



15 July 2011

Our ref: ICAEW Rep 67/11

European Securities and Markets Authority  
103 Rue de Grenelle  
75007 Paris  
FRANCE

Submitted online at [www.esma.europa.eu](http://www.esma.europa.eu)

Dear sirs

**CONSULTATION PAPER**

**ESMA'S TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE PROSPECTUS DIRECTIVE AS AMENDED BY THE DIRECTIVE 2010/73/EU**

ICAEW is pleased to respond to your request for comments *Technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU*, published in June 2011. ICAEW is listed in the European Commission's Interest Representative Register (ID number: 7719382720-34).

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours faithfully

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**ESMA'S TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE PROSPECTUS DIRECTIVE AS AMENDED BY THE DIRECTIVE 2010/73/EU**

**Memorandum of comment submitted in July 2011 by ICAEW, in response to the consultation paper, ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU published in June 2011**

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## INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *Technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU* published by ESMA on 15 June 2011, a copy of which is available from this [link](#).

## WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter which obliges us to work in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 136,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.
4. The Corporate Finance Faculty is the voice of corporate finance within ICAEW. The faculty is responsible for submissions to regulators on behalf of ICAEW. Its members include corporate finance advisers, reporting accountants, lawyers, bankers, private equity houses, brokers and companies. The faculty provides a range of services to its members including a monthly magazine *Corporate Financier*.

## MAJOR POINTS

### Support for the initiative

5. ICAEW has consistently supported the European Commission's aims to identify and reduce unnecessary administrative burdens on EU companies and unjustified costs for companies and intermediaries and to simplify the Prospectus Directive. There is an inherent tension in this aim between a proportionate disclosure regime and investor protection and we believe that ESMA's request for comments on its proposed technical advice to the European Commission is a valuable opportunity to debate how best to manage that tension.
6. We are broadly in agreement with the proposals for the base prospectus but we disagree with the proposal that the summary of the prospectus should be 'a fresh assessment by the issuer of the key information in the prospectus'. In producing the prospectus the issuer will already have assessed the risks and other key information and it is unclear how meaningful and cost effective a new assessment by the directors would be. There is also a risk that the wording in the summary arising from such a 'fresh assessment' would actually be inconsistent with the main body of the prospectus.
7. We consider in general that ESMA could make more extensive cuts to the disclosure requirements in the proposed proportionate disclosure regimes for rights issues and SMEs/ Small Caps. We have reservations about whether the desirable degree of proportionality will be achieved:
  - in the case of rights issues, because certain disclosures appear overly concerned with ensuring that new investors receive information that is easily available publicly and, in our view, a new investor acquiring rights in the market is no different in principle to a new investor acquiring shares in the market (where such investors are not relying in information in a prospectus); and

- regarding both rights issues and SMEs/ Small Caps, because some disclosures are included on the basis that it is not costly to do so rather than whether they serve a regulatory or other purpose.

## RESPONSES TO SPECIFIC QUESTIONS

### Format of the final terms to the base prospectus (Article 5(5))

**Q1: Do you consider the list of “Additional Information” in Annex B complete? If not, please indicate what type of information could be classified as “Additional Information” and to what item they would belong to (CAT A, CAT B or CAT C, as defined in Part 3.III). Please add your justifications.**

**8.** We agree that the list of ‘Additional Information’ in Annex B is complete.

**Q2: As for the “additional provisions, not required by the relevant securities note, relating to the underlying”, please provide the information which could fall under this item.**

**9.** We do not believe that prescriptive guidance on such information would be helpful as it is dependent on the circumstances and the instrument. We agree with ESMA’s intention that such information should be limited (paragraph 26).

**Q3: Under “CAT. B” items, is the list of details which can be filled out in the final terms complete? If not, please indicate with your justifications what elements should be added.**

**10.** We consider that the list of details which can be filled out in the final terms is complete.

**Q4: Based on the instructions given in this document, could you please estimate the increase of the number of supplements to be approved in per cent?**

**11.** We do not believe that it is possible to provide a typical estimate.

**Q5: Based on the instructions given in this document, could you estimate the increase of the relevant costs?**

**12.** We do not believe that it is possible to provide a representative estimate.

**Q6: Do you agree with the proposed mechanism of combining the summary with the final terms? If not, please provide your reasons and an alternative suggestion.**

**13.** We agree it is sensible to combine the summary with the final terms. However greater clarity is required on whether the summary will be subject to regulatory review as a result of being combined with the final terms or whether it could be reviewable on a standalone basis (see also the response to Q7).

**Q7: Please estimate any possible costs that this mechanism would imply for issuers.**

**14.** This mechanism will potentially imply further translation costs for those issuers whose base prospectus needs to be translated. Costs may also be incurred depending on whether combining the summary with the final terms renders the summary subject to review by the competent authority compared to if it was issued on a standalone basis (see response to Q6).

### Format of the summary of the prospectus and detailed content and specific form of the key information to be included in the summary (Article 5(5))

**Q8: Do you agree with our modular approach?**

**15.** Yes we agree.

**Q9: Do you agree with our approach of identifying the mandatory key information to be contained within five sections?**

**16.** We believe it is a good idea to structure the summary to mirror the format of the prospectus.

**Q10: Do you agree that we have provided sufficient flexibility for issuers and their advisers in drafting summaries – whilst ensuring that summaries are brief and provide the reader with the necessary comparability between prospectuses?**

17. We consider that ESMA has provided sufficient flexibility for issuers and their advisers in drafting summaries.
18. In relation to the commentary in paragraph 99 of the paper, although not the subject of a specific question, we disagree with the proposal that the summary of the prospectus (which is contemporary with the prospectus) should be 'a fresh assessment by the issuer of the key information in the prospectus'. In producing the prospectus the issuer will already have assessed the risks and other key information and it is unclear how meaningful and cost effective a new assessment by the directors would be. There is also a risk that the wording in the summary arising from such a 'fresh assessment' would actually be inconsistent with the main body of the prospectus.

**Q11a: Do you agree that our approach adequately limits the length of summaries?**

19. We agree that the qualitative approach adopted by ESMA; ie that summaries should contain the key information that investors need and should be short.

**Q11b: What is "short" for a summary for: (i) an issuer; & (ii) an investor?**

20. It is not possible to provide a typical size due to the variables involved including size and nature of the issuer, type of investor and how big the prospectus is.

**Q11c: Do you think that there should be a numeric limit on the length of summaries? If so how might that be done?**

21. We consider that a numeric limit on the length of summaries is not appropriate and could make inclusion of all appropriate information quite difficult. The nature and complexity of an issuer's business and track record will influence how lengthy or detailed the summary needs to be.

**Q12a: Do you agree with our proposed content and format for summaries?**

22. Yes, subject to our concern raised in our response to Q10.

**Q12b: Are there other pieces of information which should appear in summaries? And are there disclosure requirements in our tables which are not needed for summaries?**

23. In Section B, we believe point B.29 should also apply to any expert report, such as a Competent Person's Report (CPR).

**Q13: Is there a need to augment Point B.9 with additional disclosure requirements, such as key assumptions, or to state that the forecast is reported on in the main body of the prospectus?**

24. Yes, we consider that key assumptions are too important to omit and help set the context in the summary.

**Q14: Do you agree with our proposal for amending Article 3, 3rd paragraph, Prospectus Regulation?**

25. We can see that it would be of benefit from an issuer's perspective for the summary to be scrutinised by the competent authority to help ensure a balance between completeness and brevity. This proposal would however impose more cost and time implications on the competent authority, in particular where there is a time lag between reviewing the base prospectus and the summary.

**Q15: Could you estimate the change in costs that will arise from the proposals in this document for summaries?**

**26.** We do not believe that it is possible to provide an estimate that will also depend on the (unknown) number of summaries that will be produced.

**Proportionate disclosure regime (Article 7)**

**27.** In general we consider that ESMA could make more extensive cuts to the disclosure requirements in the proposed proportionate disclosure regimes for rights issues and SMEs/ Small Caps (see individual sections below). We also have reservations about whether the desirable degree of proportionality will be achieved:

- in the case of rights issues, because certain disclosures appear overly concerned with ensuring that new investors receive information that is easily available publicly and, in our view, a new investor acquiring rights in the market is no different in principle to a new investor acquiring shares in the market (where such investors are not relying in information in a prospectus); and
- regarding both rights issues and SMEs/ Small Caps, because some disclosures are included on the basis that it is not costly to do so rather than whether they serve a regulatory or other purpose.

**Proportionate disclosure regime regarding rights issues**

**Q16: Do you agree with the proposal to consider that “near identical rights” should have the same characteristics than pre-emption rights? Do you agree with the definition given in paragraph 117? Are there any other characteristics which should be taken into account?**

**28.** A point of clarification would be useful on how rights that are sold on are dealt with in the proposed definition.

**Q17: Do you agree that there should be only one single proportionate regime and not two separate regimes, one for regulated markets and one for MTFs?**

**29.** We consider that combining the regime for regulated markets and MTFs will not achieve maximum proportionality for regulated markets and those MTFs with appropriate disclosure requirements and market abuse rules.

**Q18: Do you agree with the proposal to consider that appropriate disclosures requirements for MTFs would include, as a minimum, obligations to publish:**

- annual financial statements and audit reports within 6 months after the end of each financial year,
- half-yearly financial statements within a limited deadline after the end of the first six months of each financial year, and
- inside information?

**30.** If the single proportionate regime is adopted, the above disclosure requirements for MTFs would be sensible.

**Q19: What should be the maximum deadline for publishing half-yearly financial statements?**

**31.** We believe that four months is a reasonable deadline.

**Q20: For issuers listed on MTFs where there are no disclosure requirements on board practices and remuneration, do you agree that this information should be included in the prospectus?**

**32.** We agree this information should be included in the prospectus if a separate proportionate regime is adopted for MTFs.

**Q21: Are there any other disclosure requirements not listed above which should be required for MTFs?**

**33.** We are not aware of any other requirements.

**Q22: Regarding the appropriate rules on market abuse, do you agree that there should be provisions in order to prevent insider trading and market manipulation? Do you consider it necessary to require that the rules of the MTFs fully comply with the provisions of the Market Abuse Directive?**

**34.** We agree on both counts.

**Q23: Are there any other EU Directive or Regulation not listed in paragraph 122 which should be taken into account?**

**35.** We are not aware of any omissions in paragraph 122.

**Q24: As regards MTFs with appropriate disclosure requirements and market abuse rules, do you agree that in order to benefit from the proportionate prospectus, issuers should be required to make available their periodic and ongoing disclosures in a way that facilitates access to information by posting them on their websites?**

**36.** We agree.

**Q25: Do you agree with the approach proposed in order to determine which items to delete from Annexes I and III of the Prospectus Regulation?**

**37.** We agree with the approach.

**Q26: Do you agree with the proposed items which could be deleted from Annex I (Minimum Disclosure Requirements for the Share Registration Document) and Annex III (Minimum Disclosure Requirements for the Share Securities Note) of the Prospectus Regulation?**

**38.** Yes, we agree with what is proposed to be omitted but we suggest that more items, such as capitalisation and indebtedness information, could also be considered for exclusion.

**Q27: Do you consider that the language regime could be a concern in terms of investor protection in case of passporting? Do you consider that the proportionate disclosure regime should be conditional upon compliance with the language requirements of Article 19 of the Prospectus Directive?**

**39.** The risk to investor protection relates primarily to investors acquiring pre-emption rights or shares on the market who will not have received the prospectus. We agree with ESMA's assessment in paragraph 126 that existing shareholders will be aware of the language regime applicable to the company.

**Q28: In case of issuers listed on regulated markets, do you consider that disclosures on remunerations required by item 15 of Annex I of the Prospectus Regulation are redundant with information already made available to shareholders and the public in general and could therefore be deleted from the proportionate prospectus for rights issues?**

**40.** Yes.

**Q29: Considering the objective to enhance investor protection, do you agree that information regarding the issuer's activities and markets and historical financial information can not be omitted?**

**41.** Again, the risk to investor protection relates primarily to investors acquiring pre-emption rights or shares on the market who will not have received the prospectus. We are of the view that the information above which is available publicly may be reasonably be omitted unless there are

changes and providing the proportionate prospectus sets out where the information may be found.

42. We also note ESMA's comments in paragraph 130 regarding the prospectus and 'financial position'. While the Prospectus Directive may require information concerning the financial position, we believe consideration should be given to requiring the prospectus to contain no more than would be expected to appear as key information in the summary.

**Q30: Do you consider that, in order to reduce administrative burden, incorporation by reference could be a solution? Do you have any suggestions to improve the incorporation mechanism?**

43. We believe that information that is a regulatory requirement can be incorporated by reference.

**Q31: Do you agree with the proposals to require basic and updated information regarding the issuer's principal activities and markets?**

44. We agree but only where such information has been updated.

**Q32: Do you agree with the proposal to require only the issuer's historical financial information relating to the last financial year?**

45. In our view it would be preferable to consider further whether historical financial information is required at all given that such information will already be publicly available, but if it is, we agree with one year only.

**Q33: Do you agree with the proposal to redraft certain items of Annexes I and III of the Prospectus Regulation as proposed in paragraphs 132 to 134? Are there any other items which should be redrafted?**

46. Yes, subject to our earlier questioning of whether information that is publicly available needs to be disclosed unless there have been changes.

**Q34: Do you agree with the proposal to include a statement in the proportionate prospectus drawing attention to the specific regime and level of disclosure applicable to rights issues?**

47. Yes we agree.

**Q35: Do you agree with the schedule for rights issues presented in Annex 2 of this consultation paper?**

48. We agree broadly subject to our response to Q29.

**Q36: What are the costs for drawing up a full prospectus? What are the most burdensome disclosure requirements? Can you provide any data? Can you assess the costs that the proposed proportionate prospectus will allow issuers to save?**

49. Verification of disclosures forms a major element of the issuer's costs. Where aspects of disclosure are reduced (eg the items referred to in Q29) this will cut down on the extent (and cost) of verification work.

**Proportionate disclosure regime regarding SMEs and issuers with reduced market capitalisation**

**Q37: Do you agree that a full prospectus should always be required for an IPO and for initial admission to a regulated market (as described in paragraph 141 above)?**

50. We agree although it is worth recognising that this will not help one of the European Commission's aims which is to reduce the administrative costs to companies raising capital on a public market for the first time.



**Q38: Do you agree with the proposal summarized in the table in paragraph 141?**

**51.** We agree.

**Q39: Do you agree that there should be only one schedule for a proportionate prospectus for both unlisted and listed SMEs and Small Caps or do you believe that further consideration should be given to having a separate regime for unlisted companies, dealt with under the proposed revision to MiFID?**

**52.** We agree.

**Q40: Can you provide data on the average costs for SMEs and Small Caps to draw up a prospectus? What are the most burdensome parts of a prospectus to produce?**

**53.** We consider that issuers are the best source of this information.

**Q41: Do you consider that the three items identified in paragraph 147 (the OFR and the requirements to include a statement of changes in equity and a cash flow statement when the audited financial statements are prepared according to national accounting standards and to produce interim financial statements when the registration document is dated more than nine months after the end of the last audited financial year) could be omitted without lowering investor protection?**

**54.** We consider that the OFR, the statement of changes in equity and cash flow statement not drawn up under IFRS could also be omitted from a proportionate prospectus for small cap rights issues without diminishing the ability of investors to reach informed decisions.

**Q42: Do you agree with the items ESMA proposes to delete and to redraft listed in Annex 4 and the proportionate schedule for the share registration document presented in Annex 5?**

**55.** We consider that further deletions could be made, such as the OFR.

**Q43: Are there any other items which could be deleted or redrafted? Please justify any suggestions, including, if possible, the costs that would be saved and the impact on investor protection.**

**56.** We believe that OFR and the indebtedness statement could both be deleted with no significant impact on investor protection.

**Q44: Taking into account the items which ESMA proposes to delete or redraft as per Annex 4, do you consider the proportionate disclosure regime for SMEs/Small Caps could strike the right balance between investor protection, the amount of information already disclosed to the markets and the size of the issuers?**

**57.** Our assessment is that ESMA has given more weight to investor protection and not enough recognition given to information that is already publicly available.

**Q45: Given the number and nature of the items ESMA proposes to delete and to redraft listed in Annex 4, do you consider the proposal would suppose a significant reduction of the costs to access financial markets for SMEs and Small Caps? Can you estimate the costs that the proposed proportionate prospectus will allow SMEs and Small Caps to save?**

**58.** It is difficult to foresee significant reductions in costs for SMEs/ Small Caps to access financial markets especially when a full prospectus is required when raising capital on regulated markets for the first time. Moreover the disclosures ESMA proposes to dispense with are not wide ranging and so the cost savings associated with them may also not be significant.

## Proportionate disclosure regime regarding credit institutions and other issuers

**Q46: Do you agree with the proposal to require historical financial information covering only the last financial year for credit institutions issuing securities referred to in Article 1(2)(j) of the Prospectus Directive?**

**59.** We have no comments on this question.

**Q47: “In performing its work on the proportionate disclosure regime, ESMA has sought to identify all possible omissions with regards to content of prospectuses as part of this Consultation Paper, however do you believe that further omissions are possible particularly with respect to the areas indicated in the request for advice by the Commission?”**

**60.** We believe that ESMA might usefully consider the set of requirements in Schedule 2 of the London Stock Exchange’s AIM Rules for Companies as a reasonable example of a proportionate disclosure regime.

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