

**Esma Consultation Paper on “Draft
Regulatory Technical Standard on specific
situations that require the publication of a
supplement to the prospectus”**

June 2013

ABI is grateful for the opportunity of making its own contribution towards the consultation process on the Draft Regulatory Technical Standard concerning specific cases which require a supplement to the public offer prospectus or the admission to trading of financial instruments pursuant to Directive 2003/71 and its subsequent amendments.

The following comments concern the prospectuses relating to financial instruments for debt securities.

Q1: Do you agree that a supplement should include the disclosure requirements of the Prospectus Regulation relating to the triggering event and also any other objective consequences deriving from such an event which are capable of affecting the assessment of the relevant securities? If not, please provide the reasoning behind your position.

We are of the opinion that the prospectus supplement must contain the minimum disclosures, requested by Regulation 809/2004 regarding the event that triggered the need to publish a supplement and, where possible, also an indication of the concrete consequences that derive from such an event capable of affecting the assessment of the securities.

This additional information, however, is possible - and is important for the investor - when the supplements that need to be added to the information contained in the prospectus are clear and defined (e.g. changes in the shareholding structure which controls the issuer).

However, in other cases (e.g. losses) it might be more difficult to effectively and thoroughly identify the consequences that the event produced on the information already provided in the prospectus, given that such circumstances are not shown in official documents (e.g. the financial statement).

Therefore, we believe that it is up to the issuer, on the basis of the provisions of art. 16 (1) of Directive No. 2003/71, to assess the significant additional information capable of having an effect on the assessment of financial instruments, that needs to be included in the supplement.

Q2: Do you agree that the publication of audited annual financial statements systematically triggers the obligation to prepare a supplement? If not, please state your reasons.

We believe that the approval of the financial statement or consolidated financial statement during the offer period should not necessarily require the preparation of a supplement to the prospectus.

More specifically, when there are new negative financial statement details (e.g. losses), we agree that it would be appropriate to produce a prospectus supplement so as to provide the investor with an update on the issuer's financial situation.

If, on the other hand, the financial statement details do not make reference to losses, without prejudice to the need to give the investor adequate disclosure on the progress of the economic and financial situation of the issuer in compliance with other legislative provisions (e.g. the "Transparency" Directive) and regulations, we

do not believe it would be appropriate to enforce publication of a prospectus supplement. This situation should be expressly clarified by ESMA.

Such a solution should be applied even more, when the financial statement details do not carry any losses and the registration document is about to expire: in such cases it is necessary in fact to avoid obliging the issuer to update the registration document and, at the same time, prepare the prospectus supplement, as proposed in the consultation document leading in this way to an operational halt in the offer process as well as doubling the procedures that the issuer and the Supervisory Authorities have to perform.

Q3: Do you agree that issuers of asset-backed securities where claims of the investors against the issuer are limited to the underlying assets and the issuer is a special purpose vehicle only have to prepare a supplement on a case by case basis for audited financial statements? If not, please state your reasons.

We agree to the fact that issuers of Asset-Backed Securities should not be obliged to prepare a prospectus supplement merely on account of having published their audited financial statements, when the operations in question are securitization operations, in which the rights of the investors are limited to the transferred assets and the issuer is a special purpose vehicle.

However, a case by case assessment should be made by the issuers on the need/appropriateness of a supplement according the hypotheses indicated in the Prospectus Directive.

Q5: Do you believe that there should be a systematic requirement to prepare a supplement for interim financial information? If yes, please provide reasons.

We do not think there should be an obligation to prepare a prospectus supplement when the interim financial reports are published, unless they contain details of a particularly negative event. The issuer, in fact, should be allowed to publish a supplement, as also mentioned by ESMA in its Consultation Paper, if, pursuant to article 16 (1) of Directive No. 2003/71, the details contained in it are considered to be "significant" (e.g. details about losses) and capable of having an effect on the assessment of the financial instrument.

Q6: What do you assess the cost estimate to be compliant with this requirement?

We do not have any cost estimates on a sector level regarding the fulfilment of the procedures required for the publication of a prospectus supplement and/or registration document. We believe, however, that the drafting of a prospectus supplement, in addition to the preparation of a new registration document, represent an excessive amount of work for the issuers and the Supervisory Authorities, in addition to any costs for legal advice.

Q10: Do you agree that there should be a systematic requirement to prepare a supplement for a profit estimate in relation to the annual financial period? If not, please state your reasons.

If the draft annual financial statements submitted by the issuer's Board of Directors (or, in two-tier system, by the Management Board) – and pending approval by the Ordinary Shareholders' Meeting (or, in two-tier system, by the Supervisory Board) – is regarded as a "profit forecast" pursuant to Art. 2(11) of Regulation (EC) no. 809/2004, we believe that the disclosure of such draft financial statements during the offering period does not necessarily imply the need to prepare a prospectus supplement.

Besides from the above considerations concerning the Q2 answer, such a conviction stems from the fact that – as expressly acknowledged by ESMA in the consultation document – it is unlikely that the financial statement results will be modified between the disclosure of the draft financial statements and the subsequent approval. Obviously, if a negative modification occurs during the above-mentioned period, the issuer should produce a prospectus supplement.

Q24: Do you agree that a supplement should always be required where an issuer is seeking admission to trading on (an) additional EU regulated market(s) or intending to make an offer to the public in (an) additional EU Member State(s) than the one(s) fore-seen in the prospectus? If not, please state your reasons.

We agree that it would be appropriate to prepare a prospectus supplement if the issuer intends to submit an application for admission to trading on an EU-regulated market or make an offer to the public in a Member State other than the one initially indicated in the prospectus and it is not possible, therefore, to include the identification of such information in the final terms on the single issue.

In this way the issuer will also be in a position to make the offer of securities with a distribution over a wider market.

Q29: Do you agree that issuers should always prepare a supplement for any judgment or concluding event, even if subject to appeal, in governmental, legal or arbitration proceedings already disclosed in the prospectus? If not, please indicate your reasons.

We do not think it is appropriate to enforce publication of a prospectus supplement when there are judgements or measures or other new conditions that can change the status of judicial, arbitration and governmental proceedings, already disclosed in the prospectus.

This provision would, in fact, force issuers to prepare a supplement, for example, merely due to the fact that a judgement has been published, regardless of its content and the level of the court which issued the judgement.

On the other hand, in such cases it should be used the general principle established by the afore-mentioned Article 16 (1) of the "Prospectus" Directive, according to which, a new fact may lead to the publication of a supplement if it is "significant" and likely "to have an effect on the assessment of financial instruments" which

provides the issuer with the possibility of making an assessment on a case by case basis of whether the event is likely to have an impact that justifies the publication of a supplement. This principle should be expressly sanctioned by ESMA.

Q30: Do you agree with the triggering elements as set out in Paragraph 87? If not, please indicate your reasons.

We do not agree with the choice made, because the reference to “any judgement or concluding event” is too broad and vague and could include any event that occurs during the procedure and within the scope of a specific level of justice. In this case the issuer would always be extremely uncertain about the “intermediate” measures which should be selected for the supplement, since there would be no precise criterion on how to make such a selection. These concerns are more perceived in European judicial systems particularly complex and structured.

Q33: Do you agree that a supplement should always be required in case of an increase of the aggregate nominal amount of the programme? If not, please state your reasons.

The aggregate nominal amount of a programme is an important element in the assessment of an issuer's funding needs even if it is not the kind of information that needs to be included in the base prospectus. The issuer may, therefore, omit this kind of information, thereby avoiding the obligation to draft a supplement if there is an increase to the aggregate nominal amount.

We agree with the fact that any increase in the amount requires, on the other hand, the preparation of a supplement to the prospectus when this amount has already been disclosed in the programme and the conditions referred to in Art. 16 (1) of Directive 2003/71/EC are applicable.