The Public Offer Platform: Balancing the risk for public offers

The FCA has recently launched two new consultations *CP 24/12 Consultation on the new Public Offers and Admissions to Trading Regulations regime* ("**POATRs"**) and *CP24/13 Consultation on the new public offer platform regime*. In combination, these consultations seek to redefine how public offers are made, whether they relate to a listed security or an unlisted security. One of the most substantial shifts relates to the regulation of offers made outside of a listing forum, where the FCA now intend to regulate offers of securities over GBP5m by requiring that they are made through a Public Offer Platform (a "**POP**"). The FCA has invited comments to be submitted on these two consultations by 18 October 2024.

Background

At present, the regulation of public offers of transferable securities is, in essence, limited to the UK's financial promotions regime and the Prospectus Regulations, which only oblige a person to publish a prospectus if they are raising over EUR8m. Companies raising capital below this amount can therefore proceed without the need to have a prospectus approved by the FCA. The FCA are concerned that this leaves a gap in regulation, which can allow potentially higher risk investments to be offered to the public. The FCA has also expressed the view that the EUR8m prospectus threshold has also acted as a 'cap' beyond which companies wishing to raise capital face a cliff edge of costs due to having to produce a full prospectus.

The new consultations are part of a wider process of change to the capital markets following the UK's exit from the European Union. In November 2020, the previous Government asked Lord Hill to conduct an independent review of the UK listing regime together with the prospectus regime (the "**UK Listing Review**"). The UK Listing Review obtained evidence that the existing prospectus regime slowed down capital raising, excluded retail investors, and discouraged the disclosure of meaningful forward-looking information. The UK Listing Review's Final Report, published in March 2021, recommended, among other things, that HM Treasury ("**HMT"**) conduct a review of the prospectus regime. In July 2021, HMT published a consultation on the UK's Prospectus Regime, which addressed Lord Hill's recommendations and proposed repealing and replacing the UK Prospectus Regulation. Following the review outcome, in March 2022, the government committed to repealing and replacing the current Prospectus Regulation.

What's Changing?

The FCA has for a long period expressed concerns about the use of crowdfunding platforms by those looking to raise capital, most recently in its Dear CEO Letter published in January . A particular concern is that the activities of a crowdfunding platform are not directly regulated, although such platforms

will often come into contact with various parts of the FCA Handbook, such as the financial promotions regime and the Consumer Duty. Separately, the FCA continues to feel the effects of the 2019 collapse of London Capital and Finance, where 'mini-bonds' were inappropriately marketed to the public in what has transpired to be suspicious circumstances, and the subsequent Gloster Report. The new regime seeks to, on the one hand, allow more targeted regulation of offers of securities by companies where they are not being admitted to a public market, and on the other ensure robust regulation of offers of securities.

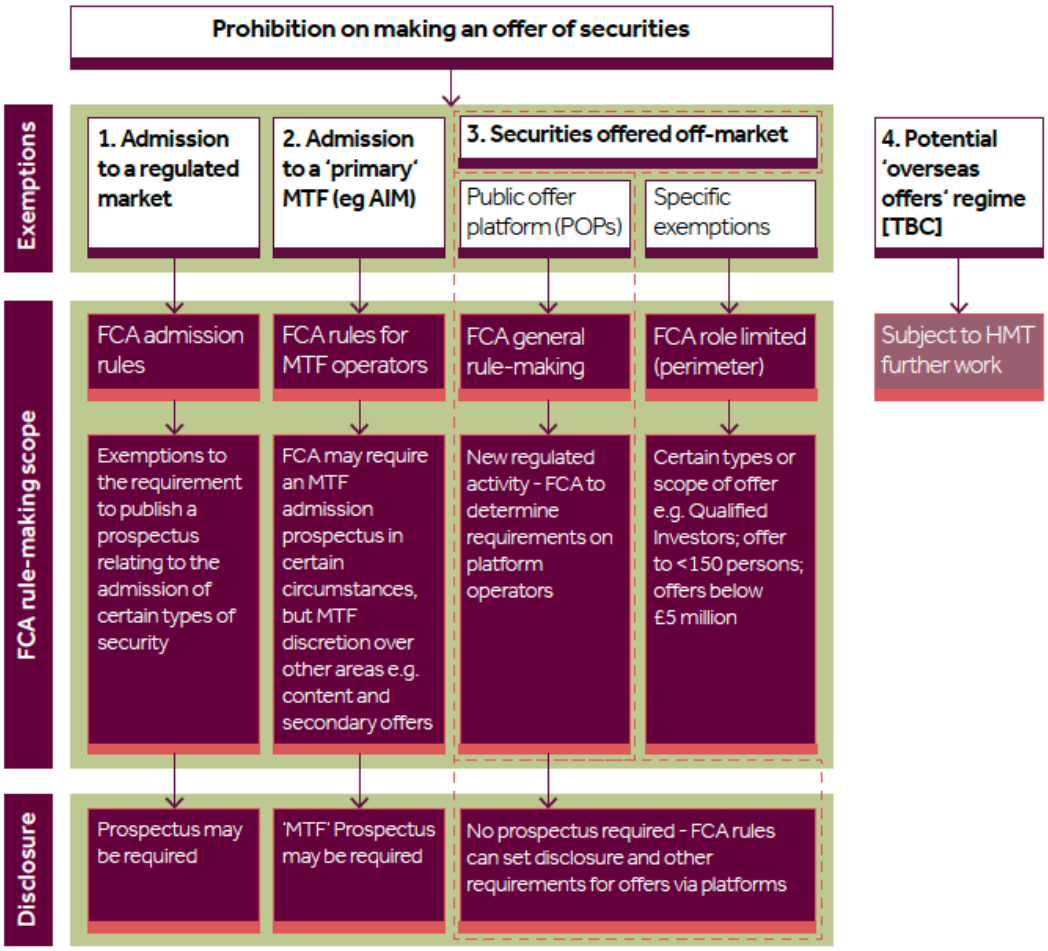
The POATRs create a new regulated activity of operating an electronic system for public offers of relevant securities. Companies seeking to make public offers of securities outside a public market, to a broad investor base, and where the value of the offer is more than GBP5m, will now be required to do so via a POP. The FCA hopes to balance two broad aims: (1) that investors receive appropriate protections against potential fraudulent offers and receive sufficient information on legitimate securities, and (2) that companies are able to raise capital efficiently and effectively from a broader investor base according to their needs. It is clear therefore that POP operators are expected to have a key gatekeeping role with respect to offers that are made to the public.

How will the changes be implemented?

The POATR will introduce a new general prohibition on public offers of securities, subject to exceptions such as offers of securities admitted to trading on UK regulated markets or MTFs. The proposed POP regime will provide an exemption from the public offer restriction where an issuer is seeking a broad, investor base (many of which will be retail clients) and is seeking to raise more than GBP5 million within a 12-month period. There will be certain exemptions to this requirement, for example where an offer is only targeted at Qualified Investors or the offer is made to fewer than 150 persons. Nevertheless, the FCA has indicated that an offer may nevertheless be made on a POP on a voluntary basis, so long as it is clearly labelled as such, although clearly the FCA hopes that the rules applicable to POPs will act as a general benchmark for all types of public offer.

The FCA has prepared the following diagram to show how an offer through a POP will set amongst the other types of offer following the introduction of POATRs:

Figure 1: the new regime for permitted public offers of securities



POP operators: the new gatekeepers

Anyone seeking to operate a POP will be required to make an application to the FCA to seek the appropriate authorisation. Once authorised, the POP operator will be subject to a number of due diligence and information requirements in respect of each offer on their platform.

The FCA envisages that the due diligence will be divided in two steps. Firstly, information that POP operators are required to gather from issuers, which as a minimum should include the following:

- General information on the issuer;
- Financial information;
- Information on the public offer; and
- Additional information for closed ended funds.

The FCA stresses that these are minimum requirements only and that other parts of the FCA Handbook, such as the Consumer Duty, may well be particularly relevant to the offer.

The second stage will be to conduct an assessment on the information gathered, including a creditworthiness assessment. There should be a degree of verification of the information and the FCA suggests that for factual information, there should be an accuracy and completeness assessment, based on obtaining appropriate corroborative independent evidence. Non-factual information should be subject to a plausibility assessment. The results of this diligence should lead the POP operator to determine whether it is appropriate to facilitate the public offer, having regard to a number of factors including:

- whether any omissions can be explained
- sufficiently detailed and consistent information so as to be able to understand the issuer's business model and the key risks of the investment
- fitness and propriety of the issuer and key individuals
- if there was information that it sought to verify but was unable to or that was considered implausible
- the issuer's creditworthiness
- compliance with additional disclosures, e.g. under the financial promotions rules.

POP operators are likely to be required to provide investors with a disclosure summary setting out the results of the diligence described above and the FCA has set out a proposed form of disclosure in its consultation paper. When POP operators fall short of FCA standards, investors may have a private right of action and against them.

Conclusion

It is clear that the FCA views POP operators to be undertaking a highly responsible role in making of public offers by SMEs. Under the Public Offer Platform regime, liability for offers would primarily sit with platform operators, who will be responsible for conducting proper due diligence and providing disclosure on offers hosted on their platform, which in many ways will be a more onerous duty than that imposed on directors at present. This represents a significant shift from the current position, whereby the regulation of crowdfunding platforms leaves consumer protections and disclosure standards to the discretion of platform operators. Similarly, whilst the FCA will hope that the additional scrutiny forces directors to be more mindful of their civil and criminal responsibilities to avoid making misleading and/or false statements in offering materials, the opposite may become true if the directors effectively become absolved of all liability, which instead falls on the POP operator.

The FCA hopes that clearer regulation in this area will not only protect consumers but provide a clearer route to raising capital by SMEs. It will be interesting to see whether a healthy and varied market of potential POP operators, who are prepared to take on the responsibility and potential liabilities for

acting in that role, develops. This will be critical to the success of the regime; SMEs will only find it attractive to launch an offer on a POP if the fees charged for doing so are proportionate to the amount of their raise. Otherwise, the tighter regulation risks replacing one cliff edge (i.e. under the prospectus regime) with another (the mandatory GBP5m POP requirement). Similarly, offers will only be viable if the diligence process can be completed in a reasonable timeframe, in a way that does not hinder the offer.

We are preparing a response to the FCA consultation CP24/13 and would welcome any thoughts that we can include with our submission.

Chris Spencer
10 September 2024