

## **Equity Capital Markets - Supplementary Prospectuses: When are they required?**

ESMA Consultation Paper - Draft regulatory and technical standards on specific situations that require the publication of a supplement to the prospectus

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## Further information

If you would like further information on any aspect of listing in London, please contact the person at Hogan Lovells with whom you usually deal or:



Maegen Morrison  
Partner, Head of London Equity Capital Markets  
T +44(20) 7296-5064  
maegen.morrison@hoganlovells.com



John Basnage  
Partner, US Securities  
T +44(20) 7296-2766  
john.basnage@hoganlovells.com



Nicola Evans  
Partner  
T +44(20) 7296-2861  
nicola.evans@hoganlovells.com



Peter Kohl  
Partner, US Securities  
T +44(20) 7296-5644  
peter.kohl@hoganlovells.com



Nigel Read  
Partner  
T +44(20) 7296-5121  
nigel.read@hoganlovells.com



Danette Antão  
Professional Support Lawyer  
T +44(20) 7296-2221  
danette.anta@hoganlovells.com

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## **ESMA CONSULTS ON PROPOSED DRAFT REGULATORY AND TECHNICAL STANDARDS ON WHEN TO PUBLISH A SUPPLEMENTARY PROSPECTUS**

On 15 March 2013, the European Securities and Markets Authority (ESMA) published a consultation paper on a draft regulatory and technical standard (RTS) concerning situations which, if they arise, will always require the publication of a supplement to the prospectus.

Responses must be submitted by 14 June 2013.

### **BACKGROUND**

A procedure was established in the Prospectus Directive (Directive 2003/71/EC) to ensure that every significant new factor, material mistake or inaccuracy relating to information in the prospectus which is capable of affecting the assessment of the securities is published in a supplement to the prospectus.

The consultation paper sets out a draft RTS concerning situations that will require the publication of a supplement to the prospectus which ESMA is obliged to develop in accordance with the Prospectus Directive. The listed situations are concrete examples of the general obligation in Article 16(1) of the Prospectus Directive to publish in a supplement every significant new factor, material mistake or inaccuracy relating to information included in the prospectus which is capable of affecting the assessment of the securities.

### **SCOPE OF RTS**

ESMA notes that there is a lack of market certainty when determining what constitutes a significant new factor, material mistake or inaccuracy relating to information in the prospectus.

Consequently, ESMA has identified a short list comprising ten situations, which will always require issuers, offerors or persons asking for admission to trading to draw up and publish a supplement to the prospectus. As the Prospectus Directive does not make a distinction between positive, negative or neutral changes when referring to the assessment of materiality or significance, similarly the list does not make such a distinction. ESMA notes that positive and negative changes could be important for investors and it is ultimately for investors to decide what they perceive to be positive or negative.

ESMA also notes, however, that even where a situation has arisen which is on the list, a new prospectus (instead of a supplement) could be required by the competent authority due to lack of consistency, completeness or comprehensibility of the full prospectus when read with the supplement. In addition, ESMA notes that the list is not an exhaustive list of all situations requiring a supplementary prospectus.

The draft RTS sets out the minimum content of a supplement where one of the ten situations applies.

### **MEANING OF "MATERIAL" AND "SIGNIFICANT" – SAME TEST FOR PROSPECTUS**

In relation to all situations that are not included in the list which may require a supplement, ESMA notes that it is up to the issuer, the offeror or the person asking for admission to trading on a regulated market to assess their significance or materiality, without prejudice to the powers of the home competent authority.

ESMA states that the test as to whether a new factor, mistake or inaccuracy qualifies as a triggering event for producing a supplement is the same test as whether information should be included in the prospectus. Consequently, the terms 'significant' or 'materiality' should be assessed according to the same qualitative and/or quantitative criteria used when drafting the prospectus. This means that, in accordance with the Prospectus Directive, information must be included if it *"is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospectus of the issuer and of any guarantor, and of the rights attaching to such securities"*.

Accordingly, ESMA considers that any mistake or inaccuracy should be considered as "material" and any new factor should be considered as "significant" when the omission of such information prevents investors from making such an informed assessment.

### **LIST OF TRIGGERING EVENTS**

The draft RTS specifies ten situations which should be considered as a significant new factor or a material mistake or inaccuracy and, therefore, will always require the publication of a supplement to a prospectus. These are summarised below.

## **1. PUBLICATION OF NEW ANNUAL AUDITED FINANCIAL STATEMENTS**

ESMA proposes that a supplement should be submitted as soon as practicable after the publication of the annual audited financial statements of:

- an issuer;
- a guarantor;
- an obligor in respect of asset backed securities;
- an issuer of the underlying shares of depositary receipts; and
- an issuer of the underlying shares or other transferable securities equivalent to shares in the case of convertible or exchangeable securities.

This obligation would not apply to the publication of annual audited financial statements by (i) issuers of depositary receipts (that is, the depositary) or (ii) issuers of asset-backed securities, where claims of the investors against the issuer are limited to the underlying assets and the issuer is a special purpose vehicle.

ESMA clarifies that a supplement is always required for the publication of annual audited accounts, even where they confirm a profit estimate previously included in the prospectus, as ESMA believes that the accounts contain further information than the profit estimate which is significant for the investment decision. Furthermore, ESMA clarifies that a supplement is not automatically required for the approval by the issuer's or guarantor's shareholder meeting of the audited annual financial statements of the most recent financial year.

## **2. PROFIT FORECAST FOR EQUITY SECURITIES AND DEPOSITARY RECEIPTS**

There is currently a presumption that the publication of a profit forecast before the final closing of an offer of shares would trigger the need for a supplement. ESMA proposes to extend this presumption so that an obligation to publish a supplement arises where a profit forecast is published by:

- an issuer where a prospectus relates to shares and other transferable securities equivalent to shares;
- an issuer of the underlying shares or other transferable securities equivalent to shares where a prospectus relates to securities that are convertible or exchangeable into shares or transferable securities equivalent to shares; and
- an issuer of the underlying shares where the prospectus is drawn up in respect of depositary receipts.

ESMA notes that any modification of an outstanding forecast would be treated as a new profit forecast.

## **3. PROFIT ESTIMATE FOR AN ANNUAL FINANCIAL PERIOD**

Similar to its approach on profit forecasts, ESMA proposes that the publication of profit estimates should also trigger an obligation to publish a supplement where the profit estimate is published by:

- an issuer where the prospectus is drawn up in accordance with the registration requirements for shares; debt and derivative securities; banks; share rights issues; small and medium enterprises and companies with reduced market capitalisations (in respect of shares and debt and derivative securities) and issues by credit institutions;
- a guarantor where the prospectus includes disclosure requirements for guarantees;
- an issuer of the underlying shares or other transferable securities equivalent to shares where a prospectus relates to securities that are convertible or exchangeable into shares or transferable securities equivalent to shares;
- an issuer of the underlying shares where the prospectus is drawn up in respect of depositary receipts; and
- an obligor in respect of asset backed securities.

ESMA has re-confirmed that it is not necessary to automatically produce a supplement for a profit estimate related to an interim financial period. Any amendments to interim estimates would need to be assessed on a case by case basis.

## **4. CHANGE OF CONTROL OF THE ISSUER**

ESMA considers that a change in control of the issuer's equity is material where the offer or admission to trading relates to:

- an issuer where a prospectus relates to shares and other transferable securities equivalent to shares;
- an issuer of the underlying shares or other transferable securities equivalent to shares where a prospectus relates to securities that are convertible or exchangeable into shares or transferable securities equivalent to shares; and
- an issuer of the underlying shares where a prospectus is drawn up in respect of depositary receipts.

ESMA notes that investors need to know the identity of the controller entity behind the issuer as

this may affect key investment factors, such as the business or corporate strategy of the issuer. The supplement must include the description of any known arrangements in relation to such change of control.

#### **5. PUBLIC TAKEOVER BIDS FOR EQUITY SECURITIES AND DEPOSITARY RECEIPTS**

ESMA proposes that both any new public takeover bid by third parties and the outcome of any public takeover bid in respect of:

- the equity of the issuer where a prospectus relates to shares and other transferable securities equivalent to shares;
- the equity of the issuer of the underlying shares where a prospectus is drawn up in respect of depositary receipts; and
- where a prospectus relates to securities that are convertible or exchangeable into shares or transferable securities equivalent to shares,

shall be considered as significant and would trigger a requirement to produce a supplement.

The two limb requirement to produce a supplementary prospectus will result in withdrawal rights for investors being triggered twice (where the prospectus relates to an offer to the public) but ESMA believes that this is justified, given that this information is essential for an informed investment decision.

#### **6. WORKING CAPITAL STATEMENTS FOR CERTAIN EQUITY SECURITIES**

ESMA proposes an automatic obligation to produce a supplement where a prospectus contains a working capital statement and that statement ceases to be valid. The requirement would be triggered regardless of whether the change to the working capital statement is positive or negative. The trigger event would apply to prospectuses in respect of:

- shares;
- other transferable securities equivalent to shares; and
- debt securities that can be converted or exchanged into shares or other transferable securities equivalent to shares.

The supplement must include an explanation of the new factor, mistake or inaccuracy.

#### **7. ADMISSION TO TRADING OR OFFER TO THE PUBLIC IN AN ADDITIONAL EU MEMBER STATE**

ESMA proposes that a supplement shall be required where an issuer is seeking admission to

trading on an additional EU regulated market, or intending to make an offer to the public in an additional EU Member State than the one(s) specified in the prospectus. In the case of a base prospectus, this obligation would not apply where the additional information can be included in the final terms. The supplement must include the information required by the Prospectus Regulation with respect to the application for admission to trading on a regulated market or the offer to the public in such EU Member State which is not included in the prospectus or base prospectus (for example, disclosures about applicable taxes).

#### **8. NEW SIGNIFICANT FINANCIAL COMMITMENT FOR EQUITY SECURITIES**

The Prospectus Regulation defines a significant gross change as "a variation of more than 25%, relative to one or more indicators of the size of the issuer's business, in the situation of an issuer".

ESMA proposes that where a prospectus relates to:

- shares;
- other transferable securities equivalent to shares; or
- underlying shares or other transferable securities equivalent to shares in the case of convertible or exchangeable securities,

if an issuer makes a new significant financial commitment which is likely to give rise to a significant gross change, the issuer shall publish a supplement so that investors can consider the most up to date financial position when making their investment decision.

#### **9. ANY JUDGEMENT OR CONCLUDING EVENT OF GOVERNMENTAL, LEGAL OR ARBITRATION PROCEEDINGS ALREADY DISCLOSED IN THE PROSPECTUS**

ESMA proposes that all issuers (debt and equity) should always be prepared to prepare a supplement for any judgement or concluding event, even if subject to an appeal, in the course of any governmental, legal or arbitration proceedings already disclosed in the prospectus. ESMA notes that there should be no distinction between a positive, negative or neutral result and the obligation to publish a supplement would also extend to interim judgements or other concluding events. ESMA also notes that a requirement to produce a supplement may also arise in relation to a judgement or concluding event in relation to proceedings that are not disclosed in the prospectus. In such cases, whether a supplement is required will be based on a case by case assessment in accordance with the Prospectus Directive.

#### **10. AN INCREASE IN THE AGGREGATE NOMINAL VALUE OF THE PROGRAMME**

ESMA proposes that a supplement is required when the issuer increases the aggregate nominal amount of the programme. ESMA notes that, whilst the Prospectus Regulation does not require the inclusion of an aggregate amount of the programme in the base prospectus, there exists a practice to include such information on a voluntary basis and therefore, issuers must believe that this information is important to investors when making their investment decisions.

#### **COMMENT**

ESMA's consultation coincides with the UKLA's current consultation on a number of its technical notes, one of which concerns supplementary prospectuses (TN/605.2). (Click [here](#) for our article on the UKLA consultation.) In general, the technical note provides that when assessing whether an offer or admission can be amended through a supplementary prospectus, the UKLA will consider whether the "fundamental premise of the original document still stands". ESMA specifically does not address the situation where there have been amendments to the terms and conditions of the securities. However, the UKLA's standpoint is that terms and conditions should not be changed through a supplementary prospectus, except in very limited circumstances where, following the amendment or change to the terms, the securities are manifestly the same securities.

ESMA's list of triggering events does not appear to conflict with the UKLA position as none of the events appear to have the effect of changing the fundamental terms and conditions of the offer. For example, both ESMA and the UKLA agree that increasing the number of securities to be admitted could be done via a supplement to the prospectus. Furthermore, ESMA states that the same test should be applied to supplements as for prospectuses, when determining information should be disclosed to investors. If this position is agreed following consultation, we would expect the UKLA to confirm that it endorses ESMA's approach by revising its technical note.

Whilst one might query whether ESMA's list of situations reveals any 'surprises' which are not already perceived to be trigger events in practice, the market should welcome the certainty of a prescribed list, which will go towards making the assessment of whether to produce a supplement a simpler and formulaic process.

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