

# Equity Capital Markets Update

## Q1 2010

OLSWANG





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"An innovative approach has emerged whereby non-cash assets are used to reduce defined benefit pension scheme deficits." (see page 5)

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# Recent Legal Developments

A new year, a new coalition Government and a new budget on the horizon; the only constant is the uncertainty in London's equity capital markets. We will be able to report in the next edition on the compromises reached by the Conservatives and Liberal Democrats on elements of their respective manifestos, including plans to ensure deficit reduction and continued economic recovery, potential changes to personal allowance for income tax and taxing non-business capital gains at rates similar to income tax, and plans to reform the banking industry. In this edition, we look at the new interplay between working capital statements and risk factors, changes to the Takeover Code and recent approaches to securing defined benefit pension scheme liabilities.

"Detailed disclosure of the issuer's assumptions and reference to risk factors is not appropriate for inclusion in a "clean" working capital statement."

## **UKLA Guidance on Interaction between Working Capital Statements and Risk Factors**

In Issue No. 24 of List!, the UKLA published an article on the interaction between working capital statements and risk factors. The article notes the potential for significant overlap and possible inconsistency between the "Risk Factors" section of a prospectus and the issuer's working capital statement. The UKLA points to CESR guidance and confirms that detailed disclosure of the issuer's assumptions and reference to risk factors (especially those suggesting that the issuer will or may run out of working capital in the next 12 months) is not appropriate for inclusion in a "clean" working capital statement.

The UKLA goes on to outline principles it will use in applying the CESR guidance, including the following:

- The UKLA's role is to ensure that the document (including working capital statement) is consistent with risk factor disclosures. It is for the issuer to address inconsistencies, either by addressing the facts underlying the risk or providing the working capital statement on a qualified basis;
- Not all risk factors dealing with matters of funding or finance are necessarily inconsistent with a clean working capital statement (for example, covenants within an issuer's facilities limiting its scope for expansion), but these should be carefully drafted so as not to be viewed as qualifying the issuer's working capital statement;
- The document as a whole should be consistent, including the business strategy section which should be drafted to take into account any limits to working capital;

- Some high impact / low probability risks may be consistent with a clean working capital statement, so long as identified as such, clearly drafted and based on reasonable assumptions;
- Risks should only be expressed to operate "in the longer term" if this is genuinely the case;
- Risk factors should be particular to the issuer and should detail a specific risk, rather than trying to cover all conceivable risks; and
- Risk factors cannot be made to be consistent with a clean working capital statement simply by including a disclaimer or preamble.

THE UKLA is seeking feedback on its guidance, the full text of which can be found [here](#).

"April 2010 saw changes to the Takeover Code intended to improve transparency of persons involved in offers."

## **New Rule 8 Disclosure Requirements**

### **Wider "Opening Position Disclosure" requirements under Rule 8 of the Takeover Code from 19 April 2010**

19 April 2010 saw the introduction of a number of important changes to the Takeover Code disclosure regime. The changes are intended to improve the transparency of the positions of persons involved in takeover offers as the disclosure regime extends its focus beyond dealings by parties.

#### **Opening Position Disclosure**

Under Rule 8 of the Code, an Opening Position Disclosure announcement must contain details of long interests and short positions in, and rights to subscribe for, the relevant securities of parties to a takeover offer, including the target company and any paper offeror(s).

Opening Position Disclosures must be made by both the target company (within 10 business days of the start of the offer period and, if later, after an announcement identifying the offeror) and by the offeror (within 10 business days of the first announcement identifying them as such). This disclosure requirement also includes opening positions of any persons acting in concert with the parties. Exempt principal traders (EPTs) connected with a party to the offer are also required to disclose their opening positions.

Importantly, under Rule 8.3(a), any person with an interest, or who gains an interest, of 1% or more in any class of paper offeror or offeree securities must also now make an Opening Position Disclosure (within 10 business days of the start of the offer period or announcement that first identifies the paper offeror, as the case may be). Prior to 19 April 2010, there had not been a requirement for persons with an interest of 1% or more to disclose unless, or until, they undertook any **dealings** during the offer period. However, from now on, such persons will be subject to Opening Position Disclosure requirements regardless of whether they have dealt in relevant securities.

## Dealing Disclosure

A Dealing Disclosure must be made by any person who is, or becomes, interested in 1% or more of any class of the relevant securities of any party to the offer. A Dealing Disclosure must contain details of a person's long and short positions in, and rights to subscribe for, any relevant securities, unless these details have been previously disclosed and are unchanged.

As with Opening Position Disclosures, disclosure of all dealings in relevant securities of any party to the offer must be made by all parties to the offer, their concert parties, and EPTs connected with a party to the offer.

Any person who has, or gains, an interest of 1% or more of any class of relevant securities of the target company or of any paper offeror must make a Dealing Disclosure, even if the interest in the relevant securities of the company dealt in is less than 1%.

In all cases, the Dealing Disclosure must be made on the business day following the date of the relevant dealing.

## Additional obligations

To facilitate compliance with the Takeover Code, target companies and paper offerors are required under Rule 22 to assist the Takeover Panel's identification of persons interested in 1% or more of any class of their relevant securities. They must also provide the Panel with this list following the commencement of the offer period and send an explanation of the disclosure requirements under Rule 8 to the identified persons. The Panel has indicated (in RS 2009/1) that it will normally expect parties to obtain this information from the company's shareholder register, DTR notifications and responses to s.793 notices and analysis received or readily available from the company's brokers and advisers.

If you have any questions on these articles please contact Paul Guite ([paul.guite@olswang.com](mailto:paul.guite@olswang.com) / +44 (0) 207 067 3465).

"An innovative approach has emerged whereby non-cash assets are used to reduce defined benefit pension scheme deficits."

## New Approach to Securing Defined Benefit Pension Scheme Liabilities

The green shoots of economic recovery may have emerged but defined benefit pension problems are unlikely to improve in the short to medium term. Scheme valuations continue to reveal ballooning deficits and, as a result, many companies are faced with the problem of how to put adequate funding arrangements in place for their pension schemes. In this context, one innovative approach to tackling scheme funding deficits which has emerged in recent months is the use of non-cash assets to pay off pension scheme deficits.

Essentially, this approach involves a sponsoring employer entering into a partnership agreement with its trustees under which it agrees to make prescribed payments to the pension scheme. In return, the employer will transfer certain assets to the partnership to provide collateral for those payments. An example of how this funding structure can be used is Sainsburys who have announced a £600m recovery plan for its defined benefit pension scheme which involves the transfer of £750m of its property portfolio to a partnership arrangement with its pension scheme trustees. The partnership will provide a fixed payment of £35m per annum to the pension scheme over 20 years with Sainsburys taking back control of the properties at the expiry of the agreement – subject to any remaining funding deficit being cleared. M&S has entered into a similar leaseback arrangement over its property portfolio whereas ITV has entered into a partnership agreement with its trustees backed by their interest in their digital media subsidiary, SDN.

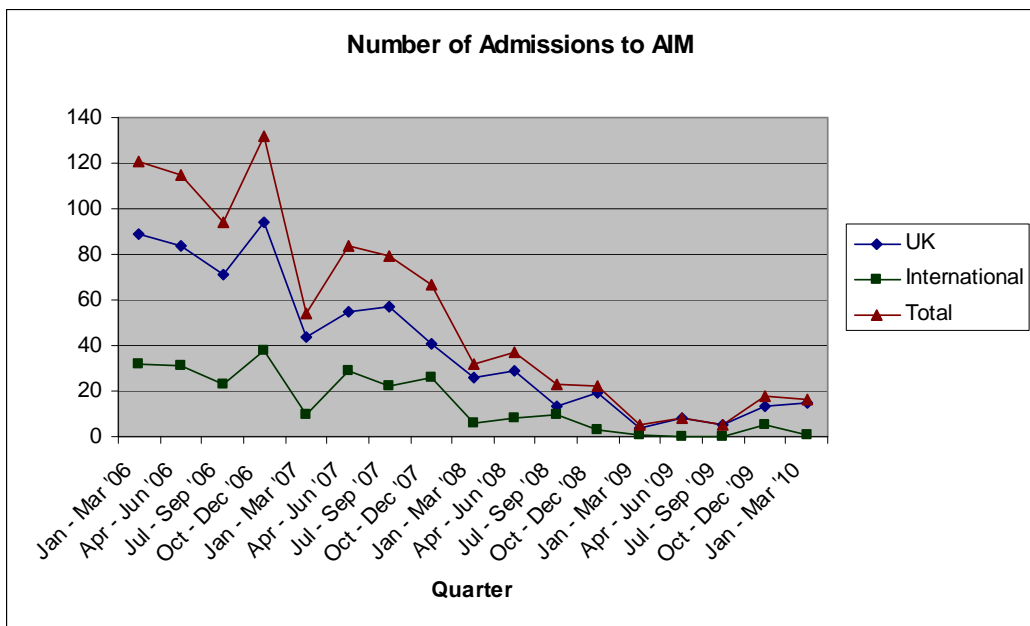
Effectively, this approach enables companies to use balance sheet assets (such as property, investments or IP) to achieve an immediate reduction in their scheme deficits without creating additional pressure on cashflow. Importantly, it also gives the scheme trustees an economic stake in their sponsoring employer's business going forward, whereas the company retains control of the assets either on an ongoing basis or when title reverts back at the end of the partnership agreement.

If you are interested in knowing more about how non-cash asset funding arrangements work, or what alternative funding structures you could put in place for your defined benefit pension arrangement, please contact David Farmer ([david.farmer@olswang.com](mailto:david.farmer@olswang.com) / +44 207 067 3013) in the first instance.

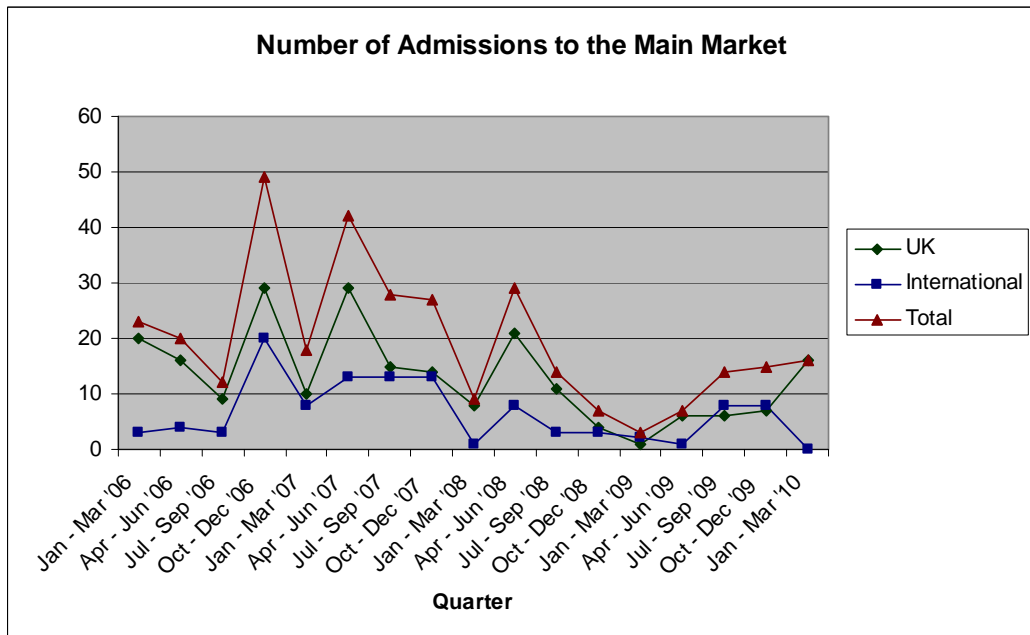
# Market Overview

## Number of Admissions to AIM and the Main Market

This quarter's statistics raise some interesting points of note: the first being the minimal number of overseas companies being admitted to either the AIM Market or the Main Market in Q1 2010. On the positive side, 11 UK companies were admitted to the Main Market in March 2010, the highest monthly figure since the heady days of mid-2007.



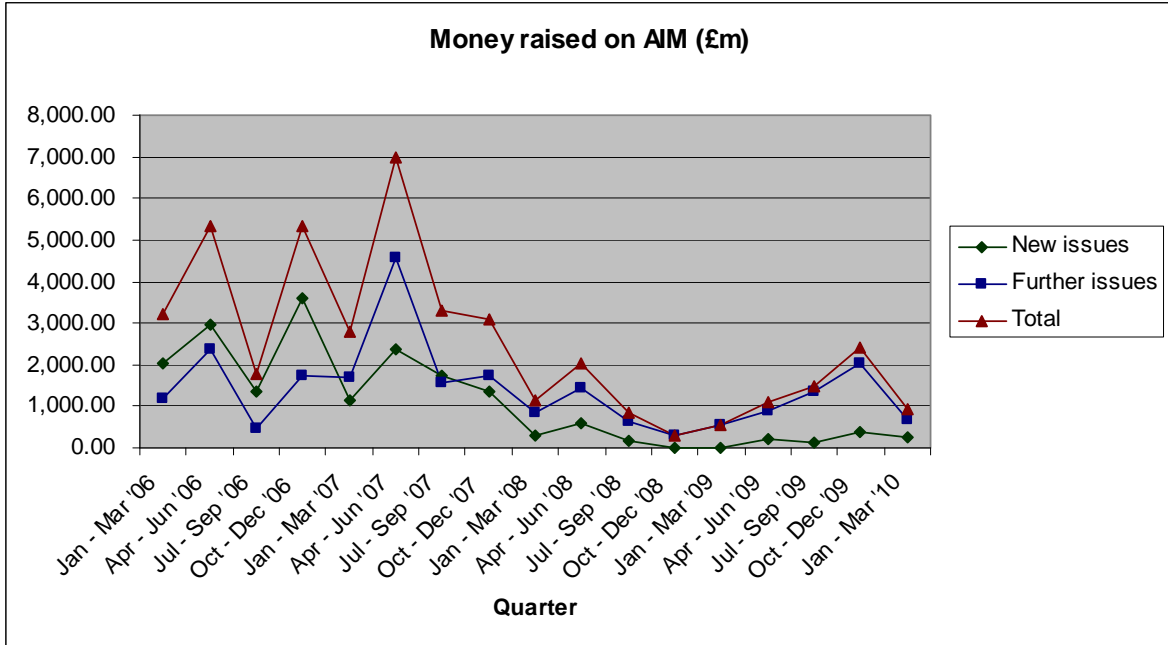
Source of data: London Stock Exchange



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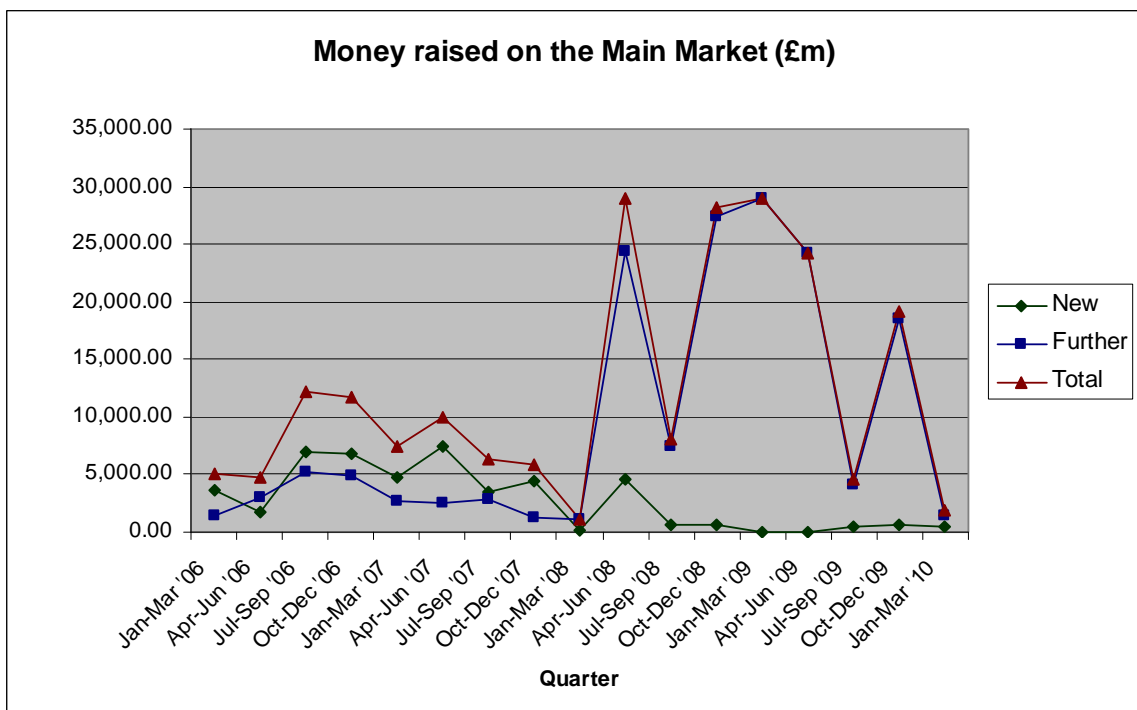
## Fundraising Activity on AIM and the Main Market

The increasing trend in the amount of money raised on the AIM market through 2009 (mainly by way of further issues) has fallen away rapidly in Q1 2010.



Source of data: London Stock Exchange

The lion's share of money raised in the last two years on the main market has been by way of further issues but, similarly to the AIM Market, the amount raised in Q1 2010 has fallen back to a level not seen since Q1 2008. The erratic timing and significant size of recent further issues reflected the urgent need for capital in times of economic turmoil and perhaps the reduced figure in Q1 2010 represents a new era.



Source of data: London Stock Exchange

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