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FCA – DRAFT GUIDANCE ON SCHEMES OF ARRANGEMENT AND PROSPECTUSES

Aug 19, 2020

SUMMARY

In this draft note the FCA confirms the well-established position that the issue of new securities pursuant to a scheme of arrangement (scheme) under Part 26 of the Companies Act 2006 does not constitute an offer of transferable securities to the public requiring the need for a prospectus. However, the FCA is still of the view that a scheme with a mix and match facility offering a choice between shares and cash, would require a prospectus (absent an exemption).

The FCA has published Primary Market Bulletin No.30 which, amongst other things, is consulting on a new Technical Note on whether a prospectus is required where securities are issued pursuant to schemes of arrangement (scheme).

There is a long standing and established view amongst practitioners that a takeover which involves the issue of transferable securities, but which is achieved by way of a statutory scheme under Part 26 of the Companies Act 2006, should not trigger the requirement for a prospectus as the issuance does not fall within the definition of 'public offer'. This is on the basis that there is no offer which enables investors to buy or subscribe for securities (ie. there is no element of individual choice on the part of the recipient) but instead there is a court procedure under which members/creditors are asked to vote on and approve an arrangement which results in the allotment of securities to shareholders. There may, however, still be a requirement to produce a prospectus if shares are being admitted to trading on a regulated market.

However, there has been some uncertainty and disagreement in the market for a number of years whether a takeover offer via a scheme which contains mix and match facilities ie. cash and/or shares, would require a prospectus, absent any other exemptions being available.

This draft Technical Note reaffirms the FCA's view that if a shareholder is being asked to make a choice between different forms of consideration then a prospectus should be produced (absent an exemption) because an investor is deciding to buy or subscribe for the securities in question.

The FCA's position is unlikely to come as a surprise to the market given their position to date and companies concerned that the FCA may seek to challenge a decision not to publish a prospectus where securities are being issued pursuant to a scheme should contact the FCA in advance.

Draft Technical Note 606.1

Primary Market Bulletin No.30

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MEET THE TEAM

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