

# European Commission Proposal for a New EU Prospectus Regulation

December 4, 2015

## Introduction

On November 30, 2015, as part of its Capital Markets Union action plan to lower barriers to accessing capital markets across the European Union, the European Commission published a proposal for a new [European Prospectus Regulation](#) which is intended to repeal and replace the existing European Prospectus Directive (Directive 2003/71/EC, as amended) along with its corresponding implementing measures (including the current Prospectus Regulation (809/2004)).

The proposed amendments to the European prospectus regime, which governs the offer to the public, and admission to trading on regulated markets, of transferable securities in the EEA, constitute the most significant and wide-ranging changes to the rules for the preparation and publication of prospectuses since the current European regime came into force in 2005.

In describing the new proposals, the Commissioner for Financial Stability, Financial Services and Capital Markets Union, Jonathan Hill said they “will help return prospectuses more closely to their original purpose, to provide clear and comparable information to investors across Europe so that companies can unlock the investment they need to grow...Taken together these measures will make it easier for companies to get funding in Europe. They will make prospectuses simpler, faster and cheaper to produce. They will be clearer to investors and easier to get hold of.”

Set out below is a high-level summary of how the new proposals plan on achieving these objectives.

## Key proposals under the new Prospectus Regulation

### Prospectus exemptions

No prospectus would be required for offers of securities with a total value in the EU below €500,000 (up from the current €100,000) over a period of 12 months. In addition, Member States will be given the choice to exempt offers of securities with a total consideration between €500,000 and €10,000,000 over the same period, provided the offer is domestic only and no passport into another Member State is sought. For issuers already admitted to trading on an EEA regulated market, any subsequent admission of the same securities on the same regulated market will not require a prospectus provided the new securities represent less than 20% (up from 10%) of the existing securities already admitted to trading on the same regulated market over a period of 12 months.

### Prospectus summaries

Recognising that the summary format introduced by the amending Directive 2010/73/EU has not met its objectives, the new summary would be subject to a maximum length of six pages of A4, containing three main sections covering key information on the issuer, the security and the offer/admission respectively. For each of the sections, general headings would be introduced, as well as indications of their content, but issuers will have latitude to develop brief narratives and select the information which is material. The liability regime of the summary would remain unchanged (i.e. liability would attach to the summary only if it is misleading, inaccurate or inconsistent when read together with other parts of the prospectus).

### Risk factors

In an attempt to curb the tendency of including in prospectuses generic risk factors that obscure the more specific risk factors that investors should be aware of, only risk factors that are material and specific to the issuer and its securities would be permitted in a prospectus. Issuers will be required to

allocate risk factors across two or three categories, differentiated by their relative materiality based on the issuer's assessment of the probability of their occurrence and the expected magnitude of their negative impact. ESMA will be given the power to develop guidelines on the assessment by competent authorities of the specificity and materiality of risk factors across categories.

### **Incorporation by reference**

A wider range of information will be able to be incorporated by reference in a prospectus provided that information is published electronically and complies with the language requirements of the Prospectus Regulation. Information capable of being incorporated by reference will include material from the following sources: prospectuses, supplements and final terms; documents prepared in the context of takeovers, mergers and divisions; regulated information which needs to be disclosed under the Transparency Directive and the Market Abuse Regulation; memoranda and articles of association; and in the case of issuers admitted to trading on multilateral trading facilities who are not under the scope of the Transparency Directive, all or parts of their annual and interim financial information and management reports. ESMA will be given the power to develop draft regulatory technical standards to complete the list of documents required under EU law.

### **Reduced disclosure requirements for existing listed issuers and SMEs**

For offers or admissions of securities issued by companies already admitted to trading on a regulated market or an SME growth market for at least 18 months, and in place of the little-used "proportionate disclosure" regime, issuers will have the option of producing a shorter-form prospectus, containing minimum financial information covering the last financial year only (which may be incorporated by reference) and other information limited to that which is not required to be disclosed on an ongoing basis such as the terms of the offer, use of proceeds, risk factors, board practices, directors' remuneration, shareholding structure and related party transactions.

To further make it easier for SMEs to raise capital in a cost-effective manner, SMEs without securities admitted to trading on a regulated market who are offering securities to the public will benefit from a specific regime in which the prospectus disclosure schedules will focus on information that is material and relevant to companies of such size. In addition, SMEs will have the option of producing a prospectus in a "question and answer" format, with the design and content details to be set out in delegated acts and accompanied by ESMA guidelines.

### **Universal registration documents (URDs)**

This new feature of the prospectus regime will provide an optional shelf registration mechanism for frequent issuers. The aim is to provide issuers who make the effort of drawing up a complete registration document every year with a fast-track prospectus approval when a prospectus is later required. The expectation is that the competent authority should be able to scrutinise the remaining parts of the prospectus (namely, the securities note and summary) within five working days instead of the current 10 working days when an offer or admission to trading is planned. In addition, it is intended that in certain circumstances such issuers will be able to fulfil their ongoing disclosure obligation under the Transparency Directive by integrating their annual and half-yearly financial reports into the URD. For issuers who have previously filed three consecutive URDs approved by the competent authority, they will be able to file their subsequent URD without prior approval outside of the context of an offer or admission to trading.

### **Base prospectuses**

Base prospectuses consisting of several documents (the so-called "tripartite prospectus") will be possible, and the registration document of a base prospectus may take the form of a URD. There will no longer be an obligation to draw up a summary of the base prospectus when the final terms are not contained in the base prospectus, so that only the "issue specific" summary will be required to be produced and annexed to the final terms, when those are filed. Base prospectuses will be permitted for any kind of non-equity securities, not only for those issued under an offering programme or in a continuous and repeated way by credit institutions.

## High denomination non-equity securities

In an attempt to remove the incentive to issue debt securities in large denominations and improve secondary market liquidity on bond markets, the existing prospectus exemption for offers of securities with a denomination above €100,000 will be removed, and the dual standard of disclosure for non-equity securities admitted to trading on a regulated market (retail vs. wholesale) will be replaced with a unified prospectus template, taking the existing wholesale disclosure regime as a starting point and adding only the information items necessary for retail investor protection. Issuers offering non-equity securities solely to qualified investors or requiring a minimum commitment of €100,000 per investor will still benefit from a prospectus exemption.

## Prospectus publication

Consistent with the shift towards electronic publication of prospectuses, for example, on an issuer's website, ESMA will be tasked with developing an online storage mechanism for all prospectuses approved in the EEA, with a search tool that EU investors may use for free.

## Sanctions

Similar to other initiatives at EU level in the financial sector, it is proposed that minimum sanctions and measures, including monetary fines, aimed at introducing a consistent approach to sanctions, will be introduced for infringements of the prospectus regime. Competent authorities will be able to publish a statement concerning any wrongdoing and the name of the person(s) responsible, and will have the ability to prohibit further and/or repetitive wrongdoing. Member States can choose to provide for more measures and higher sanctions as well as sanctions of a criminal nature, if they wish to do so.

## Next steps

The draft Prospectus Regulation will be sent to the European Parliament and the Council of the EU for discussion and adoption under the co-decision procedure. A number of delegated acts will also need to be adopted by the European Commission and draft regulatory technical standards and guidance will need to be developed by ESMA in respect of various provisions of the Prospectus Regulation. As with any other EU Regulation, its provisions will be legally binding in all EU Member States without transposition into national law from the day of entry into application.

The precise timeline for adoption of the new Prospectus Regulation and it coming into force remains subject to the European legislative process, but with significant work to be done in terms of publishing and consulting on delegated acts, draft regulatory technical standards and guidance that ESMA will be required to develop, it is unlikely to be applicable before mid-2017 at the earliest. Nonetheless, the publication this week of the proposal for a new Prospectus Regulation sets out a number of significant changes to the European prospectus regime that should in time assist in simplifying the process for raising capital on Europe's equity and debt capital markets.

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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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