

Securities Law in Germany

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1. Description of the Securities Markets

In Germany there are seven stock exchanges (Berlin, Düsseldorf, Frankfurt, Hamburg, Hannover, Munich and Stuttgart), the electronic stock exchange “Eurex” for futures transactions, a commodities exchange in Hannover and energy exchanges in Frankfurt and Leipzig (each a “Stock Exchange”).

The German securities markets are basically divided by law into two different markets, namely a regulated market (the “Regulated Market”; *Regulierter Markt*) and a regulated unofficial market (the “Regulated Unofficial Market”; *Freiverkehr*). These markets differ in terms of approach to the regulation of trading, listing and continuing obligations. The Regulated Market is the most regulated of the German markets in terms of listing requirements and continuing obligations. The least regulated market is the Regulated Unofficial Market. The market segmentation referred to above applies to all Stock Exchanges.

The main Stock Exchange in Germany is the Frankfurt Stock Exchange (*Frankfurter Wertpapierbörse*), also known by its German abbreviation FWB (“FWB”). The FWB established two market segments on January 1, 2003. These two segments are the General Standard (the “General Standard”) and the Prime Standard (the “Prime Standard”). Securities admitted to the Regulated Market and listed on the FWB will automatically be traded on the General Standard. Trading on the Prime Standard requires an additional application for admission thereto. Since October 25, 2005, the Regulated Unofficial Market of the FWB has been also divided into two market segments: namely the Open Market (the “Open Market”) and the Entry Standard (the “Entry Standard”), which differ in terms of approach to regulation. Trading on the advanced Entry Standard requires the filing of more comprehensive

information in respect of the issuer and has more extensive continuing disclosure requirements. The Entry Standard provides small- and medium-sized businesses easier access to the German public markets with fewer regulatory requirements, while the transparency requirements, which are higher than those applicable in the Open Market, guarantee a certain regulatory standard.

Xetra (Exchange Electronic Trading) is an electronic cash market trading system on which approximately 260 European banks and securities trading houses currently trade all shares listed on the FWB. Exchange participants are offered connectivity to about 350,000 securities (equities, certificates, warrants, ETFs – exchange traded funds – & ETCs – exchange traded commodities – and actively managed funds) via Xetra.

This chapter focuses on the regulatory framework of the FWB and its carrier, the Deutsche Börse AG, as it is the main German Stock Exchange.

2. The Listing/Market Authority

2.1. Exchange Supervisory Authority

The German federal structure and, accordingly, the provisions of article 74 (1) no. 11 of the German constitution (*Grundgesetz*), provides that the establishment and supervision of stock exchanges fall within the remit of the respective federal states (*Bundesländer*) in which a Stock Exchange is located. Usually the respective exchange supervisory authority (*Börsenaufsichtsbehörde* or “Exchange Supervisory Authority”) is part of the Ministry of Economics in each federal state.

The Exchange Supervisory Authority supervises the Stock Exchanges in accordance with the provisions of the Stock Exchange Act, covering, *inter alia*, the internal organisation of stock exchanges, the admission of banks and other financial institutions, the listing of securities and the proper conduct of trading and settlement of securities transactions.

The Exchange Supervisory Authority, which supervises the FWB, is the Ministry of Economics, Transportation, Urban and Regional Development of the State of Hessen (*Hessisches Ministerium für Wirtschaft, Verkehr und Landesentwicklung*). The main tasks of the Exchange Supervisory Authority are the supervision of market

price fixing, the approval of the rules of exchange (*Börsenordnungen*) of the FWB, the development of preventive measures and the supervision of proper trading. The Exchange Supervisory Authority is in particular entitled to make information requests and require the submission of documents from the FWB as well as from other market participants, carry out on-site inspections, instruct the FWB and other market participants for the purposes of investigating misconduct and, in urgent cases, may temporarily suspend an official broker's authorisation pending further investigation.

2.2. Exchange Council

Whereas the Exchange Supervisory Authority has a supervisory role, the exchange council (*Börsenrat* or “Exchange Council”) is the authority that deals with the enactment of the FWB's internal regulatory framework. The Exchange Council consists of at most 24 members selected for a maximum term of office of three years. The Exchange Council is entitled to enact the rules of exchange (see section 4 below), general terms and conditions of trade and settlement, internal rules for the management of the FWB and the fee schedule applicable for services rendered by the FWB. Furthermore, the Exchange Council is authorised to appoint and dismiss the managing directors of the FWB.

2.3. Monitoring Office

Sec. 7 of the Stock Exchange Act provides that each Stock Exchange shall establish and operate an office responsible for monitoring trading, pricing and settlement of securities transactions (*Handelsüberwachungsstelle* or “Monitoring Office”). Such Monitoring Offices collect and analyse all data relating to trading and settlement and carry out investigations necessary for the discharge of their monitoring role.

The Monitoring Office is required to operate in accordance with any directives given by the Exchange Supervisory Authority.

2.4. Deutsche Börse AG

The Stock Exchange, as a regulated market, must be a separate entity from its carrier, which provides in particular premises, personnel, infrastructure, etc. for the conduct of securities trading. The carrier is usually a registered association, a

corporation or a chamber of industry and commerce. The FWB's carrier is Deutsche Börse AG, a stock corporation under German law ("Deutsche Börse") that is itself listed on the FWB.

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2.5. Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)

Although the Federal Financial Supervisory Authority ("BaFin") (see section 3 below) is not a listing authority, its regulatory powers include the approval of securities prospectuses that are required for a listing and the supervision of the proper trading of securities on Stock Exchanges.

3. The Regulatory Authority

All German securities markets and providers of financial and securities trading services are subject to national supervision by BaFin. The Securities Supervision/Asset Management department at BaFin can be contacted at:

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Tel.: +49 (0)228/4108-0
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The principal responsibility of BaFin is to ensure that German securities markets and market participants operate in compliance with applicable legal provisions, in particular in respect of insider trading prohibitions, prospectus requirements,

disclosure of financial and price sensitive information, public takeover law and other statutory provisions safeguarding proper, transparent and efficient trading on securities markets in Germany. In connection with this responsibility, BaFin is entitled to conduct investigations, require disclosure of documents and/or information, prescribe appropriate remedies in case of non-compliance and impose administrative fines in certain cases of non-compliance. Finally, BaFin can also forward cases of misconduct to the competent prosecution authorities (*Staatsanwaltschaften*) in the event that such misconduct is subject to criminal sanction.

4. Principal Laws Regulating the Securities Markets

The securities markets in Germany are, *inter alia*, regulated by:

- *Stock Exchange Act* (Börsengesetz)

The Stock Exchange Act comprises basic principles regarding the organisation of stock exchanges and other securities markets and the trading and listing of securities. Furthermore, the Stock Exchange Act authorises the government to enact provisions and regulations to protect the public and to ensure the proper conduct of securities trading.

- *Stock Exchange Admission Regulation* (Börsenzulassungsverordnung)

The Stock Exchange Admission Regulation comprises, *inter alia*, listing requirements, listing procedures and disclosure obligations for securities for which an application for admission to the Regulated Market has been filed or will be filed.

- *Rules of Exchange* (Börsenordnung)

The Rules of Exchange regulate the internal organisation of the respective Stock Exchange, the details of the listing procedure, the proper conduct of trade and price fixing and the publication of all information regarding prices and volumes. Furthermore, the Rules of Exchange also govern the composition of the management of each Stock Exchange and the appointment of its members.

- *Rules for the Regulated Unofficial Market* (Freiverkehrsbedingungen)

These rules of each Stock Exchange provide for, in particular, the requirements of listing on the Regulated Unofficial Market, e.g. the Open Market or Entry Standard of the FWB.

- *Investment Act* (Investmentgesetz)

The Investment Act regulates the distribution and sale of interests, participations and shares in domestic and foreign investment funds in Germany.

- *German Banking Act* (Kreditwesengesetz)

The German Banking Act forms the statutory framework for banking and financial service activities and focuses on the protection of creditors and bank depositors.

- *Securities Trading Act* (Wertpapierhandelsgesetz)

The Securities Trading Act focuses on the regulation of trading with securities, financial instruments, futures, derivatives and similar financial products. In addition, it stipulates the obligation to disclose changes in interests in stock of corporations listed on the Regulated Market and to disclose other important information relating to such listed companies (e.g. annual financial accounts, quarterly reports or invitation and agenda of the annual general meeting). Furthermore, the Securities Trading Act contains certain specific provisions against insider trading and manipulation of stock exchange quotations and stipulates certain rules of conduct for financial service institutions providing financial services and ancillary services.

- *Securities Prospectus Act* (Wertpapierprospektgesetz)

The Securities Prospectus Act regulates prospectus requirements for the offering of tradable securities and the exemptions from such requirements. It furthermore stipulates certain principal rules as to form and mandatory content of a prospectus, prospectus approval by BaFin and prospectus publication.

- *Security Prospectus Regulation* (Prospektverordnung (EG) Nr. 809/2004)

The Security Prospectus Regulation stipulates, in particular, the details as regards mandatory content, incorporation by reference and publication of prospectuses.

- *Act on the Prospectus for Securities Offered for Sale* (Wertpapier-Verkaufsprospektgesetz)

The Act on the Prospectus for Securities offered for sale applies to offers of securities in companies (e.g. closed funds, trusts) that have not issued tradable securities within the meaning of the Security Prospectus Act.

- *German Securities Acquisition and Takeover Act* (Wertpapiererwerbs- und Übernahmegesetz (WpÜG)).

The German Securities Acquisition and Takeover Act stipulates the form, content, procedural rules and publication requirements applying to public takeover offers and furthermore stipulates under which circumstances a mandatory takeover offer must be submitted. Accordingly, the German Securities Acquisition and Takeover Act applies only to shares in stock corporations listed on the Regulated Market and securities representing such shares (e.g. options, convertibles).

5. Participants in the Securities Markets: Requirements for Licensing

Under sec. 32 of the German Banking Act, enterprises which offer banking and/or financial services within the meaning of sec. 1 of such Act must hold a written permit ("licence") that is granted by BaFin. The grant of such licence requires that a certain number of conditions are met, e.g. certain minimum requirements as to initial trading, status of shareholders and managers and professional qualifications of the management.

Trading and brokerage activities on a Stock Exchange require the prior permission of the management of the respective Stock Exchange, according to sec. 19 of the German Stock Exchange Act. This also applies to individuals acting as a broker on behalf of an enterprise having obtained such permission. Further requirements are stipulated in the local Rules of Exchange of each of the Stock Exchanges (e.g. sec. 12 *et seq.* of the FWB Rules of Exchange). Participation on an electronic trading system requires authorisation by the Stock Exchange maintaining such system. Such authorisation is usually granted if the respective applicant has obtained trading authorisation on any Stock Exchange and has accepted the rules of conduct of such electronic trading system.

6. Procedures and Methods for an Application for Listing

6.1. Regulated Market

The Regulated Market is an organised market within the meaning of sec. 2 (5) of the Securities Trading Act. As of April 2009, securities of approximately 705 domestic

and foreign companies are listed on this market segment (Prime Standard: 387; General Standard: 318).

Taking an FWB-listing as an example, an issuer of shares or bonds ("Issuer") applying to be listed on the Regulated Market must go through an approval process. The Issuer has to submit an application to the management of the Stock Exchange. Such application must be filed in conjunction with at least one bank or financial institution that is regulated and licensed under the German Banking Act. If the Issuer itself is such a bank or financial institution, it may file its application without obtaining mandatory support of another bank or financial institution. The legal requirements for admission are regulated in detail in the Stock Exchange Act, the Stock Exchange Admission Regulation, in the Securities Prospectus Act and in the applicable Rules of Exchange.

The application must be submitted in written form and has to include certain mandatory information, e.g. registered trade name and head office of the Issuer, the character and value of the securities to be issued and further details. In addition to the application, the Issuer must submit a securities prospectus, either as draft or already approved by BaFin, unless the listing does not require filing a prospectus. The prospectus has to be published and include certain mandatory information set forth in sec. 5 *et seq.* of the Securities Prospectus Act to enable the public to properly evaluate the Issuer and the securities to be listed.

Admission to trading will only be granted if the Issuer and the securities to be admitted comply with the applicable capital markets provisions that are displayed in sec. 32 of the Stock Exchange Act, and has to be published in the electronic federal gazette by the management of the Stock Exchange.

Initial trading begins at the earliest on the trading day following the publication of the listing admission or the prospectus (if required). The placing of securities is undertaken by the financial institutions advising the Issuer. In the context of initial public offers and secondary offers, pricing is usually fixed by means of an ordinary or accelerated book-building process or, in rare cases in this market, on a fixed price basis.

6.2. Regulated Unofficial Market (*Freiverkehr*)

Taking the FWB as an example, the Regulated Unofficial Market is a market segment where a substantial proportion of the issuers are not incorporated in Germany. The Regulated Unofficial Market is not an organised market within the meaning of sec. 2 (5) of the Securities Trading Act, which means that the regulatory requirements are light in terms of trading and settlement procedures. The Rules for the Regulated Unofficial Market of Deutsche Börse (*Allgemeine Geschäftsbedingungen für den Freiverkehr der Frankfurter Wertpapierbörse*) provide the regulatory framework for the particular listing requirements in this segment. Issuers are in general merely subject to certain formal admission requirements, and only a few continuing obligations and requirements are applicable in the Open Market segment. The application for listing of securities of an Issuer on the Unofficial Regulated Market must be made in writing by a bank or a financial institution admitted to the FWB. The listing in the Entry Standard of the FWB requires, in addition, the consent of the Issuer. The decision-making body for admission is Deutsche Börse, which acts as the operating body (carrier) of the Regulated Unofficial Market.

In the Entry Standard segment, the Issuer has to file more comprehensive information about the Issuer and is subject to certain continuing disclosure requirements. The main difference between a listing on the Regulated Market and on the Regulated Unofficial Market is that the listing in the latter case does not require a formal securities prospectus according to the Securities Prospectus Act, but only an *Exposé* comprising certain information about the relevant securities and Issuer.

As of April 2009, securities of approximately 9459 domestic and foreign companies are listed in this market segment (Entry Standard: 113; Open Market: 9346).

7. Procedures and Methods for an Application for Listing: Foreign Issuers

The same procedures and listing requirements as previously described are applicable to foreign Issuers. Depending on the Issuer's jurisdiction of incorporation, the management of the respective Stock Exchange may require further information and/or documentation on a case by case basis.

As is the case with domestic Issuers, the documentation must principally be prepared in German. The management of the Stock Exchange may allow foreign Issuers to prepare the documentation in English or any other language usually used for the purpose of conducting international security transactions in Germany.

For a listing in Germany, a securities prospectus principally has to be drafted in German, however, BaFin may allow a prospectus in English if the summary of the prospectus, which is included in a prospectus, is drafted in German.

8. Listing Requirements

The listing requirements depend upon the market segment, i.e. whether the securities are to be listed on a Regulated Market or Regulated Unofficial Market.

8.1. Regulated Market

Admission Requirements	
Minimum term of incorporation	Three years, exemptions apply
Volume to be issued	Expected market value of the listed shares, or if no estimate is possible, the (aggregate) value of the company's equity after issue, of at least of EUR 1.25 million
Minimum number of shares to be issued	Minimum of 10,000 shares
Share classes	Ordinary shares and/or preferred shares
Mandatory free float	Minimum of 25%, exemptions apply
Approval documentation	Offering prospectus must include the mandatory content requirements, including balance sheet and P&L statements for the last three financial years including notes to the financial statements and a

	management report for the latest financial year
Language of publication	German; German or English for foreign Issuers
Retention obligation for existing shareholders	----
Decision-making body	Management of the Stock Exchange
Legal basis	Stock Exchange Act (sections 32 <i>et seq.</i>), Stock Exchange Admission Regulation, Securities Prospectus Act, Security Prospectus Regulation
Other	Trade monitoring (Trading Surveillance Office)

8.2. Regulated Unofficial Market

As indicated above, the Regulated Unofficial Market is not an organised market within the meaning of sec. 2 (5) of the Securities Trading Act, which means that the regulatory regime is lighter in comparison to the rules applied on the Regulated Market. The Rules for the Regulated Unofficial of Deutsche Börse (*Allgemeine Geschäftsbedingungen für den Freiverkehr an der Frankfurter Wertpapierbörse*) provide the regulatory framework for the listing requirements in this segment. Issuers are subject to certain admission requirements that are generally not comparable with the admission requirements applicable to the Regulated Market as indicated above. The main requirement is that the Issuer must have a share capital of at least EUR 250,000 (for further details see section 6.2 above).

9. Continuing Obligations for Listed Companies

The continuing obligations that apply to listed companies principally depend upon the market the Issuer is listed on (Regulated Market or Regulated Unofficial Market). The continuing obligations also vary within the segment of the relevant market (e.g. Prime or General Standard of the Regulated Market of the FWB or Open Market or Entry Standard of the Regulated Unofficial Market of the FWB).

9.1. Regulated Market (General Standard)

Continuing Obligations	
Annual financial statements	Publication required within four months of the subsequent financial year
Interim reports	Half-year financial report and two further interim financial reports within the first and second half of the fiscal year (<i>Zwischenmitteilung der Geschäftsführung</i>) required; interim reports can be replaced by quarterly reports according to specific standards
Ad Hoc disclosure under the terms of sec. 15 of the Securities Trading Act	Required
Obligation to report changes in shareholding or voting rights acc. to sec. 21 of the Securities Trading Act	Mandatory
Obligation to report directors' dealings acc. to sec. 15a of the Securities Trading Act	Mandatory
Language of publication	German or English, depending on the jurisdiction of incorporation of the Issuer and the location(s) of the Stock Exchange where the shares are listed

9.2. Regulated Market (Prime Standard)

As indicated above, securities of Issuers listed on the Regulated Market and traded on the FWB are automatically traded on the General Standard. If such securities are also admitted to the Prime Standard, the following additional continuing obligations arise from such admission:

- The Issuer is required to prepare and publish quarterly reports for the first and third quarter of its fiscal year that must be prepared by using the same accounting principles as the annual financial statements.
- The Issuer is required to forward its annual financial statements, half-year reports and quarterly reports to the management of the FWB. These financial statements must be prepared in both German and English. Upon application by the Issuer, the management of the FWB may allow financial statements of Issuers incorporated abroad to be prepared in whole or in part in English only.
- The Issuer must prepare and continuously update a corporate action timetable (*Unternehmenskalender*) for the financial year in German and English. The timetable must include details of material corporate events of the Issuer such as general meetings, press conferences and analysts' conferences.
- In addition to the press conference held in relation to the announcement of the annual financial figures, an analysts' meeting must be held at least once a year.
- Current reporting and disclosures required under the Securities Trading Act must be set up additionally in English.

10. Civil and Criminal Liability for Securities Laws Breaches

10.1. Breaches of the Stock Exchange Act

Breaches of compliance obligations according to the Stock Exchange Act include:

- failure of the Issuer to comply with its continuing obligations;
- admission to trading on the basis of a prospectus containing incorrect or incomplete statements that are material to the assessment of the value of the securities; and
- inducement to engage in speculative exchange transactions on a commercial basis by taking advantage of the inexperience of others;

that may result in:

- revocation of the admission for listing; and/or
- liability for untrue or misleading statements made in a prospectus.

If it can be clearly proven that information contained in a prospectus is inaccurate, an investor who has purchased newly issued securities is entitled to return such securities to the Issuer or the underwriting bank. Both are then obliged to refund the issue price as well as any related transaction costs. In case of securities acquired on a Regulated Unofficial Market, the investor is entitled to a refund of the purchase price. If the securities have already been sold, the investor will be compensated for any losses incurred.

10.2. Breaches of the Securities Trading Act

Breaches of compliance obligations under the Securities Trading Act include:

- failure to publish price sensitive information immediately, particularly with regard to ad hoc disclosure;
- publication of untrue or misleading information in a notification relating to price sensitive information, in particular with regard to ad hoc disclosure;
- insider dealing;
- failure to keep a list of insiders (*Insiderverzeichnis*);
- stock exchange and market price manipulation; and
- failure to publish annual financial statements, half-year reports or interim report; (e.g. quarterly reports);

that may result in:

- liability to pay compensation;
- a fine and/or imprisonment of up to a five-year term, respectively; or
- an administrative offence resulting in an administrative fine of EUR 1,000,000 (maximum).

10.3. Breaches of the Stock Corporation Act

Breaches of compliance obligations under the Stock Corporation Act include:

- making false statements;
- misrepresentation of facts;
- false issuance or falsification of deposit certificates; and
- violation of the duty to report and confidentiality;

that may result in:

- a fine and/or imprisonment of up to a three-year term, respectively; or
- administrative offences and fines of EUR 25,000 (maximum).

10.4. Breaches of the Securities Prospectus Act

Breaches of the Securities Prospectus Act may lead to various sanctions imposed by BaFin. BaFin may, for example, prohibit the making of a public offer of securities by an Issuer if the prospectus does not meet the mandatory requirements as to content and form or if an offer of securities is made without prior publication of a prospectus. In order to guarantee effective enforcement of these regulations, BaFin is granted certain investigative rights. Furthermore, BaFin may impose fines of up to EUR 500,000 in the event of an infringement of any applicable regulations.

11. Offering Securities: Distinction between Public and Private Offers

German law distinguishes between public offers, requiring a prospectus, and exempt offers to the public. Basically, if securities are offered and advertised to the public, a prospectus is required for such issue. Conversely, if any offer of securities is made to or directed at only qualified investors or to fewer than 100 non-qualified investors, a prospectus is principally not required. Further exemptions apply if the total consideration in respect of the securities being offered does not exceed EUR 100,000 within a 12-month period or if the securities being offered are denominated in amounts of at least EUR 50,000. Another exemption applies for Issuers already admitted to trading on the Regulated Market if the total consideration in respect of the securities being offered does not exceed EUR 2.5 million within a 12-month period.

The Securities Prospectus Act provides a legal definition of public offers requiring a mandatory prospectus in sec. 2 (4). An offer of securities is deemed a public offer if the following criteria are met:

- a sufficiently concrete offer to acquire securities or sign for securities; and

- an approach of potential investors by any means of advertisement containing sufficient information of the terms and conditions of the offer and the offered securities to enable an investor to decide upon the acquisition or signing of such securities.

12. Offering Securities: Prospectus/Disclosure Requirements

12.1. Offering of Securities to the Public

A prospectus is required for securities that are offered to the public in Germany for the first time (see section 18 below for re-sale and secondary offerings and sections 11 and 17 for exemptions available) and have not yet been admitted to trading on the Regulated Market. The basic requirements as to form and content of such prospectus are set forth in the Securities Prospectus Act and the Securities Prospectus Regulation. According to the Securities Prospectus Act, each Issuer of securities that are being offered to the public in Germany for the first time is obliged to publish a prospectus if no exemption applies (see section 11 above).

12.2. Application for listing on the Regulated Market

In addition to the prospectus requirement on a public offer, a prospectus is also required if and to the extent the relevant securities will be listed on the Regulated Market. Exemptions to this general rule apply, in particular, in the case where less than 10% of all shares in issue are listed within a 12-month period.

12.3. Inclusion of Securities into the Regulated Unofficial Market

The listing of securities on the Regulated Unofficial Market itself does not require a prospectus, rather the submission of a corporate *Exposé* by the Issuer. However, a prospectus is required under the Securities Prospectus Act if the relevant securities are to be offered by means of a public offer. Thus, a proposed listing on the Open Market or the Entry Standard may also require a prospectus even if the Issuer restricts its activities only to the implementation of a listing but advertises the relevant shares to the public.

13. Quasi Securities: the Offer of Options, Collective (Managed) Investments and Derivatives

Prospectus listing requirements according to the Securities Prospectus Act and the Stock Exchange Act only apply to securities. Although there is no legal definition of securities, it is generally accepted that all financial instruments and/or securities that are (a) tradable at capital markets and (b) fungible are regarded as securities. Accordingly, individually negotiated financial instruments or participations in limited liability companies (*GmbH*) or partnerships (*KG* or *GmbH & Co. KG*) are not securities. Securities of foreign Issuers meeting the criteria mentioned above also fall within the scope of applicability of the Securities Prospectus Act.

It should be noted that certain securities are exempt from prospectus requirements according to the Securities Prospectus Act (see section 16 below).

14. Prospectuses: Form and Content

A prospectus has to meet certain requirements. The Securities Prospectus Act and the Securities Prospectus Regulation stipulate rules as to the form, content and publication of a prospectus. The main criteria for the drawing up of prospectuses are laid down in the Securities Prospectus Regulation together with its annexes and schedules. Depending on the type of the securities to be issued, the applicable annexes will vary. For example, with regard to the issue of shares, Annex 1 and 3 of the Securities Prospectus Regulation will apply. Additional schedules of the Securities Prospectus Regulation may apply to Issuers with complex financial history requiring pro-forma financial information or to Issuers from certain sectors (real estate, financial sector, etc.).

As a general principle, the prospectus has to contain the information necessary to enable the public to make a proper assessment in detail of the Issuer and the securities to be issued. The prospectus must be accurate and complete.

(a) Basic content requirements (not exhaustive)

Significant and detailed information with respect to the topics set out below:

- Those individuals or entities assuming responsibility for the contents of the prospectus;
- The securities (nature, number, nominal value, payment agents, tax implications, price, etc.);
- Any securities other than shares;
- The Issuer (firm name, registration details, etc.);
- The Issuer's share capital;
- The Issuer's business activities (detailed description including business risks);
- The Issuer's financial assets, earnings and financial situation;
- The audit of the Issuer's annual accounts;
- A detailed description of the general and specific risks connected with the investment (risk catalogue);
- Associated companies and participations;
- Financial result and dividend for each share;
- (Consolidated) financial statements;
- The Issuer's management and supervisory bodies; and
- Recent developments in the Issuer's business and business prospects.

(b) Form

Principally, the prospectus must be drafted in German. BaFin may allow Issuers to use another language that is not uncommon in international securities trading, as long as a translation of the prospectus summary is provided and sufficient information to the investors will be assured. However, the summary of the prospectus must be in German. The prospectus must contain the creation date and the signature of the Issuer and, if an admission for trading on the Regulated Market is also applied for, the signature of a registered bank.

In addition, a prospectus must also be made available to BaFin in electronic form for disclosure on the internet.

(c) CESR Recommendations

The Committee of the European Securities Regulators ("CESR") has issued its "CESR's recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses no. 809/2004" which includes

instructions and advice on the construction of certain terms and requirements laid down in the Securities Prospectus Regulation. The objective of the CESR's recommendations is to avoid ambiguity that could lead to different interpretations of the rules within the EU and therefore hamper the functioning of the single market. Although BaFin generally follows the rules of interpretation of the CESR, in certain cases, BaFin may refuse to apply particular recommendations or require a stricter interpretation of the requirements of the Securities Prospectus Regulation. The CESR's recommendations can be downloaded at www.cesr-eu.org.

15. Prospectuses: Filing and Currency Requirements

The prospectus must be published at least one working day before the commencement of the public offer. It may not be published without the prior approval of BaFin. Such approval shall be granted after 10 working days, extended to 20 in the event of an initial offering or admission. A copy of the prospectus must be deposited at BaFin after approval and before publication.

If admission to trading on the Regulated Market has been applied for, the management of the Stock Exchange will decide on the admission of the securities to be listed. The earliest that admission may be granted is on the trading day following the date on which the application was filed. The prospectus has to be published in the same securities exchange gazette (*Börsenpflichtblatt*) in which the application for admission has been published. Furthermore, the prospectus itself, or a reference to where the prospectus has been published and is available to the public, must be published in the electronic German Federal Gazette (*elektronischer Bundesanzeiger*).

The European Passport

Many of the requirements and extensive obligations that market participants have to meet in Germany, such as publishing prospectuses when offering securities, are based on European Union (EU) Directives that seek to ensure harmonisation of financial markets across Europe. This applies also to the EU Prospectus Directive, the objective of which is to improve investor protection,

promote competition in the European single market and harmonise national financial markets. In this context, a so-called European passport for issuers has been introduced.

The European passport for Issuers makes it easier and less expensive for companies to raise capital throughout the EU on the basis of approval by a regulatory authority in one EU member state ('home competent authority'). It reinforces protection for investors by guaranteeing that all prospectuses, irrespective of where they have been issued in the EU, provide them with the clear and comprehensive information they need to make investment decisions. It may serve as 'single passport' for Issuers of securities wishing to offer their securities in more than one member state of the EU. The principle of automatic mutual recognition means that companies will no longer have to ask each member state for regulatory approval of their prospectus for potential investors. Via the 'single passport for issuers', securities will be offered to investors either by public offer or trading. Thus, a prospectus for a public offering or admission to trading approved by BaFin may be used for the same purpose in any other EU member state. Likewise, a prospectus approved by any EU member state's financial market regulator may be used in Germany provided that BaFin is given notice of such approval, the language of the prospectus is generally accepted on financial markets, which in general will be English, and there is a German summary of the prospectus.

16. Offering Securities: Exemptions Available

16.1. Regulated Market

If an offer of securities is recognised to be a public offer in accordance with the criteria set forth in section 11 above, certain offers are exempt from the prospectus requirements pursuant to section 3 (2) and sec. 4 of the Securities Prospectus Act. The exemptions can be divided into three categories. Amongst others, these exemptions include:

16.1.1. Exemptions for certain types of offers

A prospectus shall not be drawn up if the securities subject to an offer:

- are only offered to qualified investors, e.g. persons or institutions that, in the course of their professional or commercial activities, purchase or sell securities on their own account or for the account of others;
- are offered to a limited number of non-qualified investors;
- are offered only to employees by their employer or by an enterprise affiliated with the employer's enterprise;
- can be acquired only in denominations of at least EUR 50,000, or at a purchase price of at least EUR 50,000 per investor, or if the sales price of all the securities offered does not exceed EUR 100,000; or
- form part of an issue for which a still valid prospectus has already been published in Germany.

16.1.2. Exemptions for specific Issuers

A prospectus shall not be drawn up if the securities subject to an offer:

- are issued as non-dividend securities by a member state of the EU, another contracting state of the European Economic Area ("EEA"), a country having full member status with the Organisation for Economic Cooperation and Development ("OECD") or a country having entered in to a special accord with the International Monetary Fund ("IMF") in connection with the IMF's general loan agreements;
- are issued by an international organisation regulated under public law of which at least one member is a member state of the EU or another contracting state of the EEA;
- are bonds permanently or repeatedly issued by a bank or a financial institution or a financial service provider regulated under the German Banking Act (including foreign banks or financial service providers maintaining branches in Germany);
- are shares issued by a German or foreign investment company that can be redeemed by their holders; or

- are bonds issued by a company or legal entity whose registered office is situated in a member state of the EU or in another contracting state of the EEA and carries on its activities under a state monopoly.

16.1.3. Exemptions for certain securities

A prospectus shall not be drawn up if the securities subject to an offer:

- are shares whose number over a period of 12 months amounts to less than 10% of the number of the shares of the same class already admitted to the Regulated Market of the same Stock Exchange;
- are shares that are allocated to shareholders after a capital increase out of retained earnings;
- are certificates that are issued instead of shares of the same Issuer and if such issue does not affect the Issuers' registered share capital;
- are issued following the exercise of conversion, exchange or subscription rights attaching to securities other than shares, provided that the shares to be issued are the same class as the shares already admitted to the same Regulated Market;
- are offered in the case of a merger of companies;
- are offered for the purpose of a reverse takeover; or
- are offered only to employees by their employer or by an enterprise affiliated with the employer.

16.2. Regulated Unofficial Market

As mentioned above (see section 6.3 above) the mere inclusion into the Regulated Unofficial Market does not require a prospectus but only an *Exposé*. In the event a prospectus is required due to a public offer, the respective exceptions mentioned above may apply.

17. Offering Securities for Re-sale and Secondary Trading: Further Requirements and Exemptions

German securities law provides for no particular filing requirements for the re-sale of securities and secondary trading. Under the Securities Prospectus Act, a mandatory prospectus must only be drafted and published in the event of a public offering of securities to the public. Henceforth, an initial issue of securities to a financial intermediary, which is usually exempt from the obligation to draft and publish a prospectus, that then re-sells to a wider (retail) market is not explicitly covered by the Securities Prospectus Act. However, according to the administrative practice of BaFin and the relevant case law, it is generally accepted that the purpose of the Securities Prospectus Act is to ensure that sufficient information is provided to investors and that this general principle should not be circumvented by choosing re-sale or similar models. Accordingly, a re-seller or similar financial intermediary, not being the Issuer of securities, is obliged to draft and publish a prospectus provided that (a) it has issued securities to a specific intermediary (wholesaler), and (b) such wholesaler intends to re-sell said securities to the public.

If and to the extent that the Securities Prospectus Act applies to re-sellers, according to the aforementioned, such re-sellers also benefit from the exemptions under the Securities Prospectus Act as displayed above (see section 16 above).

18. Continuing Disclosure Requirements and Supplementary/Replacement Prospectuses

In general, there are no requirements concerning the requirement to update a prospectus after the issue of the securities.

However, if, following the publication of the prospectus and before commencement of trading or the end of the Public Offer circumstances have changed that are of material significance for the assessment of the securities, such changes must be published in a supplemental prospectus.

Notwithstanding such requirements, the publication of current and up-to-date capital market information is ensured by the obligations under the terms of sec. 15, 15a and 21 *et seq.* of the Securities Trading Act which provide for Issuers'

obligations with regard to disclosure, insider trading and disclosure of major holding and voting rights (see section 9 above).

19. Special Cases: Employee Share Schemes

19.1. German Stock Corporations

The implementation of employee share schemes or stock option programs in a German stock corporation require prior approval of shareholders. They are usually supported by a “conditioned capital”, generally approved in the same shareholder’s meeting, or by company-owned shares. If the shares of the respective company are already listed on a Stock Exchange, the shares issued under a stock option program or employee share scheme (“New Shares”) may also be included on such listing. In this case, the Issuer is released from its obligation to publish a prospectus if, during a period of 12 months, the number of the New Shares is within the threshold of 10% of the number of the shares that are already listed. In the case of a company not listed on a Stock Exchange, the issue of New Shares is exempt from prospectus requirements pursuant to the Securities Prospectus Act (see section 16.1 above).

19.2. Foreign companies

The European legislator intends to amend the Securities Prospectus Directive to the extent that, in the future, companies that are also listed on a foreign stock exchange or on a non-regulated market in the EEA are exempt from the obligation to publish a prospectus if these companies or their affiliates issue shares to directors or employees. In such cases the issuer shall be exempt from the obligation to publish a securities prospectus provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer. According to the current calendar of the European legislator these amendments shall be implemented by the end of the year 2009.

In relation to employee incentive programs such as stock option schemes or restricted stock programs, it is for the time being still debatable whether a prospectus

is required pursuant to the German Securities Prospectus Act if non-EEA multinational companies that are not listed on an organised market within the EEA offer these equity incentive instruments to their German employees.

Generally, anyone who intends to offer securities to the public in Germany must publish an approved prospectus according to the Securities Prospectus Act. Such a public offer could also be an offer of securities to employees who are known to the company by name and address.

The issuance of stock options is, as a rule, not regarded as the issuance of securities since stock options under most employee stock option schemes are not transferable to any third party and are therefore not tradable on a securities exchange. The key question in this respect is whether the issue of a stock option is regarded as an issue of an option to purchase shares or whether it is considered to be an offer of the underlying securities. Principally, the issue of a stock option is regarded (only) as an issue of an option to purchase shares that does not trigger a prospectus requirement. However, BaFin has been seen to follow a “look through approach” and considers that the issue of stock options requires a prospectus if the receipt of the option follows automatically without any further decision of the respective employee as to the receipt of the underlying share. Thus, if there is a decision of the employee to exercise the option or not, the issue of the shares and not of the option itself is the relevant trigger for prospectus purposes.

With respect to the issue of shares, the Securities Prospectus Act provides for the following exemptions from the obligation to draft and publish a securities prospectus that may be applicable in connection with employee incentive programs:

- The offer of securities is made to or directed at less than 100 people in each EEA member state. Therefore, if less than 100 German employees of the foreign entity, either employed directly or via a subsidiary, are concerned by the contemplated incentive program, the exemption applies.
- The total consideration in respect of the transferable securities in any 12-month period does not exceed EUR 100,000.00.
- The shares are offered or allotted free of charge. In most of these cases, the issuance of securities might not even be considered as an “offer” since this means a communication containing sufficient information to enable an investor to decide to purchase or subscribe for the securities. Irrespective of this, nothing

prevents BaFin from assessing whether an offer of free shares in fact comprises a “hidden” consideration. The European Commission takes the view that, in most cases where free shares are offered in the context of an employee share program, where shares are not offered in lieu of remuneration that the employee would otherwise receive, it would be incorrect to find a “hidden” consideration in the employment relationship, for example by claiming that the employees would have a higher salary if the employee shares were not available to them.

20. Special Cases: Rights Issues

One of the most common examples of rights issue is the issue of subscription rights applying to shares in stock corporations. According to the Stock Corporation Act, each shareholder in a stock corporation is entitled to subscribe for such proportion of shares issued that corresponds to his existing stake in the entire share capital of such corporation. Shareholders entitled to subscription rights may either exercise their rights by subscribing for new shares or sell such rights, usually by using a financial intermediary to arrange for such subscription rights trading.

Regarding prospectus requirements for the issue of subscription rights, the following must be distinguished: (i) an offer addressed to the existing shareholders to exercise their subscription rights in accordance with the applicable laws prohibiting any sale or trade of such subscription rights, and (ii) cases where such subscription rights are also offered to the public that are not current shareholders.

In the first case, a respective offer will usually not be regarded as a Public Offer within the meaning of the Securities Prospectus Act, provided that the offer is strictly limited to the current shareholders and the public sale or trade of subscription rights is excluded.

In the latter case, the usual prospectus requirements as displayed above will also apply to the offer of subscription rights. In such cases, the whole rights issue (offering of new shares to the owners of subscription rights and the offering of the subscription rights themselves) will be assessed as a Public Offer.

21. Special Cases: Takeovers

The Securities Acquisition and Trading Act applies to all takeover bids where the target company is a German-based corporation or partnership limited by shares and whose shares are admitted to trading on the Regulated Market in Germany or on a regulated market within the EEA ("Target"). The Securities Acquisition and Trading Act regulates all takeover bids to acquire certain market-traded equity securities of Targets, whether for stock consideration, cash consideration or a combination of the two, irrespective of the size or purpose of the acquisition. The Securities Acquisition and Trading Act sets out reporting requirements, criteria in relation to the consideration to be offered, the duration of the offer period and the conditions under which the Target may mount a defence against a hostile takeover. BaFin supervises the compliance of takeover bids in accordance with the Securities Acquisition and Trading Act.

The Securities Acquisition and Trading Act distinguishes between ordinary offers to buy, (sub. 21.1), takeover bids (sub. 21.1) and mandatory offers (sub. 21.3).

21.1. Offer to Buy

In contrast to the Public Offer mentioned in section 11 above, an offer to buy with respect to German takeover law is understood as the obligation to offer to *buy* shares of a listed company. It is defined as a publicly announced offer to acquire shares or certificates representing shares in a certain Target. All such offers are subject to the general requirements in sec. 10 – 28 of the Securities Acquisition and Takeover Act. Once an offeror makes the decision to submit an offer to buy, it must announce this intention without undue delay. Within four weeks from this announcement, the offeror is required to submit a detailed offer document, containing detailed information concerning the offeror, the consideration, effective dates and conditions of acceptance. The purpose of the intended acquisition, means of financing and post-acquisition plans for the Target must also be included.

21.2. Takeover Bids

If an offeror intends to acquire control of 30% or more of the voting rights through the contemplated offer, the offer will be regarded, by definition under sec. 29 of the

Securities Acquisition and Takeover Act, as a takeover bid applying to the entire voting rights/share capital of the Target. The offeror must then comply with the additional requirements set out in sec. 30 – 34 of the Securities Acquisition and Takeover Act. A limited offer for control, being an offer that seeks to acquire 30% or more but less than 100% of the remaining outstanding voting rights, is expressively prohibited (sec. 32 of the Securities Acquisition and Takeover Act).

21.3. Mandatory Offers

Even in the absence of an intention to acquire the entire voting rights/share capital in a Target, a shareholder may nevertheless gain direct or indirect control of a Target by acquisition of 30% or more of the voting rights in such Target. In that event, he will be compelled to extend to all remaining shareholders an offer similar to that required under a voluntary takeover bid (sec. 35 – 39 of the Securities Acquisition and Takeover Act).

21.4. “Squeeze-out” of Minority Stockholders

In order to facilitate the completion of a takeover of the Target, the Stock Corporation Act allows minority shareholders to be “squeezed-out” by a shareholder holding at least 95% of the voting rights in return for a cash payment. This payment must reflect the fair value of the Target at the time of the resolution of the general meeting to squeeze-out the minority shareholders (sec. 327 a-f of the Stock Corporations Act).