

United Kingdom: Government Review of the Prospectus Regime

In brief

On 1 July, HM Treasury published a [consultation](#) that takes forward three key recommendations from Lord Hill's UK Listings Review (click [here](#) for further information on that Review). It sets out how the Government proposes to: (i) review and potentially replace the prospectus regime that the UK has inherited from the EU; (ii) give the Financial Conduct Authority (the "**FCA**") new rule making responsibilities that will allow it to incorporate a replacement prospectus regime into its handbook; and (iii) amend the prospectus liability regime so that there are fewer barriers to the inclusion of more forward-looking information in prospectuses.

The Government is seeking views on its proposals from, among others, investors and financial services firms. The consultation will close on 24 September 2021.

Comment

With these proposals, the Government is seeking to:

- facilitate wider participation in public offerings, including by retail investors, by removing certain disincentives that currently exist from companies structuring their offerings to allow for this;
- without lowering regulatory standards, simplify the regulation of prospectuses and remove unnecessary duplications (most notably by separating out the regulation of admissions to stock markets from the regulation of public offers of securities);
- improve the quality of information that investors receive under the prospectus regime; and
- make the most of the opportunities presented by the UK leaving the EU by ensuring that the regulation of prospectuses is more agile and dynamic.

These are sensible aims and the proposed methods for achieving them are both attractive and indicative of a positive step change to the UK listing regime. In practice, though, there is a lot still to be worked through, as many of the more detailed changes will be left for the FCA to implement using its proposed new powers. It will be interesting to see how the proposed new listing regime will be viewed internationally. There is also an outstanding question around how these proposals will fit in with the BEIS consultation on audit and director liability reform (for further on this, click [here](#)), as those proposals appear to be pulling the UK regulatory landscape for listed and very large private companies in a different direction.

In depth

Overall approach to reforming the UK prospectus regime that has been inherited from the EU

The UK's current prospectus regime requires, unless an exemption applies, that a prospectus must be published in two instances:



- where an application is made for securities to be admitted to trading on a UK Regulated Market ("**Admissions to Trading on a UK Regulated Market**");¹ or
- where an offer is made to the public of transferable securities ("**Public Offers**").

Preparing a prospectus is expensive and time-consuming. The Government is therefore proposing fundamental reform of the UK prospectus regime, aiming to making it more dynamic and agile, by separating out the rules on when a prospectus is required for: (1) Admissions to Trading on a UK Regulated Market; and (2) Public Offers.

1) Amending the rules on Admissions to Trading on a UK Regulated Market

The UK Prospectus Regulation² will be replaced (all or, in part, as necessary). As part of these changes, the Government is proposing to remove section 85(2) of FSMA,³ which makes it a criminal offence to request admission to trading on a UK Regulated Market without having first published a prospectus. This is on the basis that a more proportionate response may be to let the market decide whether to refuse an application that is not supported by an approved prospectus. The detailed rules replacing the UK Prospectus Regulation will not be enacted in legislation, but instead, to allow for future flexibility, the FCA will have new rule making responsibilities that will allow it to incorporate a replacement prospectus regime into its handbook, and to amend it as necessary in the future.

New FCA powers on Admissions to Trading on a UK Regulated Market

The consultation proposes that:

- the FCA should have responsibilities that are framed in such a way that give it broad discretion to specify, in its rules, when a prospectus is required in connection with an application for securities to be admitted to trading on a UK Regulated Market, what exemptions are available, and to determine the content of the prospectus;
- the FCA should be granted sufficient discretion to be able to recognise prospectuses prepared in accordance with overseas regulation in connection with a secondary listing in the UK; and
- relevant provisions should be retained in statute only where strictly necessary.

The consultation asks for comment on the proposed statement of purpose for a prospectus, being:

"A document of record, available to the public free of charge, that provides potential investors with the information they need and that they can rely on to make an investment decision in a security."

Prospectus content, review and approval and other ancillary provisions

In respect of prospectus content, the Government proposes retaining, in statute: (i) the substance of the current "necessary information" test (set out in Article 6 of the UK Prospectus Regulation); (ii) the clarification that what is "necessary information" may vary depending on certain factors; and (iii) provisions equivalent to Article 18 of the UK Prospectus Regulation, (that currently permits the FCA to authorise the omission of information from the prospectus that would otherwise ordinarily be required). Otherwise, the Government proposes giving the FCA the responsibility to make all of the detailed rules on content (including for secondary issuances, base prospectuses etc). The FCA is also expected to have a number of further powers, including to set the rules on review and approval of prospectuses, as well as other powers replacing ancillary provisions in the UK Prospectus Regulation.

Encouraging more forward-looking information in prospectuses

The consultation proposes lowering the statutory liability that attaches to forward-looking information in a prospectus. In particular, it proposes replacing, for forward-looking information only, the current "negligence standard" of liability (established by section 90 and

¹ The FCA maintains a [list of regulated markets in the UK](#), which includes the main market of the London Stock Exchange. It does not include multilateral trading facilities, or MTFs, (such as AIM).

² [Regulation \(EU\) 2017/1129](#), as it forms part of retained EU law in the UK following the UK's departure from the UK.

³ The Financial Services and Markets Act 2000.



Schedule 10 of FSMA) with the "recklessness standard"⁴ applied (in relation to misleading statements in a company's annual reports) by section 463 of the Companies Act 2006 and Schedule 10(A) of FSMA (which addresses the liability of issuers in connection with other information published by issuers). Similarly, the Government proposes applying the standard applicable in section 463 of the Companies Act 2006 and Schedule 10A(3) of FSMA to omissions in forward-looking information.⁵ In order to benefit from lower standards of liability, a company that includes forward-looking information in a prospectus will be required to explicitly identify that information as forward-looking information, warn about the inherent uncertainty of such information, and state explicitly that a lower standard of liability applies.

2) Amendments to the UK's Public Offer rules

The Government proposes retaining the existing section 85(1) of FSMA³ prohibition on offers to the public of transferable securities without an FCA-approved prospectus (the "**Public Offer Prohibition**"), and the accompanying sanction applicable to non-compliant offers set out in section 85(3) of FSMA.⁶ However, the Government also proposes:

- **new, broader exemptions from the Public Offer Prohibition**, including exemptions based on where the securities will be traded (including UK Regulated Markets or junior markets, like AIM), and a new exemption for existing holders of securities, which is aimed at exempting rights issues, in particular; and
- **a number of possible options for the Public Offer Prohibition in respect of Public Offers by: (i) private companies; and (ii) overseas companies with securities admitted to trading on an overseas stock market.**

New, broader exemptions from the Public Offer Prohibition

A new exemption for securities admitted (or applying for admission) to trading on a UK Regulated Market

The consultation does not provide a lot of detail on how this exemption would work in practice. However, it is clear that the proposed new FCA rules applicable to when securities are admitted to trading on UK Regulated Markets will determine whether a prospectus is needed in these circumstances.

A new exemption for companies with securities admitted (or applying for admission) to trading on junior markets

Junior markets (i.e. companies with securities admitted to trading on MTFs⁷) are intended to benefit from the proposed new exemption from the Public Offer Prohibition for public offers to existing holders of securities (for further, see "*A new exemption to the UK's public offer rules for public offers to existing holders of securities*" below). However, the Government is proposing to go further for junior markets by either:

- **Providing for a simple exemption from the Public Offer Prohibition.** This exemption would be structured in a similar way to the one proposed for companies with securities admitted to trading on UK Regulated Markets. It would only apply where the company has itself requested admission of the securities to trading on an MTF; or
- **Providing for an exemption from the Public Offer Prohibition AND a new "MTF admission prospectus".** The Government recognises that, currently, even if a prospectus is not required in connection with admission of securities to an MTF, the relevant MTF operator's own rules usually require a document similar to a prospectus to be produced.⁸ Taking account of the fact that this practice is likely to continue following the implementation of these proposals, the Government would like to ensure that relevant companies benefit from the same change to the standard of liability in respect of forward-

⁴ That "recklessness standard" is that a person "knew the statement to be untrue or misleading, or was reckless as to whether it was untrue or misleading".

⁵ That standard is, "knew the omission to be a dishonest concealment of a material fact".

⁶ Breach of section 85(1) FSMA is a criminal offence punishable by up to two years in prison, a fine, or both.

⁷ In this consultation, the MTFs (multilateral trading facilities) referred to are so-called "primary MTFs" that provide a trading facility for the securities of issuers who have themselves consented to the market operator providing a trading facility in their securities. They include the London Stock Exchange's (**LSE's**) AIM market and Acquis Exchange's Acquis Growth Market.

⁸ Under the LSE's AIM Rules, companies are required to prepare and publish an Admission Document meeting the requirements of the AIM Rules and approved by AIM, and under the Acquis Growth Market rulebook, an applicant must submit a prospectus for review and approval by the FCA.



looking information in such documents as is proposed for forward-looking information in a prospectus (see "*Encouraging more forward-looking information in prospectuses*" above). The Government proposes doing this by recognising admission documents published in relation to admission to an MTF as a form of prospectus, known as an "**MTF admission prospectus**". If this option is pursued, the Government proposes preserving the current system in which MTFs set their own admission criteria and rules but, as now, that these will be subject to the FCA retaining its current oversight over such rules.

A new exemption for Public Offers to existing holders of securities

The Government is proposing introducing a new exemption from the Public Offer Prohibition for offers directed at existing holders of a company's securities. The consultation clarifies that this would exempt all rights issues, and all share-for-share offers (or security-for-security offers), as well as removing the need for the current exemptions for securities offered in connection with various forms of mergers and acquisitions.

Other exemptions to the Public Offer rules

The consultation is asking for views on the operation of certain key current exemptions from the Public Offer Prohibition (the 150 person threshold for public offers of securities, the "qualified investors" exemption and the exemption for employees etc), although it states that the Government is not minded to change these exemptions at this time. However, the Government is proposing to establish powers to vary the exemptions to the Public Offer Prohibition by means of secondary legislation. This is so that HM Treasury will have the power to delete, vary or create new exemptions in a more agile way (i.e. via statutory instrument) in the future. The consultation also confirms that if a new trading venue aimed at SMEs is established (as is being considered as part of the Wholesale Markets Review), an appropriate exemption from the Public Offer Prohibition will be introduced for securities admitted to trading on this new SME trading venue.

Possible options in respect of Public Offers by private companies and overseas companies with securities admitted to trading on an overseas stock market

Public Offers by private companies

The Government is seeking views on three options regarding alternative obligations to the requirement that an offeror publish a prospectus where a UK incorporated private company offers securities that are not to be admitted to a stock market of any type and the consideration for the securities being offered exceeds EUR 8 million. The first option is to require that a company offering securities over a threshold amount must (instead of preparing a prospectus) register with, and offer its securities via, a firm authorised as an investment firm. That investment firm would be subject to the FCA conduct of business rules and therefore be required to ensure appropriate investor protections. The second option is the same as the first option, except that the relevant authorised investment firm must first be authorised to perform a newly created authorised activity, being the operation of a platform for the public offering of securities, in respect of which the FCA would frame appropriate new rules and practices. The Government would consider whether the threshold amount of EUR 8 million equivalent could be lowered so that more offers could go through firms authorised with the new permission. Finally, the third option is to maintain the status quo (i.e. to keep the requirement for a prospectus where consideration for the securities being offered exceeds EUR 8 million, though this amount would be re-stated to UK sterling). If this option is pursued, the FCA would need to write specific prospectus rules for the offering of securities in private companies into its handbook.

The Government is currently proposing **not** to provide a mechanism for public offers of securities into the UK by overseas private companies. The consultation highlights that the "qualified investor" exemption will continue to facilitate the access of UK institutional investors to overseas private equity markets.

Public Offers into the UK by overseas companies with securities admitted to trading on an overseas stock market

The Government is seeking views on three proposed options in respect of allowing overseas companies with securities admitted to trading on an overseas stock market ("**Overseas Listed Companies**") to extend an offer (in association with an admission of securities to an overseas stock market) of those securities (an "**Offer**") to the public in the UK. Under the first option, the status quo would be maintained and an Overseas Listed Company would be able to extend an Offer to the public in the UK provided that they publish an FCA-approved prospectus (though this is rarely done in practice as Overseas Listed Companies tend to rely on the "qualified investors" exemption). Under the second option, the Government would create a new regime of regulatory deference (the "**Deference Mechanism**") whereby Overseas Listed Companies would be allowed to extend an Offer on the basis of offering documents prepared in accordance with the rules of the relevant stock market's jurisdiction, with no FCA review and/or approval of those documents. However, the Overseas Listed Company would be required to notify the FCA where such an Offer is made into the UK, and the FCA would have the right to order the closure of the Offer to the public in the UK where it is of the view that the Offer is detrimental to the interests of UK investors. Finally, under the third option, the Government would **not** provide a mechanism for Overseas Listed Companies to make an Offer into the UK, but would leave the door open for the Government to include such a mechanism in a Mutual Recognition Arrangement with overseas partners in the future.



Next steps

The consultation will close on 24 September 2021 and the Government will consider the responses to it alongside the Government's Future Regulatory Framework (FRF) Review, whose key purpose is to determine how the UK's financial services regulatory framework needs to adapt to reflect the UK's position outside of the EU and ensure that it is fit for the future.

The replacement of the existing UK prospectus regime (as contemplated in the consultation) will be achieved via a two-stage process that will involve: (i) a Government consultation followed (if the Government decides to proceed) by legislation; and (ii) an FCA review and consultation on the FCA rules that will replace the UK Prospectus Regulation (assuming that the FCA obtains the relevant powers to do so).



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