

July 2017

The European Union Publishes Its Final Prospectus Regulation

On June 30, 2017, the final text of a new EU regulation entitled “Regulation on the prospectus to be published when securities are being offered to public or admitted to trading on a regulated market” (the “Prospectus Regulation”)¹ was set forth in the Official Journal of the European Union. The Prospectus Regulation, which will replace, on a phased basis, the EU Prospectus Directive,² is the product of an initiative that forms part of the European Commission’s Action Plan for Capital Markets Union.³ As an EU regulation, the Prospectus Regulation has direct applicability (meaning it does not need to be implemented by national legislation). It comes into force on July 20, 2017, though most of its provisions will not apply until July 21, 2018.⁴

The Prospectus Regulation repeals the Prospectus Directive, though, except as noted below, generally carries over the requirements of the Prospectus Directive, but on a basis designed to reduce the administrative burden of preparing prospectuses and to ensure greater uniformity in implementation and interpretation by reason of its direct applicability. As a practical matter, EU member states will, over the next two years, need to consider the implications for their national legislation that implemented the Prospectus Directive.⁵

¹ Regulation (EU) 2017/1129. The text of the Prospectus Regulation can be found [here](#).

² Directive 2003/71/EC (and amendments thereto) along with its relevant implementing measures.

³ COM(2015) 486 final. The Action Plan has been aimed at stimulating investment and growth in Europe by strengthening the role of market-based finance in the European economy, in part through the facilitation of capital raising in the European capital markets.

⁴ The rules on the non-applicability of the Prospectus Regulation to sales of units in collective investment undertakings, on subsequent resales of non-equity securities to non-qualified investors as well as those relating to the exemption from publication of prospectus for offers of securities with a total consideration of less than €1 million over a 12-month period will apply from July 21, 2018. The provisions relating to the exemption from obligation to publish a prospectus for subsequent share issuances and convertible securities issuances will apply from the date of the entry into force of the Prospectus Regulation that is July 20, 2017.

⁵ As was the case with the EU Market Abuse Regulation (MAR) that replaced the EU Market Abuse Directive, EU member states will need to amend their existing domestic legislation relating to the Prospectus Directive to ensure compatibility with the Prospectus Regulation. For example, in the case of MAR, the UK Government amended the then-existing UK primary and secondary market abuse legislation by way of new statutory instruments to ensure conformity with MAR. Additionally, any provision in the Financial Conduct Authority (FCA) Handbook that had an equivalent provision to MAR was deleted and replaced with a cross-reference to the appropriate MAR provision.

We summarize below the key changes brought about by the Prospectus Regulation.

Amendments Affecting Prospectus Exemptions

The following amendments will apply from July 20, 2017:

- **Subsequent share issuances.** The existing exemption for admission to trading of securities fungible with already listed securities will be extended so that a prospectus will not be required as long as the new securities represent less than 20% (up from the current 10%) of the existing securities admitted to trading on the same regulated market over a period of 12 months. Moreover, this exemption will apply not only to share issuers but to all issuers of fungible securities. In practice, the effect of this change could be of limited use as issuers will most likely seek to stay below the 10% threshold to avoid triggering preemption rights (typically set at 10%) typically embedded in the corporate laws of EU member states.
- **Convertible securities issuances.** The existing exemption for admission to trading of shares resulting from the conversion or exchange of equity-linked securities, as long as the resulting shares are of the same class as those already admitted to trading on the same regulated market, will be capped at 20% (currently there is no limit) over a period of 12 months. There are certain exemptions from the 20% threshold, such as where the conversion or exchange relates to securities that have been issued prior to the entry into force of the Prospectus Regulation or that have had a prospectus published at the time of their issuance or admission to trading, where the shares qualify as Common Equity Tier 1 and result from an automatic conversion of Additional Tier 1 instruments upon occurrence of a trigger event, and where the shares qualify as eligible own funds and result from the conversion of other securities triggered by certain solvency requirements.

The following amendment will apply from July 21, 2019:

- **Employee offers.** Offers of securities to existing or former directors and employees located in the EU will cover all issuers regardless of where their head office or registered office is located (currently this exemption only applies to those issuers with a head office or a registered office located in the EU). Any such issuer will still be required to make available a document containing information on the number and nature of the shares and the reason for and details of the offer.

Amendments Affecting Prospectus Disclosure Requirements

The following amendments will apply from July 21, 2019:

- **Secondary issuances.** Issuers that have securities admitted to trading on a regulated market or an SME growth market⁶ continuously for a period of 18 months will now be able to use a new simplified prospectus, which will replace the current “proportionate disclosure regime.” Both issuers of shares as well as issuers of Global Depositary Receipts (“GDRs”) will be allowed to take advantage of this minimum disclosure regime. The short form prospectus will include financial statements for the last financial year only as well as other information that is not disclosed on an ongoing basis, such as profit forecasts and estimates (where applicable), a working capital statement, statement of capitalization, disclosure of relevant conflicts of interests and related party transactions, shareholding structure, and, where applicable, pro forma information. In practice, this regime could potentially benefit debt issuers that have equity securities listed on a regulated market for the required period of time, although it is difficult to ascertain at this point whether such disclosure will truly be less burdensome since the extent to which the information mentioned in the Prospectus Regulation’s recitals will need to be disclosed (e.g., whether a working capital statement will always need to be provided even if normally it is not required for debt or GDR issuances) is to be finalized in secondary legislation. Additionally, debt issuers with a Rule 144A tranche could continue to be subject to the more fulsome disclosure expectations in the Rule 144A market.
- **Frequent issuers.** Frequent issuers, that is issuers that regularly tap the market and have securities traded on an EU regulated market or a multilateral trading facility, will now be allowed to use a “universal registration document” (similar to a U.S. “shelf registration statement”). The universal registration document will have to be filed annually. Issuers will be permitted to file the universal registration document without prior approval provided that they had two universal registration documents previously approved consecutively by a competent authority. The approval time frame for such document has been shortened from 10 to five days provided that the relevant competent authority receives five days’ notice prior to submission of the document for approval and is satisfied that the document meets all the approval requirements. In certain circumstances, frequent issuers using the universal registration document will be allowed to fulfill their ongoing disclosure obligations under the Transparency Directive by integrating their annual and half-yearly reports into their universal registration document so that an annual report would no longer need to be published.
- **Revised disclosure regime for non-equity securities designed for qualified investors.** In addition to providing for more limited disclosure requirements in respect of non-equity securities

⁶ SME growth markets were created under the Directive on Markets in Financial Instruments repealing Directive 2004/39/EC (commonly referred to as “MIFID II”) to facilitate access to capital for SMEs. SME growth markets are unregulated markets, which are operated as a sub-category of multilateral trading facilities.

with a minimum denomination per unit of at least €100,000 (as is currently the case), issuers applying for admission to trading of non-equity securities, regardless of denomination, on a regulated market (or a specific segment of such market) to which only qualified investors can have access for the purpose of trading securities will also be able to take advantage of more limited disclosure requirements. The European Commission is to supplement the Prospectus Regulation with a schedule setting out the minimum information requirements in respect of such non-equity securities (as well as non-equity securities with a minimum denomination per unit of at least €100,000), which is to take into account the information needs of the investors concerned (i.e., qualified investors). The recitals to the Prospectus Regulation further clarify that no resales to non-qualified investors should be allowed for retail non-equity securities, unless a prospectus that is appropriate for non-qualified investors is prepared in accordance with the applicable Prospectus Regulation rules.

- **Small and medium-sized enterprises (“SMEs”).** A simplified prospectus (an “EU Growth prospectus”) will be introduced under the proportionate disclosure regime for use by (i) SMEs that have no securities admitted to trading on a regulated market, (ii) issuers, other than SMEs, with securities traded or to be traded on SME growth market meeting certain capitalization requirements, and (iii) issuers whose offer of securities to the public does not exceed €20 million provided they do not have securities listed on a multilateral trading facility and had, on average, no more than 499 employees in the previous year. The new EU Growth prospectus will have a standardized format and sequence, designed to be easier to complete.
- **Base prospectuses.** Issuers of all types of non-equity securities, not just those issued under an offering programme, will be permitted to use a base prospectus format. A base prospectus will be allowed to be drawn up as a single document or as several separate documents. Frequent issuers will be allowed to use a universal registration document and any amendments thereto as a constituent part of a base prospectus. The requirement to prepare a summary of the base prospectus will be abolished and only an issue-specific summary will need to be produced once the final terms are known.
- **Incorporation by reference.** The scope of documents that are allowed to be incorporated by reference will be enlarged as long as the information in those documents is available electronically and complies with the language requirements of the Prospectus Regulation. The following documents will be allowed to be incorporated by reference: prospectuses, supplements and final terms, documents prepared in connection with takeovers, mergers and divisions, regulated information required to be disclosed under the Transparency Directive and the Market Abuse Regulation, memoranda and articles of association, reports on determination of the value of an asset or a company, and all or part of the annual and interim financial information and management reports for issuers admitted to trading on multilateral trading facilities and not subject to the Transparency Directive.

Amendments Affecting Risk Factors

The following amendments will apply from July 21, 2019, though issuers may choose to apply the revised framework earlier:

- Issuers will be required to allocate the risk factors across a limited number of categories based on their relative materiality as assessed by the issuer on the basis of the probability of their occurrence and the expected magnitude of their negative impact. In each category, the most material risk factors (as determined by the issuer) should be mentioned first. The exact requirements for each category are to be set out in secondary legislation. Only risk factors that are material and specific to the issuer will be allowed to be included in a prospectus, and issuers will no longer be able to include generic risks.

In practice, the changes to the risk factors structure could create additional burdens for issuers and, potentially, subject issuers to additional liability exposure to the extent risks come to fruition that were not permitted to be included under the regime. This might lead issuers to provide additional disclosure for the non-EU tranches of their offerings to the extent they view it necessary from a liability perspective (for example, for offerings with a Rule 144A tranche).

Amendments Affecting Prospectus Summaries

The following amendments will apply from July 21, 2019, though issuers may choose to apply the revised framework earlier:

- A new prospectus summary will take on the form of a key information document with a maximum length of seven pages in A4 format, extended by one to three pages in certain circumstances, for example, when harmonizing such summaries with the new key information document requirement under the Packaged Retail and Insurance-Based Investment Products (PRIIPs) Regulation or when including additional information on a guarantee attached to the securities. Only up to 15 of the most material risk factors will be allowed to be included in the summary in a separate subsection. The usual warning section will be accompanied by three main sections covering key information on the issuer, the security and the offer/admission. General headings with indication of their content will be required but issuers will be allowed to develop brief narratives and select material information.

Amendments Affecting Prospectus Sanctions

The following amendments will apply from July 21, 2019:

- New provisions on sanctions and measures aimed at creating a harmonized approach to sanctions have been introduced so that EU members states will be required to provide their competent authorities with powers to impose certain minimum sanctions or take appropriate minimum

administrative measures. Competent authorities will be required to establish a mechanism for reporting of actual or potential violations of the Prospectus Regulation, including a publication, on the competent authority's official website, of a statement describing the type and nature of any wrongdoing and the identity of the persons responsible.

Amendments Affecting Prospectus Publication

The following amendments will apply from July 21, 2019:

- The option to have an approved prospectus published by means of insertion in a newspaper or a printed prospectus being available at the offices of the issuer will be abolished. A prospectus will be deemed made available to the public when it is published in electronic form either on the website of the issuer, the offeror or the person asking for admission, on the website of the regulated market where the admission to trading is sought, or the website of the operator of the multilateral trading facility where no admission to trading on a regulated market is being sought. An approved prospectus will also need to contain a prominent warning stating when the validity of the prospectus would expire.
- The European Securities and Markets Authority (ESMA) will provide an online storage mechanism (similar to EDGAR in the United States) where investors will be able to search all prospectuses for free.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Mark S. Bergman
+44-20-7367-1601
mbergman@paulweiss.com

John J. Satory
+44-20-7367-1606
jsatory@paulweiss.com

Staff attorney Monika Kisłowska contributed to this Client Memorandum.