

# New rules for prospectuses

## I. OVERVIEW

New rules for prospectuses came into effect on July 1, 2012, introducing the following changes:

- **Changes to the scope of the prospectus regime and the public offer exemptions (see section II)**
  - A narrowing of the scope of the prospectus regime to exclude offers with a total consideration of less than EUR 5,000,000 (previous threshold: EUR 2,500,000).
  - Amendments that generally widen, but in some cases tighten, the exemptions from the requirement to publish a prospectus in connection with an offer to the public.
- **Changes to general prospectuses matters (see section III)**
  - Prospectus summaries.
    - New form and content requirements for all prospectus summaries, introducing a table format and a granular list of disclosure “elements” that must be included in the summary in a set order.
    - Liability if, when read together with the rest of the prospectus, the prospectus summary fails to contain “key information”.
  - Supplementary prospectuses.
    - Abolition of statutory withdrawal rights that previously arose upon publication of a supplement to a listing-only prospectus.
    - Harmonisation of the period for exercising withdrawal rights to two working days following the date of publication of a supplement.
  - Proportionate disclosure regime.
    - Introduction of a proportionate (i.e. reduced) disclosure regime (“PDR”) for rights issues and offers of securities by certain smaller issuers and

credit institutions operating certain types of debt programmes.

- Accountants' reports on preliminary annual results included in a prospectus.
  - Removal of the requirement to include an accountants' report on such preliminary results, provided certain criteria are met, which may well be incapable of being satisfied in practice.
- Requirement for electronic publication of all prospectuses.
- Abolition of the annual information update.
- **Changes to debt programmes (see section IV)**
  - New rules on the contents of final terms.
  - New rules on the information that should be included in the base prospectus as opposed to the final terms.
  - New requirement to include an issue-specific summary in the final terms.

These changes took effect on July 1, 2012 by way of:

- Amendments to the Prospectus Regulation,<sup>1</sup> effected through a new Commission regulation<sup>2</sup> that was largely based on the technical advice of the European Securities and Markets Association ("ESMA").<sup>3</sup> Further changes to the Prospectus Regulation are expected to come into force in September 2012 through a proposed second Commission Regulation.<sup>4</sup>
- National law measures in the Member States of the European Economic Area ("EEA") to implement the PD Amending Directive.<sup>5</sup> In the United Kingdom, these measures take the form of amendments to the Financial Services and Markets Act 2000 ("FSMA") and the FSA Handbook.<sup>6</sup>

Prospectuses published prior to July 1, 2012 are grandfathered. This is particularly significant for issuers with debt programmes, which will not be required to prepare base

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<sup>1</sup> Regulation 809/2004/EC (the "Prospectus Regulation").

<sup>2</sup> Commission Delegated Regulation (EU) No 486/2012 (the "Amending Regulation").

<sup>3</sup> The Commission issued ESMA with a mandate to provide technical advice on the implementation of Directive 2010/73/EU (the "PD Amending Directive"), amending Directive 2003/71/EC (the "Prospectus Directive"). The first part of ESMA's mandate resulted in ESMA's technical advice of October 4, 2011 (the "First ESMA Advice") – please see our [client alert on the First ESMA Advice](#) for further details. The First ESMA Advice formed the basis to the Amending Regulation.

<sup>4</sup> The Commission published a draft regulation on June 4, 2012 (the "Draft Regulation") based on ESMA's technical advice of February 29, 2012 (the "Second ESMA Advice").

<sup>5</sup> Please see our [client alert on the PD Amending Directive](#) for further details.

<sup>6</sup> Statutory Instrument 2012 No. 1538 and Instrument FSA 2012/29.

prospectuses, final terms and issue specific summaries in accordance with the new rules when issuing securities under a base prospectus approved prior to July 1, 2012. Equally, issuers will continue to be able to passport valid base prospectuses prepared and approved under the old rules. In addition, supplementary prospectuses will not have to comply with the new rules if they relate to a prospectus published prior to July 1, 2012.<sup>7</sup>

## **II. CHANGES TO THE SCOPE OF THE PROSPECTUS REGIME AND THE PUBLIC OFFER EXEMPTIONS**

The overall scope of the prospectus regime is narrowed to exclude offers with a total consideration of less than EUR 5,000,000, calculated over a period of 12 months (previous threshold: EUR 2,500,000).<sup>8</sup>

In addition, the public offer exemptions are amended as follows:

- “Wholesale” securities.
  - The minimum denomination to qualify as “wholesale” securities, which automatically benefit from a public offer exemption, is increased from EUR 50,000 to EUR 100,000.<sup>9</sup>
- Minimum subscriptions.
  - A public offer exemption applies to offers where investors are required to subscribe for securities for a total consideration of at least EUR 100,000 per investor for each separate offer (previous threshold: EUR 50,000).<sup>10</sup>
- Offers to fewer than 150 persons.
  - The exemption for small offers is extended to offers to fewer than 150 persons per EEA Member State (previous threshold: fewer than 100 persons per EEA Member State).<sup>11</sup>

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<sup>7</sup> Article 2 of the Amending Regulation.

<sup>8</sup> Article 1 (2) (h) of the Prospectus Directive, as amended. This amendment was introduced in the United Kingdom in July 2011 (Statutory Instrument 2011 No. 1668) as part of the early implementation of certain provisions of the PD Amending Directive.

<sup>9</sup> Article 3 (2) (d) of the Prospectus Directive, as amended; S 86 (1) FSMA, as amended.

<sup>10</sup> Article 3 (2) (c) of the Prospectus Directive, as amended; S 86 (1) FSMA, as amended.

<sup>11</sup> Article 3 (2) (b) of the Prospectus Directive, as amended. This amendment was introduced in the United Kingdom in July 2011 (Statutory Instrument 2011 No. 1668) as part of the early implementation of certain provisions of the PD Amending Directive.

- Offers to qualified investors.
  - The definition of “qualified investor” is aligned with the categories of “professional client” and “eligible counterparty” under Directive 2004/39/EC (“MiFID”).<sup>12</sup>
  - This alignment with MiFID is helpful for issuers and other market participants which are required to comply with several layers of EEA securities laws. However, there remain areas of uncertainty:
    - Mirroring similar provisions under MiFID, the new rules effectively enable investors to opt in or out at any time of qualified investor status by written agreement with the relevant financial intermediary. Thus, a client will not be treated as a qualified investor if it has opted out, for example, of professional client status under MiFID. This may well lead to uncertainty, requiring further, and timely, diligence as to the status of each investor before any offer is made.
    - National law requirements (such as the UK financial promotion regime<sup>13</sup>) may impose additional limitations on securities offers and related activities, and the relevant equivalent concepts under these national rules (such as that of “investment professional” in the United Kingdom) have not been aligned with the European framework. Accordingly, issuers must continue to be mindful of both the European prospectus rules and the applicable national regimes.
- Employee share schemes.
  - Companies’ rights to offer securities to their employees without having to prepare a prospectus are broadened.<sup>14</sup>
  - Previously this was only possible under an employee scheme for companies that had securities admitted to trading on a regulated market in the EEA. Under the new rules, a prospectus is not required<sup>15</sup> in connection with employee share schemes operated by (i) companies with their head office or registered office

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<sup>12</sup> Article 2 (1) (e) of the Prospectus Directive, as amended; s 86 (7) of FSMA, as amended.

<sup>13</sup> S 21 FSMA prohibits the communication, in the course of business, of an invitation or inducement to engage in investment activity (including offering securities) in the United Kingdom, save for financial promotions by authorised persons or where an exemption applies. The Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (SI 2005/1529) provides for a limited number of exemptions from the prohibition to engage in financial promotion, including when the relevant financial promotion is directed at “investment professionals” or “high net worth entities”.

<sup>14</sup> Article 4 (1) (e) of the Prospectus Directive, as amended; rule 1.2.2 R of the UK Prospectus Rules (the “PR”), as amended.

<sup>15</sup> Companies benefitting from the employee share scheme exemption are still required to make available a document containing information on the number and nature of the relevant securities and the reasons for and details of the offer, though this document is not subject to competent authority review.

within the EEA – broadly referred to as EEA companies – (independent of their listing status); or (ii) non-EEA companies with securities admitted to trading (a) on an EEA regulated market; or (b) on a third country market that the Commission deems to comply with requirements equivalent to the requirements of certain European capital markets laws<sup>16</sup> and subject to effective supervision and enforcement in that third country.<sup>17</sup>

- This amendment has the potential to be particularly helpful for non-EEA companies that have until now maintained an EEA regulated market listing principally to be able to offer securities to their employees without publishing a prospectus. Such issuers will no longer need to maintain such an EEA listing if they have securities listed on an “equivalent” exchange, although they will need to wait for a determination of equivalence. As the Commission will only adopt equivalence decisions if requested to do so by EEA Member State competent authorities, it is unclear when the first equivalence decisions will be passed or which third country exchanges will be the first ones to be assessed.
- Retail cascades.
  - A new exemption applies to securities that are sold or placed to retail investors through financial intermediaries in a market structure typically referred to as a “retail cascade”.<sup>18</sup> The exemption is available if the following conditions are met:
    - The target securities have previously been the subject of one or more exempt offers to the public.
    - An approved prospectus, which is less than 12 months old, is available for the securities.
    - The issuer (or other person who was responsible for drawing up the prospectus) has given written consent to the use of the prospectus for the retail cascade offers.<sup>19</sup>

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<sup>16</sup> Directive 2003/6/EC (the Market Abuse Directive), Directive 2004/109/EC (the Transparency Directive) and Title III of MiFID.

<sup>17</sup> The PD Amending Directive sets out further conditions relating to the applicable legal and supervisory framework that third country markets must fulfill to be considered equivalent.

<sup>18</sup> Article 3 (2) (f) of the Prospectus Directive, as amended; s 86 (1A) FSMA.

<sup>19</sup> The Draft Regulation fleshes out the requirements relating to the issuer consent. It contemplates issuers choosing between giving their consent to one or more specified financial intermediaries or to any financial intermediary. It also proposes a new Annex XXX to the Prospectus Regulation, prescribing certain disclosure requirements in relation to the issuer consent.

### **III. CHANGES TO GENERAL PROSPECTUS MATTERS**

#### **A. PROSPECTUS SUMMARIES**

##### **1. Form and Content**

The new rules impose strict form and content requirements on all prospectus summaries,<sup>20</sup> with the aim of ensuring that “equivalent information appears in the same position in the summaries of all prospectuses and that similar products can be easily compared”.<sup>21</sup> ESMA has issued practical guidance on how to prepare a summary under the new rules in its Questions and Answers on Prospectuses (“[ESMA Q&A](#)”).<sup>22</sup>

- The summary must consist of five tables in the following order:  
A – introduction and warnings; B – information on the issuer and guarantor; C – information on the securities; D – information on risks; and E – information on the offer.<sup>23</sup>
- Each table must contain certain disclosure “elements” set out in a new Annex XXII to the Prospectus Regulation. Those elements must be included in the same order as they appear in Annex XXII.<sup>24</sup> The elements track the detailed disclosure requirements for prospectuses under the Prospectus Regulation. Accordingly, they differ depending on the type of security being issued or listed.<sup>25</sup> Where a disclosure item is not applicable to a prospectus, it should appear in the summary as “not applicable”,<sup>26</sup> together with a brief explanation of why the element is not applicable.<sup>27</sup>
- Issuers must consider whether further information should be included in the summary, above and beyond the mandatory elements, to satisfy the overriding obligation for the summary to provide “key information”.<sup>28</sup> If the issuer decides that the summary must contain additional information, it must include such information as part of one or more elements within one or more of the five tables.<sup>29</sup>

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<sup>20</sup> Article 5(2) of the Prospectus Directive, as amended; Article 24 and Annex XXII of the Prospectus Regulation, as amended.

<sup>21</sup> Recital 10 of the Amending Regulation.

<sup>22</sup> ESMA Q&A, question 80.

<sup>23</sup> Annex XXII of the Prospectus Regulation, as amended.

<sup>24</sup> Article 24 (1) of the Prospectus Regulation, as amended.

<sup>25</sup> For example, the elements required to be included in a summary for a prospectus relating to depositary receipts constitute a subset (chosen by the Commission on the basis of being “key” disclosure requirements) of the disclosure requirements under Annex X to the Prospectus Regulation.

<sup>26</sup> Article 24 (1) of the Prospectus Regulation, as amended.

<sup>27</sup> ESMA Q&A, question 80.

<sup>28</sup> Articles 2 (1) (s) and 5 (2) of the Prospectus Directive, as amended.

<sup>29</sup> Paragraphs 215-216 of the First ESMA Advice.

- The summary word limit is increased to seven percent of the total length of the prospectus<sup>30</sup> or up to a maximum of 15 pages, whichever is longer.<sup>31</sup> Previously it was limited to 2,500 words.
- The summary should be drafted in plain language, presenting the key information in an easily accessible and understandable way. It should be self-contained and should not contain cross references to other parts of the prospectus.<sup>32</sup>

Below is an excerpt of a summary for a debt prospectus that illustrates how summaries are likely to be presented under the new rules.

#### SUMMARY

*Summaries are made up of disclosure requirements known as 'Elements'. These elements are numbered in Sections A – E (A.1 – E.7). This summary contains all the Elements required to be included in a summary for this type of securities and Issuer. Because some Elements are not required to be addressed, there may be gaps in the numbering sequence of the Elements. Even though an Element may be required to be inserted in the summary because of the type of securities and Issuer, it is possible that no relevant information can be given regarding the Element. In this case a short description of the Element is included in the summary with the mention of 'not applicable'.*

Section C — Securities		
C.1	A description of the type and the class of the securities being offered and/or admitted to trading, including any security identification number.	US\$750,000,000 aggregate principal amount of 4.50 per cent. loan participation notes due 2030 (the “Notes”) with the ISIN number xxxxxxxxxx.
C.2	Currency of the securities issue.	US dollar
C.5	A description of any restrictions on the free transferability of the securities.	Not applicable. There are no restrictions on the free transferability of the Notes.

*The summary should begin with a short introductory paragraph describing its structure.*

*The summary should consist of five tables, A-E, each titled with the heading indicated in Annex XXII.*

*The disclosure corresponding to the indicated element.*

*The elements within each table should be taken from Annex XXII according to the type of security. They should be included in the same order as they appear in Annex XXII. The element number should be stated.*

*Each element should be accompanied by a short description of the relevant disclosure requirement. These descriptions are included in Annex XXII.*

*If a particular element is not applicable, a short explanation of why the element is not applicable should be included.*

<sup>30</sup> Prepared in normal typeface and layout, excluding the financial pages, according to the First ESMA Advice.

<sup>31</sup> Article 24 (1) of the Prospectus Regulation, as amended.

<sup>32</sup> Article 24 (1) of the Prospectus Regulation, as amended.

Prospectuses relating to wholesale debt are not required to include a summary section under the Prospectus Directive but Member States can opt to require one. If a wholesale debt issuer is required under super-equivalent national rules to include a section called “Summary” or voluntarily includes one, it must conform to the new rules on summaries. If a wholesale debt issuer wishes to voluntarily include a summary without complying with the new rules, it should avoid naming it a “Summary” and instead use a heading such as “Overview”.<sup>33</sup>

## **2. Summary liability**

The liability regime for summaries has been extended to cases where a summary fails to provide all key information when read together with the other parts of the prospectus.<sup>34</sup> Previously, prospectus liability could only attach to the summary (including its translation) if it was misleading, inaccurate or inconsistent when read together with the rest of the prospectus. Accordingly, this represents a potentially significant widening of the prospectus liability regime.

In this context, “key information” is “the information which is essential to enable investors to understand the transferable securities to which the prospectus relates and to decide whether to consider the offer further”.<sup>35</sup> Such key information must include:<sup>36</sup>

- The essential characteristics of, and risks associated with, the issuer and any guarantor, including their assets, liabilities and financial positions.
- The essential characteristics of, and risks associated with, investment in the transferable securities, including any rights attaching to the securities.
- The general terms of the offer, including an estimate of the expenses charged to an investor by the issuer and the person offering the securities to the public, if not the issuer.
- Details of the admission to trading.
- The reasons for the offer and proposed use of the proceeds.

## **B. SUPPLEMENTARY PROSPECTUSES**

Statutory withdrawal rights that previously arose upon the publication of a supplement to a listing-only prospectus have been abolished. Such withdrawal rights now only apply following the

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<sup>33</sup> Article 24 (1) of the Prospectus Regulation, as amended.

<sup>34</sup> Article 6 (2) of the Prospectus Regulation, as amended; S 90 (12) FSMA, as amended.

<sup>35</sup> S 87A (9) FSMA, as amended. The FSMA definition of “key information” is a shortened version of that provided in Article 2 (1) (s) of the Prospectus Directive, as amended.

<sup>36</sup> S 87A (10) FSMA, as amended, based on Article 2 (1) (s) of the Prospectus Directive, as amended.



publication of a supplement to a public offer prospectus (or a combined public offer and listing prospectus).<sup>37</sup>

In addition, the exercise period for withdrawal rights has been standardised across the EEA. Such statutory rights are now exercisable within two working days after the publication of the supplement.<sup>38</sup> This period may only be extended by the issuer (under the new UK rules, issuers can do this by specifying a later date in the relevant supplementary prospectus), whereas previously, Member States were able to prescribe a longer period, which resulted in varying requirements across the EEA. Issuers and financial intermediaries will nevertheless need to consider the commercial and wider legal implications of the publication of a supplement – the abolition of the statutory withdrawal rights is not necessarily dispositive in the context of a live deal.

Further, it is explicitly clarified that, for the two-day withdrawal rights to be triggered, the new factor, mistake or inaccuracy leading to the publication of the supplement must arise before the final closing of the offer to the public and the delivery of the securities.

### C. PROPORTIONATE DISCLOSURE REGIME

A lighter disclosure regime applies to prospectuses prepared (i) in connection with rights issues and certain other pre-emptive offers; (ii) by small and medium-sized companies (“SMEs”) and issuers with reduced market capitalisation in their offers to the public and admissions to trading; and (iii) by credit institutions that operate certain types of debt programmes, thereby facilitating faster and cheaper capital raising than under the full prospectus regime.<sup>39</sup>

- Rights issues and certain pre-emptive offers.
  - The PDR is available for issues of shares made in accordance with statutory pre-emption rights (i.e. rights issues) or “near identical rights”, provided, in the case of “near identical rights”, that:<sup>40</sup>
    - Shareholders are offered the rights free of charge.
    - Shareholders are entitled to take up new shares in proportion to their existing holdings, or, in the case of other securities giving a right to participate in the share issue, in proportion to their entitlements to the underlying shares.
    - The rights to subscribe are negotiable and transferable or, if not, the shares arising from the rights are sold at the end of the offer period for the benefit of those shareholders who did not take up those entitlements.
    - The issuer is able, as regards the entitlements giving a right to participate in the share issue, to impose limits or restrictions or exclusions and make arrangements it considers appropriate to deal with

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<sup>37</sup> Article 16 of the Prospectus Directive, as amended; s 87 Q (4)-(5) of FSMA, as amended.

<sup>38</sup> Article 16 of the Prospectus Directive, as amended; s 87 Q (6) of FSMA, as amended.

<sup>39</sup> Article 7 (2) of the Prospectus Directive, as amended; Articles 26a-26c of the Prospectus Regulation, as amended.

<sup>40</sup> Article 2 (13) of the Prospectus Regulation, as amended.

treasury shares, fractional entitlements and requirements laid down by law or by a regulatory authority in any country or territory.

- The minimum period during which shares may be taken up is the same as the period for the exercise of statutory pre-emption rights, i.e., no less than 14 days from the date of publication of the offer.<sup>41</sup>
- The rights lapse at the expiration of the exercise period.
- SMEs and issuers with reduced market capitalisation.
  - SMEs are defined as companies that, according to their latest annual or consolidated accounts, meet at least two of the following three criteria: (i) an average number of employees during the financial year of less than 250; (ii) a total balance sheet not exceeding EUR 43,000,000; and (iii) an annual net turnover not exceeding EUR 50,000,000.<sup>42</sup>
  - Issuers with reduced market capitalisation are defined as companies listed on an EEA regulated market that have had an average market capitalisation of less than EUR 100,000,000 on the basis of quotes as at the end of the previous three calendar years.<sup>43</sup>
- Credit institutions operating certain types of debt programme.<sup>44</sup>
  - Such credit institutions must be undertakings authorised to act as credit institutions under Directive 2000/12/EC.<sup>45</sup>

Issuers benefiting from the PDR are only required to comply with selected parts of the Prospectus Regulation schedules and building blocks. The new requirements are detailed in seven new annexes to the Prospectus Regulation.<sup>46</sup>

For example, issuers undertaking rights issues and eligible for the PDR enjoy significant concessions from the standard disclosure regime under the Prospectus Regulation, including the following:<sup>47</sup>

- Only the latest annual financial statements must be included.
- No Operating and Financial Review section is required – the issuer is only required to provide information on the “most significant recent trends in production, sales and inventory, and costs and selling prices”.

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<sup>41</sup> Article 29(3) of Council Directive 77/91/EEC.

<sup>42</sup> Article 2 (1) (f) of the Prospectus Directive.

<sup>43</sup> Article 2 (1) (t) of the Prospectus Directive, as amended.

<sup>44</sup> Articles 1 (2) (j) and 1 (3) of the Prospectus Directive, as amended.

<sup>45</sup> Article 2 (1) (g) of the Prospectus Directive, as amended.

<sup>46</sup> Annexes XXIII – XXIX of the Prospectus Regulation, as amended.

<sup>47</sup> Annex XXIII of the Prospectus Regulation, as amended.

- Only a short business description without, for example, information on assets, employees and R&D is required.

The PDR allows cheaper and faster capital raising for the eligible companies but it does not abolish the general disclosure requirement under Article 5(1) of the Prospectus Directive; even PDR prospectuses have to contain all information which is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to the relevant securities.

#### **D. ELECTRONIC PUBLICATION**

The new rules require all prospectuses to be published electronically (either on the issuer's website or on the website of a financial intermediary), regardless of whether the issuer also publishes the prospectus in hard copy.<sup>48</sup>

#### **E. ABOLITION OF THE ANNUAL INFORMATION UPDATE**

The new rules have abolished the requirement for issuers to prepare an annual information update that sets out all information published or made available to the public over the previous 12 months.<sup>49</sup>

#### **F. ACCOUNTANTS' REPORTS FOR PROFIT ESTIMATES**

The Draft Regulation (expected to enter into force in September 2012) proposes to relax the Prospectus Regulation requirement for an accountants' report where preliminary annual results are included in a prospectus.

An accountants' report would not be required in relation to such preliminary results if the following conditions are met:

- The relevant information only contains non-misleading figures substantially consistent with the final figures.
- A statement is included in the prospectus that (i) the person responsible for this financial information, if different from the person responsible for the prospectus in general, approves it; (ii) independent accountants or auditors have agreed that the financial information is substantially consistent with the final figures to be published in the next annual audited financial statements;<sup>50</sup> and (iii) the relevant financial information has not been audited.

It is not clear that this expected change is at all workable in practice.

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<sup>48</sup> Article 14 (2) of the Prospectus Directive, as amended; PR 3.2.4A R, as amended.

<sup>49</sup> Currently required under PR 5.2.

<sup>50</sup> In the Second ESMA Advice, ESMA has clarified that "it is not expected that the auditors accept formally responsibility in relation to this "agreement" granted by auditors".

#### IV. DEBT PROGRAMMES

##### A. CONTENTS OF FINAL TERMS

The new rules impose strict limits on the contents of final terms.<sup>51</sup> To achieve this, the Prospectus Regulation disclosure requirements for debt securities have been divided into the following three categories:<sup>52</sup>

- Information categorised as “CAT A” must be included in the base prospectus only (or any supplement to the base prospectus). This information cannot be left in blank for later insertion in the final terms. CAT A information includes, for example, credit ratings assigned to the issuer and risk factors (including risk factors relating to particular types of securities that might be issued under the programme – issuers are not permitted to fill out risk factors in final terms).
- When an item is categorised as “CAT B”, the base prospectus (or a supplement to the base prospectus) must contain all the general principles relating to such item, with placeholders only for certain issue-specific details not known at the time of approval of the base prospectus. Any such placeholder may be filled out in the final terms. For example, the base prospectus (or supplement) should describe the type and class of the securities, the rights attaching to them (including complicated payment formulae) and the interest provisions, but issuers are permitted to include placeholders, for example, for the particular interest rate at which the product will be offered.
- When an item is categorised as “CAT C”, the base prospectus (or a supplement to the base prospectus) may contain a placeholder if the information is not known at the time it is approved, and such information must be included in the final terms. Examples of CAT C information include the maturity date and estimated expenses of the issue.

If any of the disclosure items in categories CAT A, CAT B or CAT C are not applicable to a prospectus, they must be expressly referred to in the relevant final terms as “not applicable”.<sup>53</sup>

Final terms may also include (on a voluntary basis) a strictly limited range of additional information items that are not required by the Prospectus Regulation but would nonetheless be useful to investors.<sup>54</sup> These information items are set out in Annex XXI of the Prospectus Regulation and are limited to:

- Examples helping investors understand how the value of their investment is affected by the value of the underlying assets when they are investing in complex derivative securities falling within Annex XII of the Prospectus Regulation.<sup>55</sup>

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<sup>51</sup> Article 22 (4) of the Prospectus Regulation, as amended.

<sup>52</sup> Article 2a of the Prospectus Regulation, as amended.

<sup>53</sup> Article 22 (4) (a) of the Prospectus Regulation, as amended.

<sup>54</sup> Article 22 (4) (b) of the Prospectus Regulation, as amended.

<sup>55</sup> Recital 18 of the Prospectus Regulation.

- Additional provisions, not required by the securities note, related to the underlying assets.
- Country(ies) in which the securities are being offered to the public.
- Country(ies) in which the securities are to be admitted to trading on a regulated market(s).
- Country(ies) in which the base prospectus is being passported under the Prospectus Directive.
- Series number of the relevant securities.
- Tranche number of the relevant securities.

In addition, final terms must also contain a prominent statement that, *inter alia*, indicates where the base prospectus and possible supplements are published and that explains that the final terms must be read in conjunction with the base prospectus.<sup>56</sup>

## **B. CONTENTS OF THE BASE PROSPECTUS**

The new limitations on the contents of the final terms effectively increase the content requirements for the base prospectus, thereby extending the scope of the disclosure subject to review by competent authorities.

Under the new rules, base prospectuses must include all information which the issuer “knew at the time of drawing up the prospectus” and which enables investors to take an informed investment decision.<sup>57</sup> This means that base prospectuses must disclose, for example, complicated pay-out formulae for structured products in relation to all products that can be issued under the programme.<sup>58</sup> At the same time, issuers must ensure that their base prospectuses remain easily analysable and comprehensible.<sup>59</sup> It may well be the case that these requirements will be reconciled by producing multiple base prospectuses for different types of products.

The base prospectus is also required to contain the template “form of final terms” which has to be filled out for each issue.<sup>60</sup> Final terms must not amend, replace or (save in limited

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<sup>56</sup> Article 26 (5) of the Prospectus Regulation, as amended

<sup>57</sup> Recital 17 of the PD Amending Directive; Recital 5 of the Amending Regulation; and Paragraphs 15-16 and 113 of the First ESMA advice.

<sup>58</sup> It is currently unclear whether competent authorities will allow new pay out formulae (effectively, new products) to be added to a base prospectus by way of a supplementary prospectus. Competent authorities may well insist in these circumstances on a new base prospectus or a standalone prospectus for that new product. When preparing a base prospectus, therefore, an issuer needs to consider the full range of securities that it might want to issue under that base prospectus and include disclosure accordingly.

<sup>59</sup> Article 5 (1) of the Prospectus Directive.

<sup>60</sup> Article 22 (5) (1a) of the Prospectus Regulation, as amended.

circumstances) replicate any information included in the base prospectus.<sup>61</sup> Amendments to the base prospectus must be done by way of a supplementary prospectus or, if the amendment is not sufficiently material to require a supplementary prospectus under Article 16 of the Prospectus Directive, by a notice to the market.<sup>62</sup>

These rules are expected to result in a significant increase in the publication of supplementary prospectuses and they may lead to increased use of specialised drawdown prospectuses.<sup>63</sup>

### C. ISSUE SPECIFIC SUMMARY

Issuers are now required to produce an issue specific summary in connection with each issue of securities under a base prospectus and append it to the final terms.<sup>64</sup> The issue specific summary should consist of the base prospectus summary, fully tailored to the particular issue and annexed to the final terms, and it must contain:<sup>65</sup>

- The information from the summary of the base prospectus which is only relevant to the particular issue.
- The options contained in the base prospectus which are only relevant to the particular issue.
- The relevant information given in the final terms which has been previously left in blank in the base prospectus.

The issue specific summary is not subject to separate competent authority approval, but it is nonetheless expected to slow down the issue process and lead to additional costs for issuers. In particular, where the base prospectus summary has been translated into a number of languages in connection with the passporting into other EEA jurisdictions, the issuer is required not only to prepare an issue specific summary, but also to translate it together with the final terms into each language into which the summary or the base prospectus is required to be translated.<sup>66</sup>

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<sup>61</sup> Article 22 (1a) and (4) of the Prospectus Regulation, as amended. For example, if a base prospectus provides for three different types of securities to be issued (securities A, B and C), it should set out the redemption mechanics for each of the three types. When the issuer issues securities using that base prospectus, the final terms would be required to contain a statement to the effect that “the redemption mechanics applicable to security C apply to this issue” so that it is clear to investors which parts of the base prospectus are relevant to the particular issue.

<sup>62</sup> Article 2a (2) of the Prospectus Regulation, as amended.

<sup>63</sup> A drawdown prospectus is a prospectus prepared for a particular issuance of notes under a securities programme. It combines details of the issuer (which may be incorporated by reference from an earlier base prospectus), the securities (i.e. the final form terms of the securities) and the offering into one single document approved by the competent authority. Separate final terms are not required.

<sup>64</sup> Article 24 (3) of the Prospectus Regulation, as amended.

<sup>65</sup> Article 24 (3) of the Prospectus Regulation, as amended.

<sup>66</sup> Article 26 (5a) of the Prospectus Regulation, as amended.



If you would like to discuss any of the above issues further, please feel free to contact any of your regular contacts at the firm on +44 (0) 207 614 2200 or any of our partners and counsel listed under Capital Markets in the “Practices” section of our website (<http://www.clearygottlieb.com>).

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