

The New EU Prospectus Regulation

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Today's speakers



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Agenda

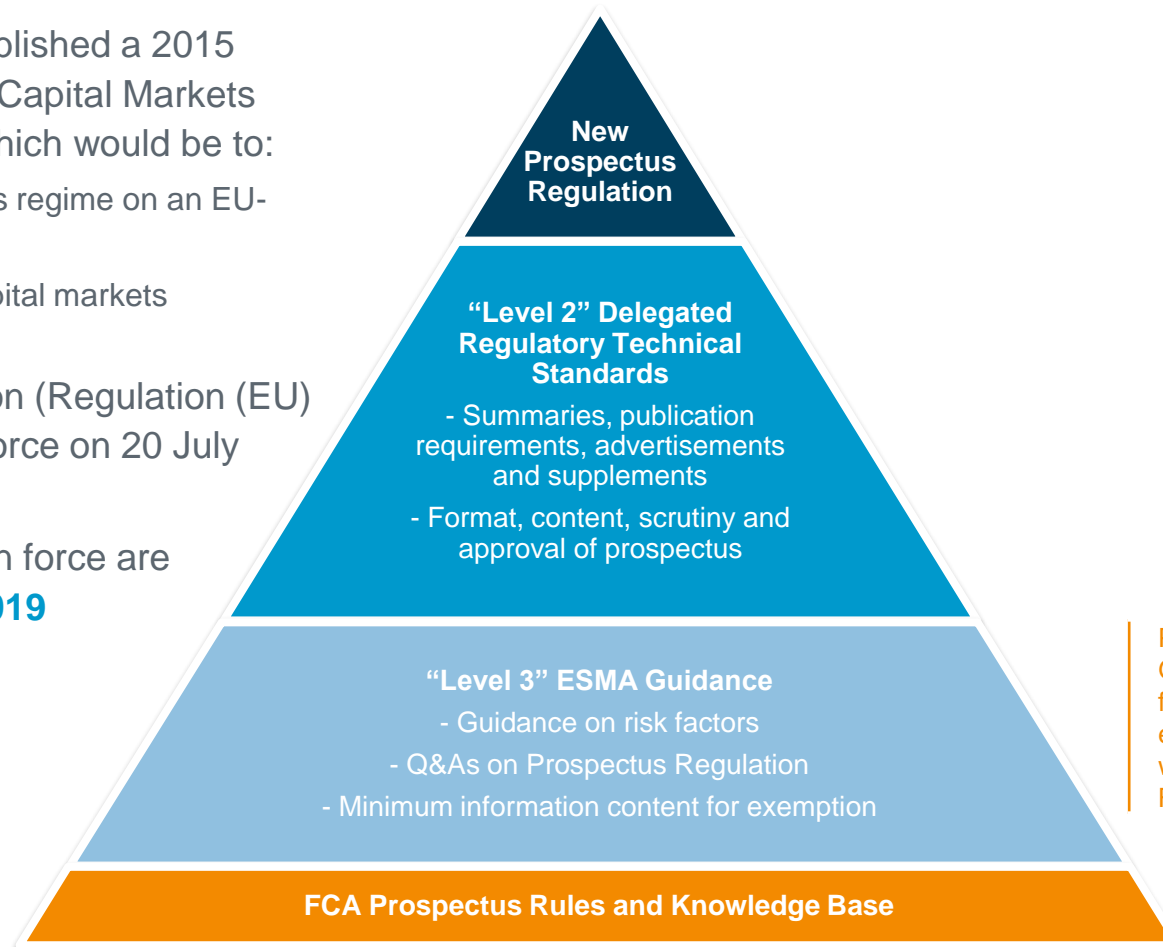
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Background

- European Commission published a 2015 green paper advocating a Capital Markets Union, key objectives of which would be to:
 - Harmonise the prospectus regime on an EU-level
 - Simplify access to the capital markets (especially SMEs)
- New Prospectus Regulation (Regulation (EU) 2017/1129) entered into force on 20 July 2017
- All measures not already in force are applicable from **21 July 2019**

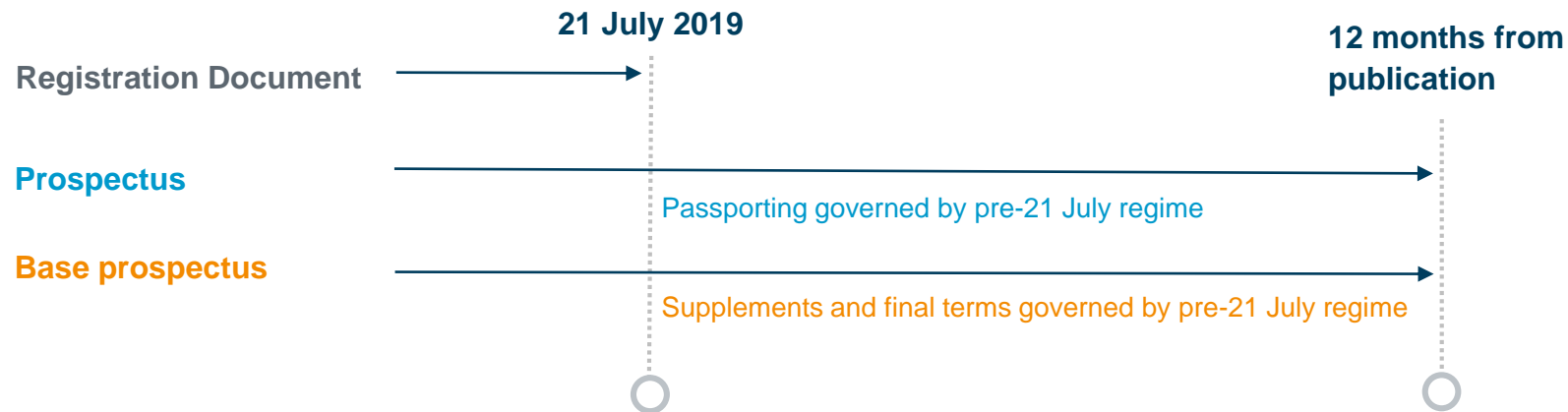


Prior ESMA Guidance should be followed “to the extent compatible with the Prospectus Regulation”

Application

Grandfathering

ESMA Q&A 4(1)



Brexit

- Regulation took effect as a matter of English law on 20 July 2017
 - Delegated regulations to take effect 20 days following publication in the Official Journal
 - No current intention in the U.K. to amend provisions of the Prospectus Regulation following Brexit
- Passporting rights post-Brexit not currently addressed
 - Any prospectus passported into the UK before “exit day” will be grandfathered for use in the UK until its validity expires
 - New third-country issuer regime (see Appendix)

The Summary

- Limited to 7 sides of A4 (text must be “readable”)
- Must contain key information that investors need to understand the nature and risks of issuer *and* a new express requirement to be accurate, fair, clear and not misleading
 - Liability will only attach if either of these two requirements are not met when summary is read together with the other parts of the prospectus
- Q&A format
 - 4 sections: (i) prescribed warnings, (ii) information on the issuer, (iii) information on the securities, and (iv) information on the offer to the public/admission
- Maximum of 15 “most material” risk factors
 - ESMA guides that disclosure should be consistent with disclosure in risk factors themselves (i.e., with respect to categorisation and ranking by materiality)
- Financial information must follow the prescribed template
 - ESMA acknowledges that issuers will need some flexibility
 - Must also be clear signposting of financial information extracted from financial statements
 - No limit on number of APMs and no requirement to include an explanation of APMs within summary
- Inclusion of summary no longer required for programme base prospectuses
 - To be included with final terms instead
- Requirement for PRIIPs to include KID disclosure?
- Prospectus Regulation – *Recitals 28 to 33 and Article 7*
- ESMA Delegated RTS (summaries, publication requirements, advertisements and supplements) – *Chapter I and Annexes I to VI*

Risk Factors

- Specificity
 - Risk factor must establish a clear and direct link
 - Materiality
 - Risk factor must be material to informing investment decision
 - To be assessed based on the probability of occurrence and the expected magnitude of its negative impact (may use a qualitative scale of risk)
 - No definition of “materiality” provided
 - Quantitative disclosure
 - Where available, quantitative disclosure to be provided to demonstrate the potential negative impact
 - Mitigating language
 - Should only be used to illustrate the risk factor’s probability of occurrence and the expected magnitude of its negative impact
 - Corroboration
 - The information elsewhere in the prospectus should corroborate that the risk factor is material and specific
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- Categories
 - No more than 10 categories or sub-categories. ESMA suggests seven categories:
 - *relating to the issuer*: risks relating to financial situation; risks related to business activities and industry; legal and regulatory risks; internal control risks and environmental, social and governance risks
 - *relating to the securities*: risks related to the nature of the securities; risks related to the offer to the public and / or admission of the securities to trading on a regulated market
 - Concise disclosure
 - Risk factor section should be scrutinised by competent authorities to combat “size inflation” of prospectuses
 - Example risk factors included in the ESMA Guidance
 - [Prospectus Regulation – Article 16](#)
 - [ESMA Guidance on Risk Factors](#)

Profit Forecasts and Estimates

- Requirement remains for equity and non-retail equity prospectuses to include prior valid profit forecasts/estimates retained, but requirement to include report by reporting accountants has been abolished
 - Private report may still be required by banks
- Wholesale non-equity prospectuses may include a profit forecast/estimate but no requirement to do so
- Requirements for the assumptions used to reach profit forecasts/estimates in line with former regime, except that:
 - Now clarified that assumptions must be reasonable (as well as properly compiled)
 - In the case of a forecast, assumptions shall draw the investor's attention to those uncertain factors which could materially change the outcome of the forecast
- As before, the prospectus must include a statement that a profit forecast/estimate is:
 - Comparable with historical financial information
 - Consistent with the issuer's accounting policies
- *Equity Registration Document – Annex 1, Section 11*
- *Retail Non-Equity Registration Document – Annex 6, Section 8*
- *Wholesale Non-Equity Registration Document – Annex 7, Section 8*

Scrutiny

- Delegated Regulation aims at creating a single rulebook that can be implemented consistently throughout EU
 - Peer reviews of NCAs within 5 years
 - NCAs nevertheless allowed to consider additional criteria (including for specialist issuers)

- Focus on:
 - Comprehensibility
 - plain language*
 - understandable structure
 - contents page
 - no unnecessary repetition
 - font size
 - explanation of trade or industry specific terminology*
 - issuer's operations and principal activities*

*not required for wholesale debt prospectuses

Statutory (maximum) review periods

	1 st draft	Subsequent drafts	Competent authorities may set shorter review periods
Issuer does not have securities admitted to trading on a regulated market and has not previously offered securities to the public	20 working days	10 working days	(FCA not intending to change their review periods)
Other issuers	10 working days	5 working days	

- Consistency
 - prospectus v documents incorporated by reference
 - summary v rest of prospectus
 - risk factors v rest of prospectus
 - use of proceeds v actual proceeds
 - OFR v hfi v issuer's business description v risk factors
 - working capital statement v risk factors v auditor's report v use of proceeds v issuer's strategy

- Proportionate approach to review where information has already been included in a prospectus
- Detailed submission procedure for issuers
 - Prospectus Regulation – Article 20
 - ESMA Delegated RTS (format, content, scrutiny and approval of the prospectus) – Chapter V

Publication

- Electronic versions of prospectuses must be fully downloadable, printable and searchable
 - pdf or inline-XBRL
 - Summary must be accessible as a standalone document
 - Prospectus, summary, final terms and documents incorporated by reference must be available on the same designated section of a website
 - Documents on display not necessarily published in the same place
 - Cannot charge registration fee or include an acceptance limiting liability
 - Measures can be taken to avoid targeting residents of Member States or third countries
 - ESMA will keep a central repository of prospectuses
 - In the UK, regulation places obligation on FCA to supply the document, but CP19/6 proposes that the issuer and its counsel will be required to provide relevant information
- No longer a requirement for issuer to file prospectus with the NCA, but NCA now required to publish document
 - CP19/6 envisages that, in the UK, the documents will be published on the NSM by the FCA
 - Prospectus Regulation – *Article 21*
 - ESMA Delegated RTS (summaries, publication requirements, advertisements and supplements) – *Chapter II*
- ### Passporting
- Unchanged except that ESMA will establish a notification portal to allow NCAs to upload certificates of approval
 - Prospectus Regulation – *Articles 24 to 26*
 - ESMA Delegated RTS (summaries, publication requirements, advertisements and supplements) – *Chapter VI*

Appendix



Exemptions

Triggers to produce a prospectus

- Unchanged from current regime:
 - Offer of securities to the public
 - Admission to trading on regulated market in the EEA

From July 2017

- Current exemptions retained, with the following changes to “listing” exemptions:
 - Issuers are permitted to admit to trading on a regulated market securities representing less than 20% of the same securities already admitted to trading over a 12-month period without a prospectus (note: (i) not just shares, (ii) >10% of existing securities remains uncommon in some jurisdictions)
 - *Closure of convertible bond loophole*: specific exemption applicable at the time of conversion of the bonds into shares will be capped at 20% of the class of shares already admitted to trading

From July 2018

- New Prospectus Regulation does not apply to offers to the public with consideration in EEA over 12-month period of less than €1 million (increased from €100k)
- Member States may choose to increase total consideration in EEA over 12-month period exemption from €1 million to €8 million (UK threshold is €8 million)

From July 2019

- No longer a requirement for an “equivalent document” on a takeover or merger offer
 - Requirement to provide information describing the transaction and its impact on the issuer
- Employee share scheme exemption applies wherever issuer is located
- Prospectus Regulation – *Articles 3 to 5*
- ESMA Technical Advice on Minimum Information Content regarding information in connection with a takeover

Other Content Requirements

Significant change (Equity and Wholesale and Retail Non-Equity)

- Deletion of reference to “trading position” as meaning was considered unclear
- Disclosure of current trends now also includes a statement concerning any significant change to the “financial performance” of the group since date of last published financial information
- Intention that analysis of “financial position” and “financial performance” makes it clear the statement should cover changes in both the income statement and balance sheet
- Note statement on “financial performance” not required for secondary issue prospectus under reduced disclosure regime

Dilution (Equity)

- Disclosure must include comparisons showing:
 - Participation in share capital and voting rights for existing shareholders before and after a capital increase, on the assumption that they do not acquire new shares
 - Net asset value per share from the date of the latest balance sheet before the capital increase and the price per share in the offer
- Where shareholders are diluted regardless of whether they take up any entitlement (i.e., by a non-pre-emptive placing conducted alongside an open offer) an indication of dilution must be presented on the basis that they subscribe in the offer for their full allocation

- Equity Registration Document – *Annex 1, Items 10.1(b) and 18.7*
- Retail Non-Equity Registration Document – *Annex 6, Items 7.1(b) and 11.5*
- Wholesale Non-Equity Registration Document – *Annex 7, Items 7.1(b) and 11.4*

- Equity Securities Note – *Annex 11, Section 9*

Other Content Requirements (cont.)

Use of proceeds

- Equity and Retail Non-Equity – ESMA specifically notes that “general corporate purposes” cannot be used in all circumstances, although no requirement for standalone section required, as initially proposed (*ESMA Final Report – Technical Advice under the Prospectus Regulation, paras 56 and 359*)
- Wholesale non-equity – simplified language retained to avoid onerous requirements where funds are being raised for general corporate purposes

OFR (Equity)

- Changes to OFR requirements to align with the management report requirements in Article 19 of the Accounting Directive
- Will enable certain OFR requirements to be satisfied by incorporation by reference from Annual Reports

Capitalisation and indebtedness statement (Equity)

- New requirement to provide a narrative update if material change occurs between the date made (no earlier than 90 days pre-prospectus) and publication of the prospectus

- Equity Securities Note – *Annex 11, Item 3.4*
- Retail Non-Equity Securities Note – *Annex 13, Item 3.2*
- Wholesale Non-Equity Securities Note – *Annex 14, Item 3.2*

- Equity Registration Document – *Annex 1, Section 7*

- Equity Securities Note – *Annex 11, Item 3.2*

Other Content Requirements (cont.)

Complex financial history and significant financial commitments (Equity)

- Where an issuer has made a significant acquisition in the prior three years, substantive business disclosure of the new asset will be required that will be similar to that made in relation to the issuer itself as well as financial statements

Historical financial information (Equity and Retail Non-Equity)

- Clarification that changes to the accounting framework do not trigger requirement to restate historical financial information

Regulatory Environment (Equity)

- Standalone section on the issuer's regulatory environment now required

Strategy and objectives (Equity)

- Longstanding IPO practice of disclosure of "equity story" formalised in content requirements

Stabilisation (Equity)

- Requirement to include information around stabilisation activities that must be publicly announced under the EU Market Abuse Regulation

- ESMA Delegated RTS (format, content, scrutiny and approval of the prospectus) – *Article 17*
- Equity Registration Document – *Annex 1, Item 18.1.4*
- Retail Non-Equity Registration Document – *Annex 6, Section 11.1.4*
- Equity Registration Document – *Annex 1, Section 9*
- Equity Registration Document – *Annex 1, Item 5.4*
- Equity Securities Note – *Annex 11, Item 6.5*

Other Content Requirements (cont.)

Takeover regime disclosure (Equity)

- Need only to stipulate the national legislation relevant to the issuer and give an overview of the position of a shareholder in case of a takeover and any potential frustrating measures

Tax (Equity and Retail Non-Equity)

- Disclosure must now include reference to applicable tax regimes and further information only where the investment attracts a tax regime specific to the type of investment

Constitutional documents (Equity and Retail Non-Equity)

- Limited to the issuer's principal objects and purposes and, for equity:
 - Description of the rights, preferences and restrictions of each class of share
 - Any provisions that may effect of delaying, deferring or preventing a change of control

Tangible fixed assets (Equity)

- Now no requirement to disclose separately tangible fixed assets in Equity prospectus (included in IFRS financial statements already)

- Equity Securities Note – *Annex 11, Item 4.9*
- Equity Securities Note – *Annex 11, Item 4.11*
- Retail Non-Equity Securities Note – *Annex 13, Item 4.15*
- Equity Registration Document – *Annex 1, Item 19.2*
- Retail Non-Equity Securities Note – *Annex 13, Item 4.15*

Incorporation by Reference and Documents on Display

Incorporation by reference

- Expanded list of documents that may be incorporated by reference, including:
 - Regulated information
 - Management reports (as defined in the EU Accounting Directive)
 - Corporate governance statements
 - Constitutional documents
- Hyperlinks to be included in the prospectus of all documents incorporated by reference
- Prospectus Regulation – *Article 19*

Documents on display

- Documents to be made available electronically on a website (not necessarily issuer's):
 - Constitutional documents
 - Reports and other documents prepared by experts at issuer's request which is included or referred to in the prospectus
- Where, in the UK, a prospectus is combined with a class 1 circular, there is no requirement to allow electronic access to documents put on display pursuant to the Listing Rules (e.g., an SPA)
- Equity Registration Document – *Annex 1, Section 21*
- Retail Non-Equity Registration Document – *Annex 6, Section 14*
- Wholesale Non-Equity Registration Document – *Annex 7, Section 13*

Supplementary Prospectuses and Third-Country Issuers

Supplementary prospectus regime

- Formulation of the test unchanged
- Additions made to examples in existing Delegated Regulation of situations when a supplementary prospectus must be published:
 - an issuer publishes a new profit forecast or estimate not included in the prospectus
 - an issuer is seeking admission to trading on at least one additional regulated market in at least one additional Member State or making an offer to the public in at least one Member State that is not mentioned in the prospectus
 - a new significant financial commitment is likely to lead to a significant gross change (previously the case that the significant financial commitment had to be ‘undertaken’)
- New requirement to publish a supplementary registration document rather than update a registration document through disclosure in a securities note

- *Prospectus Regulation – Articles 10(1) and 23*
- *ESMA Delegated RTS (summaries, publication requirements, advertisements and supplements) – Chapter V*

Third-country issuers

- Two options:
 - Draw up a prospectus in accordance with the Prospectus Regulation
 - Draw up prospectus in accordance with own national law provided that information requirements are equivalent and the NCA of the home member state has concluded a co-operation arrangement with the authorities in the third-country issuer
- Commission has asked ESMA to provide technical advice on general equivalence criteria to guide future assessments
 - Focus on equity and non-equity securities
- *Prospectus Regulation – Articles 28 to 30*

Reduced Disclosure Regime

SECONDARY ISSUES

- Applicable where an:
 - Issuer has been trading on a regulated market or an SME growth market for 18 months and issues securities fungible with the relevant existing listed securities or other non-equity securities
 - Proposal to broaden to include securities “giving access” to listed securities (e.g., GDRs)
 - Offeror is offering securities that have been admitted to trading on a regulated market or an SME growth market for ≥ 18 months
 - Further proposals to broaden this regime to apply where an:
 - Issuer seeks admission to a regulated market if it has had securities offered to the public and admitted to trading on an SME growth market for >2 years and complied with reporting and disclosure obligations
- Prospectus Regulation – *Article 14*
 - Secondary issuances equity registration document and securities note – *Annexes 3 and 11*
- Reduced disclosure includes:
 - Annual and half-yearly financial information published over the last 12 months
 - Profit forecasts and estimates (if applicable)
 - Concise summary of the information disclosed under MAR over the last 12 months
 - Risk factors
 - Working capital statement
 - Statement of capitalisation and indebtedness
 - Relevant conflicts of interest
 - Related-party transactions
 - Major shareholders
 - Pro forma financial information (where applicable)

Note: different approach to “significant change” disclosure – no “financial performance” requirement
 - Secondary issuances non-equity registration document and securities note – *Annexes 6 and 15*

Reduced Disclosure Regime

WHOLESALE REGIME AND EU GROWTH PROSPECTUS

Wholesale regime

- Existing €100,000 wholesale regime for debt extended to offers of any non-equity securities to be traded only on a regulated market to which qualified investors have access
- *Prospectus Regulation – Recital 21*

EU growth prospectus

- Applicable to:
 - SMEs or offerors of securities in an SME
 - SME is defined as a company with a market capitalisation of less than €200 million for previous 3 years or satisfies two of the following criteria:
 - Less than 250 employees (average over last financial year)
 - Balance sheet not exceeding €43 million
 - Annual net turnover not exceeding €50 million

- Other issuers having their securities traded on an SME growth market with an average market capitalisation of less than €500 million or offerors of such securities
- Other issuers having no securities traded on an MTF, have less than 500 employees (average over last financial year) and offer less than €20 million of securities over a 12-month period

- Specific disclosure requirements for summary, registration document and securities note, including:
 - Two years financial information for equity and one year for debt
- *Prospectus Regulation – Recital 21*
- *EU Growth prospectus – Annexes 22 to Annex 26*

Universal Registration Documents

- Similar in concept to US shelf registration
- Open to issuers that already have securities admitted to trading
- URD will be similar to a registration document and can make up part of a prospectus
 - Issuer publishing a URD will then only be required to produce a summary and securities note for each new issuance
- Issuer could adapt an annual report and accounts to form the basis for a URD
- “Frequent issuers”:
 - Only an issuer’s first two URDs will need to be approved as long as the issuer subsequently publishes a URD every year (approval will be required for a URD when it is part of a prospectus)
 - Benefit from quicker guaranteed turnaround time for prospectus review (although, for London listings, not quicker than the existing FCA targets)

Will issuers use URDs?

- URD has to be drafted to equity issuance standard, so unattractive to debt-only issuers, especially those with existing EMTN programmes
 - Very few issuers publish an equity prospectus every year
 - The final prospectus will still need to be approved
- [Prospectus Regulation – Article 9](#)
 - [Universal registration document – Annex 2](#)

Advertisements

- Definition of an advertisement broadened from ‘announcement’ to ‘communication’
- NCA where the advertisement is disseminated can review compliance of advertising activity with assistance from issuer’s home member state NCA
- Additional requirements for advertisements disseminated to ‘potential’ retail investors:
 - The word ‘Advertisement’ should be prominent. Oral communications should clearly identify themselves as advertisements at the beginning of the message
 - Communication should make it clear that the NCA does not endorse the securities being offered or admitted
 - Communication must include a recommendation to investors to read the prospectus before making an investment decision
 - Communication must include a comprehension alert if the communication relates to complex securities or will require a comprehension alert in the prospectus summary
 - Communication must not be a similar length or format to a prospectus such that there is a possibility for confusion
- Rules remain broadly similar for:
 - amending advertisements in the event of a supplementary prospectus
 - requirement for consistency of information (i.e., no APMs in advertisements that are not in the prospectus)
- *Prospectus Regulation – Article 22*
- *ESMA Delegated RTS (summaries, publication requirements, advertisements and supplements) – Chapter IV*

Key Source Materials

Material	Source
Prospectus Regulation	<ul style="list-style-type: none">• https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1129&from=EN
“Level 2” Delegated Regulations	<ul style="list-style-type: none">• Covering Summaries, Publication Requirements, Advertisements and Supplements: https://ec.europa.eu/transparency/regdoc/rep/3/2019/EN/C-2019-2022-F1-EN-MAIN-PART-1.PDF• Covering Format, Content, Scrutiny and Approval of a Prospectus: https://ec.europa.eu/transparency/regdoc/rep/3/2019/EN/C-2019-2020-F1-EN-MAIN-PART-1.PDF
“Level 3” ESMA guidance	<ul style="list-style-type: none">• Technical Advice on Minimum Information Content for Prospectus Exemption: https://www.esma.europa.eu/sites/default/files/library/esma31-62-1207_final_report_on_technical_advice_under_prospectus_exemption.pdf• Guidance on Risk Factors: https://www.esma.europa.eu/sites/default/files/library/esma31-62-1217_final_report_on_guidelines_on_risk_factors.pdf• Q&A’s on Prospectus Regulation: https://www.esma.europa.eu/sites/default/files/library/esma31-62-1258_prospectus_regulation_qas.pdf
FCA documents	<ul style="list-style-type: none">• Consultation Paper on new Prospectus Rules (19/6): https://www.fca.org.uk/publication/consultation/cp19-06.pdf• Technical Notes on Prospectus Content (to be updated): https://www.fca.org.uk/markets/ukla/knowledge-base#prospectus-content