

# REITs and the CISX

Whilst the availability of the CISX for a listing is perhaps well known, what I would aim to do in the next few minutes is to give you some practical understanding of how a REIT can list on the CISX, what that involves, the flexibility that a listing on the CISX can provide above a listing on the London Stock Exchange, and demonstrate that a listing need not be a long and expensive process.

A REIT needs to be listed as an investment fund and therefore the relevant section of the Listing Rules is Chapter 7.

## REIT conditions

By way of reminder and in order to set the background to the listing of a REIT it is worth looking at the conditions for REIT status:

- Although it is called a trust a REIT must be a company;
- It must be closed ended;
- It must be exclusively UK tax resident;
- It must have only one class of shares (other than non-voting fixed rate preference shares);
- It must be listed on a recognised stock exchange;
- It must distribute annually at least 90% of property rental profits by way of dividend to the extent lawfully possible;
- No one shareholder may hold more than 10% of the shares; and importantly
- The REIT must hold at least three properties (or separate rental units) with no more than 40% of the value in any one unit.

## Investment Funds

The conditions for REIT status tie in nicely with the conditions for listing of investment funds, such that by their very nature REITs will be investment funds for the purposes of a CISX listing. By way of summary, the conditions for an investment fund to list on the CISX are that the investment fund must be duly incorporated in a jurisdiction recognised for the purpose by the exchange, must be able to satisfy the exchange that its directors together with any appointed investment manager have sufficient and satisfactory experience in the management of investments of the type in which the investment fund proposes to invest, and importantly that the assets of the investment fund must be invested with the aim of spreading investment risk. Given the requirement for the

holding of at least three property rental units with no more than 40% of the value of the REIT in any one unit, this is a good fit, and REITs will be investment funds in CISX listing terms as long as they continue to satisfy the tests for REIT status.

So, how does one list? The answer to this depends upon whether the REIT already has its shareholders and is not making an offer for further subscription, whether there is to be an offer to the wider public for subscription for shares or whether there is to be a limited and more private offer for subscription to a small select group of further investors.

Depending on the answer to those questions, an applicant may bring securities to listing as an investment fund by way of an introduction, by way of an offer for subscription or an offer for sale, or by way of a placement.

## Introduction

A listing by way of introduction would be made where the REIT has its shareholders and is not making an offer for further investors. The listing document would have to meet the content requirements for the listing rules, including a summary of voting rights, entitlements to dividends and such like, but many of the content requirements would not be applicable, and one is able to complete a non-applicability letter, for example in relation to the offer price and offer period, as there is no offer.

The reasoning for allowing a listing by way of introduction is that the securities are already widely held by the public, in other words their marketability can be assumed. This obviously comes down to an interpretation of what "widely held" means, and a REIT could have as few as eleven shareholders and comply with the rule that no one shareholder could have more than a 10% holding. A REIT held in that way could apply for a listing by way of introduction on those numbers.

The price at which the shares would be listed would be NAV, and it would be open to the REIT to create a market either through sales to third parties directly by the shareholders, or by the appointment of a market maker. The fact that there was no offer at the time of listing does not preclude any future trading.

## Offer for Subscription and Offer for Sale

An offer for subscription is an invitation to the public by or on behalf of an issuer to subscribe for securities of the issuer not yet in issue or allotted. The CISX needs to be satisfied in the case of an offer for subscription that the

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basis of the offer is fair and that every investor who applies at the same price for the same number of securities receives equal treatment.

An offer for sale is the same as an offer for subscription save that in the case of an offer for sale the offer is in relation to securities already in issue or which have been agreed to be subscribed.

In either case there will need to be a listing document but this will ordinarily be the same document as the offer document. What we would need to do is to be involved at an early stage in the drafting of that offer document to ensure that the necessary listing document content requirements are contained in the offer document. This is very similar to the way we work on offer documents for Jersey Expert Funds, which many of you will be very familiar with, and which also have very particular content requirements for regulatory approval.

## Placing

The final way in which to apply for the listing of a REIT as an investment fund would be by way of a placing. A placing is the obtaining of subscriptions for or the sale of securities by an issuer (or by an intermediary such as a Sponsor) privately from or to persons selected by the issuer or the intermediary. There cannot be a placing if there is likely to be significant public demand for the securities.

If a placing is permitted the CISX may require to be provided with a list of placees.

No matter which method of listing one chooses, be it introduction, offer for subscription or sale, or placing, a potential applicant must make a listing application and must appoint a Sponsor who undertakes to accept the responsibilities of a Sponsor as set out in the CISX's listing rules. Ogier provide an in-house company which can act as sponsor in respect of any listing applications. This process marks the CISX out from the London stock exchange in that the Sponsor and exchange fees are much smaller. On a standard investment fund listing of a UK company we would expect the Sponsor and legal fees to be in the region of £10,000 plus annual fees of £1,500 for compliance with the relevant continuing obligations. An early sight of the offer or listing document would assist, in that we could ensure that the relevant CISX health warnings were incorporated. The CISX listing fees would be approximately £3,300. There is no requirement for a NomAd to be appointed or retained and this again is a significant fee saving.

## Accounts

There is a requirement on listing an investment fund in relation to providing previous year accounts. This will obviously depend on how long the fund has been established but the rules generally are that the investment fund applicant must have published audited accounts

which cover the period of at least three years ending not more than 12 months prior to the date of the Listing Document.

The CISX, however, can waive in whole or in part the requirement for three years of audited accounts:

- if the CISX is satisfied that the acceptance of accounts covering a shorter period is desirable and investors have the necessary information to make an informed judgment about the applicant;
- where the investment fund has been established for less than three years but more than 12 months in which case the audited accounts must cover the period from the establishment of the fund; and
- where the investment fund has been established for a period of less than 12 months the exchange may simply require the publication of an audited six monthly statement.

The accounting requirements can cause difficulties listing a new trading company as three years of accounts are generally required, and it is worth being aware of the ease of investment fund listing in this regard and the discretion in the hands of the CISX.

## OTHER REQUIREMENTS

### 25% public holding

On a listing of a closed ended investment fund at least 25% of the class of securities being listed must be in the hands of the public no later than the date of which dealings commence. The CISX can exempt this requirement but only if the fund has a sufficient number of units in issue to create a market in its securities.

For the purposes of this rule, a member of the public is not:

- A connected person (which means a director or controlling shareholder of the company or any of its associates or subsidiaries);
- Any person whose acquisition of securities has been financed directly or indirectly by a connected person; and
- any person who takes instructions from a connected person in relation to the acquisition, disposal, voting or other disposition of securities of the issuer registered in his name or otherwise held by him.

### Directors

Two miscellaneous points to be aware of in relation to directors:

The directors are responsible for the information contained in the Listing Document and must state such

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responsibility in the Listing Document, although the directors can confine their responsibilities on third party information to the proper extraction of the information from the sources shown in the Listing Document.

On a closed ended investment fund the CISX requires that at least two of its directors be independent of any appointed investment adviser.

## Listing Process

Once the decision has been reached as to the method of bringing the securities to the list, the REIT can look to go through the listing process, which involves the submission of initial application documents and then final application documents. The initial application documents include the listing document in draft form, a certified copy of the Memorandum and Articles of Association of the company and such financial information as is available at the time. This will then be reviewed by the exchange prior to the final application documents being submitted, which include a formal application for the listing, a sponsors declaration, a standard form listing undertaking and the final form listing document and financial information as required.

I do not propose to go into the content of the listing document, but there are requirements in the listing rules as to what a listing document needs to contain. There are no surprises in that text, and a listing document should in very general terms set out the activities, assets and liabilities, financial position, management, prospects of the issuer such that prospective investors would be able to make an informed assessment of those factors were they to seek to buy shares on the market. Depending on the incorporation of the company, these issues would normally need to be dealt with in any event in any offer document, and the only additional features would be specific CISX wording by way of certain health warnings to comply with the listing rules. When one examines the rules, one will see that the CISX rules are based broadly on the principles of the UK listing authority listing rules and may therefore be familiar to investors and advisors but are significantly less onerous in their application.

There is importantly no set timetable prescribed at the outset by the CISX, and our experience is that the CISX will be flexible and work with an applicant to ensure that the listing is carried out properly, but also in accordance with the timetable required by the applicant. The documentation is not heavy and the CISX are very helpful in providing advice on the content of the listing documents to ensure that when submitted the documents contain all of the relevant and necessary information. If one wanted to list as quickly as possible, we would anticipate that the listing process itself could be completed in

That is all I propose to say about the listing of the REIT, and I hope that that gives you a flavour of what is involved, and an indication of the simplicity and flexibility of the process.

## Jurisdiction of Incorporation

The next topic in relation to which there is in our view an offshore angle is the jurisdiction of the incorporation of the company itself. Whilst a REIT must be exclusively UK tax resident, a REIT does not need to be incorporated in the UK.

## Tax Residence

In this respect, there had been some concerns that a Jersey incorporated company which was tax resident in the UK may not qualify for REIT status as the test for REIT status states that the REIT must not be resident in another place in accordance with the law of that place relating to taxation. If an exempt company was incorporated in Jersey and was tax resident in the UK, the question arose as to whether the Jersey company could potentially be deemed to be resident in Jersey as well as resident in the UK by virtue of the fact that it pays an exempt company fee. The question also arises that when exempt companies are abolished at the start of 2009, will a Jersey incorporated company managed and controlled in the UK be dual resident? If so, the company would not meet the REIT criteria.

In order to overcome this potential hurdle, Jersey has amended its principle tax law with effect from 1 January 2007 to confirm that a Jersey incorporated company will not be regarded as resident in Jersey for the purposes of Jersey's income tax law if:

- it is centrally managed and controlled in another jurisdiction outside Jersey;
- it is tax resident in that other jurisdiction; and
- the highest rate of corporation tax in that jurisdiction is 20% or above.

This should make it clear that a UK resident company incorporated in Jersey will not be regarded as resident in Jersey as it will be centrally managed and controlled in the UK, be tax resident there, and the UK is a jurisdiction where the highest rate of corporation tax is over 20%.

Now that we have overcome that particular hurdle, and a REIT is able to be a Jersey company, the question that one then has to ask is why establish a REIT as a Jersey company rather than as an English company.

## Capital Distributions

Jersey companies may be incorporated with no par value shares which can be redeemed or purchased by the company (subject to the terms of the issue of the shares

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and the company's memorandum and articles of association) out of its stated capital account, that is, the equivalent of its share and share premium accounts, without recourse to its distributable reserves. Given that REITs will, by their very nature, be heavily utilising their distributable reserves due to the need to maintain an annual 90% distribution of property rental profits, in the event that a REIT disposes of property and does not wish to reinvest the proceeds of such disposal, a Jersey no par value company would allow for a more streamlined and cost effective return of capital to investors without recourse to distributable profits.

## Dividend Criteria

This is a key area for REIT eligibility and the English law position, and current Jersey law position, is that dividends can only be paid out of distributable profits or reserves. Jersey is changing its Companies Law, however, and the changes will allow for dividends to be paid on the satisfaction of a cash flow solvency test only. This again adds flexibility to an area which is key to the success of the REIT structure.

## Abolition of Prohibition on Financial Assistance

This year should see not only a change to the rules in relation to dividends, but there is also to be a further enhancement to the flexibility of Jersey company law by the abolition of the prohibition on financial assistance. The English position continues to prohibit financial assistance where that assistance is provided by a public company or a subsidiary of a public company. The proposals for Jersey are for the abolition of the prohibition to extend to both private and public companies. Given that a REIT needs to be listed in order to be a REIT, this will entail significant transaction management advantages for Jersey public companies, and is another factor to be considered.

## No Stamp Duty on Share Transfers

Share transfers of companies incorporated in Jersey are not subject to stamp duty provided that share register is maintained offshore. Jersey companies are required by law to maintain a share register in Jersey. Care will obviously need to be taken as to how much administration is carried on in Jersey to ensure that the REIT remains at all times exclusively UK tax resident but this is another potential advantage.

## Cell Companies

It would be possible for a Jersey incorporated REIT to be structured as an incorporated cell company. The idea behind the incorporated cell company is that a Jersey core company would be established with a number of cells each of which would be separately incorporated and have separate legal personality. As a matter of substantive law the incorporated cell company has been

designed to ensure the ring fencing of each cell's respective assets and liabilities. In the REIT context this may be of particular relevance to ring fencing different types of property, different sets of investors, or properties in different locations.

## Expedited Regulatory Treatment

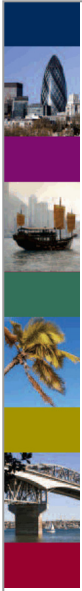
If a Jersey company is used, the combination of stock exchange listing and the requirement that no shareholder holds more than 10% of the shares is likely to characterise a Jersey incorporated REIT as a collective investment fund for the purposes of Jersey law. Recent changes will again help in this regard, and expedited regulatory approval is available from the Jersey Financial Services Commission in relation to closed ended, listed, Jersey corporate funds meeting the criteria of the Commission's Listed Funds Guide. The main criteria relates to the investment manager or investment advisor and the inclusion of certain prescribed information in the offer document which will be required in connection with the listing. The investment manager or advisor will be approved if regulated for this purpose in an OECD member state and otherwise if sufficient track record and experience can be demonstrated to Jersey Financial Services Commission. In much the same way that Jersey expert funds (which many of you will be familiar with) have allowed for expedited regulatory approval, the Jersey Financial Services Commission has again set a target to issue regulatory approvals within three working days of the submission of the relevant application forms. Again, if the REIT is to be listed as part of an offer for subscription from investors, and the REIT is to be Jersey incorporated, we would wish to have early sight of the listing document and/or offer document to ensure that the necessary content requirements for the purposes of the CISX listing and for the Jersey Financial Services Commission's requirements are all set out clearly within that document.

That completes my remarks on the advantages of using a Jersey incorporated company as a REIT, and I hope that I have also given you some practical insight into the way in which REITs can be listed on the CISX.

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Ogier is an award winning offshore legal and fiduciary services provider. The group advises on all aspects of BVI, Cayman, Guernsey and Jersey law and associated fiduciary services through a global network of offices that cover all time zones and key financial markets.

Ogier continues to be recognised as a leading law firm by the principal legal directories, including Legal 500 and Chambers.



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