

Primary Market Technical Note

When a prospectus is required where securities are issued pursuant to Schemes of Arrangement

The information in this note is designed to help issuers and practitioners interpret our Listing Rules, Prospectus Regulation Rules, Disclosure Guidance and Transparency Rules, and related legislation. The guidance notes provide answers to the most common queries we receive and represent FCA guidance as defined in section 139A FSMA.

In this note we address the question of whether the issue of new securities pursuant to a scheme of arrangement under Part 26 of the Companies Act 2006 constitutes an offer of transferable securities to the public ("public offer"), which if made to persons in the UK would trigger the requirement to publish an approved prospectus under section 85 FSMA. We understand that the longstanding and common view among practitioners is that issuances of securities in this instance should not trigger the requirement for a prospectus as the issuance does not fall within the definition of public offer. We believe that the basis of this view is that there is no offer which enables investors to buy or subscribe for securities; 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.

Under the Prospectus Regulation, an approved prospectus is required in the United Kingdom if there is a public offer, within the definition in section 102B(1) of FSMA. The definition is that there is an offer of transferable securities to the public if there is a communication to any person which presents sufficient information on the transferable securities to be offered, and the terms on which they are offered, to enable an investor to decide to buy or subscribe for the securities in question.

Recital 22 of the Prospectus Regulation assists in the interpretation of 'public offer'. It states that where securities are allocated without an element of individual choice on the part of the recipient, including allocations of securities where there is no right to repudiate the allocation or where the allocation is automatic following a decision by a court, such as an allocation of securities to existing creditors in the course of a judicial insolvency proceeding, such allocation should not qualify as an offer of securities to the public.

Where a scheme of arrangement has the result that no individual shareholder is asked to make a decision to buy or subscribe for securities, but all shareholders are allotted securities automatically if the scheme is approved, in our view an issuer may reasonably conclude that there is no public offer of those securities and therefore no prospectus is required.

In contrast, if a shareholder is being asked to make a choice between different forms of consideration, for example where a scheme includes mix and match facilities offering a choice between shares and cash, in our view an issuer may reasonably conclude that a prospectus should be produced (absent an exemption) because an investor is deciding to buy or subscribe for the securities in question. The allocation of shares in these circumstances is not automatic, in accordance with recital 22.

Issuers should obtain their own legal advice but may contact us in advance if they are concerned that we may seek to challenge their decision not to publish a prospectus where securities are being issued pursuant to a scheme of arrangement.