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GMS Flash Alert

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United Kingdom - What New EU Prospectus Regulation Means for Share Plans

The European Parliament has produced a new Regulation on the prospectus requirements where securities are offered to the public.

The Regulation imposes a primary obligation to simplify the requirements related to prospectuses while still ensuring that investors remain well informed. Its intention is to open up access to the European capital markets for investors and ensure that the prospectus requirements should be applied in a "uniform manner throughout the Union.".

WHY THIS MATTERS

The Regulation contains a number of provisions to determine when a prospectus is required, the information that prospectus should contain, and its approval and publication.

The Regulation has removed the need for a market equivalency decision to be made, which should help promote employee share schemes for all companies, no matter where they are registered or listed. Not only global companies, but also now U.K. companies, should welcome this step. In light of the June 2016 Brexit referendum vote, this relaxation could provide some relief for U.K. companies as the U.K. undergoes the process of withdrawing from the EU. If the need for making a market equivalency decision had been retained, after Brexit, U.K. companies would need to produce a formal prospectus with the related costs that have previously adversely affected offers proposed by global companies not registered or listed in the EU.

Background

European Parliament Approves Regulation

On December 7, 2016, the presidency reached provisional agreement with the European Parliament on the new Regulation to govern the rules for prospectuses. The Regulation ("The Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading") was published in final text on December 16, 2016.[1]

The Regulation is a result of submissions made on behalf of the employee share schemes industry, primarily regarding the restrictive nature of the EU Prospectus Directive (EUPD). The EUPD includes specific exemptions that industry has relied on for offers to directors and employees. These have been reviewed and some revised, in particular, the employee share schemes exemption, which includes limitations and does not apply to offers made by companies not registered or listed in the European Union. These limitations are to be removed.

Regulation Compared to a Directive

The implementation of the new prospectus regime as a regulation rather than a directive is significant. It means the Regulation will have immediate effect without the need for local law to become part of the legislation of each EU member state. It must also be applied by the letter, with the same wording and effect. This is not the case with a directive, under which a member state's legislative body can have flexibility with respect to interpretation and implementation. This has clearly been an issue with the EUPD as certain provisions were not enacted in some member states and different interpretations were given to other provisions and exemptions.

The Regulation in Brief and Employee Share Plan Exemption

Among other things, the Regulation provides for the determination of:

- when a prospectus is required,
- the information that the prospectus should contain, and
- the prospectus's approval and publication.

Moreover, it contains the current exemptions, with some changes. The EUR 5 million exemption has been "flexed" to a EUR 1 million up to EUR 8 million exemption, in a 12-month period, as decided by each member state.

KPMG NOTE

This leaves room for differences. It also allows for member states to impose local rules, provided those do not "constitute a disproportionate or unnecessary burden"; again, because it injects a level of flexibility this can lead to a lack of uniformity.

The 150-persons exemption remains unchanged.

Among the more relevant exemptions worth focusing on is a revised employee share schemes exemption.

The revised terms take into account that incentivising directors and employees to hold securities in their own company or group is positive for the company, its shareholders, and the recipients. Employee share schemes are recognised as an important mechanism to align the interests of those relevant stakeholders in the success of a business.

The Regulation states that there should be no requirement to publish an approved prospectus for offers made in the context of an employee share scheme. A document simply needs to be provided containing information on the number and nature of the securities and the reasons for and details of the offer.

KPMG NOTE

No specific pro-forma has been provided by the EU Commission. The documents usually provided to participants could be updated to comply with this requirement or a separate document provided.

Perhaps the most important change is that the revised exemption can apply to foster equal access to employee share schemes to directors and employees of all companies, whether or not a company is established or listed inside or outside of the EU. There is no longer a requirement for an equivalency decision.

The No Equivalency Decision Requirement Is More Significant Post-Brexit

To promote employee share schemes for all companies, no matter where they are registered or listed, the Regulation has removed the need for a market equivalency decision to be made. This is of crucial importance for global, as well as now for U.K. companies. Due to the Brexit vote, this relaxation will provide some comfort to U.K. companies during the process of the U.K.'s withdrawal from the EU. Without it, after Brexit, U.K. companies would need to produce a formal prospectus with the related costs which have previously adversely affected offers proposed by global companies not registered or listed in the EU.

Progress of the Regulation

The final text of the Regulation was adopted by the EU Parliament on April 5, 2017.[2] The press release from the EU Parliament states that the Regulation will come into effect 24 months after its "entry into force." The timing of the entry into force has not yet been confirmed.

KPMG NOTE

Exemptions for Employee Share Schemes and Timing of Full Implementation for the Regulation

The KPMG International member firm in the U.K. has been taking a proactive role – being in periodic contact with the European Commission to raise questions, contribute ideas, and generally to better understand the state of affairs. It needs to be clear to the EU Commission that only a full, unrestricted exemption for employee share schemes will establish that they are not accidently still caught by the prospectus regime.

At present, the authorities have indicated that there is no plan to provide guidance on the employee share scheme exemption.

It is understood the expected full implementation of the Regulation will be around July 2019.

RELATED ARTICLE

This article is excerpted, with permission, from "KPMG-EU Prospectus Regulation Article" (April 2017), a publication of the KPMG International member firm in the United Kingdom.

FOOTNOTES:

1 See the European Parliament's "Briefing" (February 2017).

To access/view the texts adopted and current status on the European Parliament's Web site, click here.

Also, see the European Commission's press release, "Capital Markets Union: Commission welcomes agreement to give companies easier access to capital markets" (December 8, 2016).

For additional information on the European Council's Web site, click here.

2 To access/view the texts adopted and current status on the European Parliament's Web site, click here.

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For additional information or assistance, please contact your local GMS or People Services professional or the following professional with the KPMG International member firm in the United Kingdom:

Alexy Armitage
Director
Tel. + 44 (0) 20 7694 1360
Alexy.Armitage@kpmg.co.uk

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