

13 April 2012

Update on Amendments to the EU Prospectus Directive

Long-awaited amendments to the EU regime governing public offers of securities take effect on 1 July 2012.

In September 2009, the European Commission published proposals to amend the Prospectus Directive 2003/71/EC (the Directive), intending to provide greater clarity, reduce administrative burdens for issuers and intermediaries, lift more offers outside the prospectus regime and into the private placement category, introduce a more proportionate disclosure regime, and help retail investors analyse the prospectus and understand the risks posed by the securities before investing.

The Directive provides for a single regime throughout the European Union (EU) governing the content, format, approval, and publication of prospectuses for public offers of securities and the admission of securities to trading on a regulated market. Its key innovation is that a prospectus approved in one Member State is valid across the EU, giving issuers a “passport” across EU capital markets.

The proposals culminated in an amending directive which came into force on 31 December 2010 and must be implemented by Member States by 1 July 2012 (the Amending Directive). In the case of certain changes, it is necessary first for supplementary legislation to be published by the European Commission. Until the amendments have been implemented in a particular Member State, the domestic law of that State will reflect the Directive as originally enacted.

Key Amendments

Amendments to the Directive include the following:

- **Thresholds for offers outside the scope of the Directive.** Article 1(2)(h) has been amended to provide that where the total consideration of an offer in the EU is less than €5 million calculated over a period of 12 months, the securities are outside the scope of the Directive. The amendment increases the limit from the current maximum of €2.5 million and clarifies that the total is calculated EU-wide. Article 1(2)(j) has been amended to provide that debt securities issued in a continuous or repeated manner where the total consideration of the offer in the EU is less than €75 million (subject to the other existing conditions) are outside the scope of the Directive. The amendment increases the limit from the current maximum of €50 million and clarifies that the total is calculated EU-wide.
- **Offer and admission exemptions.**
 - By way of deregulation, regarding the exemption in Article 3(2)(b), an increase in the threshold for the number of investors to whom an offer may be made before a prospectus is required (from 100 to 150 investors).
 - By way of stricter regulation for offers at the higher end of the financing spectrum, the minimum consideration per investor to qualify for the exemption in Article 3(2)(c) for offers to investors for the acquisition of securities has been increased from €50,000 to €100,000. Consequently, the exemption in Article 3(2)(d) for offers of securities with a minimum denomination per unit of €50,000 has been increased to €100,000. The higher thresholds mean that issuers targeting investors making investments between €50,000 and €100,000 will no longer be able to use the exemption from publishing a prospectus.

- **Definition of qualified investor.** The definition has been aligned with the definitions of professional client and eligible counterparty found in the Markets in Financial Instruments Directive (MiFID). Issuers should benefit as more investors will be eligible for inclusion in private placements of securities.
- **Retail cascade.** The exemption from the obligation to publish a prospectus for placing, or subsequent resales, of securities through intermediaries in a “retail cascade” has been formalised, such that the intermediary may rely on the initial prospectus provided it is valid and the issuer or person responsible for drawing it up consents to its use.
- **Offers qualifying for reduced disclosure.** Article 7(2)(b) has been amended so that only offers of debt securities made at or above €100,000 (up from €50,000) will continue to qualify for reduced disclosure under the prospectus regime.
- **Employee share scheme exemption.** The exemption in Article 4(1)(e) has been extended to apply to all companies whose head or registered office is in the EU (not just EU-listed companies) and also non-EU companies listed on a regulated market or a third country market, so long as the European Commission has adopted an equivalence decision regarding the third country market (to be announced).
- **Summary.** Article 5(2) has been amended to clarify the purpose of the prospectus, and to require the summary to be drawn up in a common format in order to facilitate comparisons between summaries for similar securities. A definition of “key information” has also been added in Article 2(1) to include the essential characteristics and risks associated with the issuer, any guarantor, and the investment in the relevant security; the general terms and reasons for the offer; and the use of proceeds. Amendments to Article 6 provide that civil liability may arise where the summary does not provide, when read together with the other parts of the prospectus, key information needed to aid investors when considering whether to invest in such securities. The format of the summary and the format and detailed content of the key information to be included is addressed in the draft delegated regulation published by the European Commission on 30 March 2012.
- **Rights issues.** A new “proportionate disclosure regime” is to be introduced for pre-emptive offers (that is, rights issues and open offers) by companies with shares admitted to trading either on an EU-regulated market or a multilateral trading facility (MTF) (so long as the MTF imposes appropriate ongoing disclosure requirements and market abuse rules and the company has not disapplied the statutory pre-emption rights).
- **Validity of prospectuses.** It has been clarified that the validity period begins **on approval** (rather than at publication) of the prospectus.
- **Annual information update.** The requirement for issuers to produce an annual information disclosure document has been repealed (since it replicates requirements of the Transparency Directive). Instead of the registration document being updated in accordance with that annual information disclosure, it would be supplemented under the supplementary prospectus regime.
- **Supplementary prospectuses and withdrawal rights.** It has been clarified that the period in respect of which a supplementary prospectus is required to be published is the later of (i) closing of the offer and (ii) commencement of trading. Article 16(2) of the Directive has been amended to provide that withdrawal rights apply only where there has been an offer to the public and not where there has only been an admission to trading on a regulated market, and to provide that the rights must be exercised within two business days of publication of the supplement (and not within a minimum of two business days, as currently), unless the issuer extends that period.
- **Final terms.** Issuers are now required to communicate the final terms (where these are not contained in the base prospectus or a supplement) to the competent authority of the host Member State(s), as well as to investors and to the competent authority of the home Member State. Amendments have also been made to clarify that the final terms may only contain information relating to the securities note and cannot be used to supplement the base prospectus.
- **Electronic publication of the prospectus.** The methods of publication have been amended to provide that a prospectus will be deemed available to the public when published on the issuer’s website **or** (rather than as well as) the website of financial intermediaries placing or selling the securities.

France

The following steps will be required to complete the implementation process of the Amending Directive in France:

- **Public consultations on proposed amendments to French law and regulation.**

The *Direction Générale du Trésor* (an administrative body under the French Ministry of Finance) and the *Autorité des Marchés Financiers* (AMF, the French regulatory authority) each launched at the end of November 2011 a public consultation on proposed amendments to, respectively, the French *Code de Commerce* and the *Code Monétaire et Financier* and the *Règlement Général* of the AMF (the General Regulation enacted by the AMF). The proposed amendments seem to follow the Amending Directive closely. However, the outcome or conclusion of such consultations (which were closed at the end of December 2011) is not publicly available.

- **Entry into force of the proposed amendments to French law and regulation.**

- With respect to the French *Code de Commerce* and *Code Monétaire et Financier*, article 59 of Law No. 2012-387, dated 22 March 2012, entitles the French government to take, by way of an ordinance (*ordonnance*) (the Ordinance), all required measures (initially falling within the Parliament's attributions) to implement the Amending Directive. The Ordinance is to be adopted before 23 March 2013 and the draft law ratifying this Ordinance must be presented to the Parliament within three months following its publication. The drafts of the Ordinance (unlike drafts of legislation) are not public and therefore the implementation process under French law cannot be closely followed. The only public documents that can be referred to are the public consultations described in the preceding paragraph, subject to the fact that the proposed amendments may differ from the final text to be adopted by the Ordinance.
- With respect to the General Regulation of the AMF, the amendments proposed by the AMF must be ratified by the French government in order to enter into force under French law. Only certain amendments to the General Regulation can be enacted before the entry into force of the Ordinance. The AMF may choose to amend the General Regulation gradually and implement as soon as practicable those amendments that do not require the prior adoption of the Ordinance. Alternatively, the AMF could postpone amending the General Regulation until the Ordinance becomes effective under French law. At this point in time, no additional information has been provided by the AMF on the implementation steps that it intends to take.

Although the Amending Directive must be transposed in France before 1 July 2012, this process may be finalized after the deadline.

Germany

On 15 February 2012, the German government submitted a bill regarding implementation of the Amending Directive to the German parliament (*Bundestag*) for the final vote. It can therefore be expected that the amendments will be enacted and become effective on 1 July 2012. In line with the provisions of the Amending Directive, the amendments to the exemptions from the obligation to issue a prospectus will be implemented in the German Prospectus Act (*WpPG*).

United Kingdom

On 31 July 2011, following a consultation on early implementation measures in March 2011 which received universal support from industry, the UK government introduced early the changes to Articles 1(2)(h) (the increase in the threshold for an offer of securities for which a prospectus is required from €2.5 million to €5 million) and 3(2)(b) (the increase in the minimum number of investors for which a prospectus is required from 100 to 150) of the Directive. This was achieved by amendments to the Financial Services and Markets Act 2000 (the Act) by the Prospectus Regulations 2011 (2011/1668) and the prospectus rules of the UK Financial Services Authority.

The UK government introduced those measures into UK legislation early to allow small businesses to access the capital markets more easily; however, issuers will need to take care when undertaking cross-border offers in

Morgan Lewis

reliance on them because Member States may have yet to implement the same measures. Particular care will need to be taken when using the fundraising threshold, as the limit applies to the total consideration of the offer throughout the European Union. For example, where an offer of €3 million is made in the UK and in another Member State that has not yet implemented the measures in the Amending Directive, the offer may not be exempt under the domestic law of the other State. Where a prospectus is required in another Member State, issuers should consider electing to issue a prospectus in the UK which could then be passported into that State so as to prevent the issuer from infringing the laws of that State.

In December 2011, HM Treasury and the Financial Services Authority (FSA) issued a joint consultation paper on implementation of the remaining amendments, which will be achieved by amendments to the Act by the Prospectus Regulations 2012 and amendments to the rules of the FSA, in particular the prospectus rules. Implementation is scheduled for 1 July 2012.

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Miami

Ethan W. Johnson	+1.305.415.3394	ejohnson@morganlewis.com
Rebecca Leon	+1.305.415.3396	rleon@morganlewis.com

Frankfurt

Jan P. Klumb	+49 69 71 40 07 49	ijklumb@morganlewis.com
Torsten Schwarze	+49 69 71 40 07 63	tschwarze@morganlewis.com

Paris

Ann G. Baker	+33 1 53 30 44 24	abaker@morganlewis.com
Rima Maitrehenry	+33 1 53 30 44 25	rmaitrehenry@morganlewis.com

London

William J.G. Yonge	+44 (0)20 3201 5646	wyonge@morganlewis.com
--------------------	---------------------	--

About Morgan, Lewis & Bockius LLP

With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, regulatory, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived start-ups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—nearly 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change. © 2012 Morgan, Lewis & Bockius LLP. All Rights Reserved.