

25 March 2013

ESMA Publishes Draft Standards for Prospectus Supplements

Aim of proposed regulatory technical standards and consultation paper is to clarify the list of events that will trigger the automatic requirement for a supplement.

On 15 March, the European Securities and Markets Authority (ESMA) published draft regulatory standards for, and an accompanying consultation paper on,¹ specific situations that require the publication of a supplement to a prospectus. The aim of the consultation is to clarify the circumstances where a supplement will be required.

Background

The Prospectus Directive² provides for a single regime in the European Union (EU), governing the content, format, approval, and publication of prospectuses. Under article 16 of the Prospectus Directive, following the publication of the initial prospectus, every significant new factor, material mistake, or inaccuracy relating to information in the prospectus that could prevent an investor from making an informed assessment of the assets, liabilities, financial position, profits, losses, and prospects of the company must be noted in a supplement to the original prospectus. Article 16(3) further provides that ESMA is to develop draft regulatory technical standards (RTS) to specify those situations where a supplement is required.

Consultation Paper

ESMA's consultation paper sets out a number of circumstances that would trigger an automatic obligation to publish a supplement. Where required, ESMA has also set out the specific information that must be included in the supplement as well as guidance on the other content that must be included. The consultation paper further notes that a supplement may also be required for a situation that is not specifically covered in the draft RTS and that it shall be the responsibility of the issuer, offeror, or person seeking admission to trading to assess the significance or materiality of the situation in the context of article 16. The consultation paper does not set out any further substantive guidance as to the definitions of "significant" or "material" for these purposes.

Events Triggering the Supplement Requirement

The discrete events that ESMA proposes would trigger an automatic supplement to the prospectus are as follows:

1. **Publication of new annual audited financial statements** by, amongst others, the issuer, the guarantor, or certain obligors. This obligation would not apply to issuers of depositary receipts (although it would apply to the issuer of the underlying securities) or issuers of asset-backed securities where investor claims are limited to the underlying assets and the issuer is a special-purpose vehicle.
2. **Publication of a profit forecast** in the context of issues of equity securities and depositary receipts. Modification of an outstanding forecast is to be treated as a new forecast.
3. **Publication of a profit estimate for an annual financial period.** This is an estimate of the profit for a

1. View the consultation paper at <http://www.esma.europa.eu/system/files/2013-316.pdf>.

2. View the Prospectus Directive, Directive 2003/71/EC, at http://www.esma.europa.eu/system/files/ProspectusDir_2003_71.pdf.

financial period that has expired but where the results have not been published. Profit estimates for interim financial periods do not fall under the automatic trigger but should be assessed on a case-by-case basis.

4. **A change of control of the issuer** in the context of issues of equity securities and depository receipts. “Change of control” is defined in accordance with the laws of the relevant member state. The supplement must include a description of any arrangements known to the issuer in relation to the change of control.
5. **A new public takeover bid for equity securities** in relation to (i) the issuer’s equity, (ii) the equity of the issuer of the underlying shares in the case of depository receipts, or (iii) the equity of the issuer of the underlying shares or other transferable securities equivalent to shares in the case of certain securities. The outcome of the public takeover bid would also trigger an automatic requirement for a supplement.
6. **The working capital statement (if included) in the full prospectus ceases to be valid.** This trigger would apply irrespective of whether the change is positive or negative. The supplement must include an explanation of the new factor, mistake, or inaccuracy and must update the prospectus.
7. **Admission to trading is sought or an offer to the public is made in an additional EU member state.** In the case of a base prospectus, this obligation would not apply where the missing information can be included in the final terms.
8. **A new significant financial commitment is undertaken and is likely to result in a significant gross change.** For these purposes, a “significant gross change” is defined in the Prospectus Regulation as a variation of more than 25% in the situation of the issuer, relative to one or more indicators of the size of the issuer’s business.
9. **A judgement or other concluding event in any governmental, legal, or arbitration proceeding that was disclosed in the prospectus,** regardless of the whether the judgement or event is neutral, negative, or positive. It would extend to interim judgments and concluding events, whether or not they are subject to appeal.
10. **An increase in the aggregate nominal value of the programme,** where the aggregate amount of the programme was included in a base prospectus.

What’s Next?

The deadline for responses to the consultation is 14 June 2013. ESMA intends to submit its finalised draft of the RTS to the European Commission for endorsement by 1 January 2014.

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