

To: Listing Agents

From: Gerard Scully

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RE: High Yield Transactions under the Prospectus Directive

It is common practice in the debt markets for high yield issuers to issue through a company within their group structure, with their debt being guaranteed on a joint and several basis by a number or all subsidiaries of the main operating company. These multiple subsidiary guarantors may reflect the nature of the issuer's business in its various industry sectors, its multiple licenses or concessions and operations in various geographical locations.

Considering high yield transactions under the Directive 2003/71/EC (the "Prospectus Directive" the following disclosure obligations currently apply:

- Consolidated accounts relating to the issuer under either Annex IV or IX Commission Regulation (EC) No 809/2004 (the "Prospectus Regulation"), depending on the denomination of the issue; and
- Annex VI of the Prospectus Regulation requires that guarantors provide 'information about itself as if it were the issuer of that same type of security that is the subject of the guarantee'. Therefore, the issuer is required to present separate single accounts relating to each company in the group guaranteeing the high yield notes.

There is no doubt that the Prospectus Directive did not anticipate a guarantee structure of this nature. The rules as applied within the Prospectus Directive contemplate the guaranteeing of a finance company by a parent company or external party (and therefore the presentation of consolidated accounts for the group), not the upward cross guarantee subsidiary support required by the high yield market.

Presentation of separate accounts for each guaranteeing subsidiary may be cumbersome for the issuer and makes it very difficult for investors to analyse the credit. Separate financial information for each guaranteeing subsidiary may be duplicative, potentially giving a highly misleading impression of the financial support for the issuing entity, since inter group items will not be excluded and no picture of the consolidated or combined balance sheet or operations for the guarantors as a totality is presented.

Investors should be presented with accounts which are truly reflective of the net assets, income, cash flow and net liabilities relevant to credit assessment. Where guarantees are joint and several across group companies, the legal effect is to combine those companies into one financial group for the purpose of that guarantee. Therefore there may be a case for the acceptance of consolidated accounts rather than single company accounts in certain instances.

Conclusion and Conditions

The Irish Stock Exchange has embarked on an extensive consultation process with industry on how best to deal with these issues.

It is clear that in the absence of a change of Annex VI of the Prospectus Regulation, the only ability which the Competent Authority (IFSRA) has to provide exemptions from the disclosure obligation of the PD rests within Article 8 and in particular 8(2)(c), i.e.

“such information is of minor importance only for the specific offer or admission to trading on a regulated market and is not such as will influence the assessment of the financial position and prospects of the issuer, offeror or guarantor”

in combination with Article 8 (3) which permits the Competent Authority to allow for total exemption or the inclusion of “equivalent” information when it judges the disclosure requirements are ‘inappropriate to the issuer’s sphere of activity or legal form’.

The tests which need to be complied with where the issuer/issue seeks leave for an omission of information are as follows:

- Each issuer must request (as part of the opening application for prospectus approval) omission of inclusion of single company accounts relating to guarantor companies, on a case by case basis, as required by Article 8 of the Prospectus Directive;
- Such requests will be considered by the ISE during the approval process with a recommendation provided to the Competent Authority upon submission of the final prospectus for approval. Such requests will normally only be recommended to Competent Authority where:
 - 1) issuance is in denominations of greater than €50,000;
 - 2) guarantees are full and unconditional¹ and joint and several;
 - 3) subsidiary guarantors are 100%-owned subsidiaries, excluding directors’ shares or other non-material share interests issued for legal reasons;
 - 4) if the consolidated accounts include both guarantor and non guarantor companies and the non-guarantor companies represent a material² amount of revenues, net income or assets, the financial information relating to each group must be separately presented in a note to the consolidated financial statements (covered by an audit opinion), presenting, in separate columns, the issuer, the guarantor subsidiaries (on a combined basis) and the non-guarantor subsidiaries (on a combined basis), with an additional column reflecting eliminating adjustments, if material.
- The Risk Factors section of the prospectus must include a specific risk warning which:
 - (a) details that a request for omission of information from the prospectus has been made under Article 8 of the Prospectus Directive or approval of the request for omission of information has been granted by the Irish Competent Authority, as appropriate;
 - (b) outlines the specific information that has been omitted from the prospectus; and

¹ A guarantee will be full and unconditional if it is in respect of the full amount of the principal and interest guaranteed (i.e., it is not a partial guarantee or limited to a specific amount) and is not subject to the occurrence of specific conditions before a claim against the guarantor can be made if the issuer fails to make payment.

A guarantee should still be considered “full and unconditional” provided that the guarantee is expressed to be enforceable to the fullest extent permitted by applicable law except for (1) limitations required by applicable law, or (2) intercreditor provisions customary in the European market and permitted by applicable law.

² A threshold of 20% of EBIDTA (earnings before interest, depreciation, tax and amortisation) and net assets; ie. where 20% or more of EBIDTA and/or net assets are represented by subsidiaries who do not provides a guarantee, a split presentation will be required to be provided in the audited consolidated accounts.

(c) specifically draws the attention of investors to the equivalent information that has been included in the consolidated financial statements and any relevant notes to such financial statements

A request for an omission should be made at the latest, two days in advance of submission of the final prospectus for approval.

Should you have any queries in relation to any of the above please do not hesitate to contact the ISE for clarification on abs@ise.ie.
