



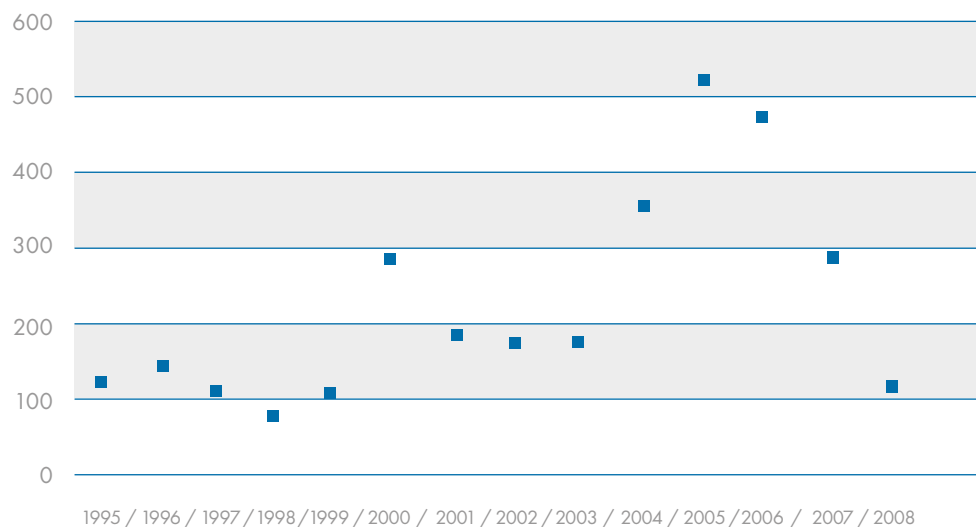
## CorporateGuard / D&O for AIM-quoted companies



Bring on tomorrow

# The Alternative Investment Market

AIM Number of new admissions by year 1995 - 2008



Source: London Stock Exchange

The decision to list on a public market may be one of the greatest milestones in any company's history.

Since it was launched in 1995, over 3,000 companies have been admitted to the Alternative Investment Market (AIM), a sub market of the London Stock Exchange. AIM allows smaller companies to raise capital in a more flexible regulatory environment than the Main Market.

## CorporateGuard D&O for AIM-quoted companies

**The liabilities faced by directors of AIM-quoted companies are every bit as onerous as for those on the Main Market.**

Admission to AIM entails a big step up in a company's regulatory compliance obligations. In particular, the scope for personal liability on the part of directors of AIM-quoted companies is significant; and directors need to be fully aware of their increased responsibilities.

CorporateGuard Directors & Officers for AIM-quoted companies provides the comfort senior officers in this sector should be looking for.

Our CorporateGuard D&O Liability cover is supplemented with specific insurance against liabilities arising out of AIM admission and placing documents; including

- shareholder misrepresentation claims
- warranty claims by brokers and nomads
- claims against controlling or selling shareholders (optional)



## AIM - Specific Liabilities

Directors will encounter two specific areas of liability not shared by directors of private companies:

1. Personal liability for false or misleading information or omissions of material information in the company's admission document
2. Liabilities arising out of breaches of rules governing the ongoing running of a public company – especially those which govern disclosure of information which could affect its share price

These can be further distinguished as between criminal and civil liability. The principle section of the criminal law which governs misleading statements by AIM directors is s.397 of the Financial Services and Markets Act 2000 (FSMA). Civil liabilities may arise from a number of different areas.

### **Criminal Liabilities – s.397**

AIM directors may incur criminal liability for false or misleading statements in either the admission document or any market disclosure under s.397 FSMA - and this offence is punishable by a fine and/or imprisonment.

Statements will contravene the law if:

- they are made with the knowledge that they are false;
- they dishonestly conceals material facts; or,
- they are recklessly misleading (even if the director does not realise they are false or misleading).

The final test is the simplest to prove and therefore the most onerous for directors.

Two directors jailed in 2005 for breach of s.397 were convicted of recklessly misleading statements. Recklessness has largely been defined in case law as being equivalent to carelessness, or to disregarding the harmful consequences of one's act.

### **Civil Liabilities**

The principal ways in which an AIM director might incur civil liability include negligent misstatement, fraudulent misrepresentation, deceit and misstatement in breach of a directors' duty of care to the company.

In each case, the director may be liable to compensate third parties for their losses.





## What's covered?

### **CorporateGuard D&O for AIM-quoted companies**

Includes advanced coverage for the liabilities arising out of the AIM admission process, including those arising out of the admission document or any subsequent placing documents.

### **Directors & Officers coverage**

The policy provides Directors and Officers Liability insurance based on our market-leading CorporateGuard wording, with key coverage points including:

- Aggregate Limits available up to £25m
- Additional ring-fenced limit for each Non-Executive of up to £1m, aiding recruitment.
- No Insured vs Insured exclusion outside the US
- Full limit of liability available for Representations at Investigations

- In an emergency, the ability to incur up to 10% of the limit without consulting ALG
- Dawn Raid fighting fund of £50k
- Kidnap and Hijacking coverage of £50k
- PR fund to publicise successfully defending a lawsuit - £50k sublimit
- Free of charge advice from a panel of leading law firms
- Ability to use any law firm in the world, although preferential rates negotiated with a panel of leading firms.

### **Public offering of securities coverage**

The company and directors are covered for any claim alleging misrepresentation in the admission document or any specified placing document or prospectus.

Critically, the policy covers any warranty or indemnity claim brought by the broker (or nomad) against the company or director.

In addition, if required the policy can offer coverage for claims against selling shareholders (for instance Private Equity companies making an exit) or controlling shareholders.

## Case Study

**In 2005, the Finance Director and MD of a UK listed plc were both found guilty of breaching s.397 of FSMA 2000.**

Their offence was “recklessly making a statement which was misleading, false or deceptive”.

Both were sentenced to jail (2 years and 3 ½ years).<sup>1</sup> Both were disqualified as directors (for 4 and 6 years). Both have had assets confiscated by the Financial Services Authority to compensate for shareholders losses.

The company’s Sales Director, who was not a board member, was acquitted.

The regulator failed to get a conviction on a more serious offence - “making a statement to the market knowing it to be misleading, false or deceptive”.

That the directors were sentenced to jail for “recklessness” - which can be equated to carelessness and does not actually require knowledge - is indicative of the tough view the courts are taking on directors’ responsibilities.

The Financial Services Authority’s Director of Enforcement commented after the case:

*“Directors can expect to be held personally responsible for the statements they make to the market, as these convictions have shown. The sentences further demonstrate that the Courts take a serious view of this type of behaviour. Before issuing a statement, directors must carefully consider their obligations and inform and consult their advisors early in the process.”*

s.397 of FSMA 2000 applies to all AIM-Quoted companies.

<sup>1</sup>Following appeal, their sentences were reduced to 18 months and 9 months respectively



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