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FINANCIAL CONDUCT AUTHORITY

Primary Market Bulletin

Newsletter from the FCA for primary market participants

About this edition

Welcome to this 22nd edition of the Primary Markets Bulletin (PMB). As in the recent 21st edition, we focus on issues associated with the withdrawal of the UK from the EU.

In this edition, we advise issuers and other stakeholders of key changes to the Listing Rules, the Disclosure Guidance and Transparency Rules and the Prospectus Rules that will be applicable if the UK leaves the EU on 29 March 2019 without an implementation period (a no-deal scenario).

Parliament has approved a legal framework, in the form of a Statutory Instrument (the Official Listings SI) that will apply from exit day. The SI will amend retained EU law related to listing of securities, prospectuses and transparency requirements and will be made under the terms of the European Union (Withdrawal) Act 2018.[1]

We recently published a Policy Statement on changes we are making to our Handbook. These ensure consistency with the revised legal framework and make other changes necessary to correct deficiencies and ensure the ongoing smooth operation of our Handbook.

This PMB summarises the key changes to the relevant Handbook provisions.

The new rules we mention would immediately apply from Exit day in a no-deal scenario (except where we indicate otherwise). They closely mirror existing requirements that issuers would have in the UK or their home state. Accordingly, we expect issuers to take reasonable steps to comply with these changes for exit day.[2]

We continue to prepare for a range of scenarios. If there is an implementation period, then these changes to our rules will not be made. For the latest information see our Brexit webpages.

Overall approach taken in the Official Listings SI

In a no-deal scenario, the UK's primary markets regime after Brexit will apply to all issuers that:

- have securities admitted to trading, or have applied to admit securities to trading, on a UK regulated market or admitted to listing in the UK, or
- are making a public offer in the UK

1. See also Treasury's explanatory information on this SI: https://www.gov.uk/government/publications/draft-official-listing-of-securities-prospectus-and-transparency-amendment-eu-exit-regulations-2019/draft-official-listing-of-securities-prospectus-and-transparency-amendment-eu-exit-regulations-2019-explanatory-information.
2. See, for further information, https://www.fca.org.uk/news/statements/brexit-what-we-expect-firms-now.

This applies regardless of the country the issuer is incorporated in. So, some issuers will have to make disclosures or do things according to our rules where they currently only follow their home competent authority's rules.

Disclosure Guidance and Transparency Rules (DTR)

Key considerations for issuers from Exit day (in a no-deal scenario)

- All issuers with securities admitted to trading on a UK-regulated market will have to comply with the transparency rules. This means that some issuers whose current home member state is not the UK will need to comply with the transparency rules.
- Issuers preparing consolidated accounts will have to use International Financial Reporting Standards (IFRS) as adopted by the UK (UK-adopted IFRS) for all financial years commencing on or after Exit day, instead of IFRS as adopted by the EU.
- The Treasury intends to issue an equivalence decision, in time for Exit day, that would determine EU-adopted IFRS to be equivalent to UK-adopted IFRS for the purposes of the Prospectus Directive (PD) and Transparency Directive (TD). On this basis, non-UK incorporated issuers will be able to prepare their consolidated accounts using EU-adopted IFRS.
- Auditors based in the EEA will become subject to the requirements currently applicable to third-country auditors, including registration with the Financial Reporting Council (FRC). However, for financial years beginning before Exit day, the current provisions allowing the use of an EEA auditor without registration will remain in force.
- Issuers will only be able to use a Primary Information Provider (PIP) to distribute regulated information. Currently, they are also able to use an incoming information society service.

Transparency requirements

DTR 1A and 4-6, covered in this section, currently apply only to issuers with transferable securities admitted to trading on a regulated market in the EU and for which we are the home competent authority (except for DTR 5 which also applies to UK issuers with securities admitted to trading on prescribed markets).

After Exit day, our transparency rules will apply to all issuers with transferable securities admitted to trading on a UK regulated market irrespective of their place of incorporation. The 'home/host' concept, which currently determines which member state's rules apply, will not be relevant in the UK after Brexit.

DTR 4 – Periodic Financial Reporting

We will amend the provisions setting out which public-sector issuers can benefit from an exemption from publishing annual and half-yearly financial reports to remove references to the EEA. This is in line with changes the Treasury has proposed to Part VI of FSMA in relation to public sector issuers. Consequently, after Exit day, a wider group of issuers will benefit from the exemption from publishing these reports, notably public international bodies and central banks.

At present DTR 4.1.6R requires issuers with securities admitted to trading on an EU regulated market which prepare consolidated accounts to make use of International Financial Reporting Standards (IFRS) as adopted by the EU, unless:

- the accounting standards they use to publish consolidated accounts are deemed equivalent by the European Commission, and
- for TD purposes, we have also assessed the standards and granted an exemption

After Exit day, issuers will instead be required to use UK-adopted IFRS for all financial years commencing on or after Exit day.

After Exit day, issuers from third countries, which will include issuers from the EEA, will continue to be able to use other accounting standards if these have been deemed equivalent to UK-adopted IFRS, and we have granted an exemption for that standard. The existing Commission equivalence decisions and FCA exemptions will continue to apply after Brexit for the changed requirement.

In addition, the Treasury has stated that it intends to issue an equivalence decision, in time for Exit day. This will determine that EU-adopted IFRS can continue to be used to prepare financial statements for TD requirements and for preparing a prospectus under the PD. On this basis, we will grant an exemption for any third-country issuers (including issuers from EEA states) in respect of EU-adopted IFRS from the amended requirement in DTR 4.1.6R. All issuers will be able to continue to prepare financial accounts using EU-adopted IFRS for financial years beginning before Exit day.

DTR 4.1.7R permits UK traded non-EEA issuers to use an EEA auditor to provide the audit report in respect of their annual financial statements. After Brexit, auditors based in the EEA will become subject to the requirements currently applicable to third country auditors, including registration with the FRC. This will also apply when they audit UK traded EEA issuers. We will amend DTR 4.1.7R to reflect this change.

Again, for financial years beginning before Exit day, the current provisions allowing the use of an EEA auditor without registration will remain in force. Registration for financial years beginning on or after Exit day will be required in time for the auditor to sign the relevant audit report.

DTR 5 – Vote Holder and issuer notification rules

DTR 5 imposes notification requirements on issuers and on holders of voting rights in issuers. Currently, only holders of voting rights of issuers for whom the UK is the home competent authority must notify issuers and us of their holdings. After Brexit, holders of voting rights in any issuer with shares admitted to trading on a UK regulated market will have to notify their holdings to us using a TR1 form.

This means that holders of voting rights of an EU issuer with securities admitted to trading both on a regulated market in its country of incorporation and on a regulated market in the UK will have to start notifying us of their holdings. They must also continue to notify the national competent authority of the issuer's country of incorporation (which would be the issuer's TD home member state).

Similarly, holders of voting rights of a third-country issuer with securities admitted to trading both on a UK regulated market and on a regulated market in an EU country must:

- Start notifying us of their holdings if the EU country is currently the issuer's TD home member state. They must also continue to notify the national competent authority of the EU country where the issuer has its shares admitted to trading on a regulated market.
- Continue notifying us of their holdings if the UK is currently the issuer's TD home member state. They must also start notifying the national competent authority of the EU country where the issuer has its shares admitted to trading on a regulated market (which will become the issuer's TD home member state going forwards).

The notification requirements do not currently apply in respect of voting rights attached to shares provided to or by members of the European System of Central Banks in the context of carrying out their functions as monetary authorities. After Brexit, the notification exemption will only apply to voting rights attached to shares provided to or by the Bank of England in the context of that function.

DTR 6 – Continuing Obligations and access to information

DTR 6 sets out, among other things, the requirements that issuers need to comply with when disseminating regulated information. Currently issuers can choose between using an FCA-approved PIP or an incoming information society service. After Brexit, issuers will only be able to use a PIP to disseminate such information.

We will also change DTR 6.2 so that regulated information must be disclosed in English.

Corporate governance requirements

DTR 1B and 7.1 set out requirements in relation to audit committees. DTR 1B.1.3R provides an exemption from DTR 7.1 for an issuer which is a subsidiary undertaking of a parent undertaking, where the parent undertaking is subject to DTR 7.1 or to requirements implementing article 39 of the Audit Directive in any other EEA State.

After Brexit, these issuers will only be exempt from DTR 7.1 where the parent undertaking is subject to DTR 7.1. However, the existing exemption will continue to apply in respect of financial years beginning before exit day.

Listing Rules (LR)

Key considerations for issuers from Exit day (in a no-deal scenario)
• Holders from any jurisdiction will be counted towards the free float (the calculation will no longer be limited to EEA holders).

Free float requirements

LR6.14R, LR14.2.2R and LR18.2.8R require that when an issuer applies for admission of shares or depositary receipts over shares to the Official List it must demonstrate that sufficient securities of that class are distributed to the public in one or more EEA states. The requirement is met when at least 25% of the securities are distributed in this way, although the FCA may accept a lower threshold. The underlying rationale for this rule is to ensure that there will be enough liquidity in the listed securities. This is also referred to as the 'free float'.

LR also set continuing obligations for issuers to maintain this level of securities in public hands within the EEA.

From Exit day, we will remove the reference to EEA holders in the rules, meaning that holders from any jurisdiction will be counted towards the free float.

The Prospectus Directive

Key considerations for issuers from Exit day (in a no-deal scenario)

- Prospectuses passported into the UK before Exit day will remain valid for use in the UK until their validity expires – even where the prospectus expires after Exit day
- Where a supplement is required for such a prospectus after Exit day, the issuer must apply to us for approval of the supplement.
- Certain public body issuers can issue their securities without producing a prospectus under FSMA. This will no longer be limited to public international bodies for which at least an EEA state is a member. Instead, any public international body for which at least a state is a member will be able to issue securities without a prospectus.
- Governments or local/regional authorities of any state will be able to issue non-equity securities without needing to produce a prospectus- this will no longer be limited to governments and local/regional authorities of EEA states.

Under the revisions to FSMA proposed in the Official Listing SI, where a prospectus passport has been issued by other EEA member states to us before Exit day the prospectus will remain valid in the UK until its expiry, provided it was valid on Exit day. If the prospectus is required to be supplemented after exit day, the issuer must request that we approve the supplements.

However, after Brexit EEA issuers will no longer be able to passport prospectuses into the UK. Those EEA issuers which previously submitted their prospectus for review and approval to their home member state and then passported the document into the UK will need to submit their prospectus to us for review and approval. They will need to do this if they wish to continue to make public offers of their securities in the UK or if they wish the securities to be admitted to trading in the UK. This is in addition to any prospectus review process that might be conducted by the EEA home member state authority.

Recognising that this may result in additional transaction review work from EEA issuers which previously used the prospectus passporting route, we confirm we expect to be able to handle this additional caseload within our existing turnaround times. Apart from where we have amended the Prospectus Rules according to our Brexit consultation or where a requirement is altered under the revisions to FSMA, the regime remains the same. Our reviews will be conducted against existing rules, guidance, processes, and service standards.

We are happy to receive a draft prospectus for review at the same time as EEA member states. Equally, we are happy to review a document after its approval by an EEA member state authority.

Finally, there are two areas where existing exemptions will be made wider because of the revisions to be made to FSMA by the Official Listing SI. Advisors for public body issuers should note that:

- More public body issuers will be able to issue their securities without producing a prospectus. The public body issuers carve-out will no longer be limited to public international bodies for which at least one EEA state is a member. Instead, any public international body for which at least one state is a member will be able to issue securities without a prospectus.
- Governments or local/regional authorities of any state will be able to issue non-equity securities without needing to produce a prospectus. This will no longer be limited to governments and local/regional authorities of EEA states.

Prospectus Regulation

The EU will change its prospectus regime on 21 July 2019 when Regulation (EU) 2017/1129 (Prospectus Regulation) replaces and repeals the PD. We published our Consultation Paper CP19/6 - Changes to align our Handbook with the EU Prospectus Regulation on 28 January 2019. The consultation proposes changes to our Handbook which will apply if the UK leaves the EU with a withdrawal agreement and observes an implementation period following departure.

ESMA Prospectus Q&As

On 31 January 2019, ESMA published its 29th update to its Prospectus Questions and Answers. It included two Brexit-related PD Q&As prepared for a no-deal scenario and covers:

- choice of PD home Member State for third country issuers
- use of prospectuses approved by the UK

ESMA Transparency Directive Q&As

The same day, ESMA published a new version of its Transparency Directive Questions and Answers. It included the following Q&A, for a no-deal scenario:

- choice of TD home Member State for third country issuers