

Capital Markets Update

Draft Bill on Security Prospectuses

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Speed Read

Draft bill on security prospectuses

- Implementation of recent amendments to Prospectus Directive: No significant deviations from European presettings
- Non-EU issuers whose securities are listed on a regulated market in Germany or in any other EU Member State and which did not exercise their right of choice yet will be deemed to have chosen Germany as their Home Member State until they have exercised such right of choice and be accordingly required to comply with the full range of the German continuing obligations.

Draft bill on security prospectuses

Introduction

The European Directive 2010/73/EU amending the Prospectus Directive and the Transparency Directive came into force on 31 December 2010 and is required to be implemented into national law by 1 July 2012.

The **German Federal Ministry of Finance** recently presented a **draft bill** meant to implement the aforementioned directive and to close a loophole in the securities regulation applying to non-EU issuers.

The proposed key legislative changes (most of them addressed in the Directive 2010/73/EU) are the following:

Exemptions from prospectus requirement

- The thresholds for the exemption for offers to less than 100 non-qualified investors will increase to **150 non-qualified investors** (in each case, per member state).
- The minimum denomination threshold for **wholesale** securities will increase from € 50,000 to **€ 100,000**.
- The **qualified investor exemption** will be **aligned to the professional client and eligible counterparty** exemption in the Markets in Financial Instruments Directive (2004/39/EC) (MiFID) and the respective implementing provisions in the German Securities Trading Act (*Wertpapierhandelsgesetz - WpHG*). This facilitation will enable investment firms to make offers to qualified investors by using their MiFID client classifications as opposed to having to determine their status under the prospectus regime.

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- The exemption for **employee offers** will apply to (i) issuers with main offices or registered offices in a member state of the European Economic Area (EEA), (ii) issuers established outside the EEA with securities listed on a regulated market in the EEA and (iii) issuers established outside the EEA with securities listed on a non-EEA-exchange, provided that such exchange has been approved as equivalent by the European Commission. Previously, an EEA-listing was generally required.
- Financial intermediaries may rely on and use an existing issuer's prospectus, provided, however, that the parties under liability for such prospectus have approved such use of the prospectus in advance and in writing (**retail cascade**).

Form and content of prospectuses

- The **summary section** of a prospectus will have to **include "key information"**, which key information is explicitly determined in the draft bill and includes the general terms of the offer including costs, which will be charged to the investor, information on admission to trading and the reasons for the offer as well as the use of its proceeds.
- The **proportionate (i.e. reduced) disclosure regime** for rights issues and SMEs provided for in the amended Prospectus Directive is not addressed in the draft bill since such reduced disclosure requirements still need to be elaborated and issued on the EU-level and published until 31 December 2014.

Other implementation issues

- Investors may only exercise **withdrawal rights** if the prospectus being supplemented relates to a **public offer** of securities but not to an exempt offer where the prospectus is only used to obtain admission to trading (e.g. pure institutional offers). Accordingly, withdrawal rights will only exist where new circumstances giving rise to the supplement arose prior to the final closing of the offer (as opposed to a later admission under the old regime). The final date upon which withdrawal rights can be exercised must be specified in the supplement, the period within which withdrawal rights can be exercised remaining two working days following publication of the supplement.
- In case of **passporting** a prospectus from Germany into an other EU Member State, *BaFin* will have to **notify the issuer or offeror of the certificate of**

approval at the same time as the competent authority of the host Member State.

- Issuers will not be required to publish the **annual information document** any longer.

Determination of the Home Member State by non-European issuers (no implementation issue)

Within the EU a **harmonized disclosure regime for public companies** was created in 2007 and 2008. The idea was to have the same disclosure and reporting requirements throughout the EU but only one national authority supervising compliance with such harmonized rules. Therefore, every issuer is allocated to one EU jurisdiction (its Home Member State) and only the regulator of the issuer's Home Member State has power to oversee compliance with the national rules (which in principle should be the same in all EU Member States). The Home Member State of non-EU issuers is generally determined along the lines of where securities of such issuer are listed or where it conducted a public offer for the first time.

Unfortunately, the German legislator created a deficient system in determining the Home Member State of non-EU issuers, which were listed in Germany prior to 2003 and have neither offered securities publicly since 2003 nor explicitly exercised their **right of choice with respect to their Home Member State**. Therefore, as of today *BaFin* does not enforce the German reporting rules against issuers listed in Germany, with respect to which the Home Member State cannot be reliably determined.

The draft bill finally undertakes to close the existing loophole:

Non-EU issuers whose securities are listed on a regulated market in Germany or in any other EU Member State and which did not exercise their right of choice yet **will be deemed to have chosen Germany as their Home Member State** until they have exercised their right of choice. Accordingly, such issuers will be required to comply with the full range of continuing obligations resulting from listing under German securities laws, including, in particular, financial reporting, disclosure of price sensitive information, major shareholdings etc.

Furthermore, all **non-EU issuers** whose Home Member state is Germany as of 30 June 2012 will be **required to file** such information with the German **Company Register (*Unternehmensregister*) and notify *BaFin*** accordingly.

Issuers listed not only in EU Member States but also outside the EU may consider a delisting from European regulated markets if they are not inclined to implement and comply with the European set of continuing obligations resulting from a listing on an European regulated market.

Useful links:

Unfortunately, the draft bill is currently in the process of being consulted with interested parties and institutions only and, therefore, is not accessible within the public domain.
Please let us know in case you wish to receive a copy of the document.

Key contact:

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