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HM Treasury Publishes UK Prospectus Regime Review Outcome

March 8, 2022

Background

On 1 July 2021, HM Treasury published a consultation on the UK prospectus regime (the UK Prospectus Regime Review). In the UK Prospectus Regime Review, the UK government considered that there was a significant opportunity to replace the UK Prospectus Regulation (being – the EU Prospectus Regulation that became part of national law on expiration of the Brexit transition period). HM Treasury sought views on a number of matters, including the:

- Separation of the regulation of the public offer of securities from the regulation of admissions of securities to trading.
- Delegation to the Financial Conduct Authority (FCA) of powers relating to admissions of securities to regulated markets.
- Scope of the UK's public offering rules, including the definition of the public, the 150-person threshold, the qualified investor exemption, and the exemption for employees, former employees, directors and ex-directors.
- Standard of liability for forward-looking information.
- Making of public offers by private companies (defined as companies with securities that are not admitted to any type of stock market), including alternatives to the requirement that an offeror publish a prospectus.
- Making of public offers into the UK by overseas companies.

The UK Prospectus Regime Review acknowledged that prospectuses are, and will remain, an important component of the regulation of UK regulated markets – and that there is a commitment to ensuring they are clear, relevant and reliable. The four key objectives of the UK Prospectus Regime Review were:

1. Facilitate wider participation in the ownership of public companies and to remove the disincentives that currently exist for the issuance of securities to wide groups of investors, including retail investors.
2. Simplify the regulation of prospectuses and remove unnecessary duplications.
3. Improve the quality of information that investors receive.
4. Make the regulation of prospectuses more agile and dynamic, so they're capable of being quickly adapted and updated as times change.

UK Prospectus Regime Review outcome

HM Treasury published the outcome of the UK Prospectus Regime Review on 1 March 2022. As proposed in the UK Prospectus Regime Review, the UK government will replace the regime currently contained in the UK Prospectus Regulation and legislate to do so when parliamentary time allows.

The aim of these changes is to simplify regulation in this area and make it more agile and effective, as well as facilitate wider participation in the ownership of public companies and improve the quality of information investors receive. These changes will separate the regulation of public offers of securities from the regulation of admissions of securities to trading. In addition, the UK government will delegate a greater degree of responsibility to the FCA to set out the detail of the new regime through rules.

HM Treasury's approach to the reform of the UK prospectus regime is outlined below.

Admissions to trading on regulated markets

The published outcome concludes that the FCA will be given enhanced rule-making responsibilities to specify if

and when a prospectus is required for admissions to trading on regulated markets, including for further issues by listed issuers. In addition, the UK government will remove the criminal offence which prohibits requesting admission to trading on a UK regulated market without an FCA-approved prospectus. The FCA will also be able to determine whether an overseas prospectus can be used. Its rulemaking responsibilities will cover other matters currently set out in the UK Prospectus Regulation, including prospectus contents, whether a prospectus must be reviewed and approved by it prior to publication, and the manner and timing of publication.

New architecture for public offerings of securities in the UK

While the FCA will be able to require a prospectus for admissions to trading on regulated markets, prospectuses will not be a feature of the public offerings regime. Instead, the new system will have a general prohibition on public offerings of securities against which there will be exemptions. The exemptions will derive from the existing exemptions in the UK Prospectus Regulation and will include the 'qualified investors' and '150 persons' exemptions, and an exemption for director/employee offers. However, the list of exemptions will be expanded to cover:

- Offers of securities which are, or will be, admitted to UK regulated markets.
- Offers of securities to those who already hold equity securities in the offering company, subject to certain conditions, including that the offer is made pro-rata to the existing holding. This exemption will not apply to securities of another company offered as consideration (for example, in a merger or acquisition); the existing exemptions for these offers in the UK Prospectus Regulation will be retained and amended.
- Offers of securities which are, or will be, admitted to trading on certain multilateral trading facilities (MTFs).
- Other categories of offer described in the 'Junior markets', 'Private companies' and 'Public offerings from overseas' sections below.

All exempted offers will continue to be subject to an 'equality of information' requirement. Thresholds stated in euros will be restated into sterling at a rate of one for one, except that the current €100,000 threshold in the Article 1(4)(d) exemption for offers of wholesale non-equity securities will be changed to £50,000.

'Necessary information' test

The published outcome confirms that the UK government intends to retain a single statutory 'necessary information' test as a basic standard of preparation for a prospectus, with three key alterations:

1. Denomination will not be included as a factor which would permit differing disclosure for non-equity securities. (The test currently differentiates between non-equity securities in denominations over and under €100,000).
2. There will be clarification that necessary information may vary according to whether an offer of securities relates to a first-time admission to a market or is a secondary issuance.
3. A modified necessary information test, which focuses on the issuer or guarantor's creditworthiness, rather than prospects, will apply to debt securities.

As is the case now, under the new regime, investors who can show they have sustained losses as a result of false or misleading information in, or the omission of information from, a prospectus will be able to seek compensation through the courts.

Facilitating forward-looking information

While retaining the existing statutory remedy for false, misleading or omitted information, the UK government intends to raise the threshold for liability that applies to certain categories of forward-looking information in prospectuses. This will ensure that a person responsible for the preparation of a prospectus is liable to pay compensation only if one of the following applies:

- That person knew the statement to be untrue or misleading.

- That person was reckless as to whether it was untrue or misleading.
- In the case of an omission, that person knew the omission to be a dishonest concealment of a material fact.

The UK government intends to ensure that these disclosures are clearly labelled as forward-looking information to which that threshold applies, and that the FCA will be given responsibility for specifying the categories of forward-looking information to which the new liability threshold will or will not apply.

Junior markets

Offers of securities which are or will be admitted to trading on certain MTFs, such as the AIM market operated by the London Stock Exchange, will be exempt from the new general prohibition on public offers of securities. In addition, admission documents published in accordance with the rules of the relevant MTFs will be treated as a type of prospectus. The operators of MTFs will continue to establish admission criteria and rules for the facilities they run, subject to FCA rules and oversight.

Scope of new public offerings regime

The existing obligations under the UK Prospectus Regulation apply to offers of ‘transferable securities’ – and this will continue to be the case under the new public offerings regime. Certain offerings of securities will continue to be entirely out of scope of the new public offerings regime.

In April 2021, the UK government consulted on the regulation of non-transferable debt securities and presented three options, one of which was to bring those securities within the scope of the UK Prospectus Regulation. The government’s preferred option is to include non-transferable securities within the scope of the new public offerings regime.

Private companies

Companies will remain able to offer securities to the public without admitting them to a stock market. The current requirement for an FCA-approved prospectus for offers over €8 million will be removed, and securities will be allowed to be offered to the public provided the offer is made through a platform operated by a firm specifically authorised for the purpose. In connection with this, the UK government intends to create a new regulated activity covering the operation of an electronic platform for the public offering of securities, such as an equity crowdfunding platform. The requirements applicable to such platforms will be set by the FCA.

The threshold below which offers of securities from private companies are exempt from the prohibition on public offers – but still will be subject to the ‘equality of information’ requirement – is being considered by the UK government. Overseas private companies will not be excluded from offering securities to the UK public, subject to UK regulation.

Public offers from overseas

The UK government intends to develop a new regime of regulatory deference for offers into the UK of securities listed on certain designated overseas stock markets. This will permit offerings to be extended into the UK on the basis of offering documents prepared according to the rules of the relevant overseas jurisdiction and market. The FCA will have power to intervene to protect UK investors in exceptional circumstances.

Next steps

The UK government will legislate to make the necessary changes to the prospectus regime when parliamentary time allows, and the FCA will need to consult on the new rules under its expanded responsibilities.

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