

## PERSONS RESPONSIBLE FOR THE CONTENTS OF THE PROSPECTUS

### **Introduction**

The definition of the persons responsible for the contents of a prospectus or of a supplementary prospectus is set out in the Prospectus Rules.<sup>1</sup> Before the introduction of the Prospectus Regulations 2005<sup>2</sup> there was a distinction between the treatment of listing particulars and of prospectuses in this regard. However, those Regulations have revoked the former code dealing with persons responsible<sup>3</sup> such that the Prospectus Rules now govern this matter. This fascicule of regulations is concerned to identify which persons are capable of being held to be legally responsible for the contents of the listing particulars in the event that any statement in or omission from the listing particulars (or supplementary particulars or a prospectus) causes an investor loss. Whereas the common law and statute would require complex questions as to the proximity of the defendant's act or omission to the claimant's loss, the regulations make much clearer the categories of person who will be liable for those losses. The general law is considered in Chapter 25.

### **“Persons responsible” for the prospectus under the Prospectus Rules and FSMA 2000**

The persons responsible for a prospectus are dealt with by the Prospectus Rules, further to s.84(1)(d) FSMA 2000. The following rules apply only in situations in which the UK is the home State for the transferable securities and the prospectus at issue.<sup>4</sup> References in these regulations to a “prospectus” are references also to a “supplementary prospectus”.<sup>5</sup> There follows a discussion of the Prospectus Rules, section 5.5 in this context, following the division in those rules between equity securities and non-equity securities.

### **Persons responsible for a prospectus for equity securities**

#### *The scope of PR 5.5.3*

The Prospectus Rules provide that the following categories of person are to be taken as being responsible for the contents of a prospectus in relation to equity shares, warrants or options to subscribe for equity shares, or other transferable securities of

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<sup>1</sup> Prospectus Rules, chap. 5.

<sup>2</sup> S.I. 2005/1433.

<sup>3</sup> Whereas the definition of persons responsible for listing particulars or supplementary listing particulars was originally set out in a statutory instrument, the Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001 (SI 2001/2956), reg. 6; effecting Financial Services and Markets Act 2000, s.79(3): which came into effect on 18<sup>th</sup> June 2001: Financial Services and Markets Act 2000 (Commencement No.3) Order 2001 (SI 2001 No 1820). The Financial Services and Markets Act 2000 (Official Listing of Securities) Order 2001 was revoked by the Prospectus Regulations 2005 (S.I. 2005/1433), Sch.3, para.4.

<sup>4</sup> Prospectus Rules, para 5.5.2R.

<sup>5</sup> Prospectus Rules, para 5.5.1R, applying 1.1.9.

similar kind.<sup>6</sup> Paraphrasing those categories from Prospectus Rules, para 5.5.3R:<sup>7</sup> the issuer; directors and those authorising themselves to be named as responsible for the prospectus; Each person who accepts responsibility for the prospectus; in relation to an offer, each person who is a director of a body corporate making an offer of securities; in relation to applications for admission to trading, each person who is a director of a body corporate making an offer of securities; and other persons who have authorised the contents of the prospectus. Each category is considered in turn in the discussion to follow.

### *The issuer*

The Prospectus Rules, para 5.5.3R provides as follows:

- ‘(2) Each of the following persons are responsible for the prospectus:
  - (a) the issuer of the transferable securities’

Therefore, the person, usually a company or a public sector body, issuing the securities will be responsible for the contents of the prospectus. The issuer will, however, not be responsible for the contents of the prospectus if the issuer has not made nor authorised the offer nor the request for admission to trading to which the prospectus relates.<sup>8</sup>

### *Directors and those authorising themselves to be named*

The Prospectus Rules, para 5.5.3(2)R provides that two classes of person will be responsible for a prospectus as follows:

- ‘(b) if the issuer is a body corporate
  - (i) each person who is a director of that body corporate when the prospectus is published; and
  - (ii) each person who has authorised himself to be named, and is named, in the prospectus as a director or as having agreed to become a director of that body corporate either immediately or at a future time’

Thus, there are two forms of person responsible under this provision. First, each director of the company at the time when the prospectus is published. It is of course possible that a person may be appointed as a director between the time when the decision was taken within the company to issue securities and the time when publication was effected. A large amount of work will have been conducted between the relevant employees of the issuer and its professional advisors between the decision to issue securities and the eventual publication of the prospectus, including the

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<sup>6</sup> Prospectus Rules, para 5.5.3(1)R provides that these regulations apply as follows: “(1) This rule applies to a prospectus relating to (a) equity shares; (b) warrants or options to subscribe for equity shares, that are issued by the issuer of the equity shares; and (c) other transferable securities that have similar characteristics to transferable securities referred to in paragraphs (a) or (b).”

<sup>7</sup> Prospectus Rules, para 5.5.3R.

<sup>8</sup> Prospectus Rules, para 5.5.5R.

preparation work on the prospectus and its contents and the application for admission to listing. Thus, a director may have missed a large amount of the work relating to the preparation of the prospectus if he is only appointed a director just before the time of publication. Indeed, this person is caught within the provision by paragraph (b). This infrequent occurrence is placed in the shadows by the more frequent occurrence of a director who takes little part in the preparation of the prospectus, aside from attendance at the board meetings which discuss the prospectus. However, the Prospectus Rules provide that:<sup>9</sup>

‘A person is not responsible for a prospectus under [the provision quoted above] if it is published without his knowledge or consent and on becoming aware of its publication he, as soon as practicable, gives reasonable public notice that it was published without his knowledge or consent’.

This provision would, it is suggested, cover the circumstance of a director who was appointed after the prospectus was completed or who was in complete ignorance of the prospectus (such that it was published without his knowledge) or who objected formally to its publication (such that it was published without his consent). It would offer no protection to a director who contributed only half-heartedly to board meetings dealing with this subject because it was outside his particular area of influence within the issuer and so, he thought, of no direct interest to him. Such a person could not claim that the prospectus was published without his knowledge, nor without his consent if he failed to object to any part of it. Thus, within an issuer, all of the directors are advised to take part and to inform themselves about the prospectus and the issue of securities.

Also caught within this provision are people who have agreed to become directors in the future. Such people may credibly be able to argue that the prospectus was issued without their knowledge, depending on the circumstances.

The Prospectus Rules do provide, however, that no person shall be responsible for the contents of the prospectus if the issuer has not made nor authorised the offer nor the request for admission to trading to which the prospectus relates.<sup>10</sup>

*Each person who accepts responsibility for the prospectus*

The Prospectus Rules, para 5.5.3(2)R provides as follows:

‘(c) each person who accepts, and is stated in the prospectus as accepting, responsibility for the prospectus’

Beyond the directors of the issuer, there will be a large number of employees within the company who will have worked on the prospectus. Similarly, among the professional advisors – solicitors, accountants, public relations consultants, investment bankers and so forth – there will have been a large number of people who will have worked on the prospectus. Any of those people could be shown to have

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<sup>9</sup> Prospectus Rules, para 5.5.6R.

<sup>10</sup> Prospectus Rules, para 5.5.5R.

caused the inclusion of any given statement within the prospectus. Under the general law, such people could be demonstrated to have caused the making of a misrepresentation. This provision, however, is limited only to those people who have accepted responsibility for the contents of the prospectus. Furthermore, it must also be stated in the prospectus that those people have accepted responsibility for the prospectus.

### *Responsibility in relation to offers*

The Prospectus Rules, para 5.5.3(2)R provides as follows:

- ‘(d) in relation to an offer:
- (i) the offeror, if this is not the issuer; and
  - (ii) if the offeror is a body corporate and is not the issuer, each person who is a director of the body corporate when the prospectus is published ...’

This provision relates to offers of securities. As drafted, it would seem to encompass any person who offers securities to another person. Indeed, so wide is the drafting that it would seem to encompass any offeror of the securities, even if that person had had no part in the initial issue of the securities nor in the preparation of the prospectus. It is suggested, that it would be a sensible limitation on the interpretation of this provision to limit it to those who are involved in the initial offer, such as underwriters, who could be said to have some inter-action with the preparation of the prospectus. Otherwise, sellers of securities in the after-market – for example, retail clients seeking to dispose of their securities to investment firms – could, on a literal interpretation of this provision, be taken to be liable in some way for the terms of the prospectus. Thus, by way of partial exemption, the Prospectus Rules provide<sup>11</sup> that:

‘A person is not responsible for a prospectus under [the provision quoted immediately above] if:

- (1) the issuer is responsible for the prospectus in accordance with the rules in this section;
- (2) the prospectus was drawn up primarily by the issuer, or by one or more persons acting on behalf of the issuer; and
- (3) the offeror is making the offer in association with the issuer.’

More particularly, an offeror who is not the issuer of the securities is not responsible if the prospectus was “drawn up primarily by the issuer, or by one or more persons acting on behalf of the issuer”.<sup>12</sup> It is not clear what is meant by “primarily” here. Clearly to the extent that the offeror is involved in the preparation or the approval of the prospectus, then the offeror ought to be liable for its contents.

### *Responsibility in relation to applications for admission to trading*

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<sup>11</sup> Prospectus Rules, para 5.5.7R.

<sup>12</sup> Prospectus Rules, para 5.5.7(2)R.

The Prospectus Rules, para 5.5.3(2)R provides as follows:

(e) in relation to a request for the admission to trading of transferable securities:

- (i) the person requesting admission, if this is not the issuer; and
- (ii) if the person requesting admission is a body corporate and is not the issuer, each person who is a director of the body corporate when the prospectus is published; and

The term “persons responsible” thus includes a person who requests the admission of securities to trading on a regulated market, together with each director of that person. Thus, a person seeking admission to trading of securities is well advised to participate in the preparation of the prospectus or to take steps to ensure that its contents do not give rise to liability or that it is indemnified by other people who have prepared the prospectus.

#### *Other persons who have authorised the contents of the prospectus*

The Prospectus Rules, para 5.5.3(2)R provides as follows:

(f) each person not falling within any of the previous paragraphs who has authorised the contents of the prospectus.”

In accordance with the earlier provisions, if a person authorises the contents of the prospectus then that person will be liable for the contents of that prospectus. A person who accepts responsibility for the terms of a prospectus may declare that he accepts responsibility only for a part of the prospectus and he will then be liable only to that extent.<sup>13</sup>

Therefore, it is possible for individuals, advisors or companies to limit their liabilities. This raises familiar problems. An investor may possibly not understand that a person who is quoted in listing particulars as having approved some or all of their contents may nevertheless have sought to limit his liability. This could be said to militate against the policy that listing particulars and prospectuses promote transparency in the process of disclosure and of responsibility for such disclosure. Alternatively, it could be said to be unjust to impose a liability on someone participating in the preparation of the listing particulars when they have not consented to accept that liability. What is unclear is what is meant by the term that such a person may “state” that their liability is limited. By “state” it may be that such a limitation of liability is to be recorded in the listing particulars themselves – an approach which would accord with the more general policy of providing clear information both to the UKLA and for the benefit of investors – rather than simply that there be an agreement between the person at issue and the issuer.

#### **Persons responsible for a prospectus for non-equity securities**

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<sup>13</sup> Prospectus Rules, para 5.5.8R.

Further, the Prospectus Rules provide that the following categories of person are to be taken as being responsible for the contents of a prospectus in relation to all other forms of securities which are not equity shares, warrants or options to subscribe for equity shares under the previous heading, the Prospectus Rules, para 5.5.4(2)R provides as follows:<sup>14</sup>

- “(a) the issuer of the transferable securities;
- (b) each person who accepts, and is stated in the prospectus as accepting, responsibility for the prospectus;
- (c) in relation to an offer, the offeror of the transferable securities, if this is not the issuer;
- (d) in relation to a request for the admission to trading of transferable securities, the person requesting admission, if this is not the issuer;
- (e) if there is a guarantor for the issue, the guarantor in relation to information in the prospectus that relates to the guarantor and the guarantee; and
- (f) each person not falling within any of the previous paragraphs who has authorised the contents of the prospectus.”

Each category is considered in turn in the discussion to follow.<sup>15</sup>

#### *The issuer*

The Prospectus Rules, para 5.5.4R provides as follows:

- “(2) Each of the following persons are responsible for the prospectus:
  - (a) the issuer of the transferable securities’

Therefore, the person, usually a company or a public sector body, issuing the securities will be responsible for the contents of the prospectus. The issuer will, however, not be responsible for the contents of the prospectus if the issuer has not made nor authorised the offer nor the request for admission to trading to which the prospectus relates.<sup>16</sup>

#### *Each person who accepts responsibility for the prospectus*

The Prospectus Rules, para 5.5.4(2)R provides as follows:

- “(b) each person who accepts, and is stated in the prospectus as accepting, responsibility for the prospectus’

Within the categories of persons responsible for the prospectus are those people who have accepted responsibility for the contents of the prospectus. Furthermore, it must also be stated in the prospectus that those people have accepted responsibility for the

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<sup>14</sup> Prospectus Rules, para 5.5.4R.

<sup>15</sup> The commentary in relation to some of these categories is similar to that in relation to equity securities above: that commentary is rehearsed where appropriate in these sections for ease of reference.

<sup>16</sup> Prospectus Rules, para 5.5.5R.

prospectus.

### *Responsibility in relation to offers*

The Prospectus Rules, para 5.5.4(2)R provides as follows:

- ‘(c) in relation to an offer:
- (i) the offeror, if this is not the issuer; and
  - (ii) if the offeror is a body corporate and is not the issuer, each person who is a director of the body corporate when the prospectus is published ...’

This provision relates to offers of securities. The breadth of this provision was considered above in relation to equity securities.<sup>17</sup> By way of partial exemption, the Prospectus Rules provide<sup>18</sup> that:

- ‘A person is not responsible for a prospectus under [the provision quoted immediately above] if:
- (1) the issuer is responsible for the prospectus in accordance with the rules in this section;
  - (2) the prospectus was drawn up primarily by the issuer, or by one or more persons acting on behalf of the issuer; and
  - (3) the offeror is making the offer in association with the issuer.’

More particularly, an offeror who is not the issuer of the securities is not responsible if the prospectus was “drawn up primarily by the issuer, or by one or more persons acting on behalf of the issuer”.<sup>19</sup> This provision was considered above in relation to equity securities.<sup>20</sup>

### *Responsibility in relation to applications for admission to trading*

The Prospectus Rules, para 5.5.4(2)R provides as follows:

- ‘(d) in relation to a request for the admission to trading of transferable securities, the person requesting admission, if this is not the issuer’

Persons responsible then includes a person who requests the admission of securities to trading on a regulated market. Thus, a person seeking admission to trading of securities is well advised to participate in the preparation of the prospectus or to take steps to ensure that its contents do not give rise to liability or that it is indemnified by other people who have prepared the prospectus.

### *Guarantors of the issue*

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<sup>17</sup> See para 21-17.

<sup>18</sup> Prospectus Rules, para 5.5.7R.

<sup>19</sup> Prospectus Rules, para 5.5.7(2)R.

<sup>20</sup> See para 21-17.

The Prospectus Rules, para 5.5.4(2)R provides as follows:

‘(e) if there is a guarantor for the issue, the guarantor in relation to information in the prospectus that relates to the guarantor and the guarantee’

Debt securities may have a guarantor. Such a guarantor is likely to be connected to the issuing company in some way – perhaps being the principal trading company within a group of companies in which it is a holding company which is seeking listing of those debt securities – and therefore it would be reasonable to require that person to take a hand in the preparation of the prospectus and so to be liable for its contents. This person requires to participate in its preparation as a result.

*Other persons who have authorised the contents of the prospectus*

The Prospectus Rules, para 5.5.4(2)R provides as follows:

(f) each person not falling within any of the previous paragraphs who has authorised the contents of the prospectus.”

In accordance with the earlier provisions, if a person authorises the contents of the prospectus then that person will be liable for the contents of that prospectus. A person who accepts responsibility for the terms of a prospectus may declare that he accepts responsibility only for a part of the prospectus and he will then be liable only to that extent.<sup>21</sup>

### **The general duty of disclosure**

The persons responsible for a prospectus are subject to the general duty of disclosure in s.87A FSMA 2000. Failure to do so may give rise to a liability for breach of that duty in any event. Rather, a further liability is imposed by these regulations which expressly provides that any person responsible for a prospectus, who is aware of a matter which calls for a supplementary prospectus, is under a duty to give notice of this to the issuer of the securities. This obligation was considered in Chapter 12 *Prospectuses*.<sup>22</sup>

### **“Persons responsible” for prospectuses under FSMA 2000**

The persons described as being responsible for a prospectus are responsible for all of the purposes of Part VI of the Financial Services and Markets Act 2000 but not for necessarily for any liability outwith that Part VI, subject to the liability of promoters under s.90(9) of the FSMA 2000. That is, they are not “persons responsible” in a general sense, for example for the purpose of a claim in tort based on negligent misrepresentation in a prospectus at common law.<sup>23</sup> Whether or not they are so liable

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<sup>21</sup> Prospectus Rules, para 5.5.8R.

<sup>22</sup> See para 12-45.

<sup>23</sup> See para 24-01.

would be a matter for the principles of that particular common law claim, as considered in Chapter 24.

### **The liability of professional advisors for listing particulars or for a prospectus**

*Professional advisors are not to be assumed to responsible for the prospectus*

In considering the liability of professional advisors, a distinction is to be made between advisors giving professional advice generally and thereby opening themselves up to general liability at common law, and those advisors whose advice is partly in the form of statements reproduced in the offer documentation. (The term “offer documentation” is used in this section to relate to both prospectuses and listing particulars.) As to the liability of professional advisors the Prospectus Rules provide only that:

“Nothing in the rules ... is to be construed as making a person responsible for any prospectus by reason only of the person giving advice about its contents in a professional capacity”.<sup>24</sup>

This raises issues as to liability at general law and the general issues considered in the remainder of this section relating to issues growing from the prospectus rules. The question as to whether or not a person is to be held liable for the contents of offer documentation, on the basis that they sanctioned their contents in a professional capacity, is left open. What this regulation does is to remove any presumption that a professional advisor should necessarily be held to be liable for the contents of those particulars. Under the Financial Services Act 1986, the principal legislation was far fuller in its code on personal responsibility for the contents of the offer documentation: especially in s.152. The Financial Services and Markets Act 2000 regime is much lighter on detail. The same issues arise, nevertheless, as to whether or not particular categories of professional advisor ought to be held liable for the contents of offer documentation. Some of the principal questions are considered here.

#### *Statements by professionals and experts*

An expert such as a valuer or accountant whose professional statement (that is, a valuation or report respectively) appears in the documentation with their consent is to be considered a person responsible for that documentation to the extent of his statement.<sup>25</sup> Whereas, a person giving advice in a professional capacity as to the contents of a prospectus, such as a solicitor or accountant, is not to be taken by reason of that fact alone to be a person responsible for the prospectus within the legislation.<sup>26</sup> The question evidently is whether the advisor was responsible in any sense for the content of any statements or representations made in the document: where the advisor

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<sup>24</sup> Prospectus Rules, para 5.5.9R.

<sup>25</sup> In the case of a statement or report attributed to an expert, the listing particulars must contain a statement that he has given and has not withdrawn his written consent to the issue of the particulars with the statement included in the form and context in which it is included.

<sup>26</sup> This was required by the Financial Services Act 1986, s.152(8) and, to this extent, is rehearsed by reg. 6(4).

simply gave advice, for example, as to the effect of a statement that would not constitute them responsible in that way. Some of the possibilities are considered below.

### **Limited authorisation of the prospectus**

Following on from the foregoing discussion of the liability of professional advisors, a person (such as a valuer) who has accepted responsibility for, or has authorised, only part of the contents of particulars will have the protection of Prospectus Rules, para 5.5.8R in the following terms:

‘A person who accepts responsibility for the prospectus under PR 5.5.3R(2)(c) or PR 5.5.4R(2)(b) or authorises the contents of a prospectus under PR 5.5.3R(2)(f) or PR 5.5.4R(2)(f), may state that they do so only in relation to specified parts of the prospectus, or only in specified respects, and in that case the person is responsible under those paragraphs:

- (1) only to the extent specified; and
- (2) only if the material in question is included in (or substantially in) the form and context to which the person has agreed.’

This person is therefore a person responsible only to the extent of this partial authorisation of the prospectus and provided that the relevant part is included in, or substantially in, the form and context to which he agreed.<sup>27</sup>

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<sup>27</sup> Prospectus Rules, para 5.5.8R