

Towards a new UK prospectus regime

Legislation published in draft

December 2022

The UK government has published draft legislation which sets out a new framework for the prospectus regime and will enable a more flexible approach to prospectus rules.

The draft will also introduce a new liability safe harbour for forward-looking statements in prospectuses.

A draft [public offers and admissions to trading statutory instrument](#) (SI) has been published as part of the package of measures [announced by the Chancellor of the Exchequer in Edinburgh](#) on 9 December. The purpose of this SI will be to replace the UK Prospectus Regulation and introduce a new regulatory framework governing public offers and admissions to trading of securities.

The draft SI sets out the legal framework required to implement the reforms to the prospectus regime which were set out in the government's [UK Prospectus Regime Review Outcome](#) earlier this year. The SI is intended to be made under powers in the Financial Services and Markets Bill which has completed its passage through the House of Commons and will be considered by the House of Lords in January.

This SI will form one small part of the much larger exercise of reforming financial services retained EU law post-Brexit, which in general aims to delegate responsibility for the detail of financial services regulations to the regulators, rather than leaving it in legislation that can only be amended by Parliament.

The draft legislation will, in particular:

- Give the FCA power to redesign prospectus contents,
- Result in fewer cases where a prospectus is required,
- Limit liability for forward-looking statements in prospectuses to encourage better disclosure.

“These changes will simplify regulation in this area and make it more agile and effective, as well as facilitating wider participation in the ownership of public companies and improving the quality of information investors receive.”

Prospectus Regime Review: [Review Outcome](#)

The new prospectus and admissions regime

The regime that will be established under the SI follows the [UK Listing Review](#) (the Hill Review) and the [Prospectus Regime Review](#) in 2021. The changes include removing the requirement for a prospectus for public offerings of securities, and replacing this with a general prohibition on public offerings, subject to exemptions. However, a prospectus will still normally be required when a company's shares or other securities are admitted to listing or trading on a public market for the first time. Other triggers for when a prospectus will be required will be set by FCA or market rules.

The SI will create new “designated” activities of:

- **offering relevant securities to the public** in the UK and communicating advertisements or other information in relation to such offers. “Relevant securities” include transferable securities and certain other securities and investment products, subject to a number of exclusions,
- **admitting, or seeking or obtaining admission of, transferable securities to a regulated market** and communicating related advertisements or disclosures,

- **admitting, or seeking or obtaining admission of, transferable securities on a “primary MTF”** and communicating related advertisements or disclosures. Primary MTFs include AIM and other markets that impose obligations on traded issuers and are not merely secondary trading venues.

Designated activities are activities which will be subject to rules made by the FCA but are not, unlike regulated activities, required to be carried on by an authorised person. The Financial Services and Markets Bill will give the FCA general powers to make “designated activity rules” relating to designated activities. The FCA's rules relating to prospectuses and admissions to a regulated market will be known as “**admission rules**”.

In making admission rules and rules relating to primary MTF admissions, the SI will require the FCA to have regard to the desirability of facilitating offers “being made to a wide range of investors”.

Admission to markets

Regulated markets

Admission rules made by the FCA will specify when a prospectus is required in connection with admissions to a regulated market, and the form and content of such prospectuses, as well as the procedures for submission to and approval by the FCA and publication of prospectuses. Admission rules can also specify conditions to be met before a regulated market operator may admit securities to trading on the market, and require suspension of trading where trading would be detrimental to the interests of investors.

Despite the changes to the legislation underpinning the prospectus regime, many of the core principles and definitions are expected to remain in place, including the need for a prospectus on an IPO when a company is being admitted to trading on a regulated market for the first time. However, a prospectus will not necessarily be triggered by an offering to the public, and the FCA may raise the threshold for when a prospectus is required for offerings of securities of a class that is already listed, including rights issues, without a prospectus. Based on the proposals in the [Prospectus Regime Review](#) and the [Secondary Capital Raising Review](#), the current threshold, where a prospectus is required for an issue of new shares representing 20% of current issued share capital, could be significantly increased, perhaps to 75%.

The listing regime is expected to continue, with the FCA being responsible for the admission of securities to the Official List and for making rules for listed issuers and listing sponsors. This is subject to the [Primary Markets Effectiveness Review \(DP22/2\)](#) whose proposals included merging the current premium and standard segments of the Official List into a new single segment. The FCA is expected to consult further on this topic over the coming months.

Junior markets

The SI will give the FCA powers to require primary MTF operators to have rules imposing obligations on issuers, including rules requiring an issuer to publish a document “described as a prospectus” as a condition of admission of securities to trading. Primary MTFs will otherwise be able to make their own rules requiring a document as a condition to admission to trading on their market and which will be treated as a prospectus, but these prospectuses will not be approved by the FCA.

The FCA rules may make provision about responsibility and liability for prospectuses published in relation to primary MTF admissions, but will not dictate the content of these prospectuses.

Prospectus contents and liability

The necessary information test

While admission rules made by the FCA will govern the specific contents, publication and review requirements for prospectuses, the SI replaces the current “necessary information” provisions of the Prospectus Regulation.

The SI retains the concept of an overarching “necessary information” test, which requires a prospectus to contain the information that is material to investors to make an informed assessment of the issuer’s assets, liabilities, profits and losses, financial position and prospects, the rights attaching to the securities, the reasons for the issue and the impact on the issuer. However, the SI allows for variation in what this requires in practice, based on the nature of the issuer, the type of securities, the circumstances, and whether the issuer has transferable securities admitted to trading. In this context, “prospects” may include creditworthiness. The [UK Prospectus Regime Review Outcome](#) noted that for debt securities issues, the test should focus on an issuer’s or guarantor’s creditworthiness rather than broader prospects.

New forward-looking information standard

The SI sets out the liability regime for prospectuses in place of the current provisions in the Financial Services and Markets Act 2000 and adds a new safe harbour for forward-looking statements as proposed in the Hill Review. In general, liability to pay compensation for misleading statements or omissions will fall on those persons who are responsible for the prospectus (the issuer and the directors in the case of a prospectus relating to shares), with a defence applying to those who can show that they took reasonable steps to ensure the prospectus was not misleading.

However, for forward-looking statements (i.e. projections, estimates, opinions about future events or circumstances, and statements of intention), liability will only apply to a person responsible for the prospectus if they knew or were reckless as to whether the information was untrue or misleading or knew that any omission was a dishonest concealment of a material fact. This means it would be necessary to show fraud or recklessness to establish liability for forward-looking statements, whereas responsible persons may be liable for other statements in prospectuses if they are negligent.

Public offers of securities

Currently, a public offer of securities, whether on or off market, will trigger a requirement for a prospectus unless it falls within one of a number of exemptions – for example, is an offer to qualified investors or to less than 150 persons who are not qualified investors.

The new regime retains the concept of exempt offers, but rather than requiring publication of a prospectus, non-exempt offers of relevant securities will be prohibited altogether. Existing exemptions which will be retained include the ability to offer or sell securities to professional (“qualified”) investors and/or to fewer than 150 other persons.

New exemptions will be added to cover offers of securities of a class which are already, or will be, admitted to regulated markets or a primary MTF, offers made by way of a regulated platform, and offers to existing equity shareholders on a pro rata basis by unlisted/untraded companies.

Relevant securities with a denomination of at least £50,000 or with a minimum consideration per investor of at least £100,000 will also be exempt from the public offer prohibition. The current wholesale exemption for debt and other non-equity securities applies to securities with a denomination of €100,000 or more.

There will be no general exemption equivalent to the current small offers exemption which enables offers below €8 million without a prospectus.

Where a public offer is permitted, there will be a general requirement that material information disclosed by an offeror and addressed to investors in oral or written form must be disclosed in the prospectus, if there is one, or otherwise must also be disclosed to all other investors to whom the offer is addressed.

Next steps and comment

Next steps

The SI is published in draft to illustrate how the new designated activity regime under the Financial Services and Markets Bill will work. Some technical and policy matters are still to be finalised, including the so-called “regulatory deference” regime for offers into the UK of securities listed on overseas stock markets.

The SI will be finalised and passed into law once the Financial Services and Markets Bill has become law during 2023.

The FCA is expected to consult on the development of the new designated activity rules during 2023, in parallel to the legislative processes for enactment of the Financial Services and Markets Bill and the SI.

The practical changes will be subject to a reasonable transition period to avoid disruption to capital raising activities and to allow market participants to adapt.

Comment

Issuers will need to wait until the SI and new FCA rules are in effect to make use of the new prospectus and offerings regime. But once in force, it is likely to mean significant changes in the approach to prospectuses especially in the context of secondary capital raisings by listed issuers, with fewer prospectuses being required. Underwriters and issuers will still, however, need to focus on ensuring adequate disclosure and diligence processes to manage risk when raising new capital from investors.

The forward-looking statements liability safe harbour should be particularly helpful to growth companies. By encouraging public disclosure of projections and forecasts, it will help them to communicate their equity story more clearly.

At the small cap and non-publicly traded end of the market, the use of regulated platforms to enable capital raisings will provide a new way to access investors of all types.

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Please contact any of us if you would like to discuss any the new UK prospectus regime or any other equity capital markets developments.

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