

## Changes to European Prospectus Regime: Will it Be Easier for US Companies to Operate Employee Stock Plans in Europe?

Recent amendments to the European prospectus rules may make the operation of certain employee stock plans in Europe by multinationals listed in the United States cheaper and more straightforward. However, the date on which a major relaxation of the rules for companies listed on NYSE or NASDAQ will come into force, if indeed it does, appears still to be some time away.

### Background

One of the thorny issues for US-listed multinationals in recent years has been whether a prospectus is required for the operation of their employee stock plans in Europe, particularly employee stock purchase plans.

Under the Prospectus Directive (now enacted into law by the relevant European countries), a prospectus is required where any transferable securities are offered to the public in the European Economic Area (EEA). The EEA comprises the countries in the European Union (EU) together with Norway, Liechtenstein and Iceland. Various exemptions may apply to employee stock plans, but if no exemptions apply then a prospectus will be required.

Preparation of a prospectus is a costly and time consuming procedure and requires the approval of the appropriate securities regulator in the issuer's "home member state." Once approved, the prospectus can be used in other EEA countries under the "passporting" procedure.

### Extension of Exemption for Employee Offers

Since the Prospectus Directive was introduced, there has been an exemption from the prospectus requirement for offers to existing or former employees or directors of a group company, provided that they make available a document containing information on the offer (it is regarded as a partial exemption because of this requirement). However, this exemption previously only applied to companies with shares listed on a regulated market in the EEA.

The rules have now been amended, so that this exemption is also available to:

- All companies with their head office or registered office in the EEA
- Non-EEA companies without securities traded on an EEA regulated market if:
  - they have securities traded on a market in a country outside the EEA;
  - the European Commission has issued a formal decision that the third country's legal and supervisory framework for that market is equivalent to the framework that applies to EEA regulated markets; and
  - "adequate information," including an employee information document, "is available at least in a language customary in the sphere of international finance."

The decision-making process on the equivalence of a non-EEA market is started by a formal

request from a regulator from one of the member states. No such requests have yet been made, and, given that the European regulatory regime is currently in the process of change, no requests are expected before these changes are finalised (and this is not expected to be before the end of 2012). Once a request is made, a sensible estimate would be at least one year before any decision is made. Accordingly NYSE- and NASDAQ-listed companies are likely to have to wait for some time before this exemption becomes available (unless they also have an EEA listing, or they are headquartered in the EEA).

### Other Exemptions

There are other exemptions that may assist US companies, and some of these were expanded by the recent changes.

If the offer is made to fewer than 150 persons (previously 100 persons) in each EEA country at any one time, no prospectus is required. (If the offer is made to 150 or more in any one country, the exemption will not be available in any other country, even if the offer is made to fewer than 150 there.)

Another exemption applies if the aggregate consideration over the period of one year does not exceed €5 million (previously €2.5 million). This is helpful for grants of restricted stock where no consideration is paid.

Member states were required to enact the changes to these limits by no later than 1 July 2012. However, despite this requirement, if relying on these exemptions, the relevant countries' implementation dates should be checked.

In addition, in most EEA countries, the grant of a non-transferable option, and the subsequent exercise of that option, does not amount to an offer of transferable securities. Therefore, no prospectus would be required. However, care needs to be taken in with regard to Germany and Poland, where regulators have differing views.

### Short-Form Prospectus if No Exemption

For US-listed companies without a European listing, there may be no applicable exemptions in relation to the operation of their stock plans in Europe, pending recognition that the US regulatory framework is equivalent. This is most often the case for employee stock purchase plans where participation is offered to all employees (although the increased limit for aggregate consideration—now €5 million—may take some of these plans out of the regime).

Guidance has been published setting out a reduced level of disclosure for prospectuses used for offers of shares to employees. This only applies to companies with securities admitted to trading on a market, albeit any market. The guidance is not binding on the EEA regulators, and a regulator may, where appropriate, request additional information to be included in the prospectus.

The information requirement for employee prospectuses is much reduced by the guidance, however, the prospectus would still be a relatively substantial document. Also, a short-form prospectus would still need to be scrutinised and approved by the relevant regulator.

Some US companies use their NYSE or NASDAQ filings as a basis for their European stock plan prospectuses, with the addition of information on the stock plan and a cross-reference indicating where the information required by the European prospectus rules appears in the US filings. This has provided a relatively cost-effective way of preparing a prospectus (although the end result is somewhat cumbersome). For these companies, the short-form prospectus guidance may not substantially reduce the work involved (or the size of the end product).

### Information Document

If the partial exemption for offers to employees is available, as noted above, there is a requirement to prepare an “information document” for the

employees. This needs to contain the number and nature of the securities offered and the reasons for and details of the offer.

Recommendations for the content of this document indicate that the requirements are much less onerous than for a short-form prospectus. We understand that the Financial Services Authority (the UK regulator) does not inspect information documents prepared for offers within its jurisdiction, but some other regulators do.

If and when the Commission makes equivalence decisions about the US markets, and the partial exemption becomes available to US-listed companies, the requirement is for “adequate information” including an employee information document. Accordingly, the burden for these companies may be greater than for those which just need to produce the information document.

*For more information about the contents of this Legal Update, please contact any of the following lawyers.*

**Andrew Stanger**

London

+44 20 3130 3934

[astanger@mayerbrown.com](mailto:astanger@mayerbrown.com)

**Maureen Gorman**

New York

+1 212 506 2679

[mgorman@mayerbrown.com](mailto:mgorman@mayerbrown.com)

**Guido Zeppenfeld**

Frankfurt

+49 69 79 41 1701

[gzeppenfeld@mayerbrown.com](mailto:gzeppenfeld@mayerbrown.com)

**David Schuette**

Chicago

+1 312 701 7363

[dschuette@mayerbrown.com](mailto:dschuette@mayerbrown.com)

**Robert Flanigan**

Paris

+33 1 53 53 03 48

[rflanigan@mayerbrown.com](mailto:rflanigan@mayerbrown.com)

**Philip J. Niehoff**

Chicago

+1 312 701 7843

[pniehoff@mayerbrown.com](mailto:pniehoff@mayerbrown.com)

---

Mayer Brown is a global legal services organization advising many of the world's largest companies, including a significant portion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

Please visit our web site for comprehensive contact information for all Mayer Brown offices. [www.mayerbrown.com](http://www.mayerbrown.com)

IRS CIRCULAR 230 NOTICE. Any advice expressed herein as to tax matters was neither written nor intended by Mayer Brown LLP to be used and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed under US tax law. If any person uses or refers to any such tax advice in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to any taxpayer, then (i) the advice was written to support the promotion or marketing (by a person other than Mayer Brown LLP) of that transaction or matter, and (ii) such taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

Mayer Brown is a global legal services provider comprising legal practices that are separate entities (the “Mayer Brown Practices”). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe – Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown JSM, a Hong Kong partnership and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. “Mayer Brown” and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

This Mayer Brown publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed herein.

© 2012. The Mayer Brown Practices. All rights reserved.