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The EU and the UK Publish Guidance on Prospectuses Applicable in the Event of No-Deal Brexit

The European Securities and Markets Authority (“ESMA”) has issued updates to its guidance on prospectuses in the form of new questions and answers (“Q&As”) relating to the Prospectus Directive (available [here](#)) and Transparency Directive (available [here](#)). The publication of the new guidance was prompted by the fast approaching date on which the United Kingdom is scheduled to withdraw from the European Union (March 29) and the continued lack of consensus on the terms of the withdrawal and, in fact, on whether there will be a withdrawal agreement upon exit. If a withdrawal agreement is in place at the time the United Kingdom exits the European Union, the new guidance will not be applicable.

In the United Kingdom, HM Treasury published on November 21, 2018 a policy note entitled “Draft Official Listing of Securities, Prospectus and Transparency (Amendment) (EU Exit) Regulations 2019: explanatory information” (“Policy Note”) (available [here](#)) aimed at providing guidance to issuers wishing to access the UK capital markets through an offer to the public or admission to trading of securities on a UK-regulated market, after the United Kingdom’s exit from the European Union without a withdrawal agreement (so-called “no-deal Brexit”). As is the case for the ESMA guidance, should the United Kingdom and the European Union have a withdrawal agreement in place upon exit, the anticipated draft legislation will not enter into force.

ESMA Updated Guidance

Home member state selection

Both the Prospectus Directive and the Transparency Directive require issuers of equity and non-equity securities that are offered to the public, or admitted to trading on a regulated market, in the European Economic Area (“EEA”) to elect a home member state in the EEA. Should the United Kingdom leave the European Union without a withdrawal agreement, it will immediately be treated as a third country and will no longer qualify as an EEA home member state. As a result, any issuer that had previously chosen the United Kingdom as its home member state will need to elect a new home member state in the EEA if it wishes to continue to offer securities to the public, or to have securities admitted to trading, in the EEA.

Under Article 2(1)(m)(iii) of the Prospectus Directive, an issuer selecting a home member state for the first time can choose from among any EEA member states where it first undertakes an offer of securities or seeks an admission to trading. As indicated in the updated guidance, ESMA is of the view that if an issuer is required to select a new home member state due to the United Kingdom’s exit from the European Union

without a withdrawal agreement, the issuer would be allowed to select a home member state as if it were doing so for the first time, *i.e.* the issuer's choice of a new home member state would be from among any EEA member states where (i) the issuer will offer securities to the public or seek admission of securities to trading following the United Kingdom's withdrawal from the European Union, or (ii) where the issuer has had securities admitted to trading prior to the United Kingdom's withdrawal and such admission has continued after the withdrawal date. Offers of securities that closed before the United Kingdom's exit would be disregarded, meaning the issuer would not be able to select an EEA member state where completed offers took place as its new home member state.

The issuer's new choice of a home member state will be treated as definitive and no subsequent changes will be allowed, except where the specific circumstances described in Article 2(1)(m)(iii) arise.

For purposes of the Transparency Directive, following the United Kingdom's withdrawal from the European Union without a withdrawal agreement, issuers that currently list the United Kingdom as their home member state will be required to select a new home member state in the EEA in accordance with the principles outlined above and to disclose such new home member state in accordance with Articles 20 and 21 of the Transparency Directive. Additionally, issuers will need to disclose their new home member state to the competent authority of the member state where they have their registered office (if applicable), the competent authority of the home member state and the competent authorities of all host member states.

For purposes of timely transfer of supervisory tasks from the United Kingdom to the new EEA home member state, ESMA recommends that issuers choose and disclose their new home member state under the Transparency Directive without delay following the United Kingdom's withdrawal. If a new home member state is not disclosed by an issuer within three months, then based on Article 2(1)(i)(iii) of the Transparency Directive, the new home member state would be the EEA member state where the issuer has its securities admitted to trading on a regulated market. If the issuer's securities are admitted to trading on a regulated market in more than one EEA member state, all such member states would be viewed as the issuer's home member states until a choice of a single home member state is made and disclosed by the issuer.

Prospectus status and passporting

As for prospectuses approved by the UK Financial Conduct Authority ("FCA") prior to the United Kingdom's withdrawal from the European Union:

- Prospectuses that were approved by the FCA prior to withdrawal will no longer be covered by the passporting mechanism available under Article 19 of the Prospectus Directive since the United Kingdom will at that point be a "third country." Similarly, any supplements to prospectuses that were approved prior to withdrawal will no longer be capable of being passported to EEA member states.

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- Prospectuses that were passported to EEA member states prior to withdrawal will no longer be allowed to be supplemented, as the FCA will no longer be able to approve documents under the Prospectus Directive.
 - As result of the inability of the FCA to approve supplements to the prospectuses passported to the EEA prior to the United Kingdom's withdrawal, issuers will no longer be able to use such prospectuses to offer securities to the public or admit securities to trading on a regulated market within the EEA (this applies to any new offers and admissions to trading as well as offers which were commenced before the withdrawal and which the issuer may wish to continue beyond the withdrawal date).

ESMA offers the following advice to issuers regarding the continuation of offers/admissions to trading initiated prior to the withdrawal as well as the initiation of new offers/admissions to trading:

- **Continuing an offer to the public in the EEA** – if, after the United Kingdom's exit from the European Union, an issuer wishes to continue with the existing offer of securities in the EEA that was based on the prospectus approved by the FCA and passported to EEA member states prior to the United Kingdom's withdrawal, the issuer will need to have a new prospectus approved in its new EEA home member state (selected in accordance with the principles discussed above) for the part of the offer that will take place in the EEA after the withdrawal.

It is important to note that the issuer will not be able to choose a new home member state until the United Kingdom has formally withdrawn from the European Union and, as result, will not be able to seek an approval of a prospectus by its new home member state before the withdrawal date. Since an offer of securities to the public in the EEA cannot be made without a prior publication of a prospectus, due to constraints related to the selection of a new home member state, ESMA is of the view that it is unlikely that the issuer will be able to continue with an existing offer after the withdrawal date, and will instead need to start a new offer once a new prospectus is approved in the new EEA home member state.

- **Maintaining an admission to trading on a regulated market in the EEA** – if an issuer is admitted to trading on a regulated market in the EEA based on a prospectus approved by the FCA and passported to the EEA state prior to the United Kingdom's withdrawal, ESMA will view such admission as valid following the United Kingdom's withdrawal. The issuer will not need to apply for approval of a new prospectus by a new home member state in the EEA in order to maintain its admission to trading on an EEA market.
- **Making a new offer to the public, or seeking a new admission to trading on a regulated market, in the EEA** – if, after the United Kingdom's withdrawal, an issuer wishes to make a new offer of securities to the public, or seek a new admission to trading on a regulated market, in the EEA based on a base prospectus approved by the FCA and passported to an EEA member state prior to the

withdrawal date, the issuer will need to have a new prospectus approved in the EEA member state even if the base prospectus previously passported has some months left of its validity under Article 9 of the Prospectus Directive.

For the three scenarios discussed above, ESMA considers that the issuer would be able to submit for review and approval, by a competent authority in its new home member state in the EEA, the prospectus already approved by the FCA as long as the prospectus contains all the information required by Article 5(1) of the Prospectus Directive. The issuer would not be obligated to prepare an entirely new prospectus for the approval by the new home member state in the EEA.

The UK Draft Regulations

The Policy Note, last updated in December 2018, clarifies the treatment of certain aspects of the prospectus and transparency rules in the event of a withdrawal by the United Kingdom from the European Union without a withdrawal agreement.¹

Approval and passporting of prospectuses

The Policy Note provides that in the event of no-deal Brexit, the UK will default to treating issuers from EEA member states as third parties for purposes of the approval and passporting of prospectuses. As such, EEA issuers wishing to make offers of securities to the public in the UK, or seeking admission to trading on a UK-regulated market, will, starting after the withdrawal, need to have a prospectus approved by the FCA, regardless of whether a prospectus for the offer or admission to trading has already been approved by a competent authority in an EEA member state.

As regards prospectuses that were approved by a competent authority in an EEA member state and passported to the UK prior to the United Kingdom's withdrawal, HM Treasury has concluded that such prospectuses will be grandfathered for use in the United Kingdom and will be permitted to be used until their validity expires (generally after a period of 12 months from the initial approval). Additionally, issuers will be able (after approval from the FCA) to supplement such grandfathered prospectuses where necessary during their validity; however, the prospectuses that have expired prior to the withdrawal date will not thereafter be eligible for use in the United Kingdom.

¹ The European Union (Withdrawal) Act 2018 repeals the European Communities Act 1972 on the day the United Kingdom leaves the European Union and converts into UK domestic law the existing body of directly applicable EU law. The Act also gives Ministers powers to make Statutory Instruments to prevent, remedy or mitigate any failure of EU law to operate effectively, or any other deficiency in retained EU law. The regulations to which the Policy Note relates are a Statutory Instrument; the text of the regulations has not yet been published.

Exemption from the obligation to publish a prospectus for certain public bodies

Under the current Prospectus Directive, certain public bodies in the EEA (including EEA states, local authorities, central banks and public international bodies of which one or more EEA states are a member) are exempt from the requirement to publish a prospectus when they offer certain securities to the public in the EEA. A different, but overlapping, group of issuers is exempt from the requirement to make certain ongoing disclosures under the Transparency Directive. While currently the exemptions from the relevant requirements of the Prospectus Directive and the Transparency Directive are only available to issuers from EEA member states, the UK government plans to extend the exemptions to certain third country public sector bodies and international bodies of which a state is a member.

Equivalence determination

Upon the UK's withdrawal from the European Union, HM Treasury will take on the function of the European Commission in making the equivalence determinations of third country jurisdictions for purposes of the Prospectus Directive, while the FCA will take on the function of the European Supervisory Authorities (such as ESMA) in providing the technical assessments of third country regimes. Existing European Commission equivalence decisions regarding the presentation of historical financial information in a prospectus are expected to be transposed into UK legislation.

HM Treasury will take on the European Commission's function in determining whether third-country jurisdictions' accounting rules meet the necessary standards to be deemed equivalent for purposes of both the Prospectus Directive and the Transparency Directive. Generally, issuers with securities admitted to trading on a regulated market in the EEA are required to use EU IFRS for their consolidated accounts. They may be allowed to use their home jurisdiction's standards only if they are deemed equivalent by the European Commission and the FCA has assessed the standards and granted exemption.

In order to minimize market disruption and ensure continuity in the event of a no-deal Brexit, HM Treasury plans to issue an equivalence decision determining that EU IFRS can continue to be used to prepare financial statements to satisfy Transparency Directive requirements and for purposes of preparing a prospectus under the Prospectus Directive. This will allow EEA issuers with securities admitted to trading on a UK-regulated market, or those making an offer of securities to the public in the United Kingdom, to continue to use EU IFRS for their consolidated accounts. For financial years starting before the withdrawal date, all issuers will be able to prepare financial accounts under EU IFRS.

Prospectus Regulation

A new Prospectus Regulation ((EU) 2017/1129) came into force in July 2017. Certain provisions of the Prospectus Regulation have been applicable since July 2017 or 2018, with the remainder of the legislation becoming effective in July 2019. HM Treasury has clarified that while it intends to transpose the remaining

Prospectus Regulation's provisions into the domestic law, only those already in force will automatically be converted into domestic UK law.

Putting the Issue in Context

With less than seven weeks remaining before the Article 50 deadline of March 29, fundamental political questions remain, and it is possible that uncertainty over the entire Brexit undertaking will remain up to the last minute. At this point, a withdrawal deal acceptable to the European Union could be approved by Parliament or no agreement may be reached. Even if an acceptable withdrawal agreement is approved by Parliament, it may be coupled with a call for a second referendum. That referendum could involve a vote in favour of the deal presented to Parliament or revocation of the Article 50 notice (and no withdrawal). In all likelihood, the Article 50 deadline will be postponed, though that postponement will need to be approved by the European Union. If it is not postponed, and there is a no-deal Brexit, or the deadline is postponed and there is still a no-deal Brexit, the guidance discussed above will be operative.

Those issuers likely to be affected by a no-deal Brexit should be considering contingency plans, though as a practical matter if there is a no-deal Brexit, it is likely that any planned offerings and listings will be postponed due to the ensuing turmoil across the markets. Even if there is a managed withdrawal, the implications post the withdrawal date will remain uncertain, again potentially until the last minute and possibly thereafter.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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