

EU Prospectus Regime – Prospectus Approval and Publication, and Dissemination of Advertisements

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Introduction

A number of changes to the Prospectus Directive regime regarding the approval and publication of prospectuses and dissemination of advertisements and also amending the Prospectus Regulation (EC) 809/2004 will come into force on March 24, 2016.

The European Commission [delegated regulation \(EU\) 2016/301](#) dated 30 November 2015 (the “**Delegated Regulation**”)¹, which was published in the Official Journal of the EU on March 4, 2016, is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (“**ESMA**”) to the European Commission in July 2015, as required by the Omnibus II Directive.

Areas covered by the Delegated Regulation include procedures for the approval of prospectuses by national competent authorities; provisions relating to the publication of prospectuses; and the dissemination of advertisements announcing the intention to offer securities to the public or the admission to trading on a regulated market.

Addressing these topics in a delegated regulation, which is directly applicable across member states, as opposed to through the Prospectus Directive, should result in consistent practice across national competent authorities in relation to these matters where that was not necessarily the case previously. Specifically, in the United Kingdom, the Financial Conduct Authority (the “**FCA**”) has (in CP15/28 and CP15/42) consulted on proposed changes to its Prospectus Rules, which will be revised as a result of the coming into force of the Delegated Regulation.

Key requirements under the new Delegated Regulation

Prospectus submission and approval

All drafts of a prospectus must be submitted electronically to the relevant competent authority in a searchable electronic format, and the competent authority must be provided with a contact for who they can communicate with electronically at the time of the first draft submission. Along with the first draft of the prospectus, or during the review process, the following items must be submitted to the competent authority in searchable electronic form:

- a cross reference list that also identifies any items from the Annexes to the Prospectus Regulation that have not been included in the prospectus;
- a reasoned request for any information that is requested to be omitted from the prospectus;
- any request for the competent authority of the home member state to notify the competent authority of the host member state with a certificate of approval (for passporting);
- any information incorporated by reference to the extent such information has not already been approved or filed with the same competent authority; and

¹ European Commission delegated regulation (EU) 2016/301 dated 30 November 2015 supplementing the Prospectus Directive (2003/71/EC) with regard to regulatory technical standards under the Omnibus II Directive (2014/51/EU) for approval and publication of prospectuses and dissemination of advertisements and also amending the Prospectus Regulation (EC) 809/2004.

- any other information considered necessary, on reasonable grounds, for review by the competent authority of the home member state and expressly required by it for that purpose.

Changes to the draft prospectus

Subsequent drafts of the prospectus submitted to the competent authority must be marked to highlight all changes made unless changes are limited in nature, in which case marked pages alone be considered acceptable. In addition to the marked draft, a clean draft must always be submitted. In circumstances where it is not possible for technical reasons to submit a marked draft, changes must be identified to the competent authority in writing. Where the competent authority has commented on the nature of any disclosure in the draft prospectus, the subsequent revised draft submitted must be accompanied by a written explanation as to how the incompleteness has been addressed.

Final submission

The final draft of the prospectus must not be annotated in the margin and must be submitted with any information noted under '*Prospectus submission and approval*' above that has changed since a previous submission with the exception of the cross-reference list. Where no changes have been made to the previously submitted information, this must be confirmed in writing.

Receipt and process for prospectus approval

Competent authorities must acknowledge receipt of initial applications for approval of prospectuses in writing electronically as soon as possible and no later than close of business on the second working day following receipt. The acknowledgement must provide details of a contact at the competent authority to whom queries regarding the application may be addressed. Where documents submitted are incomplete or supplementary information is needed, the competent authority must provide a written explanation electronically for the additional information it requires. Where timing is of the utmost importance or the incompleteness in the documentation is of a minor nature, the competent authority can communicate orally without interrupting the approval timetable. The competent authority can terminate the review process where any supplementary information it requests is not provided. On the day of approval of the prospectus, the competent authority must notify the issuer in writing electronically.

Prospectus publication in electronic form

When publishing a prospectus in electronic form, it must be easily accessible on the website; be in a searchable electronic format that cannot be modified; not contain hyperlinks (with the exception of links to electronic addresses where information incorporated by reference is available); and be downloadable and printable.

If a prospectus is made available on a website, measures should be taken to avoid targeting residents in member states or third countries where the offer does not take place, for example, by including a disclaimer as to who are the addressees of the offer.

In addition, access to a prospectus published in electronic form must not be subject to completion of a registration process; acceptance of a disclaimer limiting legal liability; or payment of a fee.

Dissemination of advertisements

Where an advertisement relating to an offer to the public or an admission to trading on a regulated market has been disseminated and a supplementary prospectus is subsequently published, an amended advertisement must be published if the matter or information giving rise to the supplementary event renders the contents of the previous advertisement inaccurate or misleading. The amended advertisement must make reference to the previous advertisement, specifying that the previous advertisement has been amended, the reasons for the amendment and identifying the differences between them. The amended advertisement must be disseminated without undue delay following the publication of the supplementary prospectus. The requirement to publish an amended

advertisement falls away after the final closing of the offer to the public or after the time when trading on a regulated market begins, whichever occurs later.

Where no prospectus is required in accordance with the Prospectus Directive, for example, because the offer is to qualified investors only and the securities are not being admitted to trading on a regulated market, any advertisement (in addition to the offering circular) must include rubric that a prospectus is not required in accordance with the Prospectus Directive unless the issuer chooses to publish a prospectus complying with the Prospectus Directive and Prospectus Regulation.

Consistency with prospectus disclosure

Information disclosed in oral or written form about an offer to the public or an admission to trading on a regulated market, whether for advertisement or other purposes, must not:

- contradict the information in the prospectus; refer to information which contradicts that contained in the prospectus;
- present a materially unbalanced view of the information contained in the prospectus, including by way of omission or presentation of negative aspects of such information with less prominence than the positive aspects; or
- contain alternative performance measures concerning the issuer unless they are contained in the prospectus.

Concluding remarks

In the United Kingdom, the Delegated Regulation will not, in any material way, alter the manner in which prospectuses are submitted to, and approved by, the FCA, or change the approach that issuers and advisers should take already to insure the consistency of marketing materials and advertising with regard to prospectus disclosure. However, the UK Listing Authority has noted that some pages and forms in its section of the FCA website will change to reflect the introduction of the revised Prospectus Rules referred to above. In any event, issuers and advisers should take note of the forthcoming procedural changes and, in particular, be alert to the new “supplementary advertisement” regime and the reduced flexibility for restricting access to published prospectuses on websites.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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