Bird & Bird

Capital Markets Group: PLC update

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Law Society Guidance issued on the use of Placing Letters for fundraisings following implementation of Market Abuse Regulation

Following the implementation of the Market Abuse Regulation (2014/596/EU) ("MAR") on 3 July 2016, a recurring question that has arisen for investment banks/brokers acting on a proposed fundraising for a client is whether it is still possible to use a placing letter to receive legally binding commitments from their placees/subscribers before a public announcement has been made of the proposed fundraising.

Previously, it was common practice for banks/brokers responsible for co-ordinating a fundraising to send out placing letters and for them to be signed and returned in advance of announcing the transaction. However, following the introduction of the market sounding regime under Article 11 of MAR, many market participants became concerned that obtaining such commitments in advance of the announcement being made would fall outside of the market soundings safe harbours regime and that they may instead constitute insider dealing.

This concern has persisted; despite the fact that previous market abuse provisions in force under the Financial Services and Markets Act 2000 were broadly similar to those implemented under MAR. As a result of this, we observed a change in market practice for conducting fundraisings, whereby the use of an accelerated bookbuild structure became prevalent. Under an accelerated bookbuild, the legally binding commitments are received by the investment bank/broker from placees (whether verbally or under placing letters) once the announcement of the proposed fundraising has been released. In part, some houses found that some of their larger institutional clients/placees would only agree to participate in a fundraising on the basis of an accelerated bookbuild process.

However, where placing letters still needed to be used (perhaps for directors who do not have CREST accounts that are looking to participate in the fundraising or where a bank/brokers outsources the receipt and settlement of subscription monies) then this could give rise to logistical issues as the relevant placing letters would need to be issued, signed and returned within a short period of time to co-inside with the building of the book of places.

A paper issued by a joint working party of the Law Society on 21 July 2017 on the implementation of certain aspects of MAR specifically looked into the question of whether or not it was still lawful for banks/brokers to adopt the previous approach of contracting with places using placing letters. Whilst it is clear that the facts of a particular transaction will need to be considered on a case by case basis, the view of the joint working party established to look at this question was that structuring a transaction through the use of placing letters or other contractual commitments in advance of the announcement of the fundraising is consistent with existing market practice and does not constitute a misuse of inside information or undermine the integrity of

financial markets. On the contrary, they viewed such practice as legitimate and useful to the proper and orderly functioning of financial markets.

Whilst market practice has now moved away from the use of placing letters in any case, this is still relevant to some houses which still use them routinely or where they are required for certain specific reasons (as noted above). Accordingly, this paper provides welcome guidance and comfort to ongoing use of such letters, should banks/brokers wish or need to do so for any reason.

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