UK capital markets: New prospectus regime and public offering platform rules

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In July, the Financial Conduct Authority (FCA) made further progress with a regulatory overhaul to make UK capital markets more attractive. The new UK Listings Regime (UKLR) took effect and the FCA opened a consultation on three more reforms.

CP24/12 handles replacing the UK Prospectus Regulation; CP24/13 proposes a new public offer platform regime; and CP24/14 covers changes to the derivatives trading obligation.

The CP24/12 and CP24/13 reforms stem from concerns, expressed in the listings review, prospectus review and elsewhere, that unduly burdensome regulation deters parties from using UK markets. In particular, companies in growth sectors such as tech are reluctant to list or raise additional capital on the London Stock Exchange. On the other hand, raising smaller amounts of capital by offering unlisted securities to the public is patchily regulated.

The UKLR reforms, introduced by policy statement PS24/6, replaced the division of listed companies into premium and standard tiers with a single category for commercial company equity shares, except for international secondary listings and shell companies. They also streamlined many of the old regime's obligations and eligibility requirements, replacing them with increased disclosures.

Implementing POATR

The proposals in CP24/12 are allied to the UKLR reforms and would implement the Public Offer and Admission to Trading Regulations 2024 (POATR), replacing the UK Prospectus Regime with a new framework. The FCA said there would be a large degree of consistency between the proposed and current regimes but with improvements to reduce costs for issuers, improve market access, or improve investor information.

The extent to which individual companies and their advisers are affected by the POATR framework will depend on whether they are making an initial public offering (IPO) or are already listed and raising money through further issuance of securities. The POATR changes would have less impact on IPOs, though they would benefit from a rationalisation of some obligations, including those regarding prospectus summaries.

"For IPO candidates, the FCA's proposals would largely maintain requirements consistent with the existing UK Prospectus Regulation," said Tom Godwin, a partner in the law firm Freshfields' global transactions group, specialising in public and private capital markets in London.

"There are some areas of relaxation around the edges: for example, the FCA is proposing to reduce the prescribed content requirements for summaries, removing the detailed financial information requirements and allowing issuers to include cross-references."

Working capital statements

The POATR would continue the prospectus regime's requirements with regards to disclosing historical financial information. The FCA has not yet decided what POATR should require regarding working capital statements (WCS), however, the existing EU-derived rules on WCS have detractors and supporters.

The WCS can either reflect that the issuer has sufficient working capital to meet its present requirements (a "clean" WCS) or that it has insufficient working capital to do so, in the light of the duration of the prospectus's validity (a "qualified" WCS). Guidelines on WCS in FCA technical note 619.1 say issuers should consider whether they have sufficient financial headroom in a "reasonable worst-case scenario".

The Secondary Capital Raising Review (SCRR) criticised this "reasonable worst-case scenario" requirement because it is undefined. That leaves companies and their advisers to make their own decisions as to what factors to consider. Others claim costs are increased because issuers cannot use due diligence undertaken for viability and "going concern" disclosures when compiling WCSs because FCA guidance often requires WCSs to be compiled on a different basis with different inputs.

"The FCA proposes to retain the requirement for a WCS but is seeking views on whether issuers should be permitted to disclose significant judgements made in preparing that statement," Godwin said. "The FCA is also interested in views on whether issuers should be permitted to base the working capital statement on diligence performed for the purposes of viability and 'going concern' disclosures in annual financial statements."

Prospectus regime

Probably the POATR's most meaningful change will benefit listed companies making further equity security issuances. At present, they must go through the effort and expense of producing a prospectus if a secondary issue exceeds 20% of the number of fungible securities admitted to trading over the previous 12 months. Following an SCRR recommendation, the FCA proposes raising that threshold to 75%. As described here, EU listing reforms will only raise it to 30%.

Under the proposals, issuers would still be able to produce a prospectus for FCA approval voluntarily for issues under 75%. This was included at the request of some large issuers, who wished to be able to demonstrate a level of compliance with requirements.

"This option may be attractive to an issuer marketing an offer to a global shareholder base across jurisdictions with disparate liability regimes," Godwin said.#"Historically investment banks have been reluctant to undertake global primary offerings in significant sizes on an undocumented basis, making the continued use of a voluntary prospectus (or, potentially in certain circumstances, such as institutional-only offerings, an unapproved offering memorandum) likely for larger offers."

CP24/13 covers another form of POATR prospectus exemption. Companies can raise up to 8 million euros by offering securities to the public without a prospectus. This has been criticised for restricting unlisted companies' access to market capital while exposing consumers to unsuitable high-risk investments, as in the London Capital and Finance mini-bonds case.

Public offer platforms

The POATR introduce a general prohibition on offering securities to the public, with several exemptions including for offers below a new cap of £5 million. If a company wishes to raise more than £5 million by issuing securities to a broad investor base without issuing a prospectus, it will need to use an electronic public offer platform (POP). Operating a POP would be a regulated activity covered by bespoke new rules, many in the proposed handbook chapter COBS 23.

"The aim of POPs is to make it easier for private companies to raise capital by removing the existing barriers to large public offers, in particular, the significant costs involved in preparing an FCA-approved prospectus," said Richard Ho, counsel in Freshfields' global transactions group in London.

"The regulatory burden will instead fall upon POP operators, who will act as gatekeepers with specific obligations."

POP operators would have due diligence obligations before public offers are communicated, which would include gathering financial information from issuers. They would have to assess and verify this information and assess the issuer's creditworthiness and whether it and its securities should be offered to the public. A disclosure summary would have to be provided to potential investors.

Several existing requirements would apply to POP operators, including the PRIN principles, Consumer Duty, the conduct of business rules including COBS 4 and Senior Managers and Certification Regime. POP operators that fail to meet regulatory requirements would be liable to investors for harm caused.

"POP operators will also be subject to new requirements on maintaining proper systems and controls, as well as periodic reporting obligations to ensure that they are able to comply with their gatekeeping obligations and to avoid liabilities to investors and the FCA," Ho said.

(Tim Hitchcock, Regulatory Intelligence)

Complaints Procedure

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