

**AMF Position-recommendation°2012-18**  
**Information provided to the market in the event of equity lines or step-up equity financing – DOC-2012-18**

Reference texts: AMF General Regulation Articles 223-1 to 223-10

Certain issuers use financial arrangements involving successive capital increases, carried out over time, in favour of a financial intermediary that does not intend to remain a long-term shareholder or to participate in the development of the company. This financial intermediary subscribes to the shares issued in these capital increases with the sole aim of quickly selling them on the market.

This position-recommendation covers all of these arrangements, which may be called equity lines or step-up equity financing, whether they involve the issue of warrants, shares or securities giving access to capital, such as OCABSAs (*obligations convertibles en actions à bons de souscription d'actions*/convertible bonds with warrants attached).

These financial transactions are the subject of an agreement entered into between the issuer and the financial intermediary under which this intermediary undertakes to subscribe, generally through the exercise of warrants, to shares<sup>1</sup> intended to be sold on the market within a very short space of time. The role of the initial subscriber is therefore to ensure that the company can raise funds immediately while eventually transferring the risks to the market – the ultimate recipient of the capital increases – which absorbs the shares issued over time.

The AMF reiterates that these agreements must take account of the provisions of this position-recommendation and must, as such, be revised.

There are two types of agreements: those in which the issuer decides whether to make an issue and those in which the decision lies with the intermediary.

**1. Prerequisites for implementing the agreement**

**1.1. Information to be provided at the general meeting**

Equity lines and step-up equity financing involve the issue of shares, causing dilution to existing shareholders. These successive capital increases automatically require the approval of the general meeting and are generally carried out through the issue of warrants or share subscription rights (*bons d'émission d'actions*).

The general meeting approves a capital increase, either by setting all the terms and conditions itself, or by delegating its power or authority to the board of directors or management board. When it delegates its power or authority, shareholders vote without having specific information on the characteristics of the issue.

**1.2. Companies whose shares are admitted to trading on a regulated market**

A company whose shares are admitted to trading on a regulated market should, in principle, draw up a prospectus for the admission of the newly issued shares before carrying out an equity line or step-up financing transaction.

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<sup>1</sup> Or securities giving access to capital.

However, if the total number of shares likely to be admitted<sup>2</sup> represents, over a rolling 12-month period, less than 10% of the number of shares of the same class already admitted to trading on the same regulated market, the company is not required to publish a prospectus for the admission of new shares under Article 212-5 1° of the General Regulation.

In this scenario, the company is required, under General Regulation Articles 223-1 to 223-10 on the ongoing disclosure requirement, to inform the market via a news release of the launch of the transaction, its main characteristics and its impact on existing shareholders.

Conversely, if the number of shares likely to be admitted over a 12-month period represents more than 10%<sup>3</sup>, the exemption from publishing a prospectus for the admission of the shares does not apply and the company will have to draw up a prospectus<sup>4</sup>.

As shares are admitted over time over the course of the transaction, the AMF believes that the prospectus should be approved prior to the launch of the transaction.

**Recommendation:**

**When a company is required to draw up a prospectus, and when it calls a general meeting to authorise the issues, the AMF recommends that this prospectus be made available to shareholders 15 days before the general meeting called to vote on the resolution authorising the launch of the transaction.**

**When a company is required to draw up a prospectus, and when the general meeting has delegated responsibility to the board of directors or the management board, the AMF recommends that this prospectus be made available prior to the launch of the transaction.**

**1.2.2. Companies whose shares are admitted to trading on Alternext**

Transactions launched by issuers whose shares are admitted to trading on Alternext do not have to draw up a prospectus describing the issues. However, as the shares resulting from these transactions are intended to be resold to the public, the issuer's shares must be admitted to trading on the public offering compartment of this market.

**Position:**

**For issuers whose shares are admitted to trading on the private placement compartment of Alternext, the AMF stipulates that equity line and step-up equity financing transactions are not, by nature, consistent with the characteristics of this compartment which, as its name suggests, is intended for private placement transactions. Shares subscribed in an equity line or step-up equity financing transaction are ultimately intended to be sold on the market, without distinction between the different types of investors.**

<sup>2</sup> Dilution is calculated by taking into account the total number of shares likely to be issued through conversion of the warrant, directly or indirectly through conversion of the securities issued.

<sup>3</sup> When equity line agreements specify, at the time of their execution, that the number of shares to be created will be greater than 10% of the capital, the 12-month period is not taken into account when drawing up the prospectus, as a prospectus is required when the transaction is launched to ensure that the market is duly informed of the circumstances under which total dilution of more than 10% is anticipated.

<sup>4</sup> While a company may qualify for the exemption under Article 215-5 1° of the General Regulation for the admission of shares resulting from the exercise of warrants, it may not, however, qualify for the listing prospectus exemption provided for in Article 212-5-7° of the General Regulation when the warrants are exercised, as specified in the answers to questions no. 27 and 29 in ESMA's "Questions and Answers related to Prospectuses". The warrants, granted on an *intuitu personae* basis under the step-up equity financing agreement, are neither transferable nor negotiable, and can therefore not be treated in the same way as the securities covered by the exemption.

## 2. Information to be provided when entering into or amending the agreement

The information to be provided to the market must take account of the final destination of the securities issued as part of this type of transaction.

### **Position:**

**The market must be informed before the launch of an equity line or step-up equity financing that the resulting capital increases are ultimately meant, on the whole, to be financed by the market.**

**If, over the course of the equity line or step-up equity financing transaction, one of the material terms and conditions of the agreement is amended, the market is informed of such amendment as soon as possible, in accordance with the procedures for ongoing disclosure reporting.**

### **Recommendation:**

**When entering into an equity line or step-up equity financing agreement, the issuer shall inform the market thereof through a news release. It shall also provide the market with information about the characteristics of the said agreement and about its purpose in view of the issuer's recent financial position.**

**The news release shall present the main characteristics of the agreement, including:**

- **the legal basis for the issue;**
- **the terms and conditions (one or more drawdowns, initiated by the issuer and/or the intermediary, etc.) and the size of the drawdowns as well as the percentage of capital likely to be issued (in terms of number of securities) and the maximum dilution caused by these drawdowns over a 12-month period and over the term of the transaction;**
- **the term of the transaction;**
- **the reasons for and maximum amount of the issue (with the caveat that this is only a potential amount and is not guaranteed);**
- **the terms and conditions for determining the issue price;**
- **the impacts for existing shareholders;**
- **how to access information about the drawdowns that have been made.**

The news release must also state, in accordance with Article 211-3 of the AMF General Regulation, that the transaction has not given rise to a prospectus subject to AMF approval or, conversely, must indicate where a prospectus may be obtained.

## 3. Ongoing information to be provided throughout the entire term of the equity line or step-up equity financing agreement

During the period covered by the agreement, the issuer remains subject to Articles 223-1 to 223-10 of the AMF General Regulation, which require that the issuer report to the market on an ongoing basis by means of news releases. On this point, the AMF reiterates that holding inside information is an obstacle to deciding whether to make a drawdown as part of an equity line or step-up equity financing transaction, if this information has not been made public.

A distinction must be made between cases in which drawdowns are controlled by the issuer and those in which they are controlled by the intermediary.

- **Cases in which drawdowns are controlled by the issuer:**

**Position:**

Over the entire term of the agreement, the issuer must ensure that it provides the market with all relevant and sufficient information (in particular inside information within the meaning of Article 621-1 of the AMF General Regulation).

At the time of a drawdown, when the drawdown is decided by the issuer, the issuer and the intermediary consider the extent to which this drawdown, taking account of prior drawdowns as appropriate, could in itself be inside information. The issuer makes its assessment based on the size of the drawdown(s) and the circumstances under which the drawdown will be made (for example, market liquidity, issuer's financial position, and allocation of the proceeds from the issue). The intermediary makes its assessment based on the size of the drawdown and the potential impact of disposals on the market.

If the intermediary believes the drawdown is inside information, it must immediately inform the issuer so the issuer can decide what action to take.

If the drawdown, taking account of prior drawdowns as appropriate, is inside information, and if the issuer maintains its drawdown decision, it must disseminate, as soon as possible and in any case before the drawdown, a news release in accordance with the procedures for ongoing disclosure reporting. If the issuer has made the drawdown, the intermediary cannot resell the shares involved in the drawdown before the news release has been disseminated.

- **Cases in which drawdowns are controlled by the intermediary:**

**Position:**

At the time of a drawdown, when the drawdown is decided by the intermediary, the intermediary considers the extent to which the drawdown, taking account of prior drawdowns as appropriate, could in itself be inside information. The intermediary makes its assessment based on the size of the drawdown and the potential impact of disposals on the market.

If the intermediary finds that the drawdown, taking account of prior drawdowns as appropriate, is inside information, it informs the issuer and delays the drawdown until the issuer has disseminated a news release in accordance with the procedures for ongoing reporting.

- **Contents of the news release**

**Recommendation:**

To avoid a situation in which several drawdowns could be inside information for the issuer or the intermediary and in which they could be an obstacle to proceeding with the transaction, the AMF recommends that, where no information on these drawdowns has been provided to the market, the issuer publish a news release, within a reasonable time frame after each drawdown, in accordance with the procedures for ongoing disclosure reporting.

The news release shall thus include the following information:

- the amount of the drawdown(s);
- the issue price;
- the number of securities issued;
- the dilution caused by the issue.

#### 4. Other obligations of the financial intermediary

**Position:**

**To avoid any impact on price, the financial intermediary must refrain from<sup>5</sup>:**

- trading in the security during the reference periods used to set the issue price;
- pre-selling subscribed shares and directly or indirectly hedging them prior to the actual subscription of the shares.

**The financial intermediary must also ensure that the disposal(s) it makes do not disrupt the orderly operation of the market.**

When the intermediary is an investment services provider, it must also verify compliance with the rules governing conflict-of-interest management and prevention referenced in Articles 313-18 *et seq.* of the AMF General Regulation. It must in particular verify compliance with the “Chinese wall” procedures prior to or at the time of the drawdowns, notably when the investment services provider has also entered into a liquidity agreement with the issuer.

#### 5. Special case of an issuer who differs the disclosure of inside information

**Position:**

**If, over the course of a transaction, an issuer assumes responsibility for temporarily differing the disclosure of inside information in compliance with Article 223-2 of the AMF General Regulation, it must immediately suspend the transaction. This is the case in particular when its financial viability is threatened (for example, should the statutory auditors issue an emphasis-of-matter paragraph or a qualified opinion related to going concern or should working capital requirements for the next 12 months not be reasonably covered). The transaction may not be resumed until a news release has been published.**

#### 6. Special case of ABSAs (*actions à bons de souscription d'actions/shares with warrants attached*)

The Autorité des Marchés Financiers also calls attention to the risks associated with the use of ABSAs (warrants attached to shares) <sup>6</sup> in an equity line transaction.

This type of arrangement was observed in a case where the issuer wished to have both a new share component and warrants (BSAs) intended to be sold to the issuer's directors and corporate officers and/or employees. Over the course of the transaction, the issuer may find itself in a situation where it does not need financing but would like to offer warrants to its directors and corporate officers and/or employees and where it then decides to buy back from the financial intermediary all of the shares this intermediary just subscribed for the purpose of cancellation. In the end, only the BSAs are issued and then sold.

In this case, the Autorité des Marchés Financiers considered that this buyback could be equivalent to the subscription by the company to its own shares, which falls under the prohibition provided for in Article L. 225-206 of the Commercial Code, pursuant to which: “*The company is prohibited from subscribing to its own shares, either directly or through a person acting in their own name but on the company's behalf*”.

<sup>5</sup> COB news release of 25 July 2001 relating to the information to be provided to the market when the issuer and the third party enter into an equity line financing agreement.

<sup>6</sup> Or other types of compound financial instruments

**Position:**

The use of ABSAs<sup>7</sup> in an equity line or in step-up equity financing implies that the issuer needs financing at the time of each drawdown. A purpose related chiefly to the grant of warrants<sup>8</sup> should therefore not be pursued.

So as not to divert the equity lines and step-up equity financing from their purpose, the simultaneous implementation of such an agreement and of share buybacks should not lead to a situation where the financial intermediary, whose role is to sell the shares it has subscribed on the market, resells them directly to the issuer.

Moreover, the AMF considers that a buyback by the issuer of shares resulting from an issue of equity lines or step-up equity financing is likely to contravene the provisions of Article L. 225-206 of the Commercial Code. An issuer shall not, therefore, buy back newly issued shares at a later date, much less cancel them.

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<sup>7</sup> See footnote page 5.

<sup>8</sup> In this case, employee and/or director and corporate officer profit-sharing.