

March 7, 2022

Changes to U.K. Prospectus Regime

U.K. Government Proposes Most Significant Changes in a Generation

SUMMARY

On March 1, 2022, the U.K. Government published its response to a consultation started in July 2021 to reform the U.K.'s prospectus regime. The consultation built on the recommendations of the U.K. Listing Review, which was led by Lord Hill, formerly the U.K.'s European Commissioner, and on which we reported [here](#). The Government's stated aims are to simplify the regulation in this area, to facilitate wider participation in the ownership of public companies, to improve the quality of information investors receive and to ensure that the regulation of prospectuses will be better able to respond to innovation and change.

The proposed changes set out in the response are broadly aligned with the proposals made in the consultation and are very significant. In several respects they will, once introduced, overhaul the legislative framework carried over from the European Union (which has been constructed over recent decades) after Brexit. In particular, it is intended that the U.K. Financial Conduct Authority ("FCA") will assume greater rule-making and supervisory responsibility under the new regime than at present. The proposed changes are part of the Government's post-Brexit strategy for wider reform of the U.K.'s capital markets.

THE PROPOSED CHANGES

The key proposed changes and themes proposed in the consultation response are set out below.

A. WHEN WILL A PROSPECTUS BE REQUIRED?

Under the current regime, there are two triggers for when a prospectus may be required: either when securities are to be admitted to trading on a U.K. regulated market or when securities are to be offered to the public in the U.K.

The new regime will retain the admission to trading trigger, such that a prospectus may still be required when securities are to be admitted to trading on a U.K. regulated market. The FCA will, though, be

granted enhanced rule-making responsibilities on when a prospectus is required, the contents of a prospectus, the timing and manner of publication of a prospectus and whether a prospectus must be reviewed and approved by the FCA before it is published. It will no longer be a criminal offence to request admission to trading on a U.K. regulated market without having first published an approved prospectus.

The public offerings trigger, however, will be removed, such that a prospectus will not be required when securities are offered to the public in the U.K. (unless there is a concurrent admission to trading on a U.K. regulated market that requires a prospectus). Instead, offerings of securities to the public in the U.K. will be prohibited unless an exemption applies. The existing exemptions from the requirement to produce a prospectus when offering securities to the public (including the qualified investor, 150 persons, takeover exchange offer and merger and division exemptions) will be carried over as exemptions to the new prohibition and there will also be significant new exemptions that cover:

- Offerings of securities which are, or will be, admitted to a U.K. regulated market or certain multilateral trading facilities (“**MTFs**”) to be specified;
- Offerings of companies’ own securities to existing shareholders pro rata (subject to other, as yet, unspecified conditions);
- Offerings of unlisted companies’ securities that are made through a platform operated by a firm specifically authorised for that purpose (see Section C below); and
- Certain offerings made by overseas issuers (see Section D below).

B. LIABILITY FOR THE CONTENTS OF A PROSPECTUS

Under the U.K.’s current prospectus regime, persons responsible for preparing a prospectus (including the issuer and, for equity prospectuses, the issuer’s directors) have statutory liability for untrue or misleading statements contained in the prospectus or the omission of any matters required to be included in it (the “necessary information” test).

This liability regime will be reformed as follows:

- The existing single “necessary information” test will be retained as a basic standard of preparation for prospectuses and the basis for statutory prospectus liability. However, it is proposed to reform the current test:
 - to clarify that “necessary information” may vary according to whether an offer of securities relates to a first-time admission to a market or a secondary issuance;
 - to remove the reference to the denomination of the security (in excess of €100,000) as a factor which permits differing levels of disclosure in retail and wholesale bond prospectuses; and
 - to focus the “necessary information” test for debt securities on the issuer’s or guarantor’s creditworthiness rather than its prospects.
- In respect of certain categories of information identified in the prospectus as forward-looking information, the threshold test for liability will be raised from a “negligence standard” to a “recklessness standard”. This new standard aligns with the standard that applies in respect of information contained in other published information, such as announcements and annual reports. It is intended that the FCA will specify the categories of forward-looking information to which this standard will apply in due course.

- Admission documents published in accordance with the rules of certain (as yet unspecified) MTFs will be brought within the statutory liability regime (including the change to the standard attaching to forward-looking information).

C. PUBLIC OFFERINGS BY UNLISTED COMPANIES

Currently, public offerings of less than €8 million are completely exempt from the prospectus regime (assuming securities will not be admitted to trading). In its consultation the Government recognised that crowdfunding provides one viable route to raise funds from the general public in reliance on this exemption, but also highlighted that the market for offerings by unlisted companies above the €8 million threshold was “largely non-functioning”. It therefore now proposes to remove any requirement for a prospectus for offerings by unlisted companies. Instead, unlisted companies will be able to offer securities to the public through a platform operated by a firm specifically authorised for the purpose. The operation of such a platform will (as with current crowdfunding platforms) be a regulated activity (and therefore subject to regulation by the FCA). This is a new development for those active in the crowdfunding space and may encourage larger unlisted companies to access capital via these platforms.

In practice, offerings via these platforms will only be available to unlisted companies that are registered as public limited companies. Under the U.K. Companies Act 2006, private limited companies are prohibited from offering their securities to the public and the U.K. Government has not proposed to reform this.

D. PUBLIC OFFERINGS BY OVERSEAS ISSUERS

The U.K. Government plans to introduce a new regime that will permit offerings of securities listed on certain (as yet unspecified) overseas stock exchanges to be extended into the U.K. on the basis of offering documents prepared according to the rules of the relevant overseas jurisdiction and market. The FCA will, however, be empowered to step in to protect U.K. investors in exceptional circumstances.

NEXT STEPS

The U.K. Government has not yet provided a timetable for when the proposed changes will be implemented. It has said it will introduce the required primary legislation when “parliamentary time allows”. In addition, the response states that the changes will not take full effect until the FCA has consulted on the new rules for which it will be responsible under its new powers.

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