospectus provisions of the CA will be repealed in their entirety.

2.3. Financial Services Act

The FSA regulates the issue of investment advertisements in the United Kingdom, which invite, or are likely to lead, a person to enter into an investment agreement. The specific prohibition is that no person other than an authorized person shall issue or cause to be issued an investment advertisement in the United Kingdom unless its contents have been approved by an authorized person. Breach of this provision can result in imprisonment and/or a fine and/or civil liability.\textsuperscript{28}

\textsuperscript{25} See infra section 3.

\textsuperscript{26} Companies Act, 1985 (as amended by Companies Act 1989), 1989, ch. 40, § 744.

\textsuperscript{27} Financial Services Act, 1986, ch. 60, pt. IV (Eng.).

\textsuperscript{28} Id. §§ 57-58.
2.3.1. Definition of Investment Advertisement

An offering document, invitation telex, or placing memorandum relating to any type of investment would fall within the definition of investment advertisement. "Investment Advertisement" means any advertisement (including every form of advertising, whether in a publication, by the display of notices, by means of circulars or other documents, by way of sound broadcasting or television or in any other manner) inviting persons to enter into or to offer to enter into an investment agreement or to exercise any rights conferred by an investment to acquire, dispose of, underwrite or convert an investment or containing information calculated to lead directly or indirectly to persons so doing.29

2.3.2. Definition of Investment

The term "investment" is very widely defined. It includes shares, debentures, government and public authority securities, instruments entitling the holder to shares or securities, certificates representing securities, units in collective investment schemes, options, futures, contracts for differences, long-term insurance contracts and rights and interests in investments.30 For these purposes, investments in the first five categories would normally cover those investments which would be offered to the public or the subject of a non-public offering.31

2.3.3. Exceptions to Restrictions on Advertising

There are a large number of exceptions from this restriction on advertising. Three are particularly relevant.

First, any advertisement which is subject to the provisions in the FSA relating to advertisements issued in connection with listed securities or which consists of any part of listing particulars, supplementary listing particulars or any other document required or permitted to be published by listing rules under Part IV of the FSA (Listed Securities).32 This

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29 Financial Services Act, 1986, ch. 60, § 57 (Eng.).
30 Id. sched. 1.
31 But see infra section 7.
32 See infra section 2.4.
therefore exempts documents approved or exempted by the London Stock Exchange such as the final prospectus and the formal notice required to be published. It does not exempt pre-listing documents such as drafts of the prospectus or an invitation telex.

Second, after Part V of the FSA is brought into force, any advertisement which consists of any part of listing particulars, supplementary listing particulars or any other document required or permitted to be published by an approved exchange under Part V of the FSA. In addition, there is an exemption for an advertisement inviting persons to subscribe in cash for any investments to which Part V applies if the advertisement is issued or caused to be issued by the person with whom the investments are to be issued and either the advertisement consists of a prospectus registered in accordance with Part V or certain matters (such as the name of that person, the nature and number of the investments and instructions for obtaining a prospectus) are contained in the advertisement.

Third, there are provisions for further exemptions to be made by statutory instrument. The most relevant is the first exemption order, the Financial Services Act 1986 (Investment Advertisements) (Exemptions) Order 1988 (the "Order"), which exempts (a) advertisements by a body corporate to its shareholders, (b) employee share schemes and (c) distribution to professionals.

2.4. Part IV of the Financial Services Act

2.4.1. In General

Part IV of the FSA regulates the application and admission of securities for listing on the London Stock Exchange. It is a condition of the admission of any securities to the Official List of the London Stock Exchange that there be submitted to, and approved by, the Council of the London Stock Exchange a document ("listing particulars") in such form and containing such information as the London Stock Exchange may specify

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33 See infra section 2.5.
34 Financial Services Act, 1986, ch. 60, pt. V (Eng.).
35 Financial Services Act, 1986 (Investment Advertisements) (Exemptions) Order, S.I. 1988, No. 316; see also infra section 3.
and that document be published.\textsuperscript{36}

\textbf{2.4.2. The Yellow Book}

The Yellow Book sets out the requirements of the London Stock Exchange for information to be included. These requirements comply with the minimum requirements of the relevant EC Directives and have additional requirements thought appropriate by the London Stock Exchange. There are certain exemptions from the requirement to have listing particulars at all (e.g., the issue of a small number of shares of a class already listed).\textsuperscript{37} There are also certain exemptions from disclosure of material information (e.g., if it is contrary to the public interest or unnecessary for persons of the kind who may be expected normally to buy or deal in the securities). An issuer will be required to observe certain continuing obligations to its security holders as to public announcements, disclosure of information, accounts and communications with holders.

\textbf{2.4.3. Other Requirements of Listing Particulars}

In addition to the specific requirements of the Yellow Book, the listing particulars will be required to 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 and (b) the rights attaching to those securities.\textsuperscript{38} Attention should be given to the nature of the securities and the issuer, the nature of the persons likely to consider their acquisition, and the fact that certain matters may reasonably be expected to be within the knowledge of the professional advisers of any kind which these persons may reasonably be expected to consult and market information.\textsuperscript{39}

\textsuperscript{36} Financial Services Act, 1986, §§ 142-157 (Eng.).

\textsuperscript{37} The Yellow Book, § 3, ch. 1, para. 5.

\textsuperscript{38} Financial Services Act, 1986, ch. 60, § 146(1) (Eng.).

\textsuperscript{39} Id. § 146(3).
2.4.4. Responsibility for Listing Particulars

Responsibility for the listing particulars under the FSA is borne by the issuer, each director (and shadow director) of the issuer (other than for Euro-currency offerings), each person expressly accepting responsibility for any part of it (and in respect of that part only) and any other person who has authorized the contents thereof or of any part thereof. If the listing particulars are misleading, the persons responsible may be liable to pay compensation to someone who has suffered loss as a result of any untrue or misleading statement therein or omission therefrom. In addition, there may be liability under the Misrepresentation Act 1967 in deceit or in negligence as well as potential criminal liability under section 47 of the FSA.

2.5. Part V of the Financial Services Act

2.5.1. In General

When it is brought into force, Part V of the FSA will regulate the issue of advertisements in the United Kingdom related to securities (limited to shares, debentures, government and public authority securities, instruments entitling to shares or securities and certificates representing securities) which are not listed or the subject of an application for listing on the London Stock Exchange. It was included in the FSA at a time when the Public Offers Directive had not been finalized and was an attempt to anticipate the implementation of the Directive in the United Kingdom. Part V will therefore have to be changed. In July 1990 the DTI published a consultative paper on the implementation of Part V. The paper received considerable criticism and draft regulations have not yet been made public.

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40 Id. § 152.
41 Id. § 150.
42 Misrepresentation Act, 1967, ch. 7 (Eng.).
43 Financial Services Act, 1986, ch. 60, § 47 (Eng.); see infra section 5.
45 Financial Services Act, 1986, ch. 60, pt. V (Eng.).
2.5.2. Requirements of the Public Offers Directive

The Public Offers Directive requires a prospectus to be published when transferable securities are offered to the public for the first time in a Member State. The Directive leaves it up to each Member State to define "offer to the public." However, the Directive does recognize that certain offerings would not be offers to the public, including offers to "professionals," offers "to a restricted circle of persons" and Eurosecurities offerings which are not the subject of a generalized campaign of advertising or canvassing. Note that "best efforts" Eurosecurities offerings and bought Eurosecurities issues by a single manager will not be exempted.

2.5.3. Purpose

The thrust of Part V is to prohibit the issue of or the causing to be issued of an advertisement in the United Kingdom offering any unlisted securities which is a primary or secondary offer (as those terms are defined) unless there has been delivered for registration to the UK registrar of companies a prospectus relating to the securities, or the advertisement is such that no investment agreement can be entered into in pursuance of it until such a prospectus has been delivered.

2.5.4. Exemptions

There is a provision for the exemption of certain types of advertisements such as those issued to persons appearing to be sufficiently expert in understanding any risks involved. The Public Offers Directive contemplates more exemptions, although the DTI did not include the exemption for Eurosecurities in its first proposals.

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47 Id.
45 Financial Services Act, 1986, ch. 60, pt. V (Eng.).
49 Id. § 170(2)(c).
2.5.5. Similarities to Listed Securities

There is a general duty of disclosure in the Public Offers Directive on terms similar to that for listed securities. The same list of persons responsible and heads of liability apply as for listed securities.

3. CONCEPT OF NON-PUBLIC OFFERINGS

There are several concepts of non-public offerings in the CA and the FSA, each of which vary in their purpose and ambit.

3.1 Companies Act

There are several exceptions from the potentially wide scope of offer to the public.

3.1.1. "Professionals" Exemption

The most important exception is the so-called "professionals" exemption, which has been used since the creation of the Euromarkets for offers and sales in the United Kingdom. For foreign companies the CA and, since 1989, in respect of securities with a maturity of less than five years, for U.K. companies, the FSA, deem an offer or sale of shares or debentures to a person whose ordinary business it is to buy or sell shares or debentures (whether as principal or agent) not an offer to the public.\(^5\)

Although there is no judicial guidance on what factors get taken into account in determining whether an institution or person is or is not a "professional," the term would include:

(i) market-makers in shares and debentures; and
(ii) securities dealers, merchant banks, investment banks and clearing banks.

Provided that it is their ordinary business to deal in, rather than merely to carry on a business involving investing in shares or debentures, the term would include:

(iii) professional managers appointed to act as fund managers on behalf of such organizations as investment companies, unit trusts, pension funds, money market

\(^5\) Companies Act, 1985 (as amended by Companies Act 1989), 1989, ch. 40, § 79(2) (Eng.); Financial Services Act, 1986, ch. 60, § 195 (Eng.).
funds or other trusts and funds whose funds are invested in shares or debentures, or to manage as agents the securities portfolios of individuals and companies;

(iv) professional trustees of unit trust schemes, pension funds, money market funds and other trusts and funds whose funds are invested in shares or debentures; and

(v) insurance companies.

In general, the following categories of persons would not be "professionals" except in exceptional circumstances:

(i) non-professional trustees of pension funds (such as where the trustees are drawn exclusively from directors or senior executives of the organization (which is not itself carrying on business as a "professional"); and

(ii) companies exercising cash management techniques.

A company which invests surplus cash in shares or debentures could not by virtue of that fact alone be said to have an "ordinary business" of dealing in shares or debentures.

3.1.2. Other Specific Exceptions

In addition to the more general exception referred to in section 3.1.3., infra, there are specific exceptions for certain types of offers by private companies:

(i) to existing members of the company making the offer;

(ii) to existing employees of the company making the offer;

(iii) to members of the family of such member or employee;

(iv) to existing debenture holders;

(v) in relation to employees' share schemes;

and in relation to shares or debentures which are or are to be in all respects uniform with shares or debentures previously issued and for the time being listed on the London Stock Exchange.\(^{51}\)

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\(^{51}\) Companies Act, 1985 (as amended by the Companies Act 1989), 1989, ch. 40, § 60 (Eng.).
3.1.3. More General Exception

There is a more general exception if the offer by a private company can properly be regarded, in all the circumstances, as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or otherwise as being of a domestic concern of the persons receiving and making it.\textsuperscript{52}

3.2. Financial Services Act

Section 57 of the FSA\textsuperscript{53} permits the issue of an investment advertisement issued or approved by an authorized person. In addition, there are also several exceptions to the investment advertisement restrictions in the FSA, two of which can be used to facilitate a non-public offering.

3.2.1. Section 57 Exception

An investment advertisement issued or approved by an authorized person is permitted by section 57. The conduct of business rules of that authorized person’s SRO will provide the standard to which the authorized person must adhere in issuing or approving such an advertisement, if it constitutes a “specific investment advertisement.”\textsuperscript{54} There is attendant liability for the authorized person in so doing.\textsuperscript{55} Typically, this is a liability which the authorized person will not want to assume. The advertisement must therefore not be a specific investment advertisement. Generally, an advertisement falling within the exceptions described in sections 3.2.2 and 3.2.3, infra, will not be a specific investment advertisement according to the rules of the SRO.

\textsuperscript{52} Companies Act, 1985 (as amended by Companies Act 1989), 1989, ch. 40, § 60 (Eng.). See supra paragraphs (i) to (iv) of section 3.1.2. for examples of this exception.

\textsuperscript{53} Financial Services Act, 1986, ch. 60, § 57 (Eng.).

\textsuperscript{54} See, e.g., Rule 5-9(b) of the Securities and Futures Authority Limited.

\textsuperscript{55} Financial Services Act, 1986, ch. 60, § 62 (Eng.).
3.2.2. Other Exceptions

An advertisement issued or caused to be issued by the government of any sovereign entity, any local authority, any central bank of any country or any international organization the members of which include any member of the European Community is not an investment advertisement.\(^5^6\)

3.2.3. Exemptions Provided by the Order

Article 9(2) of the Order\(^5^7\) provides an exemption from section 57 of the FSA if the advertisement is issued or caused to be issued in the United Kingdom to persons whom the person issuing the investment advertisement reasonably believes to be persons of a kind described in article 9(3) of the Order\(^5^8\) or reasonably believes that the means by which the advertisement is issued is such that it will not generally be made available except to persons to whom the advertisement may otherwise lawfully be issued.\(^5^9\) An issuer will impose contractual restrictions on managers of issues so that the requisite reasonable belief can be formed.

A person falls within article 9(3) if he is either:
(a) an authorized person under the FSA;\(^6^0\)
(b) an exempted person under the FSA;\(^6^1\)
(c) a person who is acting in the course of a business or employment which involves the dissemination of information concerning investments or activities of the kind described in Part II of Schedule 1 of the FSA\(^6^2\) (dealing in investments, arranging deals in investment, managing investments, giving investment advice and establishing collective investment schemes) through newspapers, journals, magazines or other

\(^{5^6}\) Financial Services Act, 1986, ch. 60, § 58(1)(a) (Eng.).

\(^{5^7}\) Financial Services Act, 1986 (Investment Advertisements) (Exemptions) Order, S.I. 1988, No. 316. See also supra section 2.3.3.

\(^{5^8}\) See id. art. 9(3).

\(^{5^9}\) Id. art. 9(2)(b).

\(^{6^0}\) A member of one of the four SROs or a person directly authorized by the SIB.

\(^{6^1}\) For example, the Bank, certain investment exchanges, Lloyd's, listed money market institutions, and overseas persons acting within the scope of the so-called "overseas persons" exemption.

\(^{6^2}\) Financial Services Act, 1986, ch. 60, sched. 1, pt. II (Eng.).
periodical publications, or by way of sound broadcasting or television;

(d) a sovereign entity, any local authority or any international organization the members of which include any member of the European Community;

(e) a body corporate or an unincorporated association which either:

(i) if it is a body corporate and has more than twenty members or is the subsidiary of a holding company which has more than twenty members, it, or any of its holding companies or subsidiaries, has a called up share capital or net assets (the aggregate of its assets less the aggregate of its liabilities) of not less than £500,000;

(ii) if it is any other body corporate, it or any of its holding companies or subsidiaries has a called up share capital or net assets of not less than £5,000,000; or

(iii) if it is an unincorporated association, it has net assets of not less than £5,000,000;

(f) a person who holds a permission granted under paragraph 23 of Schedule 1 of the FSA;\(^{63}\)

(g) a person acting in his capacity as a director, officer, or employee of a person of a kind described in paragraph (e), supra, being a person whose responsibilities, when acting in that capacity, involve him engaging in activities which fall within Part II of Schedule 1 of the FSA or which would fall within Part II were it not for the provisions of Part III of that Schedule;\(^{64}\) or

(h) any trustee of a trust where the aggregate value of the cash and investments which form part of the trust's assets (before deducting the amount of its liabilities) is £10 million or more or has been £10 million or more at any time during the previous two years.\(^{65}\)

\(^{63}\) Specific exemptions for dealings in the course of a non-investment business.

\(^{64}\) Financial Services Act, 1986, ch. 60, sched. 1, pt. II (Eng.) (applying to certain excluded activities such as dealing as a principal).

\(^{65}\) Id. art. 9(3).
4. RESALES OF SECURITIES ACQUIRED IN A NON-PUBLIC OFFERING

4.1. Companies Act

The CA as it applies to foreign companies applies to offers and sales in the primary market because the restriction applies only to subscription of shares or debentures, not to the purchase thereof. The CA, as it applies to UK companies, applies in both the primary and the secondary market, although in practice, secondary market sales rarely involve offers to the public.66

4.2. Financial Services Act

There are no specific restrictions on the resale of securities acquired in a non-public offering. However, the general provisions of the FSA relating to investment advertisements,67 cold calling,68 and the carrying on of investment business in the United Kingdom69 will apply.70 Care must also be taken that a non-public offering does not fall within the public offering sections of Part V of the FSA71 once in force.

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66 If a company allots shares or debentures with a view to their being offered for sale to the public, any document by which the offer for sale to the public is made is deemed to be a prospectus even if it is not issued by the person making the offer. Companies Act, 1985 (as amended by Companies Act 1989), 1989, ch. 40, § 58(3) (Eng.). This is true for foreign companies as well. Id. § 79(1).

67 Financial Services Act, 1986, ch. 60, § 57 (Eng.).

68 Id. § 56.

69 Id. § 3.

70 See infra section 5 (Market Regulation of Non-Public Offerings) for which FSA provision is applicable.

71 Financial Services Act, 1986, ch. 60, §§ 158-71 (Eng.). See also supra section 2.5.
5. Market Regulation of Non-Public Offerings

5.1. Section 3 of the Financial Services Act

5.1.1. In General

No person is allowed to carry on or purport to carry on investment business in the United Kingdom unless he or she is an authorized person or an exempted person.\textsuperscript{72} A person who contravenes this provision is liable to imprisonment or a fine. Any investment agreement entered into by an unauthorized person shall be unenforceable by it and the consideration paid to the person illegally carrying on investment business may have to be returned to the other party together with compensation for any loss sustained for having parted with it.

5.1.2. Application

An issuer does not itself carry on investment business in the United Kingdom just because of an issue syndicated in London. However, the U.K. persons with whom it deals in the United Kingdom must be authorized persons. Those persons it deals with outside the United Kingdom must not do anything in the United Kingdom which is prohibited by the FSA; contractual restrictions are imposed on them by the issuer to prohibit them from doing so.

5.2. Section 47 of the Financial Services Act

5.2.1. Sanctions

Any person who does any act or engages in any course of conduct which creates a false or misleading impression as to the market or the price or value of any investments is guilty of an offense\textsuperscript{73} if he or she does so for the purpose of creating that impression, thereby inducing another person to acquire, dispose of, subscribe for or underwrite those investments or to refrain from doing so or to exercise, or refrain from exercising, any rights conferred by those investments.\textsuperscript{74} Any investment

\textsuperscript{72} Id. § 3.
\textsuperscript{73} An offender is subject to imprisonment and/or a fine.
\textsuperscript{74} Id. § 47.
agreement entered into as a consequence is not enforceable by the party issuing the advertisement and the consideration paid to the party issuing the advertisement may have to be returned together with compensation for any loss sustained for having parted with it.

5.2.2. Stabilization Activities

This provision will catch any stabilization activities of non-public offerings.

5.2.3. Safe Harbor

There is a safe harbor for stabilization activities applicable to both public and non-public offerings, provided that they are conducted in conformity with the rules set out by the SIB in respect of certain types of investment.  

5.3. Section 56 of the Financial Services Act

5.3.1. In General

No person shall in the course of or in consequence of an unsolicited call made on a person in the United Kingdom or made from the United Kingdom on a person elsewhere by way of business enter into an investment agreement with the person on whom the call is made, or procure or endeavor to procure that person to enter into such an agreement. Any investment agreement entered into as a consequence is not enforceable by the party making the unsolicited call. The consideration paid to the party making the unsolicited call may have to be returned together with compensation for any loss sustained for having parted with it.

5.3.2. Exceptions

There are exceptions to this restriction which are contained in the various conduct of business rules with which members of each SRO are required to comply. There is an exemption

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75 This safe harbor applies to normal types of investment but not, for example, to collective investment schemes, covered warrants, options, and swaps.

76 Financial Services Act, 1986, ch. 60, § 56 (Eng.).
substantially similar to the article 9 exemption from section 57 allowing unsolicited calls on the same kinds of person described therein.\textsuperscript{77}

5.4. \textit{Section 57 of the Financial Services Act}

The same restrictions as described in section 5.3, \textit{supra}, apply to all investment advertisements, no matter when issued.\textsuperscript{78}

5.5. \textit{Section 154 of the Financial Services Act}

5.5.1. \textit{In General}

Where listing particulars are or are to be published in connection with an application for listing of any securities on the London Stock Exchange, no advertisement or other information of a kind specified by the listing rules shall be issued in the United Kingdom unless the contents of the advertisement or other information have been submitted to the London Stock Exchange and it has either approved those contents or authorized the issue of the advertisement or information without such approval.\textsuperscript{79}

Contravention of this section by a non-authorized person is an offense punishable by imprisonment and/or a fine. Contravention by an authorized person is treated as a breach of the conduct of business rules of the SRO of which that person is a member, the ultimate sanction for which is expulsion from that SRO and a withdrawal of authorization to engage in the provision of investment services.

5.5.2. \textit{Treatment of Marketing of Euro-Currency Securities}

The London Stock Exchange treats selective marketing of Euro-currency securities in a more lenient manner than underwritings or placements of domestic U.K. securities. It allows circulation of draft listing particulars for the purpose of arranging syndication without those listing particulars being approved by the London Stock Exchange. It also permits

\textsuperscript{77} See \textit{supra} section 3.2.3.

\textsuperscript{78} Financial Services Act, 1986, ch. 60, § 57 (Eng.).

\textsuperscript{79} \textit{Id.} § 154.
distribution of invitation telexes without their being required to be submitted for approval. The effect of this is to bring those documents back within the scope of section 57, because they are not of a kind specified by section 154.

5.6. Part V of the Financial Services Act

The essence of Part V \(^8^0\) will be to regulate advertisements at the primary and secondary offer stages.\(^8^1\)

5.7. Broker/Dealer Regulation

Unless an exemption applies, each person carrying on an investment business in the United Kingdom must be authorized either by the SIB directly or by an SRO. As a result, that person will have to comply with certain conduct of business rules, capital requirements, and reporting requirements imposed by the SIB or relevant SRO.

6. Offerings Outside the United Kingdom

6.1. U.K. Companies

The provisions of the CA described in section 4.1., supra, apply to U.K. companies no matter what jurisdiction in which they are making an offer since there is no geographical limitation to be found in the relevant provision of the CA. If the offer is to the public, then a prospectus complying with the CA requirements will be required to be issued and a copy delivered to the U.K. registrar of companies.\(^8^2\) The same test as to what is or is not an offer to the public will apply. The most commonly used exceptions are for securities with a maturity of less than five years and for securities listed on the London Stock Exchange.\(^8^3\) It is not uncommon, however, for

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\(^{8^0}\) Id. §§ 158-71.

\(^{8^1}\) See supra section 2 (Concept of Public Offerings) for when §§ 158-71 of the FSA are applicable.

\(^{8^2}\) Companies Act, 1985 (as amended by Companies Act 1989), 1989, ch. 40, § 64(1) (Eng.).

\(^{8^3}\) Companies Act, 1985 (as amended by Companies Act 1989), 1989, ch. 40, § 79(2) (Eng.). Part III of the CA has been repealed insofar as it relates to offers of shares or debentures which are listed on the London Stock Exchange. The process is considerably simplified for U.K. companies
U.K. companies to issue securities listed on the Luxembourg Stock Exchange to comply with the CA prospectus requirements because of an inability to comply with the London Stock Exchange's requirements (e.g., for property companies or mineral companies) and because of the ease of complying with the applicable CA requirements.

6.2. Non-U.K. Companies

U.K. regulation is only relevant if the syndication or distribution is being conducted by a person in the United Kingdom, or the offering is being made in the United Kingdom.

6.3. Mutual Recognition

The EC Directives referred to in section 1.2, supra, provide for listing particulars and prospectuses which meet the standard of the Listing Particulars Directive published in one Member State to be used freely in another. In summary, the principles of mutual recognition are as follows:

6.3.1. Acceptance of Listing Particulars

If applications for listing are made within a short interval in more than one Member State, then, subject to translation and the addition of purely local information, the listing particulars approved by the competent authority in one Member State must be accepted in other Member States, without additional information being required or further approval being needed.  

6.3.2. Prospectus as Listing Particulars

If applications for listing are made within a short interval in more than one Member State, then, subject to translation and the addition of purely local information, a prospectus which has been drawn up and approved during the preceding three months and which meets the requirements for listing particulars must be recognized as listing particulars in other

already listed on that exchange.

Member States. This is to accommodate the issues procedures in most Member States, other than the United Kingdom, where the public offer typically precedes the application for listing by several weeks.

6.3.3. Recognition of Prospectus for a Public Offer

Where a prospectus is drawn up which also meets the requirements for listing particulars, including scrutiny and approval, then, subject to translation and the addition of purely local information, it must be recognized as a prospectus for a public offer of the same securities made simultaneously or within a short interval in another Member State, without further information being required or further approval needed.

Note that listing particulars cannot be used as a public offer prospectus in another Member State. This will not be significant if, as is proposed in the United Kingdom, the document by which listing is sought is called a prospectus but is drawn up to listing particulars standards. In addition, to obtain mutual recognition, the prospectus must be approved by the competent authority as complying with listing particulars standards. This requires pre-vetting by the competent authority of a Member State. Member States are not obliged to give mutual recognition to issuers who have their registered office outside the EC. Thus, for example, listing particulars prepared to enable the common stock of a U.S. issuer to be traded on an EC exchange will not automatically be available as an offering document in other Member States.


The general provisions described in Market Regulation of Non-Public Offerings apply to all investment business being

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85 Id.
86 Id.
87 Id.
89 Id.
91 See supra section 5.
carried on in the United Kingdom.

7. OTHER CONSIDERATIONS

7.1. Collective Investment Schemes

The Undertakings for Collective Investment in Transferable Securities ("UCITS") Directive\(^{92}\) applies to open-ended mutual funds (whether in corporate or trust form) which invest in transferable securities. A UCITS established in one Member State can be publicly marketed throughout the EC, provided that certain conditions in relation to the constitution of the fund are met, a prospectus-like document making mandatory disclosures is issued, and local marketing rules are satisfied.\(^{93}\)

Part I, Chapter VIII of the FSA\(^ {94}\) regulates the promotion of collective investment schemes ("CIS") in the United Kingdom. A CIS is widely defined to include a range of mutual funds and arrangements for the collective management of assets.\(^ {95}\)

It is only possible to promote a CIS to the general public in the United Kingdom if that scheme is an "authorized unit trust" or a "recognized scheme."\(^ {96}\) To qualify as either category requires compliance with detailed regulations aimed at investor protection. Pursuant to an exemption to the general regime, however, a CIS falling outside these categories (an "unregulated scheme") may be marketed to a restricted but significant class of persons. In particular, section 76(2)\(^ {97}\) permits an authorized person to promote an unregulated scheme to another authorized person or a person whose ordinary business involves the acquisition or disposal of property of the same kind as the property, or a substantial part of the property, to which the scheme relates.\(^ {98}\)

\(^{93}\) Id.
\(^{94}\) Financial Services Act, 1986, ch. 60, §§ 75-95 (Eng.).
\(^{95}\) Id. § 75.
\(^{96}\) Id. § 76(1).
\(^{97}\) Id. § 76(2).
\(^{98}\) Further exemptions are included in the Financial Services (Promotion of Unregulated Schemes) Regulations 1991.
7.2. Pounds Sterling Considerations

There are particular considerations to bear in mind when an issue is of sterling securities by an issuer that is not an authorized deposit-taking institution under the BA. Whether the issue is of a public or non-public nature is irrelevant. Although of little legal significance now that timing consent is no longer required, the Bank regulates sterling securities by reference to the definition of "sterling securities" contained in the Control of Borrowing Order 1958.99

There is a prohibition on an issuer that is not an authorized institution accepting deposits in the United Kingdom in the course of carrying on (whether there or elsewhere) a business which for the purpose of the BA is a deposit-taking business.100 In essence, acceptance of sterling deposits (which is given a wide meaning) other than on particular occasions (e.g., more than once a year) could fall afoul of this prohibition. The Bank has issued regulations, the current version being the Banking Act 1987101 (Exempt Transactions) (Amendment) Regulations 1990 ("Regulations"), containing safe harbors. The Regulations provide safe harbors for sterling commercial paper (with maturities of seven to 365 days) and sterling medium term notes (with maturities of more than one to five years) issued by a company the net assets of which exceed £25 million and the shares or debt securities of which are listed on the London Stock Exchange or, for so long as it is in existence, the Unlisted Securities Market, or guaranteed by such a company or an authorized institution.

Certain other conditions need to be satisfied. Companies listed on certain foreign exchanges may also be able to rely on the safe harbor, but only if they comply with detailed disclosure requirements set out in the Regulations, which follow domestic U.K. disclosure requirements and from which no derogations can be obtained. In practice, the latter safe harbor has not been used.

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99 Control of Borrowing Order, S.I. 1958, No. 1208 (securities (shares, bonds, debentures and debenture stock) in relation to which the principal, dividends, interest, or subscription moneys (or any of them) are payable in sterling, or in relation to which there is an option (by whichever party exercisable) for any such payments to be made in sterling).

100 Banking Act, 1987, ch. 22, § 3(1) (Eng.).

101 Id. as amended by Exempt Transactions Regulation, S.I. 1989, No. 20.
8. CONCLUSION

The United Kingdom currently has a relatively certain and well used regime for the making of non-public offerings, the most obvious manifestation of which is the Euromarkets. Provided that offers are made only to “professionals,” non-public offerings will fall outside U.K. prospectus and filing requirements.\(^\text{102}\) If a listing of securities on the London Stock Exchange is sought, this does not necessarily mean that the securities will be sold to the public because syndication occurs in such a way as to make offers to professionals a required limitation prior to listing being sought and in respect of some documents not falling within the listing process.

The implementation of Part V of the FSA\(^{103}\) will have a major effect on what constitutes a non-public offering and how it is effected.

\(^{102}\) Note that parties making non-public offerings may, nonetheless, voluntarily comply with such requirements.

\(^{103}\) Financial Services Act, 1986, ch. 60, §§ 158-71 (Eng.); see supra section 2.5.