

Prospectus Disclosure Regime in Europe – the proportionate disclosure regime and supplementary prospectuses

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Regulators have recently clarified two important aspects of the prospectus regime that applies across the European Economic Area pursuant to the Prospectus Directive (Directive 2003/71/EC as amended by Directive 2010/73/EU). The Prospectus Directive provides the overarching European regulatory framework for the publication of prospectuses in connection with debt and equity securities being offered to the public or admitted to trading on regulated markets in the EEA.

Proportionate disclosure regime

On October 28, 2013 the European Securities and Markets Association (“ESMA”) published two new questions and answers on the proportionate disclosure regime as part of a regular update of its guidance on the prospectus regime (see questions 89 and 90 of [Questions and Answers: Prospectuses, 20th updated version, ESMA 2013/1537](#)). The proportionate disclosure regime was introduced in July 2012 with amendments to the Prospectus Directive and permits reduced disclosure for prospectuses prepared in connection with rights issues or similar pre-emptive secondary offerings.

The new questions relate to the circumstances in which new shares are not fully taken up by existing shareholders (these shares are often referred to as the “rump”) in a pre-emptive capital raising. ESMA has confirmed that following the closing of the subscription period, any subsequent offer to the public of shares comprising the rump will be considered to be a separate offer requiring a full prospectus to be published. Placing these shares with ‘qualified investors’ however (which is standard practice in the UK) will not trigger this requirement, either in the context of a public offer or where the shares are being admitted to trading on a regulated market.

Supplementary prospectuses

ESMA consultation

Earlier in the year, ESMA consulted on a set of [draft Regulatory Technical Standards \(2013/316\)](#) concerning situations that might generally trigger the requirement to publish a supplementary prospectus. A supplementary prospectus is required if, during an offer period, there is a significant new factor, material mistake or inaccuracy concerning the information in the original prospectus (Article 16 of the Prospectus Directive).

In its consultation paper, ESMA stated that the test of whether a new factor, mistake or inaccuracy qualifies as a triggering event for producing a supplement is the same test as whether information should be included in the prospectus. As a consequence, significance or materiality should be assessed according to the same qualitative and/or quantitative criteria used when drafting the prospectus. In light of this, ESMA identified a short list comprising 10 situations, which will always require issuers, offerors or persons asking for admission to trading to draw up and publish a supplement to the prospectus. The consultation period has now closed and ESMA is considering the responses, copies of which are available on ESMA’s [website](#).

UK guidance

In the meantime, on October 7, 2013, the UK's Financial Conduct Authority ("FCA") published its own formal guidance clarifying the circumstances in which issuers will be required to publish a supplementary prospectus. The clarifications are contained in a technical note which is now in final form.

The technical note ([UKLA/TN/605.2](#)) outlines typical scenarios where a supplementary prospectus may be required. Issuers should tread carefully if they are considering amendments to drafting in the original prospectus as the FCA notes that it is not appropriate to publish a supplement merely to clarify or revise drafting, nor should drafting changes to the original prospectus be made as part of a genuine supplement. Amendments to terms and conditions are similarly not appropriate, unless the FCA can be persuaded that, following the changes, the securities are manifestly the same securities (if not, a new prospectus will need to be published). It may in some circumstances be possible to increase the number of securities offered via a supplement but only if the proposals clearly relate to the terms of the original offer, for example where an issuer needs to raise more capital for the acquisition of a target (but not to acquire a previously undisclosed target – in this case a new prospectus will be required). The final area considered by the FCA is where the issuer wishes to amend the offer period or offer amount. A supplement will be acceptable in these circumstances where the fundamental premise of the original prospectus still stands. So for example an extension to an offer period that has not yet closed, or an extension of the offer to additional jurisdictions, would be permitted.

Note that where a supplement is published, the FCA recommends that the offer be suspended between the trigger event and the publication of the supplement so that securities are not offered on the basis of incomplete disclosure.

Withdrawal rights

Still to be resolved on a Europe wide basis is the question of whether investors have withdrawal rights after a supplement has been published and before the closing of the offer, where the offer in question qualifies as an exempt public offer (an offer for which a prospectus is not required, for example an offer to 'qualified investors'). Article 16(2) of the Prospectus Directive was amended in July 2012 to include new wording but it is not entirely clear whether this limits the application of withdrawal rights to non-exempt public offers only. In the case of exempt public offers in the UK where a prospectus is only required to admit securities to trading on a regulated market, in most circumstances the offer will have closed before the prospectus is approved and so the practical application of this question may have limited bearing. However the FCA states in Primary Markets Bulletin No 7 that it is still considering this issue, and clarification has yet to be given by ESMA.

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