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THE NEW UK PUBLIC OFFERS AND ADMISSION TO TRADING REGIME: IMPACT ON DEBT CAPITAL MARKETS

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The replacement UK public offers and admission to trading regime will not be ready until 2025. Indeed, the UK FCA has yet to consult on draft rules. But the skeleton legislative 'framework' is now in place, with the statutory instrument to create the regime having been adopted by Parliament at the end of January 2024.

This article considers key concepts in the Public Offers and Admissions to Trading Regulations 2024 (the 'UK SI') – notably, the new public offer prohibition and extension of scope to non-transferable securities. It also flags prospectus disclosure considerations, either in the UK SI itself or due to be covered in the forthcoming FCA consultation.

Key issues

- Rather than requiring an approved prospectus for a public offer, the UK SI contains a prohibition: it will be unlawful for 'relevant securities' to be offered to the public in the United Kingdom.
- The range of exceptions to the public offer prohibition include many familiar concepts.
- The definition of 'relevant securities' in relation to public offers has been extended to capture non-transferable securities (in response to a default of an issue of minibonds).
- The FCA will be consulting on prospectus content rules and admission to trading requirements in 2024.

Creating the new regime

Before addressing the detail of the new legislation, it is worth briefly outlining the structure and component parts of the proposed new regime – one of the initial measures in the Government's so-called 'Edinburgh Reforms' to overhaul UK financial markets, and made under powers in the UK Financial Services and Markets Act 2023.

The Financial Services and Markets Act 2023 creates a new 'designated activities regime' to operate alongside the existing regulated activities regime in the UK. Pursuant to the UK SI, offering securities or admitting securities to trading on a regulated market or primary MTF in the UK become designated activities. Making any related communications and advertisements will, similarly, be designated activities.

The new UK public offer and admission to trading regime is being created by a mix of legislation and accompanying regulator rules:

- The UK SI creates the new public offer framework, and also key features that will be relevant for prospectus disclosure and for admission to trading. It also makes associated changes to other UK legislation.
- In line with the general approach to legislation under the Financial Services and Markets Act 2023, however, detailed rule-making powers have been delegated to the UK Financial Conduct Authority (FCA), including as to prospectus content and admission to trading requirements (for UK regulated markets and some UK MTFs).

Timing and transition

Although the UK SI has been passed, it will only come fully into force (and repeal the current 'assimilated law' regime entirely) once the final FCA rules have been prepared. In terms of progress towards final rules, the FCA engaged with market participants in informal discussions during 2023 regarding six 'Engagement Papers' on various aspects of the new regime. In December 2023, the FCA also published a summary of

the feedback that it had received. But the formal FCA consultation to create granular content and draft rules is not expected until summer 2024, and the FCA has stated that it '*will seek to make final rules in the first half of 2025*'.

Irrespective of the final date for implementation of the replacement regime, the UK SI contains a key provision relevant for those with debt issuance programmes. Transitional provisions in the UK SI contemplate continued use of a prospectus approved under the current 'assimilated law' UK prospectus regime, for the remainder of the twelve-month life of the prospectus.

This is in line with commentary from HM Treasury regarding appropriate transitional provisions to support the repeal of the existing UK Prospectus Regulation. HM Treasury also confirmed that the FCA will also ensure reasonable transition periods once relevant rules are finalised, to avoid disruption to companies' capital raising activities.

The public offer regime under the UK SI

A notable change under the new regime (and one which will distinguish the UK regime from its European counterpart) is that the UK SI recrafts the approach to public offers. Rather than requiring an approved prospectus for a public offer, instead the UK SI contains a prohibition: it will be unlawful for 'relevant securities' to be offered to the public in the United Kingdom.

That said, the UK SI contains some specific exceptions to the prohibition and, in fact, much in the 'recast' new public offer regime remains familiar.

The definition of a public offer under the UK SI, for example - or, technically, an 'offer of relevant securities to the public' - remains the same as under the current regime, although the scope of 'relevant securities' is different and is discussed further below.

Moreover, the range of exceptions to the public offer prohibition include many familiar concepts – see text box A. In practical terms, therefore, the ultimate position may not differ significantly from the status quo today – at least for 'wholesale' bonds with high denominations or bonds which are only targeted at 'qualified investors' in the UK.

Text Box A

Public offer exceptions listed in Schedule 1 of the UK SI

(All relate to 'relevant securities' other then as shown)

General

- Total consideration of less than £5 million or equivalent
- Solely to 'qualified investors'
- Fewer than 150 persons in the United Kingdom, other than qualified investors
- Denomination per unit amounts to at least GBP 50,000 or equivalent
- To persons who acquire for total consideration of at least GBP 100,000, or equivalent, per investor

Other

- Admitted or to be admitted to trading on a regulated market or primary MTF. (This exception refers to "transferable securities" and to an offer "conditional on" admission.)

- To existing holders of shares
- To persons already connected with offeror company
- In connection with takeovers, etc.
- To directors or employees
- Offered under banking or central counterparty special resolution regime
- Made by means of a regulated platform.

Focusing on just a few items in the list of public offer exceptions:

- **Denominations:** The minimum £50,000 denomination threshold would mean that debt securities with a denomination of EUR 100,000 could be offered in the United Kingdom pursuant to the UK SI threshold exception. That is helpful for 'wholesale' bonds structured to benefit from the minimum denomination threshold for an exempt public offer under the EU Prospectus Regulation regime. (Conversely, issuers wishing to make offers into the EEA using the minimum denomination threshold exemption under the EU Prospectus Regulation will need to think beyond the UK SI denomination threshold exception of £50,000; issuers may, therefore, still opt for higher denomination thresholds (that is, equivalent to EUR 100,000).)
- **An 'offer of transferable securities admitted or to be admitted to trading'**. This is a new concept in the UK SI. There is some uncertainty around the meaning of an offer 'conditional on the admission' (see text box A), and how this might work from a timing perspective. Further colour might be provided in the FCA rules, once prepared, given that a suitably-vetted prospectus or MTF prospectus (or other document) will likely be required in many cases where securities are 'to be' admitted to trading, unless an appropriate admission exemption applies.
- **An 'offer by means of a regulated platform'**: This is another new exception. It is intended to enable a route for public offers in circumstances where the offer is not otherwise excepted from the prohibition on public offers (including the £5 million threshold Schedule 1) and where there will be no admission to trading. This exception is sometimes loosely described as a securities-based 'crowdfunding platform'.

The UK government is creating a new regulated activity covering the operation of a new electronic 'public offer platform' (or 'POP'), by amending the FSMA (Regulated Activities) Order 2001, and the POP would be operated by a person with permission for the regulated activity. However, under its delegated powers, the UK FCA will determine requirements for such platforms (including the levels of due diligence and disclosure required on offers made through them). One of the UK FCA's six Engagement Papers last year focused solely on the POP.

The different 'securities' definitions within the UK SI

Unlike the current UK prospectus regime, the UK SI introduces a distinction in scope between securities offered to the public in the UK and those to be admitted to trading on a regulated market or primary MTF. For public offers, the provisions apply to 'relevant securities'; for admission to trading, the provisions apply to 'transferable securities'.

The definition of 'relevant securities' in relation to public offers is a new concept in the UK SI. The government broadened the scope beyond the familiar definition of 'transferable securities' to capture non-transferable securities. This broader scope was a response to a high-profile default of an issue of 'minibonds' (that is, non-transferable securities which fell outside the scope of the UK prospectus regime).

Briefly, the new concept of 'relevant securities' includes 'transferable securities' (other than 'transferable securities' which are 'excluded securities' (that is, broadly speaking, sovereigns, supranational issuers, and various other excluded products, such as money market instruments with a maturity of less than one year)). Additionally, certain other 'investments' are added into the scope of the 'relevant securities' definition – see text box B.

When assessing the impact on debt capital markets, it is clear that 'mainstream' bonds fall squarely within the definition of 'relevant securities' – and, therefore, squarely within the UK SI public offer prohibition. Accordingly, the fact that the exceptions in Schedule 1 of the UK SI replicate so many of the public offer exemptions under the current regime, including those exemptions most commonly considered in a debt context, is welcome.

Text Box B
'Relevant securities' definition

"… (a) transferable securities, other than excluded securities,

and

(b) investments that—

(I) are of a kind specified for the purposes of section 22 of FSMA 2000 (regulated activities) as a result of article 77 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (instruments creating or acknowledging indebtedness), but

(ii) are not transferable securities or excluded securities…"

…

For ease of reference an extract from article 77 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 is set out below:

Art 77 RAO:

"..(a) debentures; (b) debenture stock; (c) loan stock; (d) bonds; (e) certificates of deposit; (f) any other instrument creating or acknowledging indebtedness…"

Prospectuses and admission to trading

As mentioned above, the skeleton framework for the regime under the UK SI is only a starting point. The remit of the UK FCA, under the Financial Services and Markets Act 2023 delegated powers, covers the bulk of the regime – including powers to specify when a prospectus is required, what the prospectus for a regulated market should contain, whether it should have a summary, who will be responsible for the prospectus, and the manner and timing of the approval and publication of a prospectus.

Suffice to say that the concept of a prospectus for admission to trading of 'transferable securities' on a UK regulated market will continue under the new regime - and will also be introduced for certain UK primary MTFs, to be known as an 'MTF admission prospectus.'

Detailed prospectus content requirements remain unknown, at this stage. Indeed, the FCA indicated in its December 2023 summary feedback paper that it was not yet communicating its likely response on any of the industry discussions last year in connection with its various Engagement Papers.

Accordingly, the formal consultation by the FCA during 2024 will be the next significant step. The following (non-exhaustive) list indicates some of the key themes of interest for debt capital markets and were suggestions proposed by the UK FCA last year as options under consideration for its rules:

- whether there will be uniform disclosure for wholesale and retail prospectuses (adopting wholesale-style disclosure for all);
- the amount of ESG disclosure which will be mandated in the prospectus (with two alternative levels of information proposed by the FCA in the Engagement Papers);
- the scope of 'protected forward-looking statements' (see below);
- whether prospectus summaries might be dropped altogether;
- how the FCA will apply withdrawal rights and requirements when a supplement is prepared;
- whether a lighter disclosure regime might be created for certain vanilla sterling denominated bonds issued by non-financial corporates; and
- any leniencies for certain types of issuers or for certain fungible issues.

Statutory provisions relevant to prospectus content

In the meantime, the UK SI sets out some provisions which will be pertinent both to prospectus disclosure and to liability:

Necessary information test: The UK SI outlines the new 'necessary information' test to determine what should be included in a prospectus. This largely corresponds with the current 'Article 6 test' under the UK Prospectus Regulation regime by which an issuer determines appropriate prospectus content. There are, however, small differences:

- the 'necessary information test' no longer makes a disclosure distinction based on higher denominations. How that will translate in practice when it comes to preparing a prospectus for admission to trading will depend on the UK FCA implementation;
- for debt prospectuses, the 'prospects' of the issuer and of any guarantor are to be read as a reference to the 'creditworthiness' of the issuer and of any guarantor. Again, final colour will come from the UK FCA rules; and
- MTF admission prospectuses will also have to adhere to the 'necessary information' test.

Protected forward-looking statements: The draft UK SI makes a change to the liability threshold for certain 'protected forward-looking statements' or 'PFLS'. Rather than the standard negligence threshold, liability will not attach in respect of the PFLS unless there is knowledge or recklessness as to whether something was untrue or misleading, or knowledge that an omission was dishonest concealment of a material fact.

A forward-looking statement is described in the UK SI as including a statement containing a projection, forecast, estimate, forecast or target, a statement giving guidance, a statement of opinion as to future events or circumstances, or a statement of intention. It will be a protected forward-looking statement only if it is of a kind specified by the UK FCA (another of the FCA powers) and where accompanied by an appropriate statement identifying it as a PFLS.

The PFLS concept follows a recommendation which was part of the Lord Hill Listing Review, a few years ago, that such statements are helpful for investors. However, it remains to be seen whether those involved in preparing a prospectus would wish to include such forward-looking statements on this basis.

In the debt world, the PFLS is likely to be most relevant in the context of Environmental, Social and Governance (ESG) information and might encourage issuers to be more willing to include such ESG disclosure in prospectuses.

UK regulated markets and primary MTFs

- Notably, although the UK SI brings primary MTFs within scope of the regime, there is an important distinction. The FCA's powers to make 'designated activity rules' in relation to MTFs are more limited – especially for MTFs restricted to qualified investors.
- Even for primary MTFs which are not restricted to qualified investors, the FCA may only specify certain criteria, and the FCA's powers are limited solely to requiring an MTF admission prospectus or supplementary prospectus to be produced (and to certain related rules, such as relating to responsibility for the MTF admission prospectus). However, the UK FCA can neither specify requirements as to the content of the MTF admission prospectus, nor require the MTF admission prospectus to be reviewed or approved by the UK FCA. Accordingly, MTF operators will retain significant autonomy as to their rules and prospectus content.

Regulatory deference

- One item which is not addressed in the UK SI and which will be of interest to debt capital markets is 'regulatory deference'. This would permit offers into the UK or admission to trading in the UK of securities listed on certain overseas stock markets, using offering materials approved by the appropriate overseas regulator. In relation to those selected jurisdictions, no additional UK FCA review and approval of the offering documentation would be required; instead, full reliance would be placed on the effectiveness of the regulation of the relevant overseas market.
- The concept of regulatory deference in relation to other third country prospectus regimes was raised by HM Treasury in its 9 December 2022 Policy Note which accompanied the initial illustrative draft of the UK SI, but it has seemingly not been progressed. It is therefore not clear, at this stage, whether HM Treasury will choose to take the concept of a regulatory deference policy forward, in parallel with the new UK regime.

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