

## Changes to European Prospectus Rules Offer Relief to Asia-based Issuers

Recent amendments to the European prospectus rules may make the operation of certain employee stock plans in Europe, by multinationals listed outside Europe, cheaper and more straightforward.

However, it appears that any major relaxation of the rules for such companies might not actually come into force (if indeed it does) for some time yet.

### Background

One issue Asia-based multinationals have had to address 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 of 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 is required.

Preparation of a prospectus is a costly and time-consuming process requiring 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.

This Legal Update discusses three levels of relief which, in view of recent changes, Asia-based issuers may be able to rely on to ease the prospectus requirements:

- Partial exemption for employee offers
- Full exemption
- Short-form prospectus

### Partial 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 a document containing information on the offer is made available (such an offer is regarded as a partial exemption because of this requirement). However, this exemption previously only applied to companies (including Asia-based companies) if their shares were listed on a regulated market within the EEA (not including the AIM market of London Stock Exchange).

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

- EEA-based companies (i.e., all companies with their head office or registered office in the EEA) without a listing
- Non-EEA-based 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 of 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, Asia-based companies are likely to have to wait for some time before this partial exemption becomes available. However, it may be that some of the full exemptions referred to below apply, but if not, the company may be able to take advantage of the short-form prospectus requirements for employee offers (also referred to below).

## INFORMATION DOCUMENT

If the partial exemption for offers to employees is available, 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 an equivalence decision about an Asian stock exchange, and the partial exemption becomes available to companies listed on that exchange, 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.

## Full Exemptions

There are other exemptions that may assist Asia-based 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 persons 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 persons in another country.)

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, issuers relying on these exemptions are advised to check the relevant countries’ implementation dates.

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 with regard to Germany and Poland, where regulators have differing views.

## Short-Form Prospectus if No Exemption

For Asia-based companies without a listing on an EEA-regulated market, there may be no applicable exemptions in relation to the operation of their stock plans in Europe, pending an equivalence decision for the regulatory framework of the Asian exchange on which they are listed (if applicable). 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).

Those companies may qualify for a short-form prospectus. 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 that additional information 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 have to be scrutinised and approved by the relevant regulator.

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