14 October 2013

Dear Sirs,

Consultation paper: ESMA guidelines on enforcement of financial information

We are pleased to respond on behalf of the European Economic Area member firms of Deloitte Touche Tohmatsu Limited\(^1\) to certain questions in the European Securities and Markets Authority (ESMA) July 2013 consultation paper on ‘ESMA guidelines on enforcement of financial information’\(^2\) (the “Guidelines”). We have selected questions most relevant to our experience in the field of audit.

As an initial comment, we strongly support the aim of a single set of high-quality financial reporting standards consistently applied without regional variation, and to this end, are supportive of the Guidelines’ objective of fostering a common approach to the enforcement of financial information. Consistent with this, with regard to International Financial Reporting Standards (IFRS), we also support information sharing among IOSCO members of enforcement issues,\(^3\) and, as appropriate, referral of matters to the IFRS Interpretations Committee, recognizing that elaboration or interpretation of accounting and auditing standards should be provided at a global level by the International Accounting Standards Board and International Auditing and Assurance Standards Board respectively under their established due process.

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\(^1\) Please see [http://www.deloitte.com/about](http://www.deloitte.com/about) for a description of the legal structure of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee.

\(^2\) Enforcement of financial information being defined as “examining compliance of financial information with the relevant reporting framework, taking appropriate measures where infringements are discovered during the enforcement process and taking other measures for the purpose of enforcement”, ESMA guidelines paragraph 15.

Question 5 – Do you agree that issuers from third countries using an equivalent GAAP to IFRS should be subject to an equivalent enforcement and coordination system? Do you agree with the measures proposed to make this enforcement more efficient?

We agree that issuers from third countries using an equivalent GAAP to IFRS should be subject to an equivalent enforcement and coordination system to that applying to Member State issuers, to contribute to investor protection, market confidence and consistency in the European Union.

We support high quality and consistency of enforcement activities in Europe. Therefore, we also agree with the measures proposed in the Guidelines, paragraphs 22-24: a European enforcer may refer the task of compliance with the relevant reporting framework to another European enforcer or to a centralised team to be organised by ESMA at the request of the European enforcers, but the actual enforcement decision always remains the responsibility of the relevant “home” Member State enforcer.

In general, we also support information sharing between European enforcers, ESMA and relevant third country authorities, subject to the protocols and local legislation that permit the different authorities to share information. In particular, we support dialogue on financial reporting matters, for reasons of efficiency and to contribute to consistency, with the overall objective of improving the quality of financial reporting for the benefit of investors and other users.

Question 6 – Do you agree that enforcers should have the powers listed in paragraph 30? Are there additional powers which you believe that enforcers should have?

The powers listed in paragraph 30 of the Guidelines seem appropriate. These powers should already be in place in Member State law for financial information that companies listed on a regulated market in the European Union disclose under the Transparency Directive. However, they are not all necessarily in place regarding applications for approval of a prospectus for admission to trading creating thereby a risk of regulatory arbitrage (for example, the powers of the competent authority mentioned in the Prospectus Directive do not include the power to examine compliance of financial information in the prospectus with the relevant financial reporting framework).

Regarding third country issuers, powers such as carrying out on-site inspections and requiring information from issuers and auditors may be limited by applicable law. In many cases, cooperation with relevant third country authorities will be needed; as mentioned above, the

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aim of any such cooperation should be improving the quality of financial information for the benefit of investors and other users.

We are not aware of additional powers that enforcers should have to carry out their enforcement role. Regarding enforcers’ powers to require information and documents from auditors, the Transparency Directive contains a specific paragraph stating that such disclosure shall not constitute a breach of any disclosure restriction imposed by contract or law and shall not involve the auditor in liability of any kind. A similar provision is not included in the Prospectus Directive. With the aim of removing obstacles restricting the auditor’s ability to communicate to the enforcer, we strongly recommend that the Guidelines also refer to this safe harbour provision from the Transparency Directive.

**Question 8 – Are you in favour of enforcers offering pre-clearance? Do you have any comments on the way the pre-clearance process is described and the pre-conditions set in paragraph 42 to 45 are described?**

Overall, we are neither in favour nor opposed to enforcers offering pre-clearance on financial information prior to its publication and recognise that there are different practices in Europe. Pre-clearance can have advantages in providing issuers (and auditors) with a greater level of certainty about a possible enforcement decision. However, it can have disadvantages, namely that it can slow the financial reporting process, defer responsibility for decisions to the enforcer and not the issuer, and is not generally transparent so does not benefit other issuers.

We agree that where pre-clearance is offered, the issuer should have determined the accounting treatment to be applied and the auditor should have provided a view on this, based on the specific facts and circumstances also communicated to the enforcer, to avoid pre-clearance decisions becoming interpretations of accounting principles.

If pre-clearance is offered, its consequences should be clear and we agree that this should in principle include that the enforcer cannot reverse its position after the financial information has been published.

We believe that it is sometimes useful when a preparer together with its auditor can have a dialogue with their regulator on a specific issue prior to the financial statements being issued. This dialogue may take the form of an informal information-sharing type of dialogue or be part of a more structured system, if a system of preclearance exists in the jurisdiction concerned and there is a wish that such issue be processed through though that system.

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We do however strongly support open and broad dialogue between enforcers and auditors, as well as between ESMA and auditors, on generic issues, and in our experience these discussions have proved to be very useful. We believe that this type of dialogue has been effective in improving the quality and consistency of financial statements and that timely dialogue on generic issues can reduce the need for pre-clearance.

**Question 9** – Do you agree that in order to ensure investor protection, the measures included as part of a prospectus approval should be supplemented by additional measures of ex-ante enforcement in relation to financial information? If yes, could you please specify the exact nature of ex-ante enforcement that you would expect from enforcers?

We agree that, in the context of a prospectus (and an initial offering document in particular), a full ex-ante enforcer review of the financial statements and other financial information included in the prospectus outside the financial statements, should be the normal procedure. This should not preclude supplementary (ex-post) review measures. In the case of cross-border offerings, as mentioned above, we support dialogue between regulators from different jurisdictions for efficiency and to contribute to consistency.

**Question 10** – Do you agree that a risk-based approach to selection should not be used as the only approach as this could mean that the accounts of some issuers would potentially never be selected for review?

We agree that a selection process should be based on a mixed approach, combining risk-based selection according to specific risk factors and sampling. This will allow the possibility of an issuer being selected for review while the focus of review activities will remain on the issuers presenting the highest risk, based on broad enough criteria which reflect changing circumstances and enforcement priorities. Results of reviews can of course be used to re-assess risk factors. Timely sharing of selection models and risk factors between enforcers and ESMA will allow ESMA to further develop selection criteria, as indicated in paragraph 52 of the Guidelines.

**Question 11** – Do you agree that a risk-based approach should take into account both the risk of an individual misstatement and the impact of the misstatement on financial markets as a whole?

Yes. The factors to be taken into account outlined in paragraph 49 of the Guidelines appear appropriate.
Question 12 – Do you think that a maximum period should be set over which all issuers should have been subject to at least one full review (or to be used to determine the number of companies to be selected in sampling)?

To increase the potential preventive impact of reviews, a maximum period during which all issuers should have been subject to at least one review may be appropriate; setting this period could also be taken into account in order to calibrate the enforcement resources that are needed. For issuers subject to reviews in multiple jurisdictions, including outside of the European Union, we support dialogue, as appropriate, with relevant regulators in considering timing and conduct of reviews.

Question 14 – Do you agree that the examination procedures listed in paragraph 54 of the proposed guidelines are appropriate for an enforcer to consider using? Are there other procedures which you believe should be included in the list?

We agree that the procedures listed in paragraph 54 of the Guidelines are appropriate for an enforcer to consider using but would add that we would expect that “Engaging in on-site inspections” (g) would occur only rarely where there are significant doubts on the appropriateness of financial statements. Similarly, we would also expect that an enforcer would meet with an issuer’s auditors without the issuer being present (c) only in exceptional circumstances.

We support the use of a non-limitative list as it allows ESMA to develop other tools not included in this list but consistent with the ESMA Regulation.

The examination procedures should in any event comprise some form of dialogue between the enforcer, the issuer and its auditor prior to any enforcement action being determined.

Question 15 – Do you agree that, in determining materiality for enforcement purposes, materiality should be assessed according to the relevant reporting framework, e.g. IFRS?

We agree that, in determining materiality for enforcement purposes, materiality should be assessed in the same way as for reporting purposes, according to the relevant reporting framework, e.g. IFRS.

Question 16 – What are your comments regarding enforcement actions as presented in paragraphs 57 to 67 of the proposed guidelines? Do you agree with the criteria proposed?

We would welcome further clarification on the enforcement actions proposed in paragraphs 57-60, in the light of what is set out in IFRS, in particular IAS 8 Accounting Policies, Changes in Accounting Estimates and Errors, which have been adopted in the EU. For instance:
(a) What is a “corrective note”\(^6\) (see paragraph 57(b)) and how would this note fit with the IFRS requirements? How does it differ from a restatement of financial statements?

(b) Paragraph 57(c) refers to a “correction in future financial statements with adjustments of comparatives, where relevant”: how does this differ from a restatement and how can an issuer justify such a presentation under IAS 8?

If you have any questions on any of the points in this response, please do not hesitate to contact Gérard Trémolière (gtremoliere@deloitte.fr or +33 1 40 88 28 21) or Mireille Berthelot (mberthelot@deloitte.fr or +33 1 40 88 22 95).

Yours sincerely,

Gérard Trémolière
Managing Director European Regulatory Affairs

Mireille Berthelot
Partner

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\(^6\) Defined in the Guidelines as “Issuance by an enforcer or an issuer, as required by an enforcer, of a note making public a material misstatement with respect to particular item/s included in the already published financial information and, unless impracticable, the corrected information”.