March 2009

EU Prospectus Directive developments

Good news for some – but with a possible sting in the tail

Two recent developments are good news for companies that have had difficulty offering employee share plans under the EU Prospectus Directive regime:

- companies listed outside the European Economic Area (EEA) can now use a short form rather than a full prospectus for employee share plan offers: and
- in the longer term, all companies may be able to rely on a common "employee share scheme" exemption from the need to issue a prospectus – unfortunately, this could result in more onerous requirements for companies with shares traded on the London Stock Exchange main market (and other "regulated markets").

Background

Many companies have experienced difficulties in operating share plans within the current Prospectus Directive regime. These are companies:

- listed on exchanges outside the EEA;
- with shares traded on an "exchange-regulated market" (including AIM); and
- private companies.

A short term fix

In the short term, those listed companies which previously would have had to produce a full prospectus to accompany the use of their share plans in the EU can now use a "short form prospectus". The idea is that this can largely be compiled from existing information. The information required is, however, still extensive, including:

- selected historical financial information;
- trend information;
- significant changes in the issuer's financial position;
- working capital statement, capitalisation and indebtedness; and
- risk factors.

The details of this short form prospectus were announced last month by the Committee of European Securities Regulators (CESR) and has immediate effect (although individual EU member states can still decide not to accept short form prospectuses). An advantage of this approach is that, once approved by the company's home member state, the prospectus can be passported to cover offers in other member states. However, this approach is not available to private companies.

Proposal for longer term changes

The good news for the longer term is that the European Commission issued proposals in January 2009 to amend the Prospectus Directive's employee share scheme exemption. This would make the exemption available to all companies, not just those with shares traded on an EU regulated market. Unfortunately, it appears that any change will not be effective until at least 2011.

There is concern over one aspect of this proposal. This relates to a suggestion in the consultation paper that the information provided to employees under the employee share scheme exemption might be based on the "short form prospectus" model described above. This would be a serious blow for companies that currently rely on this exemption because it would significantly increase the amount of information that they would have to provide to employees. Larger companies may be able to absorb the additional cost but smaller listed companies may find that their plans are no longer viable unless they can rely on an alternative exemption.

Representative bodies are already making representations about this proposal but if individual companies also wish to do so, the closing date for comments is 10 March 2009. Please contact us if you would like us to co-ordinate your comments.

If you would like to discuss any of the issues raised in this update, please contact your usual Hewitt New Bridge Street consultant.