FINANCIAL CONDUCT AUTHORITY

Technical Note

Exemptions from the requirement to produce a prospectus

PR 1.2.2;
PR 1.2.3;
ESMA Questions and Answers on Prospectuses (ESMA Q&As)

There are various exemptions from the requirement to produce a prospectus in relation to public offers or an admission to trading on a regulated market. It is worth noting that, where transferable securities are being offered to the public and being admitted to trading on a regulated market, only a single prospectus would be required. However, if an exemption from the requirement to produce a prospectus only applied to the admission, the issuer would still have to produce a prospectus relating to the public offer if none of the relevant exemptions applied to such an offer.

a) ~~10~~20% exemption

Under the Prospectus ~~Directive (PD)~~ Regulation (P Reg), issuers who are admitting securities fungible with securities already admitted to trading on the same regulated market ~~shares~~ that represent less than ~~10~~ 20% of ~~shares of the same class that are~~ the number of securities already admitted to trading on the same regulated market, are exempt from the requirement to produce a prospectus (which relates only to admission to trading on a regulated market but not to public offers). The ~~10~~ 20% limit is applied over a rolling 12-month period. As such, any ~~shares~~ securities admitted over the previous 12 months not covered by any other exemption, would count towards the ~~10~~ 20%, unless the P Reg provides otherwise.

Whether these admissions relate to one or more transactions is irrelevant. In calculating the ~~10~~ 20%, we will discount any securities that have benefited from applying another exemption from the requirement to produce a prospectus unless the P Reg provides otherwise. So, for example, shares admitted under the employee share exemption would be disregarded for the calculation of the ~~10~~ 20% limit.

For example: A company has 160 shares in issue and then issues a further ~~20~~ 40 shares to employees (covered by the relevant admission to trading exemption) after three months. A further issue of ~~ten~~ 20 shares is placed with institutions (so covered by a public offer exemption) six months later. The calculation determining whether the ~~10~~ 20% exemption is applied ~~10/180~~ 20/200, i.e. the number of shares for which admission has been sought over the last 12 months for which no other exemption applied, divided by the total already admitted.

This transaction would be covered by the ~~10~~ 20% exemption. We can ignore the employee shares in the numerator as they are covered by another exemption.

The company makes a further placement of ~~eight~~ 20 shares ~~one~~ month later to raise funds for acquiring A. The calculation is now ~~18~~40/220~~190~~, i.e. this latest issue is still covered by the ~~10~~ 20% exemption. The numerator includes all shares issued in the relevant time period not benefiting from an exemption, and the denominator is increased as a result of previous issues. A further placement of ~~two~~ nine shares occurs one month later as the company raises funds for the unconnected acquisition of B. The calculation is now ~~20/198~~ 49/240, which is more than ~~10~~ 20%, so a prospectus will be required in this final case.

b) Employee share schemes

Quantification of the €5m threshold

We have noted that there is some uncertainty in the market about whether the €5m threshold for offers to fall outside the scope of the Prospectus Directive (PD), set out in schedule 11A of FSMA should be calculated for the UK only or on an aggregated basis across all the relevant EU States, where a simultaneous offer of securities is made across several EU States. We are doubtful that the threshold can be calculated for the UK only where there is an offer of securities across several member states.

Private companies

We have been asked whether an offer of shares in a private company constitutes an offer to the public and will necessitate a prospectus, especially in light of the restriction in section 755 of the Companies Act 2006. Our view is that this will depend on whether the shares of that company are transferable securities within the meaning of the PD. The PD generally contemplates that shares (whether in public or private companies) that are capable of being negotiated on the capital markets should fall within the PD's scope.

Individual schemes

We have received specific requests on whether particular plans or schemes fall under the scope of the PD and whether a prospectus needs to be published for such schemes. In line with our policy not to provide legal advice on matters, we do not consider it appropriate or indeed possible for us to provide advice on each individual scheme. We believe it is up to the issuer and its advisers to consider, for any particular scheme, whether an offer of transferable securities has been made to the public and whether they are exempt from producing a prospectus.

c) Takeover documents

One of the exemptions from the requirement to produce a prospectus is in connection with takeovers and mergers. Where securities are offered in connection with a takeover or merger, there is no requirement to produce a prospectus, if a document is also being produced (for example, an offer document) containing information regarded by the UKLA as being equivalent to a prospectus. To decide whether a document is equivalent to a prospectus, we intend to apply the full vetting process to it. There will be a degree of discretion about what will be acceptable as equivalent, but it is nevertheless limited. It is also worth noting that, whereas a prospectus benefits from the passporting provisions under the PD, there are no similar provisions for equivalent documents. This means that it may be open to any 'host' competent authority to challenge such a document as not being equivalent.

Importantly, there is no obligation to publish supplementary prospectuses for an equivalent document. This means that withdrawal rights, as provided for under section 87G of FSMA, will not be introduced.

A takeover that involves the offer of transferable securities to target shareholders would be likely to require a prospectus to be produced (unless an exemption applies). So, issuers of loan notes or other securities designed to allow target shareholders to participate in the bidding vehicle will probably have to produce a prospectus or equivalent document, if the securities are constituted as transferable securities.

~~d) Convertible securities~~

~~The ESMA document 'Questions and Answers on Prospectuses' (ESMA Q&As) set out ESMA's views on the application of Article 4 .2 (g) of the PD and how it believes this exemption applies. We follow ESMA's views on the exemption (ESMA Q&A 27)~~

~~Therefore, if an issuer has previously issued a convertible bond, the exemption will apply and the underlying securities can be admitted to trading without the need for an additional prospectus (provided the underlying shares are of the same class as shares already admitted to trading on that regulated market) . ESMA suggested that competent authorities should consider taking enforcement action or cancel the transactions in cases where the issuer appears to be abusing the exemption – i.e. interposing an artificial convertible to avoid producing a prospectus.~~

~~If an issuer/advisers have any concerns over whether we would accept that the exemption applied in specific circumstances, they should raise the particular issue with us well in advance of making the listing application for the new securities.~~

~~e~~ d) Subdivision or consolidation

A prospectus is not ordinarily produced by issuers in a redenomination where their legal advice is that the exemptions in PR 1.2.2R(1) and PR 1.2.3R(2) apply. In such a case we have agreed with the Recognised Investment Exchange (RIE) that no new admission application will be required going forward. A letter should be sent to the UKLA, addressed for the attention of Listing Applications and also sent to the relevant team at the RIE at least two clear business days before the reclassification is due to take place, specifying the number of reclassified securities and their ISIN numbers. The letter should set out the issues' proposed timetable and be ~~accompanies~~ accompanied by the circular or other document, detailing to shareholders the proposed arrangements. ~~We will charge the usual application fee.~~