



Understanding the Revised Proposal for a New EU Prospectus Regulation

On 15 March 2016, the European Council published the latest proposal for a new prospectus regulation (the “New Regulation”). The New Regulation is part of an effort towards a harmonized regulatory framework so as to ensure investor protection and market efficiency across the European Union (the “EU”). The New Regulation aims to replace the EU prospectus directive 2003/71/EC as amended (the “Prospectus Directive”) and parts of the prospectus regulation 809/2004/EC (the “Prospectus Regulation”). It promises significant progress for capital formation in the EU, including a centralized database and universal securities registration to permit faster follow-on offerings and integrated disclosure.

Who?

The European competent authorities continue the move towards the completion of the Capital Markets Union, which will affect capital raising of all kinds by issuers in the EU.

The EU Commission launched its review of the Prospectus Directive in early 2015 and published a first proposal for a New Regulation on 30 November 2015.

Following its review of the EU Commission’s proposal, the EU Council published a revised proposal on 15 March 2016. On request from the European Council, the European Central Bank published an opinion on the revised proposal on 17 March 2016. The European Securities and Markets Authority (“ESMA”) will, in turn, be required to produce guidelines and delegated acts which will define the form and procedures of the New Regulation.

What?

The objective of the New Regulation is to lay down uniform simplified requirements for the drawing up, approval and distribution of prospectuses to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State.

The New Regulation wishes to address efficient and proportionate disclosure across the EU and faster access to the capital markets.

Where?

The proposed New Regulation covers securities issued by issuers incorporated in a Member State. It would also apply to third-country issuers intending to offer securities to the public in the EU or seeking admission to trading of securities on a regulated EU market under a prospectus drawn up in accordance with the New Regulation or, under certain conditions, in accordance with the legislation of a third country. The New Regulation also provides for certain cooperation arrangements with third countries to allow an efficient exchange of information.

When?

Although no specific timing has been set for the implementation of the New Regulation, the New Regulation will apply 24 months after it enters into force, which is currently expected to be in late 2018. This should give market participants sufficient time to anticipate and adjust to the changes coming forward.

Why?

The legislative and market developments since the implementation of the Prospectus Directive have led to divergent approaches and fragmented rules across the European Union. Market participants have expressed concerns on the insufficient harmonization of disclosure regimes and on the expensive, complex and time-consuming process of drawing up and receiving approval of a prospectus. In contrast to the Prospectus Directive, which required implementation at the national level, the New Regulation will have direct effect in each Member State.

How?

The New Regulation proposal includes a number of amendments to the current prospectus regime, including the following:

- The **prospectus summary** would contain an introduction including warnings and key information on: (i) the issuer, (ii) the securities, and (iii) the offer to the public and/or the admission to trading, with a maximum length of six pages and modeled after the format of a key information document required for packaged retail and insurance-based investment products.
- The **risk factors** would be limited to risks that are material and specific to an issuer and its securities and would be allocated across a maximum of three distinct categories according to their materiality (i.e. high, medium and low risk).
- The range of **information that can be incorporated by reference** into a prospectus would be widened.
- The **publication of a prospectus** would need to be made in electronic form only and available either on (i) the website of the issuer, the offeror or the person asking for admission to trading; (ii) the website of the financial intermediaries placing or selling the securities, including paying agents; or (iii) the website of the regulated market where the admission to trading is sought or of the operator of the multilateral trading facility when no admission to trading on a regulated market is sought.
- ESMA will introduce a **free and searchable online EU database** containing all prospectuses approved in the Member States.
- **The removal of the EUR 100,000 denomination distinction** would eliminate the incentives to issue debt in large denominations and remove the distinction between wholesale and retail debt securities, leading to a streamlined disclosure regime for all debt securities (e.g. a summary requirement would apply to all debt securities).
- The option for an issuer with a registered office in the EU to file an annual **universal registration document**, similar to the U.S. concept of “shelf registration” or the French “*document de base/reference*”, will be introduced. This would allow an issuer to access the markets more quickly when needed.
- **Frequent issuers or secondary issuances of issuers** will have a lighter disclosure regime, where (i) the issuer’s equity securities have been admitted to trading on a regulated market or a small and medium-sized enterprise (“SME”) growth market for at least 18 months and additional securities of the same class or debt securities are to be issued, or (ii) the issuer is an offeror of a class of securities admitted to trading on a regulated market or a SME growth market for at least 18 months.
- An **alleviated optional disclosure method for SMEs** will be available, adapted to the size and length of the track record of the SME.

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