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Mr F Demarigny
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Our ref dc/522

Contact

15 September 2005

Dear Sir

CESR technical advice to the European Commission on a possible amendment to Regulation (EC) 809/2004 regarding the historical financial information which must be included in a prospectus - consultation paper

We welcome the opportunity to comment on the consultation paper.

We consider that the paper addresses an important issue in relation to the contents of prospectuses. As a general principle, investors should be provided with historical financial information of the business to which the equity securities relate. Item 20.1 of Annex 1 of the Regulation makes adequate provision in this regard where the issuer of the securities has recorded in its own accounts three years historical financial information on the relevant business. However where the issuer of securities has not been legal owner of the relevant business throughout the three year period, accounting information on the business will generally not be recorded in the accounts of the issuer for the period during which it was not the legal owner. In extreme cases, a newly formed issuer which is established as a new holding company for an existing group may have no accounts containing information relating to the existing business. In such a case, significantly less information would be presented in a prospectus by the newly formed company than would be presented if the new holding company had not been formed.

We present our responses on the questions raised in the appendix to this letter.



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*CESR technical advice to the European Commission on a possible amendment to Regulation (EC)
809/2004 regarding the historical financial information which must be included in a prospectus -
consultation paper
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If you have any questions on this letter or wish to discuss any matters, please contact David Cattermole on +44 20 7311 8346 or Peter Hughes on +44 20 7311 8281.

Yours faithfully

KPMG LLP

Appendix

27. Q: Do you agree with this approach? Please give your reasons.

We agree that the proposed requirements should be seen as additional to Item 20.1 of Annex I. In relation to Annex II, its applicability depends on the approach taken to Item 20.2 of Annex I. It may be appropriate for CESR to observe that pro forma financial information may not be necessary if historical financial information on the entity which gives rise to the significant gross change is presented and there is a narrative description of the effect of the significant gross change.

32: Do you consider that the scope of the requirements for issuers that have a complex financial history should apply in relation to public offer or admission to trading on a regulated market of any equity security to which the Shares Registration Document applies or should it be restricted only to a prospectus published in relation to a public offer or admission to trading on a regulated market of shares? Please give your reasons.

We note that the principal distinction between ‘equity securities’ and ‘shares’ is that equity securities include securities which can be converted into or exchanged into shares. We note the argument that the general approach proposed in the paper to complex financial histories reflects the same analysis which established the approach to disclosures of significant gross changes (that is disclosures are only required where a Shares Registration Document is needed). It would follow from this that the approach should apply to any equity security. We would accept, however, that the market in convertible securities is typically somewhat different from the market in equity securities; as a consequence, the existing requirements relating to significant gross changes contained in Item 20.2 of Annex I may be adequate, such that the proposed requirements need only be applied to shares.

35. Q: Do you consider that, in relation to additional requirements for issuers with a complex financial history, there is a need to distinguish between different types of issuer? Please give your reasons.

We do not consider that there is a *need* to distinguish between different types of issuer. As the Regulation does not in other respects distinguish between different types of issuer, it would appear to be difficult to justify a distinction in relation to the proposal.

40. Q: Do you believe that the cases described below should be considered as a comprehensive list? If not, please provide examples of any other cases you would consider convenient to address and of the additional requirements you would consider appropriate to require in those examples.

We believe the cases described identify the most commonly encountered circumstances in which the financial information presented in the accounts of the issuer are likely to fail to reflect adequately the historical financial information of the underlying business, but there is the danger

in seeking to create a comprehensive list that novel variations in structure might be developed so as to fall outside the defined cases. For example, the circumstances in Case 1 would be expected to lead to the same conclusion even if the new holding company inserted over the established business is not 'newly incorporated'. It may be preferable to address the question through the underlying principle rather than seeking to establish a comprehensive list of cases where the principle might apply.

45. Q: Do you agree with the proposed approach? Please give your reasons.

We agree with the principle that the prospectus should provide information relating to the business which the issuer carries on (whether or not this information is included in the issuer's own accounts). We consider that such information should cover a substantial element of the continuing business of the issuer, and that the concept of a significant subsidiary or business may be a useful means of arriving at that position. We note however that where an issuer is formed as a holding company for a number of subsidiaries or businesses which are not individually 'significant' the approach may not lead to sufficient information being presented.

51. Q: Which of the three options proposed do you prefer? Please give your reasons

AND

52. Q: If option 2 or option 3 is preferred, how would you request the issuer to conform the information given to the issuers' accounting standards?

- a. Restatement*
- b. Reconciliation*
- c. Narrative description of the difference*

Please give your reasons and provide input on the costs that each of the options would imply for issuers.

Although option 1 would lead to disclosure using standards which are acceptable under the PD Regulations, it is unlikely that an investor could properly appraise the track record of the issuer if information is not presented on the basis of consistent standards.

Options 2 and 3 correctly identify the need for the information to be available to investors in a form consistent with the accounting standards of the issuer. However in the event of restatement, options 2 and 3 cannot be sensibly distinguished, and we would consider full restatements to be effectively an option 4.

We would not consider a narrative description of differences to be an adequate basis for investors to assess a track record (the approach would suffer from the same difficulties as option 1, whichever of option 2 or 3 were adopted).

In the event that a reconciliation approach were adopted there would seem little merit in preferring option 2 over option 3. Indeed it would appear that under option 2 financial information on a subsidiary preparing financial information under eg Indian GAAP would need

to restate the information onto IFRS (or an equivalent standard) and then potentially reconcile the information to the issuer's GAAP (which might for example be French GAAP).

We consider that for consistency with the approach adopted where an issuer does include the track record of its business within its own accounts, the preferred position is for the information to be restated in line with the issuer's accounting policies.

It is difficult to estimate the cost of any of the proposals (since the question will depend on the precise details of the case). A relevant issue in assessing the costs is not the absolute amount, but the extent to which the costs exceed those borne by an issuer which is in the same position but has not inserted a new holding company over the group. Such a company may well incur the cost of restatement under the Regulation.

We do note, however, that in relation to an issuer without a complex financial history the Regulation requires restatement for the most recent two years of the three year history of the issuer. We believe that consistent with this approach, consideration could be given to requiring the presentation and restatement of information on significant acquired businesses for a two year period only.

57. Q: Which of the three options proposed do you prefer? Please give your reasons. If you support option 1, please provide input on the costs this option would mean, specially if a cash flow statement showing changes in equity would have to be produced only for the purposes of the prospectus

We consider that consistency with item 20.1 of Annex 1 provides an appropriate level of disclosure and accordingly we prefer option 1. As noted above, the question of cost should be considered through comparison with an issuer which has accounted for its underlying business. Such an issuer will have been required to prepare information in compliance with item 20.1 of Annex 1.

61. Q: Do you agree with this approach? Please give your reasons

We agree that the question of an audit will depend on the form of financial information to be presented. If the information is required to be audited, we assume that audit reports will be reproduced in the document (or incorporated by reference). Where an audit report is reproduced it would not be necessary to comply with item 20.4.1.

63. Q: Do you agree that there should be auditor's involvement concerning this additional information given in case of reconciliation or narrative description? Please give your reasons

We agree in principle that it would be desirable for the auditor to be involved in relation to additional financial information. However, care will be needed in formulating the involvement to ensure that the limitations of the work which an auditor can undertake are clearly understood.

It would not for example in our view be appropriate for an auditor to provide assurance on a narrative description.

64. Q: What kind of assurance should the auditor provide in relation to the restatement, reconciliation or narrative description:

a) a full scope audit

b) a review scope

c) a report, as in item 7a) of the pro forma annex, stating that in their opinion the financial information has been properly compiled on the basis stated?

Only a full restatement can be made subject to an audit, and we consider that a restatement should be subject to an audit. In relation to a reconciliation, it is not possible to undertake a full scope audit. It may be possible for an auditor to provide an opinion on the compilation of a reconciliation.

As noted above, we do not consider it appropriate for an auditor to provide any form of assurance report on a narrative description.

68. Q: Do you agree with this approach? Please give your reasons and provide input on the costs that each year of drawing up of historical financial information would imply for issuers

We agree with the approach proposed by CESR in relation to carve outs. The omission of information relating to the carve out business runs the risk of depriving investors of information which may be material to their investment decision. It would be useful if CESR could, perhaps in Level 3 guidance, provide guidance on how, having regard to the provision of Article 5 of the Prospectus Directive that information shall be presented in an easily analysable and comprehensible form, carve out information might be presented.

Given the nature of carve outs, the costs involved in preparation of financial information should be considered to be part of the costs of the separation and restructuring.

70. Q: Which of the above options proposed do you prefer? Please give your reasons and provide input on the costs that each of the options would imply for issuers.

We consider that for consistency with the requirements for new applicants without a complex financial history, the financial information should be subject to audit. Consideration should however be given to not prescribing in regulation the form of audit opinion in order to provide flexibility under applicable auditing frameworks, having regard to the significance of the basis of preparation to an understanding of the information presented.

77. Q: Which of the alternatives proposed do you prefer? Please give your reasons

We consider that option 2 is the appropriate and consistent analysis of the position in relation to significant acquisitions. In relation to disposals we consider that the analysis in option 1 is reasonable and that the disclosure in accounts or pro forma financial information may be sufficient.

78. Q: Would you propose any other option to deal with these situations? Please give your reasons and provide input on the costs that each of the options would imply for issuers

We have no additional suggestions on this point.

81. Q: Do you agree with this approach? Please give your reasons

We agree with the application of the approach for dealing with acquisitions and disposals to situations where there is a firm commitment or agreement which has been entered into prior to the date of the prospectus. For the purposes of defining relevant disposals, the criteria of IFRS 5 (“held for sale”, “discontinued”) might usefully be adopted. Failure to disclose such information in a document would create the risk that an investor would be unable to appraise adequately the underlying business to which the prospectus relates.

83. Q: Do you agree with this approach? Please give your reasons

In general we do not consider that a change in accounting reference date requires any special treatment. We agree that a three year period should be taken to mean a period of at least 36 months, but this may comprise more than three accounting periods if accounting reference dates have changed.