PILLSBURY WINTHROP LLP

Client Alert

The EU Prospectus Directive

Securities Practice Team

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Introduction

The EU Prospectus Directive (Directive 2003/71/EC) became effective on December 31, 2003. The purpose of the Prospectus Directive is to unify the law on the document requirements when offers of securities (whether debt or equity) are made to the public in any Member State of the European Union (EU). There are two key points of note in the Prospectus Directive:

- subject to certain exemptions, the Prospectus Directive will require the publication of a prospectus when securities are offered to the public or admitted to trading on a regulated market in the EU. The prospectus will need to be approved by the securities regulator in the EU "Home Member State" of the issuer who will also be responsible for monitoring ongoing regulatory compliance

- issuers who are not based in the EU may inadvertently select a "Home Member State" as a result of actions carried out in the EU after December 31, 2003.

Background to European Directives

EU directives do not in general have direct effect and so are not directly enforceable against legal or natural persons. They have legal effect through implementation by each Member State as a national law. The deadline for implementation of the Prospectus Directive by each Member State is July 1, 2005. In practice, certain Member States transpose Directives verbatim into their national legislation, while others take a more considered approach to implementation. It is possible, if not likely, that certain Member States will transpose the Directive into national law well in advance of July 1, 2005. ***The implications for non-EU issuers of choosing a Home Member State already have legal effect as of December 31, 2003.***

Member States

The current Member States of the EU are Austria, France, Belgium, Germany, Greece, Denmark, Ireland, Italy, Finland, Portugal, Luxembourg, Spain, The Netherlands, Sweden and the United Kingdom. In May 2004 the following countries are to become members of the EU: Cyprus, Czech Republic, Hungary, Estonia, Latvia, Lithuania, Slovakia, Slovenia, Malta and Poland.

Home Member State Principle Effective December 31, 2003

The Home Member State of an issuer based in the EU (an "EU issuer") is the Member State where the issuer has its registered office. There is an exception to this rule for the issue of: (i) non-equity securities with a minimum denomination of €1,000 and (ii) certain convertible or exercisable non-equity securities including derivatives (Qualifying Debt). For issues of Qualifying Debt, the Prospectus Directive allows an EU issuer the choice of Home Member State among the following:

- the Member State where the issuer has its registered office
- the Member State where the securities are admitted to trading on a regulated EU market
- the Member State where the securities are offered to the public

For example, a Dutch entity issuing high-denomination bonds to be traded on the Luxembourg Stock Exchange should be able to choose Luxembourg rather than The Netherlands as its Home Member State for the bonds.

Issuers who are not based in the EU (non-EU issuers) will not have their registered offices in the EU. The Prospectus Directive allows a non-EU issuer the choice of Home Member State between the following:

- the Member State where securities are first offered to the public or intended to be offered to the public at any time after December 31, 2003
- the Member State in which the first application for admission to trading of securities is made

Once a Home Member State has been selected, it will be the Home Member State for all future issues of securities in the EU by the non-EU issuer (with the exception of issues of Qualifying Debt that will be assessed on a case-by-case basis). ***Accordingly, care must be taken to ensure that an initial offer of securities by a non-EU issuer is not made in a Member State unless the issuer is comfortable with all future issues of securities in the EU and ongoing compliance being subject to the supervision of the regulatory authority in that Member State. Issuers should bear in mind that the concept of an "offer" is very broadly defined in the Prospectus Directive and may cover the issue of share options to employees as well as traditional securities offerings to the public.***

The legislation is as yet untested but a brief example should be sufficient to point out the possible risk: if a US corporate issuer with employees in Portugal offers shares to those employees, then that may be sufficient to fix its Home Member State (and regulatory authority for the purposes of any prospectus approval) as Portugal for the purposes of all future securities offerings (other than Qualifying Debt) in the EU.

If the issuer already has securities listed on a regulated market in a Member State of the EU, it has until December 31, 2005 to decide whether to notify the regulatory authority in that Member State (such as the Luxembourg Stock Exchange) to confirm its election, or to select a different Home Member State through notification or another public offering. It is not yet clear how simple the notification process will be, as it will vary from Member State to Member State. For non-EU issuers with multiple existing listings in several jurisdictions, it is also not yet clear how simple it will be to select one Home Member State at the expense of the others.

Prospectus Obligation Effective When Implemented as National Law in Each Member State (Deadline July 1, 2005)

The Prospectus Directive requires that, in the absence of an available exemption, a prospectus must be prepared and approved (by the regulatory authority of the Home Member State) where there is an offer or sale of securities in the EU or the admission of such securities to a regulated securities market in the EU (such as the stock exchanges in London, Luxembourg or Dublin). The Prospectus Directive defines an offer very broadly as "…a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities." These terms effectively cover communication by any form, including over the Internet.

Article 3 of the Prospectus Directive excludes the following from the requirement to prepare a prospectus:

- an offer of securities addressed solely to "Qualified Investors"
- an offer of securities to fewer than 100 natural or legal persons per Member State
- an offer of securities addressed to investors for a consideration of at least €50,000 per investor for each separate offer
- an offer of securities in denominations of at least €50,000
- an offer of securities for a total consideration of less than €100,000 (over 12 months)

A "Qualified Investor" is defined in the Prospectus Directive as someone who satisfies at least two of the following criteria: (i) the investor has carried out transactions of a significant size on securities markets at an average frequency of at least 10 per quarter over the previous four quarters; (ii) the size of the investor's securities portfolio exceeds €500,000; and (iii) the investor works or has worked for at least one year in a professional position in the financial sector which requires knowledge of securities investments.

In addition, there are a number of exemptions to the obligation to publish a prospectus which are set out in Article 4 of the Prospectus Directive, including:

- securities offered in the context of takeovers and mergers
- shares issued as dividends
- securities offered by an employer to a director or an employee in certain circumstances

- securities that are already admitted to trading on another regulated market in the EU

Because of the possible delays in implementation in individual Member States, we recommend that any person planning to make such an offer in the EU consider the jurisdictions on a country by country basis prior to the offer being made, to confirm that exemptions will be available.

Content of the Prospectus

The Prospectus Directive does not contain specific details of the content requirements of the prospectus – it is expected that this will be clarified in the first set of implementing measures to be adopted by the European Commission by July 1, 2004. Where a prospectus is prepared only in respect of an offer or admission to market within the Home Member State, this must be in a language accepted by a competent authority of that Member State. Where a prospectus is prepared in respect of an offer or admission to market in one or more Member States that are not the Home Member State, the Prospectus Directive allows for the publication of the prospectus in English (being "a language customary in the sphere of international finance"), although a Member State may require a summary to be prepared in its own official language. An assessment of this should be carried out on a country by country basis when the offer is considered.

Clients considering future issues in the EU should also be aware of the EU Transparency Directive. This has yet to be finalized, but one consequence of this directive may be an eventual requirement for financial disclosure in accounts to be prepared in accordance with International Accounting Standards (IAS) or an equivalent, which may or may not include US GAAP. The Transparency Directive will be the subject of a future Pillsbury Winthrop Client Alert.

Conclusion

Home Member State

Issuers considering the offer of securities in the EU, or who have offered securities in the EU since December 31, 2003 should seek specific legal advice on the possible consequences of being regulated by different Home Member States. In addition, advice should be sought and care should be exercised when issuing shares or share options to employees based in the EU.

Prospectus Obligation

Although it is not certain how the Prospectus Directive will be implemented into national law in each Member State, in comparison to the different standards which currently prevail across EU Member States, the relative certainty of prospectus requirements could prove helpful to companies or private equity funds seeking to raise capital in the EU. With regard to debt offerings, it is possible that many issuers will consider restricting their offerings to high-denomination securities in order to fall outside of the Prospectus Directive.

Contact Pillsbury Winthrop For More Details

The Pillsbury Winthrop securities practice team works to monitor developments in securities laws that will affect our clients worldwide. If you wish either to obtain a more detailed explanation of the Directive and its ramifications or develop a new comprehensive and adaptive strategy to meet the changing landscape, please contact the Pillsbury Winthrop attorney with whom you work or one of the co-leaders of the Pillsbury Winthrop securities practice team, Stanton D. Wong in San Francisco (415-983-1790 or *sdwong@pillsburywinthrop.com*) or Todd W. Eckland in New York (212-858-1440 or *teckland@pillsburywinthrop.com*). For queries on the impact of the Prospectus Directive on option grants to employees in Europe, please see our accompanying *client alert* on this topic or contact the leader of the Executive Compensation and Benefits practice team, Susan P. Serota in New York (212-858-1125 or *sserota@pillsburywinthrop.com*). If you have any questions about the specific issues discussed in this client alert, please contact Al Turnbull (011-44-207-648-9215 or *aturnbull@pillsburywinthrop.com*) or Stefanie Roth (011-44-207-648-9204 or *sroth@pillsburywinthrop.com*) in London.