

Client Update Streamlining the EU Prospectus Regime

The European Union has adopted a new prospectus regulation regime with the aim of streamlining the existing prospectus regime.

Key changes include:

- Higher thresholds that govern whether a prospectus is required for capital raisings;
- New rules for prospectus disclosure;
- A lighter prospectus regime for secondary issues and small and medium-sized companies (“SMEs”); and
- A new universal registration document to streamline prospectus publication for frequent issuers.

The new regulation, which was adopted on 16 May 2017, repeals and replaces the EU Prospectus Directive (2003/71/EC) and the existing Prospectus Regulation (809/2004), and will enter into force on 20 July 2017, though the majority of the provisions will apply only from 21 July 2019.

WHEN IS A PROSPECTUS REQUIRED UNDER THE NEW REGULATION?

In general, a prospectus is required for an admission of securities to trading, and for an offer of securities to the public. The new prospectus regime has introduced some new exemptions to the requirements for publishing a prospectus and broadened or tightened others. For instance, from 20 July 2017, issuers with securities (including depositary receipts) admitted to trading on a regulated market such as the London Stock Exchange’s main market will be able to issue without a prospectus securities that represent up to 20% of a class already admitted to trading over a 12-month period.

Currently, issuers with securities admitted to trading on a regulated market can admit shares resulting from the conversion or exchange of other transferable securities, where such shares are of the same class as the shares already admitted to trading, without having to publish a

prospectus. The new prospectus regulation introduces a cap on this exemption, which will be available only where such shares represent no more than 20% of the number of shares of the same class already admitted to trading on the same regulated market.

There is also an exemption from the requirement to publish a prospectus where the issuer is offering or allotting shares to its existing or former directors or employees pursuant to an employee share scheme, provided that the issuer makes available a document setting out the number and nature of the securities and the reasons for and details of the offer or allotment.

Furthermore, the obligation to publish a prospectus will not apply to offers of securities to the public with a total consideration in the EU of less than €1 million in any 12-month period, an increase from the current €100,000 threshold. For this increase to become effective in the United Kingdom, the UK Financial Services and Markets Act 2000 (“FSMA”) will need to be amended.

In addition, EU Member States have been given the discretion to raise the threshold at which a prospectus is required for offers to the public from €5 million to a maximum of €8 million in total over a period of 12 months. Offers to the public made pursuant to this exemption will not benefit from EU passporting rights. It is not yet clear whether HM Treasury will increase the exemption threshold upon the implementation of the new prospectus regulation in the United Kingdom.

WHAT PROSPECTUS DISCLOSURE DOES THE NEW REGULATION REQUIRE?

The new prospectus regulation prescribes new rules to ensure that the summary of a prospectus is short, simple and easy for investors to understand. Under the new regime, the summary will consist of four sections:

- an introduction, containing warnings;
- key information on the issuer;
- key information on the securities; and
- key information on the offer of securities to the public and/or the admission to trading on a regulated market.

The content of the summary must be accurate, fair, clear and not misleading and “read as an introduction to the prospectus”. It may not exceed a maximum length of seven pages of A4-sized paper when printed. The summary must also include a brief description of material risk factors, to be limited to a maximum of 15 risk factors.

In addition, issuers of debt securities will no longer be required to include a summary in their base prospectuses. In practice, however, we expect base prospectuses to continue to include a summary overview of the key terms.

The new prospectus regulation also changes the rules governing the disclosure of risk factors. Under the new regulation, the risk factors will have to be categorised under a limited number of categories, and the issuer will have to assess the materiality of the risk factors and rank them in order of materiality. While secondary legislation is expected to add further guidance on the disclosure of risk factors, this new requirement could potentially expose issuers to liability if the categorisation of risk factors is deemed misleading to investors.

WHAT IS THE LIGHTER PROSPECTUS REGIME?

The new prospectus regulation simplifies the disclosure regime that applies to secondary issuances where the issuer has securities already listed on a regulated market or SME growth market for at least the previous 18 months. The simplified prospectus must include a summary, a registration document and a form securities note, and must contain information setting forth (a) the prospects of the issuer and any significant changes in the business and the financial position of the issuer since the end of the last financial year, (b) the rights attaching to the securities and (c) the reasons for the issuance and its impact on the issuer, including on its overall capital structure, and the use of proceeds. Issuers that have guaranteed debt securities, such as Eurobonds, listed on the London Stock Exchange's main market (or any other regulated market) must also include any significant changes to the applicable guarantor of the securities. Only one year of financial information will be required to be disclosed.

The simplified disclosure regime can also be used by issuers with listed equity securities who wish to offer debt securities to the public or admit debt securities to trading on a regulated market. However, in practice, we expect this to be of limited use to issuers who wish to offer debt securities inside the United States in reliance on a private placement exemption, due to potential US anti-fraud liabilities.

The new regulation also introduces a new EU growth prospectus for offering securities to the public, which is a standardised, simple document for the following issuers, provided that they have no securities admitted to trading on a regulated market:

- SMEs;
- Issuers, other than SMEs, with an average market capitalisation of less than €500 million for the prior three years and whose securities are traded or are to be traded on an SME growth market;
- Issuers, other than either of the above, where the offer of securities in the EU does not exceed €20 million over a 12-month period, provided that such issuer does not have any

securities traded on a multilateral trading facility (“MTF”) (for example, AIM) and has up to an average 499 employees during the previous financial year.

WHAT IS THE “UNIVERSAL REGISTRATION DOCUMENT”?

The new regulation introduces a “universal registration document” – similar to a shelf registration in the US – to streamline the process of issuing further securities by frequent issuers. The universal registration document is available to issuers with a registered office in the EU and that are admitted to trading on regulated markets and MTFs. The new “universal registration document” can be used as a component of any future prospectus of an issuer. An issuer that files an approved “universal registration document” in each financial year can rely on a fast-track prospectus approval process, whereby the competent authority (in the United Kingdom, the UK Listing Authority) must provide a decision on a draft prospectus within five working days. In addition, once an issuer gains “frequent issuer” status by having its universal registration document approved by its competent authority for two consecutive years, such issuer can file subsequent universal registration documents without needing to obtain the competent authority’s further approval.

WILL BREXIT AFFECT THE IMPLEMENTATION OF THE NEW REGULATION IN THE UK?

The new prospectus regulation will have direct effect on equity and debt offerings in the United Kingdom while the UK remains a full member of the EU; however, the extent to which EU legislation, including the new regulation, will apply following the UK’s exit from the EU remains to be seen. It is likely that the new prospectus regulation will be initially embedded into UK law by the European Union (Withdrawal) Bill, once enacted, and will apply until the UK government determines whether to amend or repeal it. In the meantime, the new prospectus regulation will require various amendments to be made to FSMA and the Financial Conduct Authority’s Prospectus Rules.

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Please do not hesitate to contact us with any questions.

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