

ESMA Finalises Revised Guidelines for Prospectus Disclosure

8 March 2021

On 4 March 2021, the European Securities and Markets Authority (**ESMA**) published its **final guidelines** on disclosure requirements (the **Guidelines**) under the EU Prospectus Regulation (EU) 2017/1129 of the European Parliament (the **Prospectus Regulation**). This follows the publication of ESMA's **report** on disclosure requirements under the Prospectus Regulation in July 2020 (which contained a final form version of the Guidelines), in response to the feedback received on its **consultation paper** from 2019. The Guidelines will apply in EU Member States with effect from 4 May 2021, two months after their publication.

The Guidelines replace the **recommendations** of ESMA's predecessor, the Committee of European Securities Regulators, as last updated in 2013 (the **CESR Recommendations**). Because the United Kingdom is no longer an EU Member State, and the Brexit transition period has expired, the Guidelines will not apply in the United Kingdom – the Financial Conduct Authority (the **FCA**) has confirmed that UK issuers and their advisors should continue to have regard to the CESR Recommendations.

The Guidelines contain the following key changes:

- **Working capital:** ESMA has introduced more restrictive guidance on assumptions included in working capital statements. An issuer should not count offer proceeds in calculating its working capital if this requires significant assumptions around underwriting commitments or the endurance of irrevocable undertakings. The proceeds from an offer should only be counted for working capital purposes to the extent they are underwritten on a firm commitment basis, or where the issuer has obtained irrevocable undertakings to cover such amounts.
- **Pro forma:** The Guidelines now require the disclosure of aggregated pro forma financial information for multiple transactions undertaken by an issuer which, taken together, constitute more than a 25% variation in the issuer's total assets, revenue or profit and loss. ESMA considers this aggregation principle an important policy change as regards investor protection. Issuers will, however, be exempted from this requirement where it would be disproportionately burdensome to produce such pro forma information – in making this determination, issuers must consider and explain to the relevant national competent authority the costs of producing the pro forma information as compared against the value of such information to investors.
- **Profit forecasts:** Any profit forecasts or estimates disclosed by an issuer should be comparable with its historical financial information. This also applies where changes have occurred within the issuer's accounting policy, and the issuer must specify whether the profit forecast or estimate has been audited or subject to review. Where issuers include a profit forecast or estimate that is based on pro forma or additional financial information, it should be made clear that this is the case (and such forecast or estimate should be prepared on a comparable basis).
- **OFR and ESG:** While the CESR Recommendations address certain content requirements for the operating and financial review (**OFR**) section of a prospectus (including in relation to non-financial metrics), the Guidelines now expressly reference disclosure on matters relating to environmental, social and governance issues (**ESG**) – in order to reflect the increasing importance placed on ESG in the global capital markets. The Guidelines provide for disclosure on how an issuer's earnings, cashflow, assets and liabilities are likely to be impacted by its objectives and strategy regarding ESG matters.

- **Capitalisation and indebtedness:** The content requirements of an issuer's statements as to its capitalisation and indebtedness are now aligned with those under IFRS (the International Financial Reporting Standards).

The Guidelines also contain drafting changes and updates to reflect the differences between the Prospectus Regulation and its predecessor, the Prospectus Directive (EC) 2003/71, under which the CESR Recommendations were originally designed. Otherwise, the Guidelines and the CESR Recommendations are substantively similar, both in terms of content and ordering.

The CESR Recommendations will continue to apply in the UK. However, because the Prospectus Regulation has been adopted by UK domestic law (and the Guidelines have been drafted to correspond with the Prospectus Regulation), the FCA has said it will consult on its approach to guidance on prospectus disclosure based largely on the Guidelines, in due course.

Publication of the Guidelines rounds off the suite of secondary legislation and guidance issued in connection with the interpretation and operation of the Prospectus Regulation regime, all of which apply in the EU and post-Brexit in the UK, including:

- the [ESMA Guidelines on Risk Factors](#);
- the [ESMA Q&As on the Prospectus Regulation](#);
- the [Commission Delegated Regulation](#) on format, content, scrutiny and approval of prospectuses;
- the [Commission Delegated Regulation](#) with regard to regulatory technical standards on key financial information in prospectus summaries, prospectus publication and classification, advertisements for securities, prospectus supplements and the notification portal;
- the [Commission Delegated Regulation](#) on content requirements for a prospectus exemption in connection with a takeover by means of an exchange offer, merger or division; and
- the [Regulation \(EU\) 2017/337](#) amending the Prospectus Regulation as regards the EU Recovery prospectus and targeted adjustments for financial intermediaries to help the recovery from the COVID-19 pandemic.

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