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75007 Paris  
France

Consultation Paper  
ESMA’s Guidelines on enforcement of financial information  
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General remarks submitted by:

Vereniging VEB NCVB  
(Dutch Investors’ Association)

Contact:  
  mr. drs. G.F.E. (Geert) Koster  
  mr. drs. N. (Niels) Lemmers

Postal address:  
  Amaliastraat 7  
  2514 JC The Hague  
  The Netherlands

Telephone:  
  +31 (0)70 313 00 08

Fax:  
  +31 (0)70 313 00 99

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Response by the Dutch Investors’ Association (Vereniging VEB NCVB, hereafter, VEB) to the Consultation paper “ESMA Guidelines on enforcement of financial information”.

Introduction

Beleggersvereniging VEB (the Dutch Investors’ Association) was founded in 1924 with the objective of representing the interests of retail and institutional investors. Today, VEB is the largest investors’ association in the Benelux with 50,000 members. VEB was also a founding member of EurolInvestors (now EuroFinuse) and EuroShareholders, both pan-European organisations representing retail investors and shareholders.

The Financial Markets are constantly in a state of flux due to new legislation, the on-going financial crisis and innovation. Unfortunately, not all these developments benefit retail investors. Retail investors are therefore highly reliant on having access to adequate, timely and appropriate financial information. Bearing in mind that retail investors cannot exercise any influence over the quality and reliability of that information, it is understandable that in recent years their confidence in the financial information published has declined due to various scandals and misleading statements by listed entities. This issue, however, is highly complex and therefore individual retail investors do not devote a lot of attention to it and in this respect there is no great sense of urgency. VEB therefore actively takes part in debates, consultations and legislative procedures to ensure that investors’ interests are taken into account.

1. General remarks

VEB is in favour of more transparency in financial markets, stricter rules surrounding the enforcement of financial information, together with greater clarity and legal certainty about where responsibilities lie in the relationships between retail investors, listed entities and accountants. VEB would like to see more opportunities for investors and shareholders to be able to carefully and effectively exercise their rights and responsibilities. To achieve the balance of power between retail investors and listed entities needs to be strengthened.

VEB has studied the consultation paper “ESMA Guidelines on enforcement of financial information” (hereafter the Consultation Paper).

Recital 16 of the IFRS Regulation on the application of international accounting standards states that: “A proper and rigorous enforcement regime is key to underpinning investors’ confidence in financial markets. Member States, by virtue of article 10 of the Treaty, are required to take appropriate measures to ensure compliance with international accounting standards. The Commission intends to liaise with Member States, notably through the Committee of European Securities Regulators (CESR), to develop a common approach to enforcement.”
In the Netherlands the supervision of financial information is provided by the AFM. However, the AFM has limited powers since it cannot directly enforce compliance of the IFRS rules. The AFM has to begin civil proceedings against a company and bring it before the Enterprise Court of the Amsterdam Court of Appeal. The AFM has no special rights in these proceedings, the Court of Appeal treats the AFM as it would any other party. The Enterprise Court decides in its ruling whether the company has to amend its annual financial statements or not. The AFM has only once initiated such legal proceedings. In this particular case, the Spyker case, the Enterprise Court ruled that Spyker was not obliged to alter its annual accounts. Furthermore the Enterprise Court ruled that companies have a certain liberty in complying with the IFRS. The Dutch Supreme Court confirmed the Enterprise Court’s ruling. The AFM has not brought any new cases since the Spyker case. As a result, it is very uncertain whether the AFM can properly enforce its supervisory role with regard to financial information.

VEB has learned that other supervisory authorities have more powers to enforce the consistent application of the financial reporting standards. VEB is concerned that the powers of the AFM are too limited in terms of its supervision of financial information. In addition, VEB doubts whether the Netherlands complies with Recital 16 of the IFRS Regulation. For example, under Dutch law the AFM is not authorised to require a restatement of the financial information without judicial consent. The AFM is further not even authorised to request documentation from companies and nor is it allowed to carry out on-site inspections. VEB is therefore happy to endorse the ESMA objective (i.e. the consistent application and enforcement of the financial reporting standards in Europe) as set out in the Consultation Paper.

### 2. Questions and answers

Please find below VEB’s response to the questions in the Consultation Paper.

1. **Do you think that the proposed guidelines will improve the quality and consistency of financial reporting in Europe?**

It goes without saying that the EU should endorse consistent application of the financial reporting standards. Therefore the enforcement of these rules needs to be consistent throughout Europe. In order to achieve such consistency, enforcement must be identical in all member states in order to prevent ‘forum shopping’ or arbitrage between member states.

2. **Do you have any comments on the potential costs to the financial reporting community of any aspects of these proposals?**

VEB appreciates that costs are a matter of concern for all stakeholders, nevertheless, the cost to society of companies who fail to comply with the financial standards are of greater concern.
3. Do you agree that a common European approach to the enforcement of financial information is required in order to avoid regulatory arbitrage by issuers? In this context, regulatory arbitrage refers to the position where an issuer’s choice of the market on which to list its securities may be influenced by different approaches to enforcement being applied in different European jurisdictions.

A common European approach is essential in order to prevent such arbitrage.

4. Do you agree with the objective, definition and scope of enforcement set out in paragraphs 11 to 21 of the proposed guidelines?

VEB agrees with the objective, definition and scope of enforcement.

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?

Only if the GAAP has been declared to be equivalent: third country issuers must be made subject to the EU enforcement and coordination system in order to join the European Order. VEB is against third country issuers entering the EU without being subject to EU supervision and enforcement by the relevant authorities. It is essential that third country issuers do not enter the EU market without EU supervision otherwise retail investors will be faced with the consequences of regulation arbitrage and therefore receive less adequate, timely and appropriate information. Nor can this information be compared with other financial statements published by listed entities subject to EU supervision.

6. Do you agree that enforcers should have the powers listed in paragraph 30 of the proposed guidelines? Are there additional powers which you believe that enforcers should have?

VEB agrees that the powers listed in paragraph 30 should be granted to enforcers. As indicated above in the introduction, under Dutch law the AFM does not have such powers. In order to achieve compliance with the strict enforcement of Recital 16 of the IFRS Regulation, certain amendments to the law need to be made in the Netherlands. Needless to say, in order to protect the interests of investors, the supervisory authorities in the EU member states must have sufficient powers to be able to provide proper supervision of financial reporting.

7. Do you agree that enforcers should have adequate independence from each of government, issuers, auditors, other market participants and regulated markets? Are the safeguards discussed in paragraphs 38 to 41 of the proposed guidelines sufficient to ensure that independence? Should other safeguards be included in the guidelines? Do you agree that market operators should not be delegated enforcement responsibilities?

It is essential that supervisory authorities should be independent of the government, issuers, auditors and other stakeholders. The safeguards as set out in paragraphs 39-41 will suffice.
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?

VEB is in favour of pre-clearance with respect to prospectuses as these documents are used before a company can enter the financial market. VEB is not in favour of pre-clearance with respect to regular financial reporting.

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?

When it becomes apparent ex-ante that financial information is incorrect, the regulator is obliged to rectify this omission, either by forcing the listed entity or its accountants to publish a supplement with the correct information or by issuing a statement itself indicating that the financial information published by the listed entity is incorrect and possibly misleading.

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?

VEB considers that a risk-based approach should not be the only approach. A sampling or rotation approach could also be used to provide a broad overview.

11. Do you agree that the 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?

VEB agrees.

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)?

VEB is not sure whether a full review would be feasible. To avoid creating a bureaucracy, it might be a good idea only to make a full review compulsory if the outcome of the risk-based approach has led to several red flags.
13. What are your views with respect to the best way to take into account the common enforcement priorities established by European enforcers as part of the enforcement process?

The European enforcers, ESMA and EECS should discuss their common enforcement priorities at least once a year. The European Enforcers should then conduct their supervision activities accordingly.

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?

VEB considers these measures appropriate.

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

Materiality should be assessed according to the relevant reporting framework in order to avoid divergent standards.

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?

The enforcement actions as described in paragraphs 57 – 62 will be adequate. The main goal is that market participants receive accurate information related to the financial information prepared by the issuer. Needless to say, the enforcer should have discretionary powers in order to achieve this goal. Within the enforcement actions, first the enforcer should judge whether an item is material or not. Furthermore the enforcer should judge the impact of its decision (e.g. the enforcer might decide to only require an adoption of future statements). In order to prevent regulatory arbitrage enforcers should discuss its actions with their European counterparts.

17. Do you have any comments on the specific criteria for the submission of decisions or emerging issues to the EECS database?

VEB has no further additions to paragraph 78.

18. What, in your opinion, are appropriate activities that would help to achieve a high level of harmonisation of the enforcement in Europe?

VEB welcomes the EECS discussion aimed at achieving harmonisation.
19. Do you have any comments on the transparency, timing and frequency of the reporting done by the enforcers with respect to enforcement actions taken against issuers?

Naming and shaming is vital not only to achieve the necessary full transparency, but also to warn the public. It will also steer the sector towards better compliance and to adopt best practices and change of behaviour.

20. What are your views about making public on an anonymous basis enforcement actions taken against issuers?

Enforcement actions taken against issuers should be made public in order to give the market a fair view of the supervision activities of the supervisory body. There may be certain situations where anonymity should be maintained, but VEB considers that in those situations where the supervisory authority requires an action on the part of the issuer (see paragraph 57) there should be full transparency. In situations where an issuer is not required to take action, anonymity may be maintained.