

ESMA's Public Statement on ESG in Prospectuses

11 August 2023

On 11 July 2023, the European Securities and Markets Authority ("ESMA") published a public statement¹ ("ESMA Statement") regarding sustainability-related disclosure requirements in prospectuses for both equity and non-equity securities.

1 Introduction

ESMA emphasises that a material sustainability-related disclosure is expected to be included in prospectuses and in the final terms, in accordance with Article 6(1) of the Prospectus Regulation.

Generally, the type of the sustainability information depends on the materiality of the information to the investor. The materiality of information depends on the circumstances of the issuer and the type of securities in question.

This Client Alert covers information related to non-equity securities and should be a reminder for issuers of said securities to review their prospectuses and to align them, in a timely manner, with the ESMA Statement prior to any issue of ESG bonds. This may be done by way of a supplement or in the course of the next prospectus update.

2 Disclosure requirements

2.1 Common disclosure requirements for all ESG bonds

- *Disclosure of Basis for Statements:* The basis for any statements concerning an issuer's sustainability profile or that of the securities issued is to be provided, for example, by stating that the issuer or securities adhere to a specific market standard or label, and including the material information regarding these in the prospectus (e.g. ICMA Green Bond Principles etc).
- *Objectivity:* The information in the prospectus must provide a balanced view, so that positive and negative aspects are both presented.
 - Note that sustainability-related disclaimers or risk factors may not relate to the non-performance of factors which the issuer controls.
- *Comprehensibility:* Sustainability disclosures should be comprehensible and should therefore clearly define components of mathematical formulas, adequately describe product structures and define technical terminology.

¹https://www.esma.europa.eu/sites/default/files/2023-07/ESMA32-1399193447-441_Statement_on_sustainability_disclosure_in_prospectuses.pdf

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- *Post-Issuance Information:* It should be disclosed whether the issuer intends to provide post-issuance information. If issuers choose to do so, they should also indicate the type of information and where it can be obtained (e.g. URL to the issuer's website).

2.2 "Use of proceeds" Bonds

In relation to "use of proceeds" bonds (i.e. bonds which proceeds are applied to finance or re-finance sustainable projects or activities), ESMA expects full disclosure regarding the use and management of the proceeds as well as information enabling investors to assess the sustainability ambition underpinning project evaluation and selection.

More specifically, this concerns the following items in a prospectus:

- *Risk factors:* Disclose e.g. risks regarding the allocation and management of proceeds, and risks concerning the viability and achievement of the sustainable project.
- *Reasons for the offer and use of proceeds:* Describe the goal and characteristics of the relevant sustainable project and how the sustainable goal is expected to be achieved, as well as any permissible terms and conditions for deviations to the minimum use of proceeds and the sustainable project. If the sustainable project is not identified at the time of the prospectus approval, the criteria that will be used to determine how the proceeds are allocated for sustainable purposes should be disclosed. For example, the prospectus can include a summary of the 'green bond framework' of the issuer or respective legislation.
- *Information concerning the securities to be offered to the public/admitted to trading:* In case of an early redemption option, any impact which this may have on the sustainability performance of an investment needs to be disclosed.
- *Additional information:* If advice or assurances regarding the sustainability characteristics of the security have been provided by advisors or third parties, the prospectus should contain a disclosure concerning the scope of those assurances and by whom they were provided.

2.3 "Sustainability-linked" Bonds

In relation to sustainability-linked bonds (i.e. bonds which the financial and/or structural characteristics vary depending on whether the issuer achieves predefined sustainability/ESG objectives), ESMA expects information about the selected key performance indicator(s) (KPIs), the sustainability performance target(s) (SPTs) and information enabling investors to assess the consistency of the KPIs and its associated SPTs with the relevant sector-specific, science-based targets (if any) and the issuer's sustainability strategy.

Specifically, this concerns the following items in a prospectus:

- *Risk factors:* Disclose, in particular, risks regarding key performance measures (KPIs) and associated sustainability performance targets (SPTs), as well as risks concerning potential conflicts of interest when such KPIs are selected and monitored, and the potential impact of the issuer's overall firm-level sustainability performance on the security.
- *Reasons for the offer and impact on the issuer:* If sustainability-linked bonds are issued for general corporate purposes, disclose the rationale for the issuance as well as its impact on the issuer.
- *Information concerning the securities to be offered to the public/admitted to trading:* Describe how (if any) interest payments are influenced by the fulfilment or failure to fulfil sustainability objectives, and clearly disclose the means by which interest payments are calculated in such contexts. This information should include references to the selected key performance indicators as well as sustainability performance targets. Note also the general comprehensibility requirement mentioned above.
- *Information concerning the securities to be offered to the public/admitted to trading:* In case of an early redemption option, any impact which this may have on the sustainability performance of an investment needs to be disclosed.

- *Additional information:* If advice or assurances have been provided by advisors or third parties regarding the sustainability characteristics of the security, the prospectus should contain a disclosure concerning the scope of those assurances and by whom they were provided.

2.4 Advertisements

Article 22(3) and (4) of the Prospectus Regulation requires information in the prospectus that is consistent with any information distributed orally or in writing in an advertisement. ESMA considers the importance of the sustainability-related disclosure in an advertisement for investors as an indicator of its materiality. Therefore, (material) sustainability-related information should be included in the respective prospectus before being used for promotional purposes.

About Wolf Theiss

Wolf Theiss is one of the leading European law firms in Central, Eastern and South-Eastern Europe with a focus on international business law. With more than 360 lawyers in 13 countries, over 80% of the firm's work involves cross-border representation of international clients. Combining expertise in law and business, Wolf Theiss develops innovative solutions that integrate legal, financial and business know-how.

For more information, please contact:



Claus Schneider
Partner

E claus.schneider@wolftheiss.com
T +43 1 51510 1390



Nikolaus Dinhof-Renezeder
Counsel

E nikolaus.dinhof@wolftheiss.com
T +43 1 51510 1392



Nevena Skocic
Counsel

E nevena.skocic@wolftheiss.com
T +43 1 51510 1396



Sebastian Prkljajic
Associate

E sebastian.prkljajic@wolftheiss.com
T +43 1 51510 1395

