
EU Prospectus Directive to Exempt Employee Share Plans of U.S. Public Companies

by Susan P. Serota

The EU Prospectus Directive (Directive 2003/71/EC) requires companies that offer shares to their employees throughout the European Economic Area (EEA) to provide a Prospectus to employees unless an exemption applies. In addition to current exemptions for companies registered on a Regulated Market in the EU, for certain small offerings and stock option programs in certain EEA states, the Council of the European Union has now determined to expand the exemption to companies with shares listed on a market outside the EEA that the European Commission determines to have “equivalent” standards to an EU Regulated Market. Presumably, U.S. publicly traded companies will meet this standard.

We previously brought to your attention that companies that offer shares to employees in Europe through an employee share purchase scheme may need to comply with the EU Directive on Prospectuses, effective for offerings beginning July 1, 2005. (See our June 27, 2005 Client Alert, “EU Prospectus Required by July 1, 2005,” which described the United Kingdom Financial Services Authority (FSA) policy statement and near final rules on the implementation of the Prospectus Directive, applicable to U.S. companies that chose the UK as their home member state.) Although the FSA took the position that option grants were not covered by the rules because an option is not treated under UK law as a transferable security, broad-based employee share purchase schemes were covered. This position required U.S. companies sponsoring SAYE plans investing in employer securities and other broad-based employee share purchase programs in the UK to comply with the FSA rules implementing the Prospectus Directive.

The European Council has recently announced its decision that the employee share plans exception will be expanded and will apply not only to companies listed on an EU Regulated Market, but also to companies outside the EEA with shares registered on a third country market that the European Commission determines has “equivalent” standards to an EU Regulated Market. Because the European Commission will determine which non-EU Regulated Markets will meet the “equivalent” standard, there will be consistency in recognizing such third country markets throughout the EEA states (which is not always the case

as each state typically implements Directives under its own regulations). In addition, the company must provide a document to employees containing information on the number and nature of the securities and the reason for, and details of, the offer. The document must be made available in a language customary in the sphere of international finance.

In order for the third country market to be considered “equivalent,” at a minimum, the following conditions must be met:

1. markets in the third country are subject to authorization and to effective supervision and enforcement on an ongoing basis;
2. markets have clear and transparent rules regarding admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable;
3. security issuers are subject to periodic and ongoing information requirements, ensuring a high level of investor protection; and
4. third country markets insure market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation.

Although there is no guarantee that U.S. SEC regulated exchanges would be deemed to be “equivalent,” it is hard to imagine that they would not.

Note that private companies who offer shares under an employee share purchase plan will still need to comply with the EU Prospectus Directive in EEA countries where their employees participate in the plan unless they fit into another exemption, e.g., small offerings.

If you have any questions about the content of this advisory, please contact the Pillsbury attorney with whom you regularly work or any of the members of the Executive Compensation & Benefits group.

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