

## **Repeal of the Public Offers of Securities Regulations and the EU Prospectus Directive**

The Financial Services Authority published its policy statement and near final rules on the implementation of the Prospectus Directive in June 2005.

The Prospectus Directive aims to improve market efficiency by enabling companies to gain access to financial markets across the EU through the production of a single approved prospectus. It seeks to protect investors by requiring high standards of disclosure within these prospectuses.

The Directive identifies two circumstances where a prospectus is required:

- i. when an offer of securities is made to the public;
- ii. when securities are admitted to trading on a regulated market.

The Directive also introduces the concept of a single “passport” for issuers, where a prospectus approved by one competent authority (FSA in the UK) is available for use throughout the EU, without additional approval or significant administrative requirements from competent authorities of other Member States.

The Directive establishes a new regulatory regime that requires, amongst other things, the production of prospectuses in relation to securities “admitted to trading on a regulated market”. This change largely replaces the existing regime for listed securities in the UK, however, the overall effect is likely to be relatively small, due to the fact that companies that previously had to produce Listing Particulars, by virtue of being listed, will generally now be required to produce a prospectus in relation to admission of their securities to trading. The exemptions contained within the Directive are similar to those previously applying to listed companies and the prescribed content of the prospectus is very closely aligned with that of the set of Listing Particulars. Consequently, listed companies will not generally be required to produce prospectuses more or less regularly or in a different form under the new regime.

The Directive also brings in important changes in relation to when “an offer of securities to the public” is made. Under the existing UK Public Offer of Securities regime, any such offer to the public of non-listed securities would require the production of an (unapproved) prospectus. Under the new regime any offer to the public will require a prospectus to be approved by the relevant competent authority.

The entities most directly affected by the Directive are largely the same ones affected by the existing laws and regulations, namely those companies offering securities to the public or seeking admission of securities to trading on a regulated market.

The Directive imposes few new obligations on companies with securities admitted to trading on a regulated market compared to the existing Listing regime. The main ones are as follows:

- Compliance
- Internal Audit
- Risk Management
- Corporate Governance

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- **Annual information.** Article 10 of the Directive requires issuers whose securities are traded on a regulated market to provide the competent authority, at least annually, with a document that contains or refers to all information that they have published or made publicly available within and outside the EU over the preceding 12 months. (It is estimated that preparing the update will take, on average, 1.5 days of compliance officer time)
- **Summary of Prospectus.** The Directive requires that all prospectuses include a summary, with the exception of prospectuses relating to non-equity securities having a denomination of €50,000 or more if the securities have been admitted to trading on a regulated market.

The FSA has estimated that familiarisation with the new prospectus rules would require two days of compliance officer time, costed at approximately £400 per day.

Any company not publicly traded, may bear incremental costs as a result of making “offers to the public” as captured by the Directive and hence requiring a prospectus approved by the FSA. The incremental cost of preparing an approved prospectus, compared to an unapproved prospectus, has been estimated by the FSA at £50,000 largely comprising legal and professional costs.

Smaller companies then are likely to be unaffected, the Directive captures those companies which have securities admitted to trading on regulated markets and these tend to be substantial businesses which are generally required to have more than 25% of the business owned by third parties. In addition, in relation to public offers of securities, small companies are likely to be able to use the exemptions within the Directive that enable them to avoid production of a prospectus.

- These exemptions are found in s.86 of Schedule 11A of the Directive and are as follows:
  - the offer is made to or directed at qualified investors only [*same as in 1999 Regs*];
  - the offer is made to or directed at fewer than 100 persons [*increased from 50 persons in the 1999 Regs*], other than qualified investors, per EEA State;
  - the minimum consideration which may be paid by any person for transferable securities acquired by him pursuant to the offer is at least €50,000 (or an equivalent amount) [*increased from €40,000 in the 1999 Regs*];
  - the transferable securities being offered are denominated in amounts of at least €50,000 (or equivalent amounts) [*increased from €40,000 in the 1999 Regs*]; or
  - the total consideration for the transferable securities being offered cannot exceed €100,000 (or an equivalent amount) [*increased from €40,000 in the 1999 Regs*].
- Where a client has employed a qualified investor, an offer made to or directed at the qualified investor is not to be regarded as also having been made to or directed at the client.