

Insights

HM TREASURY CONSULTATION ON THE UK PROSPECTUS REGIME

5 July 2021

Lord Hill's findings on the UK Listings Regime in March 2021 recognised a need for change and reform including a fundamental rethink of the current prospectus regime.

In response to this, HM Treasury is consulting on changes to (i) facilitate wider participation in public company ownership; (ii) simplify the prospectus regulation; (iii) improve the quality of information investors receive; and (iv) ensure that the regulation is more agile and dynamic so it can respond to change and innovation in the future.

The overall purpose of these changes is to reflect the UK's position in a post Brexit era and give the FCA new responsibilities and discretion. The proposals being consulted on adopt Lord Hill's recommendation that the admission of securities to trading and rules around public offers of securities be separated. There is widespread support for a re-examination of the UK prospectus regime and these changes signify a step in the right direction.

Proposals include:

Scope of UK public offering rules

- retaining the section 85(1) of FSMA prohibition on public offers of securities but introducing new exemptions for companies with (or applying to have) securities admitted to trading on regulated markets. Offerors of securities admitted to trading on regulated markets or subject to an application for admission would be exempt from the rules governing public offers of securities on the basis that the securities are already freely trading or, in the case of an IPO, will be freely trading once the IPO completes;
- changing what constitutes "the public" in a public offering of securities to ensure that fundraises to existing stakeholders in the company are not subject to the public offers of securities. This aims to remove a disincentive against offering shares to a company's own shareholders and would have the effect of taking all rights issues outside the restrictions imposed by the public offering rules;

- retaining the 150 person threshold and Qualified Investor exemptions;

Admission to trading

- in parallel with the proposals for reform for public offers of securities, the FCA is proposing to remove the section 85(2) of FSMA prohibition on requesting admission to trading on regulated markets without first having published an approved prospectus and to give the FCA discretion to determine whether or not a prospectus is required when securities are admitted to trading on UK regulated markets. The FCA could use this discretion not to require a UK prospectus where a prospectus is published in another country;
- the new rule making responsibilities would enable the FCA to incorporate a replacement regime into its Handbook which would determine when a prospectus is required along with the content requirements;
- seeking views on the existing “necessary information” test for the contents of a prospectus and whether the simplified disclosure regime for secondary issuances, which requires disclosure of “relevant reduced information” prepared to a separate standard has created a differentiation in disclosure for new applicants and further issuances;
- changing the existing standard of liability in prospectuses for forward looking information from the “negligence standard” to the “recklessness standard” applicable to untrue or misleading statements for certain disclosed information eg. annual reports. The information would need to be identified as forward looking information so as to warn investors that there is inherent uncertainty as to whether the projection or prediction will prove to be accurate and explicitly state that a lower standard of liability applies. This reduction in liability would apply only in relation to statements in a prospectus which project or predict a future state of affairs and not to statements of fact. Working capital statements in a prospectus would continue to be subject to the existing higher negligence standard;

Junior markets

- reviewing the current requirement for companies admitted to multilateral trading facilities (“MTF”) like AIM, to produce a prospectus if they want to make a public offer of shares to more than 150 natural or legal persons, excluding Qualified Investors or are considering a raise of more than €8m as this disincentivises wider participation in these type of companies. Proposals include excluding a company’s own shareholders from the definition of the public, as discussed above, together with two other options:
 - for companies admitted to MTFs, exempting them from the section 85(1) of FSMA restriction on public offering rules. It would only apply where the issuer has itself requested admission of the securities to trading on the MTF; and

- recognising AIM admission documents as a form of prospectus (MTF admission prospectus) and bringing it within the scope of the liability regime (including the proposed standard of liability for forward-looking statements). The current system in which MTFs set their own admission criteria and rules would still be preserved;

Public offerings by overseas companies

- three possible options:
 - maintaining the status quo of permitting overseas companies to make offers into the UK provided an FCA-approved prospectus is reviewed and approved;
 - allowing companies with securities listed on a non-UK stock market to extend an offer of those securities to the public in the UK, on the basis of offering documents prepared in accordance with the rules of that market's jurisdiction. However, there would be no FCA review of the documents, and such a mechanism would consider investor protection on a wider and more holistic basis than is currently the case; or
 - not to provide an equivalent right to make a public offer in the UK under the revised regime. This would not constrain the UK government from including such a mechanism on a reciprocal basis in any Mutual Recognition Arrangement in the future;

Public offerings by private companies

- three possible options:
 - offer through authorised firm;
 - offer through authorised firm with bespoke permission;
 - leave such offerings subject to the current rules with the main exemption being the €8m exemption (but in £).

The [consultation](#) closes on 24 September. Any changes to the current regime will require a further UK government consultation and an FCA review and consultation.

At the same time as this consultation paper, the UK government has launched a [Wholesale Markets Review](#) which includes a new type of trading venue aimed at smaller SME issuers.

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