

Global Legal Insights: Initial Public Offerings 2018 United Arab Emirates Chapter

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Introduction

An initial public offering (“IPO”) is a process by which a company offers its shares, for the first time, to the public by virtue of drafting and publishing a prospectus on the company and carrying out a public subscription of its shares, after submitting required documentation to the relevant governmental authorities and obtaining their approvals in relation thereto.

Under the laws and regulations of the United Arab Emirates (“UAE”), in order for a company to offer its shares to the public, the said company must be or take up the legal form of a public joint stock company. Accordingly, a company wishing to execute an IPO will be either a newly incorporated public joint stock company, or a company assuming the legal form of a private joint stock company or a limited liability company that undergoes a conversion process to become a public joint stock company.

Introducing a brief on the history of IPOs in the UAE, there have only been a few IPOs in the past few years, only two of which have been executed in 2017 after the issuance of the new UAE Federal Law No. 2 of 2015 concerning Commercial Companies (“Companies Law”). We envisage that, in 2018, the market appetite will uphold the trend of one to two IPOs a year.

It is also worth noting in this regard that the companies that have undergone IPOs in the period between 2014 until 2017 operated in fundamental yet diversified industries such as the real estate, investment, leisure and entertainment, and oil and gas sectors.

Generally speaking, companies that choose to go public in the UAE and offer their shares in an IPO usually seek to raise their capital in global markets. This is supported and facilitated by the local regulators and the regulatory schemes set by the governmental authorities.

It should be noted that, for the purposes of this chapter, any reference to the UAE (which includes the Emirates of Abu Dhabi, Dubai and the five other emirates making up the UAE) excludes the geographical areas of the Dubai International Financial Centre (“DIFC”) and the Abu Dhabi General Market (“ADGM”).

The civil and commercial laws of the UAE (including the UAE's securities market laws and regulations discussed in this chapter) are not applicable to the DIFC or ADGM and vice versa.

In the UAE, there are three financial exchange markets, two of which are onshore, being the Abu Dhabi Securities Exchange ("ADX") and Dubai Financial Market ("DFM"), while the third financial market is located within the jurisdiction of the DIFC, being NASDAQ Dubai. ADX and DFM are subject to the supervisory authority of the UAE Securities and Commodities Authority ("SCA"), while the Dubai Financial Supervisory Authority regulates NASDAQ Dubai in its capacity as the securities supervisory authority within the DIFC. As at the time of writing, there is no financial market that is located in the ADGM.

This chapter excludes any regulations applicable to NASDAQ Dubai and any of the below regulations are applicable only to ADX and DFM where the text allows for the same.

ADX and DFM are governed and regulated by SCA, which has the authority to impose laws, regulations and standards with which both ADX and DFM must comply. ADX and DFM work proactively with SCA to protect investors and provide optimum trading platforms for securities trading.

Both ADX and DFM operate as a securities exchange market for trading securities including shares issued by public joint stock companies.

The IPO process: steps, timing and parties and market practice

Despite the fact that an IPO is a process carried out in a very similar manner across the globe, the mechanics of such procedure differ from one country to another in terms of the applicable laws and regulations, required documentation, governmental approvals, and timeline of its procedures.

The IPO process in the UAE slightly varies according to the business and structure of the company undergoing the IPO process, i.e. whether the company is a newly established public joint stock company or a company undergoing a conversion process to become a public joint stock company, in which emirate the company has its place of business and on which market the company will be listed. Accordingly, we have set out below two different procedures and series of steps for each company structure as detailed hereunder.

Newly established public joint stock company

First stage: initial approvals

Generally, greenfield (i.e. newly established) public joint stock companies require additional approvals from SCA to go through the route of the IPO. Some of these requirements include: (i) a special approval from the board of directors of SCA for incorporating the greenfield company; (ii) there is sufficient working capital for the twelve (12) months post the incorporation; and (iii) the offered shares are limited to qualified institutional investors and high-net-worth individuals for amounts that are no less than AED 5 million.

The founders committee of the new company (to be established) must refer to the Department of Economic Development ("DED") to obtain initial approval to establish the company as a public joint stock company in accordance with the provisions of Article (113) of the Companies Law.

After obtaining the approval of the DED, the founders committee must apply for the preliminary approval of SCA for the establishment of the public joint stock company, accompanied by all the necessary documents; namely, the memorandum of association ("MoA"), articles of association ("AoA"), an economic feasibility study for the venture, the SCA application form requesting incorporation of a public joint stock

company, a draft prospectus, a subscription application form, and evidence of payment in respect of subscription.

If the company has shares issued in-kind, the value of the in-kind shares will be assessed by one or more financial advisors chosen by SCA from those accredited by it, or those with technical and financial expertise in the subject of evaluation who are approved by SCA. SCA then considers the application for incorporation and notifies the founders committee of its observations within ten (10) working days from the date of submission of the application in full.

The founders committee completes any deficiencies or makes the amendments deemed necessary by SCA to complete the application for incorporation within fifteen (15) working days from the date of notification. Otherwise, SCA may consider this a waiver of the application for incorporation.

SCA sends a copy of the documents to the DED after they have been completed. (The period of SCA's review is ten (10) working days from the date of completing the application.)

A meeting is then held between SCA and the DED to study the application for incorporation and its documents. The meeting must be held within ten (10) working days from the date of the submission of documents by SCA to the DED.

In case there are any comments made by the DED, SCA informs the founders committee. The amendments are to be made within ten (10) working days from the date of informing the founders committee.

SCA ensures that the application and all documents and observations are completed and that the amended versions are sent to the DED. No particulars may be amended in the application after submitting it to the DED during any stage of incorporation either in respect of the capital of the company or its objectives or the names of its founders or any other data in the application for incorporation.

On approval of the incorporation application, the DED then issues a decision to license the incorporation of the company, which is announced in the official gazette at the expense of the founders.

Second stage: pre-subscription period

The founders committee attest the MoA and AoA before a notary public.

Third stage: public subscription/public offering

The founders committee must then commence the subscription process, as per the template provided by SCA, for the shares within fifteen (15) days from the date of issuance of the above-mentioned decision. The founders shall subscribe for not less than thirty percent (30%) and not more than seventy percent (70%) of the issued capital of the company, prior to the invitation to public subscription and offering for the remaining percentage of the share capital. In this regard, the founders may not subscribe to the shares offered for public subscription.

N.B.: Prior to such step, the founders committee must provide SCA and the DED with a bank certificate evidencing payment of the value of their shares in accordance with the above-prescribed percentages. Additionally, they must submit an undertaking, as per the template provided by SCA, to deposit the proceeds generated from the subscription of the total shares to the account of the company under incorporation as well as refunding the surplus funds to subscribers within fifteen (15) days from the date of the subscription closure, if any.

Once SCA's approval of the prospectus is obtained, the prospectus is then published in two local Arabic

daily newspapers at least five (5) days prior to commencement of the subscription. This is the invitation to the public offering.

The subscription must be kept open for no less than ten (10) days and no more than thirty (30) days, open to extension by an additional period of ten (10) days subject to SCA and the DED's approvals.

A company issuing its shares in accordance with the share book-building mechanism shall enter into a contract with a financial advisor in order to carry out the IPO and for them to supervise the same. Such financial advisor shall have a number of roles, including presenting the company's business to investors and ultimately setting the price of shares in the final prospectus after analysing the data from the book-building.

Companies issuing shares in an IPO process, and wishing to use the book-building process, must comply with the following:

- An application will be submitted to SCA using the form prepared for such purpose in order to obtain approval on book-building.
- The company shall neither announce nor disclose, by any means whatsoever, its intention to issue or sell shares through the book-building process before obtaining SCA's approval.
- Not less than twenty percent (20%) of the subscription shares shall be offered to retail investors, and not less than sixty percent (60%) shall be offered to qualified investors, excluding newly established companies, in which case the subscription is restricted to qualified investors only.
- Allocate to qualified investors, based upon the subscription applications submitted by them, any shares not subscribed by retail investors.

The price set for retail investors may be discounted compared to the one set for qualified investors in accordance with disclosures made in the final prospectus.

Retail investors shall pay the full value of their subscribed shares upon subscription. Qualified investors may pay the value of their subscribed shares after allocation.

The allotment of shares and refund of the surplus funds must be made within five (5) working days from the date of the subscription. In the event that the subscription applications exceed the number of shares offered, the shares shall be distributed to subscribers proportionally to their subscribed amounts or as determined in the prospectus and approved by SCA, and the distribution shall be made to the nearest whole share.

After the allocation has been made, the company must send the shareholders register to the UAE financial market (i.e. ADX or DFM) on which the shares will be listed.

The entities receiving the subscription keep the payments made by subscribers; in this regard any returns gained in relation thereto are for the account of the company under incorporation. The receiving entities will not deliver such amounts to the board of directors until the incorporation certificate has been issued and the company is registered before the commercial registrar at the DED.



Fourth stage: incorporation announcement

The company must announce an invitation to the subscribers to attend the constitutive general assembly meeting (after obtaining approval of SCA) to be held within fifteen (15) days from the date of the subscription closure. The agenda of the first constitutive general assembly must include certain matters prescribed by the SCA.

If a quorum has not been met at the first meeting, the meeting must be held within five (5) to fifteen (15) days from the date of the first meeting, and the second meeting will be deemed to satisfy the legal quorum regardless of the number of the attendees.

Within ten (10) days from the date of the constitutive general assembly, the founders will submit an application to SCA, for issue of the incorporation certificate, and will enclose the documents stipulated under Article (133) of the Companies Law.

Afterwards, SCA issues the incorporation certificate within five (5) working days.

Fifth stage: registration before the competent authorities and SCA

- The board of directors of the newly incorporated company must complete the registration procedures before DED in anticipation of its listing in the financial market within ten (10) days from the date of issuance of the incorporation certificate.
- The DED must then register the company before the commercial registrar and issue the company's trade licence within five (5) working days.
- Afterwards, the chairman of the board of directors of the newly incorporated company must, within five (5) working days from the date of issuance of the company's trade licence, provide the AoA, MoA and company licence to the company registrar to register the company in the companies register.

Sixth stage: listing on UAE financial markets

The board of directors of the newly incorporated company must, within fifteen (15) working days from the date of the company's registration before the commercial registrar, list its shares on any of the UAE financial markets (i.e. ADX or DFM) and revert to such financial market with a listing request in accordance with the listing regulations adopted by SCA and the financial market on which the shares will be listed.

Newly converted public joint stock company

Existing companies wishing to convert into public joint stock companies follow the same rules and steps applicable to newly established public joint stock companies except in relation to the following:

- Companies wishing to convert into a public joint stock company are required to fulfil, amongst others, the following requirements:
 - the value of the issued shares of the company wishing to convert has been paid in full;
 - the completion of at least two fiscal years prior to the application;
 - the company has realised, within the two financial years preceding the approval on the conversion application, net operational profits that are distributable to shareholders of no less than ten percent (10%) of the company's capital as an average; and
 - a special resolution (depending on the legal form of the company and its constitutional documents, this should be passed by no less than three quarters of either: (i) the share capital of the company; or (ii) the shares being represented in a general assembly meeting) issued by the shareholders of the company approving its conversion into a public joint stock company.
- The founders may sell by way of IPO up to thirty percent (30%) of its share capital. In this regard, the founders may not subscribe to the shares offered for public subscription.
- The founders committee (to be established by way of a shareholders' resolution) of the existing company that wishes to convert to a public joint stock company must draft a letter to SCA requesting a listing window reservation and confirming eligibility.
- Afterwards, the founders committee applies to SCA for a public joint stock conversion accompanied by its shareholders' resolution approving such conversion.
- Simultaneously, the said company appoints, approves and forms the said founders committee.
- Subsequently, the founders committee files with SCA the first draft of the local prospectus as well as the shareholders' resolution of the existing company approving the conversion, a final draft of the IPO MoA and AoA, a business plan review, and a final real estate valuation report.
- SCA will examine the conversion application and filed documents and produce a decision on the request within a period of ten (10) working days.
- In case of approval of the conversion by SCA, the founders committee must announce the conversion and notify its shareholders and creditors (if any) of such conversion via written notice within a period of five (5) working days from the date of SCA's approval.
- Shareholders and/or creditors of the company are given a period of fifteen (15) working days to object to the conversion.
- Afterwards, the company files with SCA a copy of the resolution and confirmation that the opposition period has expired. SCA forms a committee to evaluate the company assets. The process of this evaluation process is thirty (30) working days.
- A meeting between SCA and the DED is then held to examine the conversion application and its documents. The time for such procedure is five (5) working days.
- In case of final approval of the conversion application, SCA issues a licence to the company and such licensing decision is then published in the official gazette at the expense of the company founders.
- The company then proceeds with the IPO and listing in the same manner as a newly established public joint stock company.

Regulatory architecture: overview of the regulators and key regulations

The key regulators in the UAE in respect of the IPO process are the Securities and Commodities Authority (SCA) and the Department of Economic Development (DED). Additionally, and depending on the nature of the company's business, the company may be required to obtain the approval of other relevant governmental authorities or regulators such as the Central Bank or the Insurance Authority in the UAE.

Other than the key regulators mentioned above and as part of the IPO process, the company is required to

liaise with ADX or DFM for the listing of its shares and their offering to the public.

In addition to the Companies Law, one of the important regulations in respect of an IPO are the Companies Law, and the Chairman of SCA's Resolution No. (11/R.M.) of 2016 governing public offering and issuance of shares of public joint stock companies.

Public company responsibilities

Public joint stock companies are subject to a more refined governing structure in comparison to other legal forms of companies. The main differences manifest in the 'corporate governance' and the 'disclosure and transparency' regulations applicable to public joint stock companies.

Disclosure and transparency regulations

Post the IPO, the company and its shareholders have additional disclosure and transparency obligations, which include restrictions on dealing with the securities of the company, notification obligations in relation to material developments affecting the company, restrictions on publishing certain data relating to the company and to provide SCA with copies of certain documents including financial reports, and details of general assemblies and resolutions.

Corporate governance regulations

Public joint stock companies are obliged to follow separate regulations for corporate governance in addition to those specified in the Companies Law. Such set of corporate governance regulations can be found in SCA's Resolution No. (7/R.M.) of 2016 concerning the standards of institutional discipline and governance of public joint stock companies ("CGR"). These include, amongst other obligations (i) that the company is obliged to obtain approval from its shareholders and maintain records of transactions that take place with related parties, (ii) all shares issued in the company must be in the same class with equal rights attached to them, (iii) the AoA and internal by-laws of the company should include controls to protect shareholders' rights, and (iv) the company must have internal control systems to ensure compliance with corporate governance rules.

The company is also obliged to issue a 'Corporate Governance Report', which has to provide details of all remuneration and compensation paid to the board; such report must be available to the shareholders prior to the annual general meeting.

Potential risks, liabilities and pitfalls

Given that the IPO is a simple and straightforward process, there should be no potential legal risks, liabilities or pitfalls with regards to undertaking the IPO process should the above-mentioned procedures be thoroughly followed and all governmental approvals obtained. This is notwithstanding any risks, liabilities and pitfalls related to the business of the company itself or any market risks occurring during the IPO process. However, any negligence on the part of the company or its advisors may expose the company and its founders to risk. The IPO is a lengthy and detailed process that needs to be dealt with by advisors who are experienced in the field of IPOs, in order for them to handle the requirements and ensure compliance with all regulations in an efficient manner and minimise any risk to the company and its founders.

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