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September 20, 2019

## Full Effectiveness of New EU Prospectus Regulation Requires New EEA Legends and Selling Restrictions

On July 21, Regulation (EU) 2017/1129 (the “Prospectus Regulation”)<sup>1</sup> came fully into force, repealing and replacing Directive 2003/71/EC, as amended (the “Prospectus Directive”). For an overview of the key changes brought about by the Prospectus Regulation, see our July 2017 client memorandum, entitled “*The European Union Publishes Its Final Prospectus Regulation*” (available [here](#)).

As a result of the complete replacement of the Prospectus Directive and its regulations with the Prospectus Regulation, existing precedents for legends and disclaimers in offering documents referencing the Prospectus Directive dating back to 2005 (whether for equity or debt) are no longer correct. Selling restrictions and legends in offering documents for equity and debt used in the United Kingdom and other European Economic Area (“EEA”) member states now need to reflect the Prospectus Regulation.

We set forth below our suggestions for the form of the revised EEA legend and selling restriction for use in equity offerings as well as debt offerings with a denomination of less than €100,000, reflecting the changes brought about by the Prospectus Regulation. In addition, we set out suggestions for the form of the UK financial promotion legend and selling restriction, which generally accompany the EEA legend and selling restrictions in offering documents used in the EEA.

Importantly, the legends and selling restrictions provided below should not be used for the following offerings, for which alternative legends and selling restrictions would be appropriate:

- exempt offerings of debt securities with a denomination of less than €100,000 (or equivalent) that are to be traded only on an EEA member state regulated market, or a specific segment thereof, to which only qualified investors can have access;
- offerings of debt and equity securities by manufacturers and distributors of financial instruments that fall within the MiFID II<sup>2</sup> product governance regime (the regime generally requires manufacturers and

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<sup>1</sup> Regulation (EU) 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, available [here](#).

<sup>2</sup> Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014 on markets in financial instruments, available [here](#).

distributors to identify a compatible target market for the financial instrument and assess the risk involved); and

- retail offerings of debt securities that potentially constitute packaged products, as defined under the PRIIPs Regulation,<sup>3</sup> and where no key information document (KID) will be prepared under the PRIIPs Regulation.

In addition, no Prospectus Regulation selling restrictions are required for offerings of notes with a denomination of €100,000 (or equivalent) or more.

### **Selling Restrictions and Legends for Equity and Debt Offerings in the EEA**

- *Legend* (to be included on the front cover/inside front cover of the prospectus/offering circular)

This [*offering document*] has been prepared on the basis that offers of [*security*] in any member state of the European Economic Area (an “EEA Member State”)[, other than [*name(s) of EEA Member State(s) where a prospectus will be approved or passported for the purposes of a non-exempt offer*],] will be made pursuant to an exemption under Article 1(4) of Regulation (EU) 2017/1129 (the “Prospectus Regulation”). Accordingly, any person making or intending to make an offer in an EEA Member State of the [*security*] [, other than [*name(s) of EEA Member State(s) where prospectus will be approved or passported for the purposes of a non-exempt offer*],] may only do so in circumstances in which no obligation arises for the [*issuer*] or any of the [*managers/underwriters*] to publish a prospectus pursuant to Article 3(1) of the Prospectus Regulation [or supplement a prospectus pursuant to Article 23 of the Prospectus Regulation]<sup>4</sup>, in each case in relation to such offer. Neither the [*issuer*] nor any [*managers/underwriters*] has authorized the making of any offer of the [*security*] in circumstances in which an obligation arises for the publication of a prospectus [or a supplement] for such offer [(other than offers in [*name(s) of EEA Member State(s) where competent authority has*

<sup>3</sup> Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products, available [here](#). Due to the broad scope of the PRIIPs definition, there exists a high level of uncertainty regarding the potential categorization of certain types of debt securities as PRIIPs. While most market participants would consider plain vanilla debt securities (*i.e.*, debt securities with a fixed interest rate, defined maturity, redemption at par and no special features (such as early redemption)) as not covered by the PRIIPs Regulation because the amount repayable to investors is not subject to fluctuation, more complex debt securities (such as those with floating rates or with special features like a make-whole redemption, even if interest is set at a fixed rate) would more likely be categorized as PRIIPs because of the potential for repayments on such debt securities to be subject to fluctuations (even if only in limited situations).

<sup>4</sup> The reference to supplementing a prospectus pursuant to Article 23 may be deleted in circumstances where no prospectus is being or has been published (including for admission to trading purposes) that could be supplemented. For instance, it may not be relevant in a transaction where all offers are to be made on an exempt basis and the securities are to be listed on an exchange-regulated market, such as the Euro MTF or the Professional Securities Market.

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*approved the prospectus being published or has been notified (passporting) in accordance with the Prospectus Regulation]]].*

- Selling restriction

### **European Economic Area**

In relation to each member state of the European Economic Area (the “EEA Member State”), [other than [name(s) of EEA Member State(s) where the competent authority has approved the prospectus being published or has been notified (passporting) in accordance with the Prospectus Regulation],<sup>5</sup> no [security] have been or will be offered pursuant to this [offering document] to the public in that EEA Member State, except that offers of [security] to the public may be made in that EEA Member State:

- (a) to any legal entity that is a qualified investor as defined in Article 2(e) of the Prospectus Regulation (a “Qualified Investor”);
- (b) to fewer than 150 natural or legal persons (other than Qualified Investor) in that EEA Member State, subject to obtaining the prior consent of the relevant [*managers/underwriters*] [nominated by the [*issuer*] for any such offer]; or
- (c) in any other circumstances falling within Article 1(4) of the Prospectus Regulation,

*provided* that no such offer of [security] shall require the publication of a prospectus pursuant to Article 3 of the Prospectus Regulation [or require a prospectus to be supplemented pursuant to Article 23 of the Prospectus Regulation].

For purposes of the foregoing restrictions: (a) the expression an “offer to the public” in relation to the [security] in any EEA Member State means the communication in any form and by any means of sufficient information on the terms of the offer and the [security] so as to enable an investor to decide to purchase or subscribe for the [security], and (b) the expression “Prospectus Regulation” means Regulation (EU) 2017/1129.

### **Selling Restrictions and Legends for Equity and Debt Offerings in the United Kingdom**

In addition to the EEA legend and selling restriction, the following additional legend and selling restriction should be used in equity and debt offerings extended to the United Kingdom, other than offerings

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<sup>5</sup> To be added in an offering document where a (non-exempt) public equity offer will be made in the specified EEA member states.

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originating in the United Kingdom for which a prospectus approved by the UK Financial Conduct Authority (“FCA”) has been published.

- Legend

This [*offering document*] is for distribution only to, and is directed only at, persons who (i) are outside the United Kingdom, (ii) have professional experience in matters relating to investments falling within Article 19(5) of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, as amended (the “Order”), (iii) are persons falling within Article 43(2) of the Order, (iv) are persons falling within Article 49(2)(a) to (d) (high net worth companies, unincorporated associations, etc.) of the Order or (v) are persons to whom an invitation or inducement to engage in investment activity (within the meaning of Section 21 of the Financial Services and Markets Act 2000 (“FSMA”)) in connection with the issue or sale of any [*security*] may otherwise lawfully be communicated or caused to be communicated (all such persons in (ii), (iii), (iv) and (v) together being “*relevant persons*”). This [*offering document*] is directed only at relevant persons and must not be acted on or relied on by persons who are not relevant persons. Any investment or investment activity to which this [*offering document*] relates is available only to relevant persons and will be engaged in only with relevant persons.

- Selling restriction

Each [*manager/underwriter*] has represented, *warranted* and agreed that:

[(a) (i) it is a person whose ordinary activities involve it in acquiring, holding, managing or disposing of investments (as principal or agent) for the purposes of its business and (ii) it has not offered or sold and will not offer or sell the [*security*] other than to persons whose ordinary activities involve them in acquiring, holding, managing or disposing of investments (as principal or as agent) for the purposes of their businesses or who it is reasonable to expect will acquire, hold, manage or dispose of investments (as principal or agent) for the purposes of their businesses where the issue of the [*security*] would otherwise constitute a contravention of Section 19 of the FSMA by the [*issuer*];]<sup>6</sup>

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<sup>6</sup> This clause is applicable only in debt offerings to reflect the fact that Section 19 of the FSMA effectively prohibits any person other than an authorized person permitted to accept deposits under the FSMA from taking deposits in the UK by way of business. Under the Regulated Activities Order, most securities issues do not constitute deposits. However, notes with a maturity of less than one year must have a minimum denomination of £100,000 (or equivalent) or more *and* must be issued to professionals only, so as not to constitute deposits. Accordingly, this clause should be deleted if notes that have a maturity of less than one year cannot be issued under the programme, in the case of a programme, or if the notes have a maturity of one year or more, in the case of a standalone debt issuance, or in any event if the issuer is an authorized person permitted to accept deposits or an exempt person under the FSMA.

- (b) it has only communicated or caused to be communicated and will only communicate or cause to be communicated any invitation or inducement to engage in investment activity (within the meaning of Section 21 of the FSMA) in connection with the issue or sale of the [*security*] in circumstances in which Section 21(1) of the FSMA does not apply to the [*issuer*];<sup>7</sup> and
- (c) it has complied and will comply with all applicable provisions of the FSMA with respect to anything done by it in relation to the [*security*] in, from or otherwise involving the United Kingdom.

Note that following any withdrawal of the United Kingdom from the European Union, further changes may be required for legends and selling restrictions in offerings originating or being extended to the United Kingdom from the EEA. In the case of a no-deal Brexit, prospectuses approved by the FCA before the withdrawal date would no longer be permitted to be passported into EU27 member states and, instead, a new prospectus approved by an EU 27 national competent authority will be required for new offers as well as offers that were approved before the withdrawal date. As regards the use of prospectuses approved by an EU27 national competent authority for offers in the United Kingdom, the FCA has indicated that prospectuses passported to the United Kingdom prior to Brexit will remain valid for the remainder of the 12 months from their date of approval, and issuers will be able to (following the approval from the FCA) supplement such prospectuses where necessary during their validity, whereas prospectuses for any new offers will require a separate approval by the FCA. As such, in a post-Brexit scenario, the key changes to the EEA and UK legends and selling restrictions will most likely concern updates to the references in the disclaimers concerning the applicable legislation, as the UK will no longer be subject to the EU prospectus-related rules and regulations.

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<sup>7</sup> If there is only an issuer that is an authorized person, replace “does not” with “would not, if the issuer was not an authorized person,”. If there is both an issuer and a guarantor and only one of them is authorized, insert after “does not” the words “or, in the case of the [*issuer*], would not, if it was not an authorized person,”.

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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