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the legal profession

European Securities and Markets Authority
11-13 Avenue de Friedland
75008 Paris
France

24 February 2011

Re: Call for evidence
Request for technical advice on possible delegated acts concerning the Prospectus Directive (2003/71/EC) as amended by the Directive 2010/73/EU

Dear Sir / Madam,

Introduction

The International Bar Association is grateful to have the opportunity to submit proposals to the European Securities and Markets Authority (ESMA) regarding its advice to the European Commission with regard to the amendments of the Prospectus Directive (2003/71/EC) as amended by Directive 2010/73/EU.

The International Bar Association (IBA), the global voice of the legal profession, includes 45,000 individual lawyers and 197 bar associations and law societies worldwide. We are submitting our comments on behalf of the Securities Law Committee which has over 900 members from 85 different countries.

The IBA's Securities Law Committee brings together the experience of securities lawyers worldwide regularly advising both issuers and underwriters in connection with securities offerings globally, including the European Union. Thus, we are particularly focusing on the practical implications of the possible delegated acts with a view to the implementation of the objectives set out, among other things, in Recital 4 of Directive 2010/73/EU, i.e. to simplify and improve the application of the Prospectus Directive, increase its efficiency and to reduce administrative burdens in connection with securities offerings. Our comments at this stage are general in nature. We would welcome the opportunity to discuss any of the topics mentioned further or assist ESMA in any way deemed useful.

On the issues set out in the Commission's request to ESMA, we should like to comment as follows:

1. Art. 5(5)(a) Prospectus Directive - Format of the final terms to the base prospectus

Given the variety of different products to be offered on the basis of a base prospectus, the requirements for the format of final terms should not be too detailed. Generally, the order and format

of final terms will be based on the structure of the base prospectus to which they relate. That said, we do not think that there is a need to have schedules or building blocks for the final terms. The Commission rightly points out that any such requirements should preserve the flexibility of the base prospectus regime. Thus, rather than establishing a specific format, the delegated acts should be limited to establishing (or confirming) certain principles to be observed when preparing final terms. These could include:

a) Clarification of the distinction between final terms and supplement

We believe in particular that while new information that is issuer specific (i.e. would be part of a registration document in the case of a three-partite prospectus) is expected to be published in a supplement, the disclosure of information relating to the economic terms of a particular issue (including the calculation thereof) should be made in final terms. This should particularly apply to any parameters that will come to be specified in the course of the actual marketing of an offering depending on actual demand.

b) Combination of final terms and the summary

We query whether where final terms have an impact on the key information to be present-ed in the prospectus summary; this should necessitate an amendment of the summary it-self. We believe that the summary – assuming no other changes than the determination of the final terms – can and should be read conjointly with the final terms. In our view nothing is gained by replication of the summary with insertion of the final terms in an additional document. A better approach in our view would be to define as part of the further definition of key information an appropriate way to refer to final terms yet to be published in combination with clear (but flexible) guidance on the content of final terms. We do not believe that this would be a contradiction of Article 11 of the prospectus Directive because by their very nature final terms are published after the date of the prospectus and do not require an amendment of any part of that prospectus including the summary.

c) Clear definition of final terms

In the preamble to the Directive 2010/73/EU, the Commission clarifies that final terms should contain only information which is specific to the issue and which can be determined only at the time of the individual issue. The Commission goes on to say that such information might, for example, include the international securities identification number, the issue price, the date of maturity, any coupon, the exercise date, the exercise price, the redemption price and other terms not known at the time of drawing up the prospectus. We would urge ESMA to further define – as is requested by the Commission – what such other information could entail, however, without tying disclosure of such information to any specific format. Also, the compilation of information that could be contained in final terms should not be an exclusive enumeration so as to avoid any negative impact on the development of innovative products going forward and to maintain the necessary flexibility.

2. Art. 5(5)(b) Prospectus Directive - Format of the summary of the prospectus and detailed content and specific form of the key information to be included in the summary.

The development of schedules and building blocks for the prospectus summary provides a good opportunity to overcome an apparent misperception as to the possible scope of a summary. Obviously, it will be impossible to include into a prospectus summary any and all information investors need for

their investment decision. That would be the benchmark for the entire prospectus bearing in mind that Article 5 para. 1 of the Prospectus Directive (still) states that the (entire) prospectus shall “contain all information which, according to the particular nature of the issuer and of the securities (...) 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 such securities.”

Hence, the summary should set out the essential characteristics of the issuer and the offered securities (but not of all information items to be disclosed in a prospectus). The actual investment decision can only be made after the review of the entire prospectus. That understanding is supported by Recital 21 to the Prospectus Directive, which has remained unchanged. It still states that the summary should normally not exceed 2,500 words. No-one can expect that information sufficient for making an informed investment decision can be provided by a document not exceeding that size.

When it comes to providing a description of the key information that needs to be provided in the prospectus summary, we doubt that it will be possible to provide an exhaustive list and are therefore wary of the reference in the Request by the Commission to "a detailed and exhaustive description of the essential and appropriately structured key information". By its very nature, that description should remain generic to reflect the variety of issuers and securities for which a summary may be prepared. It may be possible, though to make a distinction between the requirements for equity and for non-equity securities, possibly also for derivatives, and to have different schedules for these types of securities.

As far as the reference to the PRIIPs initiative is concerned, we agree that any duplication of disclosure requirements should be avoided. That said, it should be considered that the focus of the disclosure for PRIIPs compared to that for certain (unstructured) securities like shares or straight bonds issued by an industrial company will be different. For the latter, the focus will be on issuer related peculiarities and risks and less on the structure of the product.

3. Article 7 Prospectus Directive - Proportionate disclosure regime (Article 7).

While we generally welcome attempts to reduce the burden and cost for issuers when accessing the financial markets to raise capital, the consequences of a “proportionate” disclosure regime for the protection of investors and for the international competitiveness of the financial markets within the EU should be carefully considered. We agree that - as set out in the Commission’s request – a high level of investor protection should remain the guiding principle of the Prospectus Directive. Therefore, the focus of the proportionate disclosure regime should be on the elimination of duplications and redundancies of disclosure. We particularly think of the following:

a) Avoid duplication of existing ongoing disclosure

Issuers should be allowed to incorporate by reference disclosures already made in accordance with the ongoing disclosure by listed issuers under the Transparency and Market Abuse Directives.

To facilitate such incorporation by reference, we strongly feel that the prospectuses and ongoing disclosures that are referred to in the prospectuses should be made available on a central site on the internet (i.e. a European EDGAR system). They should be identifiable according to the nature of the obligation to disclose, e.g. quarterly statement or ad-hoc re-lease.

b) Elimination of financial disclosure items not required under IFRS

Regulation 809/2004 currently requires a number of financial disclosure items to be included in a prospectus that are not prepared on an ongoing basis by a listed issuer, who prepares its consolidated financial statements in accordance with IFRS. These issuers therefore have to generate such additional information that its accounting systems may not necessarily generate specifically for a securities issue. This appears questionable, particularly as such information appears to have limited added value from an investor perspective beyond what is already available on the basis of the annual and interim financial reporting of the issuer under IFRS. Examples are:

- Information regarding any existing or planned material tangible fixed assets including leased properties and any major encumbrances thereon (Regulation 809/2004, Annex I item 8.1);
- Information on capital resources (Regulation 809/2004, Annex I item 10) to the extent not provided in the issuer's annual or interim balance sheets, at least insofar as relates to those issuers that do not face material issuer-specific or industry-wide liquidity issues;
- Statement of capitalisation and indebtedness as of a date no earlier than 90 days prior to the date of the prospectus (Regulation 809/2004, Annex III item 3.3), particularly as this requirement is inconsistent with the usual reporting cycles even if the issuer publishes quarterly interim, financial statements. Moreover, it should be sufficient to provide the capitalization and indebtedness information as of the most recent balance sheet date for which annual or interim financial statements are included in the prospectus.

One final comment on proportionate disclosure needs to be made. The regime is also set to apply to rights offerings. Unfortunately, the applicability is limited to rights offerings where statutory pre-emption rights are not excluded. This last requirement will effectively mean that the proportionate regime will not be used in certain jurisdictions such as the UK and the Netherlands where for reasons of corporate law, the statutory pre-emption rights are excluded for rights offering but are replaced by similar rights that fit into a typical offering timetable and that also allow the issuer to exclude certain jurisdictions where making the offer would be unduly burdensome.

4. Articles 3 and 7 Prospectus Directive – The consent to use a prospectus in a retail cascade

The clarification of the conditions under which financial intermediaries may use a valid prospectus drawn up by an issuer, for a retail cascade offering, provides a useful facilitation for the distribution of securities and, hence, broadens the available demand for issuers seeking to raise capital. That advantage should not be weakened by too formalistic requirements for the consent to be granted by the issuer or the person responsible for drawing up the prospectus to such use. We agree that financial intermediaries should not be allowed to cause additional prospectus liability for issuers or other persons responsible for drawing up the prospectus, through the use of a prospectus without their consent. We caution however against creating one size fits all forms of such consent.

Sincerely yours,

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