

NEWS BRIEF

UK public offers and admissions to trading regime: a new framework

On 26 July 2024, the Financial Conduct Authority (FCA) published its consultation paper setting out the new Public Offers and Admissions to Trading Regulations regime (POATRs), which would replace the UK Prospectus Regulation Rules (PRR) (CP24/12).

Following the new UK Listing Rules (UKLR), which came into force on 29 July 2024, the proposals in CP24/12 are the latest reforms that diverge from the equivalent EU regulations, making capital raising on UK public markets easier and less costly, and reducing barriers to retail participation (see feature article “New UK Listing Rules: revitalising UK capital markets”, this issue).

General prohibition and exemptions

The POATRs introduce a general prohibition on public offers of securities unless they are made under an exemption. This is a reversal of the position under the retained EU law version of the Prospectus Regulation (2017/1129/EU) (UK Prospectus Regulation) that an offer of securities is lawful if a prospectus is published or an exemption is relied on.

The exemptions under the UK Prospectus Regulation have been largely retained in the POATRs, including the exemptions permitting offers to fewer than 150 persons and offers to qualified investors. New notable exemptions under the POATRs include offers of securities that are already admitted to trading on a regulated market, such as public offers by existing shareholders, and offers of securities to existing shareholders or their connected persons. The FCA is consulting on whether to maintain the exemption for a takeover offer.

Prospectus requirements for further issuances

The FCA proposes to increase the threshold for requiring a prospectus for further issuances of securities that are already admitted to trading on a regulated market, from 20% to 75% of existing share capital. The FCA considers that there are less likely to be concerns about information asymmetry where securities are already admitted to trading, given that existing issuers are already obliged to disclose information under

the Disclosure Guidance and Transparency Rules and the retained EU law version of the Market Abuse Regulation (596/2014/EU) (UK MAR). As such, the FCA concluded that there is no strong rationale for retaining the current threshold for a prospectus on further issuances unless they are of a scale or nature that means that existing disclosures would be insufficient.

Raising the threshold to 75% is a significant departure from the existing rules, given that the increase to 20% from 10% was only introduced in 2017 when the EU Prospectus Regulation came into force, and the EU’s current prospectus reforms only raise the threshold to 30%.

The FCA proposes to allow issuers to publish a voluntary prospectus for approval by the FCA for issuances below the new 75% threshold. It remains to be seen whether issuers will take advantage of this or whether they will simply produce a detailed disclosure document, particularly if the offering is limited to qualified investors. The ability of issuers to take advantage of the new 75% threshold may also be limited in practice while the Pre-Emption Group still limits annual non-pre-emptive issuances to 20% of existing share capital.

Protected forward-looking statements

The existing rules have a negligence liability standard that has deterred most issuers from including forward-looking statements in a prospectus. The requirement to publish outstanding profit forecasts in a prospectus has also meant that even a company that is contemplating an initial public offer (IPO) is reluctant to provide forward-looking guidance to investors if an IPO is a real possibility for it in the near future. The new framework seeks to address this issue by creating the concept of a “protected forward-looking statement” (PFLS), which will be subject to a higher liability threshold based on fraud or recklessness, with the burden of proof placed on investors claiming a loss.

The new liability standard for PFLSs would reduce the risk of successful investor claims for forward-looking statements, thereby

encouraging the inclusion of forward-looking information in prospectuses. Although investors will have a lower chance of success in legal claims relating to losses caused by omissions or untrue or misleading statements in PFLS disclosures, they would benefit from the inclusion of additional and more useful information in prospectuses, which should better inform valuations and pricing.

The FCA proposes to provide a clear framework to give issuers legal certainty on what information can be deemed to be a PFLS. The new rules are proposed to include a general definition that will apply to all PFLS disclosures, category-specific criteria for financial and operational information and specific exclusions. For example, a PFLS would need to be specific and measurable, and exclude aspirational targets or purely narrative statements. In addition, the FCA intends to import the reasonable investor test from UK MAR; that is, a PFLS must be likely to be used for a reasonable investor’s investment decisions. PFLSs will also need to be clearly identified in a prospectus and accompanied by statements and disclaimers that inform investors of the risks relating to PFLS disclosures.

The introduction of the new rules in respect of PFLSs aims to make the inclusion of forward-looking statements more common at both the pre-IPO and IPO stage. Issuers and their advisers will need to consider how PFLSs can be verified, and whether sponsors and underwriters will require additional comfort or reports from the issuer’s reporting accountant. A significant increase in forward-looking statements in prospectuses may also have an impact on the UK securities litigation landscape.

Prospectus content requirements

CP24/12 also sets out proposed changes to the content requirements for prospectuses.

Sustainability-related disclosures. The FCA is considering requiring issuers that have included climate-related risk factors or climate-related opportunities to include certain climate-related disclosures in the prospectus. Where issuers have published

a climate-related transition plan and where the contents are financially material, issuers would be required to include a summary of key information about the plan in a prospectus. This would qualify as a PFLS and so also need to meet those criteria.

For debt prospectuses, issuers will be required to disclose whether the relevant debt securities have been marketed as “green”, “social” or “sustainable”, or issued under a bond framework or a similar document. This is consistent with current market practice for green or sustainable debt securities.

Prospectus summary. The new rules would make the prospectus summary requirements less prescriptive. Detailed financial information would no longer need to be included in the summary and cross-references to other sections of the prospectus would be permitted. Furthermore, the mandatory page limit would be increased from seven to ten pages.

Working capital statement. The FCA is considering whether issuers should be allowed to disclose significant judgments made in preparing the working capital statement, including the assumptions that the statement is based on and the sensitivity analysis that an issuer and its advisers have performed. The FCA is also seeking

views on whether issuers should be able to base their working capital statements on the underlying due diligence that is performed for the purposes of viability and going concern disclosures in their annual financial statements. This approach also aligns with removal of the requirement for a “clean” working capital statement for issuers seeking to list on the new equity shares (commercial companies) listing category under the new UKLR.

MTF admission prospectus

The FCA is proposing to require a multilateral trading facility (MTF) admission prospectus for all initial admissions to MTFs, such as AIM, and reverse takeovers of companies admitted to MTFs. This would enable retail investors to participate in IPOs on AIM and other MTFs and encourage increased retail participation.

An MTF admission prospectus would be subject to the same statutory responsibility and compensation provisions that apply to prospectuses; for example, the requirement for a supplementary prospectus for omissions and material misstatements as well as withdrawal rights. However, the detailed content requirements and the process for reviewing and approving an MTF admission prospectus will be set by the relevant MTF operator, such as the London Stock Exchange

in respect of AIM. MTF operators would also have discretion in deciding whether an MTF admission prospectus would be required for further issuances of shares.

The six-day rule

The FCA is proposing to shorten the period for which an IPO prospectus must be made available to retail investors before shares can be admitted to trading, from six working days to three. The current six-day rule is deemed to be a significant barrier because of the delay that it imposes and the period for which a prospectus remains live. Shortening this period is designed to encourage issuers to include a retail tranche as part of any offering.

Next steps

Responses to CP24/12 can be provided by 18 October 2024. The FCA is aiming to finalise the rules for the new regime introduced by the POATRs by the end of the first half of 2025 and there would then also be a further period before the new rules come into force.

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CP24/12 is available at www.fca.org.uk/publication/consultation/cp24-12.pdf.
