SLAUGHTER AND MAY/

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NEW PUBLIC OFFERS AND ADMISSIONS TO TRADING REGIME: FCA PUBLISHES FURTHER DETAILS

HIGHLIGHTS FOR EQUITY CAPITAL MARKETS

CAPITAL FLOWS
Part of the Horizon Scanning series

The FCA has published further details of the public offers and admissions to trading regime that next year will replace the current UK prospectus regime.

On 26 July 2024 the FCA published two consultation papers on key aspects of the new regime for public offers and admissions to trading:

- CP 24/12 sets out proposed rules on when a prospectus will be required where a company applies for its securities to be admitted to trading on a UK market, the information that must be included in it and other related matters.

- CP 24/13 sets out proposed rules that will apply to a financial services firm that operates a public offer platform under the new public offers regime.

Most of the existing rules relating to prospectuses and admissions to trading will be carried across into the regime broadly as they are. However, the FCA is proposing to make changes in a few areas to address problems identified in Lord Hill's Review of the Listing Regime and in the Secondary Capital-Raising Review (SCRR). Overall, the proposed changes represent targeted improvements, rather than wholesale reform, and will be far less radical than the changes to the listing regime that came into force on 29 July 2024. But existing listed companies will benefit from changes designed to make it easier, quicker and cheaper for them to raise further funding in a secondary capital-raising.

This briefing summarises the key points relevant to offers of shares and other ECM transactions. Key points relevant to DCM transactions are summarised in a separate briefing.

BACKGROUND

The Public Offers and Admissions to Trading Regulations 2024 (POAT Regulations), which were made by Parliament in January 2024, provide a new framework to replace the current regime that the UK inherited from the EU. In particular, the Regulations:

SUMMARY OF PROPOSED CHANGES

- In relation to secondary fundraisings, as recommended by the SCRR the FCA proposes to raise the threshold from the current 20% of existing share capital to 75%. Below this threshold, an issuer will continue to be allowed to publish a voluntary prospectus approved by the FCA.

- Rules specifying the format and contents of a prospectus summary will be relaxed slightly.

- The FCA is considering whether to modify the requirements around working capital statements in a prospectus: for example, to allow issuers to include the assumptions on which the statement is based, and the sensitivity analysis performed; or, more radically, to allow the working capital statement to be based on the underlying due diligence performed for the purposes of viability and going concern disclosures in an issuer's annual financial statements.

- Where an issuer identifies climate-related risks as risk factors, or climate-related opportunities as material to its prospects, the prospectus will have to include information about how the issuer manages the relevant risks and opportunities, broadly in line with the disclosures required by the TCFD Recommendations and ISSB Standards.

- Certain forward-looking statements in a prospectus that satisfy specified criteria and labelling requirements will be subject to a higher threshold for statutory liability.

- An operator of a public offer platform will have to obtain certain information from an issuer and carry out a reasonable verification exercise on the information collected. Investors on the platform will have to be provided with a summary in a prescribed format, together with certain information on the issuer and the offer.

- Will make it unlawful to offer securities to the public in the UK unless an exemption applies. Exemptions include where the securities are already admitted, or will as part of the transaction be admitted, to trading on a regulated market or primary MTF in the UK. (A primary MTF is a trading venue where the operator specifies eligibility criteria and continuing obligations that apply to issuers. AIM is the main example.) Where a company wishes to offer more than £5 million of securities to the public outside a public market, and no exemption is available, it will need to make the offer via a regulated public offer platform. However, no prospectus will be required in connection with a public offer.

- Give the FCA power to set rules on when a prospectus should be required where a company seeks to get its securities admitted to a regulated market or primary MTF in the UK, either initially (on IPO) or subsequently (in a secondary fundraising); what information a prospectus should have to include; who should be legally responsible for a prospectus; which types of forward-looking information should be "protected" from the usual liability rules; and related matters.

Most of the POAT Regulations are not yet in force. They will come into force when the existing rules on public offers and admissions to trading, set out primarily in the UK Prospectus Regulation, are repealed – i.e. the whole regime for public offers and admissions to trading will be replaced in one go. (For more information on the POAT Regulations, the Engagement Papers published by the FCA last year and the wider background see our client briefing published in December.)

A diagrammatic summary of the new public offers regime, reproduced from the consultation papers, can be found on the last page of this briefing.

TIMING

Comments on both consultations are requested by 18 October 2024. The FCA aims to finalise the rules for the whole regime under the POAT Regulations **by the end of H1 2025**, subject to responses to the consultation and FCA Board approval. There will be a further period before the new rules come into force.

ADMISSION TO TRADING: CP 24/12

Structure and location of proposed rules

The FCA's Prospectus Regulation Rules sourcebook (PRR) will be replaced with a new *Prospectus Rules: Admission to Trading on a Regulated Market sourcebook* (PRM), a draft of which is set out in Appendix 1 of CP 24/12. As at present, detailed contents requirements for different types of prospectus will be set out in Annexes: for example, Annex 1 will specify the items of information to be included in a registration document for an "ordinary" prospectus published by a commercial company; and Annex 11 will specify the items of information to be included in a securities note for an "ordinary" prospectus published by a commercial company.

Exemptions from the requirement to publish a prospectus

Most of the existing exemptions from the requirement to publish a prospectus will be carried across without amendment. However:

- **Secondary fundraisings**: As recommended by the SCRR, the FCA proposes to raise the threshold from the current 20% of existing share capital to 75%. Below this threshold, an issuer will continue to be allowed to publish a voluntary prospectus approved by the FCA. Where a prospectus is published in connection with a secondary fundraising, it can be a simplified or full prospectus. Where an issuer is in financial difficulty (to be defined), the FCA is considering requiring a prospectus at a threshold below 75%.

> // Raising the threshold to 75% of existing share capital will in principle make it significantly easier, quicker and cheaper for an issuer to raise substantial amounts of capital in a secondary fundraising //

Raising the threshold to 75% of existing share capital will in principle make it significantly easier, quicker and cheaper for an issuer to raise substantial amounts of capital in a secondary fundraising – for example, to strengthen the balance sheet, fund an acquisition or business development or to issue consideration shares. However, where the fundraising includes a US element, US liability and disclosure standards are likely to drive issuers to include additional information, and perhaps even to publish a voluntary prospectus.

UK rules on secondary fundraisings will be more liberal than EU rules. When the EU Prospectus Regulation is amended later this year, as part of the package of measures included in the so-called EU Listing Act, the EU threshold will be raised from 20% to 30% of an issuer's existing share capital (and the exemption will also be extended to cover offers of securities to the public). Where an issuer takes

advantage of the exemption, it will have to publish a short-form document containing key information for investors, but this will not have to be approved by an EU competent authority. (For further details see our briefing published in May this year.)

- **Securities offered in connection with a takeover by means of an exchange offer**: the FCA seeks views on whether this exemption should be retained and, if so, whether it should provide guidance on the information to be included in a takeover exempt document. At present, there are no UK regulations specifying the contents, but the FCA has had regard to a Delegated Regulation published under the EU Prospectus Regulation. Any FCA guidance is likely to use the EU Delegated Regulation as a starting point.

Content of a prospectus

The summary

Detailed financial information will no longer have to be included in the summary; issuers will be able to cross-refer to information in other sections of the prospectus; and the maximum length will be increased from 7 to 10 pages.

Financial information

Existing requirements around the historical financial information on the issuer (HFI) that must be included, and around pro forma financial information, will be carried across largely unchanged. A new Technical Note, set out in an annex to CP 24/12, will provide guidance on the information to be included where the issuer has a "complex financial history".

Working capital statement

The FCA intends to retain the requirement to include a working capital statement in a prospectus, but it seeks views on whether issuers should be allowed to disclose significant judgements made in preparing the working capital statement, including the assumptions the statement is based on (for example, that the issuer will successfully obtain new debt financing) and the sensitivity analysis that has been performed. It also seeks views on whether the working capital statement could be based on the underlying due diligence performed for the purposes of viability and going concern disclosures in an issuer's annual financial statements.

Sustainability-related disclosures

Where an issuer of equity securities or depositary receipts representing equity shares identifies climate-related risks as risk factors, or climate-related opportunities as material to its prospects, new item 5.8 in Annex 1 will require the prospectus to include additional information about the issuer's management of the relevant risks and opportunities, broadly in line with the high-level categories used in the TCFD Recommendations and ISSB Standards, namely governance, strategy, risk management and metrics and targets. Guidance may be published on additional information to be included by mineral companies (including mining and oil and gas companies). If the issuer has published a transition plan, and the contents are financially material, the prospectus will have to include a summary of key information in the transition plan.

Climate-related disclosures relating to strategy, transition plans and metrics and targets should qualify for protection as protected forward-looking statements (PFLS) if the relevant criteria are met; but disclosures on governance and risk management will not qualify as PFLS (see further below).

At this stage the FCA does not intend to require disclosure of sustainability information that is not climate-related.

Protection for certain forward-looking statements

To encourage issuers to disclose in prospectuses (especially IPO prospectuses) more detailed forward-looking information, particularly in relation to expected future financial performance and sustainability objectives, the POAT Regulations establish a different liability threshold, based on fraud or recklessness, for certain categories of forward-looking statements that meet certain criteria. These will be known as "protected forward-looking statements" (PFLS).

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The FCA is empowered to specify which types of statements should qualify as PFLS and the labelling and other requirements that should apply to them. It proposes that most mandatory disclosures required by

the Annexes will not qualify as PFLS. But any profit forecast, and certain information that must be included in the *Business Overview* (including certain climate-related items (see above)), *Operating and Financial Review* and *Trend Information* sections will qualify as PFLS if the information satisfies the relevant criteria. The proposed criteria, which are based on the requirements that apply to profit forecasts, and on US practice, are very specific: unless they are widened, many forward-looking statements are unlikely to qualify. Profit estimates, aspirational targets and most purely narrative statements will not qualify as PFLS.

All PFLS disclosures will need to be clearly labelled, and certain accompanying statements will have to be included.

The higher threshold for liability applies only in respect of statutory liability to pay compensation to investors under Regulation 30 of the POAT Regulations (which will broadly replace section 90 of the Financial Services and Markets Act 2000). Where the prospectus relates to a transaction with a US or other overseas element, if the issuer intends to include forward-looking statements, it will also to consider the risks of liability under relevant overseas laws and how they can be mitigated.

Supplementary prospectus and withdrawal rights

Existing rules around when a supplementary prospectus must be published and withdrawal rights can be exercised will be retained broadly as they are.

"Six-day" rule on IPOs with a retail offer

As recommended by the SCRR, the existing requirement that, in the case of an IPO involving an offer to the public, the prospectus must be published at least six working days before the end of the offer, will be amended to reduce the period to three working days. This is designed to encourage issuers to include a retail offer in their IPO.

Admission of securities to a primary MTF

An "MTF admission prospectus" will usually be required where (i) an issuer seeks initial admission to trading on a primary MTF on which retail investors can trade, even if there is no fundraising; or (ii) an enlarged entity seeks re-admission to such an MTF following a reverse takeover. An MTF admission prospectus will be subject to the same statutory responsibility and compensation provisions, and the same PFLS rules, as apply to prospectuses.

However, operators of primary MTFs will have discretion to decide (i) whether an MTF admission prospectus will be required for a secondary fundraising; (ii) the information that must be included in an MTF admission prospectus; and (iii) the process for reviewing and approving an MTF admission prospectus.

By introducing the concept of an MTF admission prospectus, the Government is hoping to encourage primary MTF issuers to offer securities to retail investors, instead of limiting their offer to qualified investors or fewer than 150 persons.

PUBLIC OFFER PLATFORMS: CP 24/13

Operating a public offer platform will be a regulated activity, so a firm wishing to operate one will need to apply to vary its existing permissions or seek authorisation from the FCA. According to the FCA, there are currently 27 crowdfunding platforms operating in the UK: some of these are likely to apply for permission to operate a public offer platform. Other firms may also apply.

Shares offered via a public offer platform will almost certainly be riskier than shares bought on a public market: platform operators will therefore have a key gatekeeping role in deciding if a public offer should be made to investors. To address potential information asymmetry and guard against potential fraud, a new Chapter 23 of the FCA's Conduct of Business sourcebook (COBS) will specify:

- **The information-gathering and due diligence that platform operators should carry out on prospective issuers and the securities being offered**. Among other things, before facilitating a public offer, a platform operator will have to:
    - obtain certain minimum information on the issuer, including its directors and senior management, persons capable of exercising significant influence over it, the issuer's group, its business model, intangible assets, risk factors, litigation, material contracts, historical financial information, financing structure and creditworthiness;
    - obtain certain information about the securities to be offered, how the proceeds will be used and any materials that will be used to market the offer;
    - carry out a reasonable verification exercise on the information collected. Factual information will have to be verified by reference to reliable sources; non-factual information will be subject to a "plausibility assessment";

- carry out a reasonable assessment of the issuer's creditworthiness; and
- assess whether the issuer and its securities are appropriate to be offered to the public.

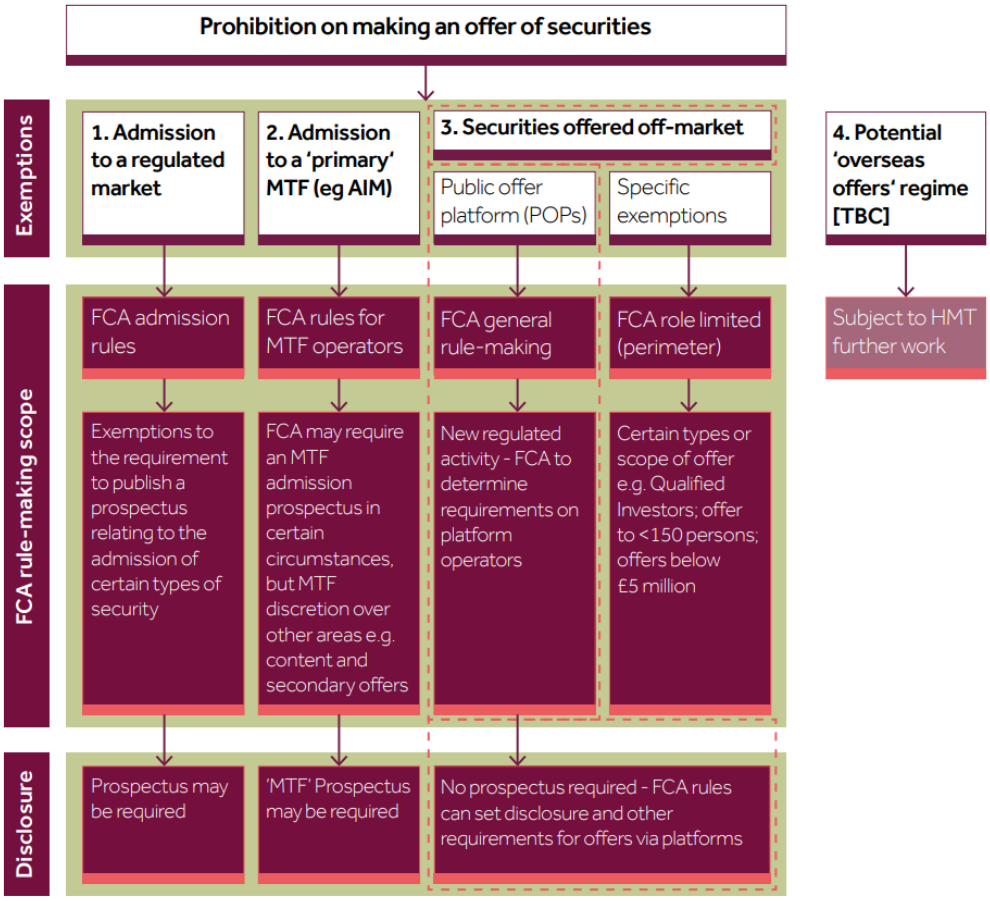
- **The information a platform operator must provide to investors**. This will include:
  - a "disclosure summary", in a prescribed format, of the issuer and the public offer, including (i) a summary of the information provided by the issuer and verified by the platform operator; (ii) a description of the checks and verification undertaken by the operator, including in relation to the plausibility of non-factual information and the creditworthiness assessment; and (iii) the operator's assessment of whether it is appropriate to facilitate the offer. Proprietary or commercially-sensitive information will not have to be included;
  - the most recent financial statements of the issuer, including whether they have been audited;
  - the terms and conditions, and other contractual documents; and
  - any other information needed for investors to make an informed decision whether to participate in the offer.

  While the offer remains open to the public, the above information will have to be available to platform investors and the operator will have to make available in real time the amount raised by the issuer via the offer. The FCA seeks views on whether operators should be required to disclose updated information after an offer has closed.

- **How legal liability and redress will apply to platform operators and issuers**. If an operator falls short of the standards imposed by the FCA, an investor may have a private right of action under section 138D of the Financial Services and Markets Act 2000 and the operator may need to compensate the investor's loss. No special liability regime will be imposed on issuers, but investors may be able to use common law remedies to seek compensation from an issuer in case of insufficient, false, or misleading disclosures. An issuer could also be liable to the platform operator for breach of its terms and conditions if it fails to disclose all relevant information.

If a firm wishes to offer 'secondary trading' type facilities as well, it will need appropriate FCA permissions for this. One option would be to provide secondary trading under the proposed new Private Intermittent Securities and Capital Exchange Systems (PISCES) regime, which initially will operate via a regulatory sandbox. (Further details of the PISCES regime will be included in a briefing to be published shortly.)

NEW PUBLIC OFFERS REGIME: DIAGRAMMATIC SUMMARY



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