

5 September 2005

Mr F Demarigny
The Committee of European Securities Regulators
11-13 Avenue de Friedland
F-75008
Paris
FRANCE

Dear Sir

Re: CESR's 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 (Ref: CESR/05-428)

I have pleasure in submitting the response of the Institute of Chartered Accountants in England & Wales ("the ICAEW") to the consultation by CESR on its technical advice to the European Commission on a possible amendment to regulation (EC) 809 / 2004 ("the Regulation") regarding the historical financial information which must be included in a prospectus ("the consultation paper").

The ICAEW is the largest professional accountancy body in Europe, with over 126,000 members. In preparing this response, we have taken account of the views of our members working in business and in corporate finance roles.

In our response to the earlier consultation paper on CESR's recommendations for the consistent implementation of the Regulation, submitted in October 2004, we noted:

"Of primary concern to us is the way that the Regulation and the Consultation are presently drafted in respect of an issuer with a complex financial history... We therefore believe that it is essential that this matter is addressed in full in the recommendations by CESR to ensure clarity and consistency of approach across the European Union and to ensure that documents are not misleading."

As a result of our experience of the practical implications of the implementation of the Regulation, we remain concerned on this issue.

We attach as Appendix 1 our detailed responses to the specific questions raised in the consultation paper. Our overall viewpoint is that sufficient, reliable historical financial information must be presented to potential investors to enable them to make appropriate investment decisions and to protect their interests; this historical financial information must cover all entities material to the investment decision.



Cost should not be a limiting factor in determining the extent of the information that should be provided or the basis on which it is to be prepared. It is essential that when potential investors are making investment decisions about essentially similar businesses but with different financial histories as a result of structure, an equivalent approach to presentation of historical financial information should be applied. Investor protection should be the overriding influence and it is interesting to note that CESR's own fact finding exercise referred to in the annex to the consultation paper indicates that ".. the majority of regulators currently require the inclusion of financial information relating to entities other than the issuer in some or all kinds of cases covered by the exercise". Therefore there is clearly precedent in most member states for issuers to include additional information where complex financial histories exist which means that most issuers will already acknowledge some costs attributable to the provision of this additional information. The UK experience is that the presentation of complex financial histories has become an accepted part of market practice.

Please contact me should you wish to discuss any of the points raised in this response or if you would like further information on this submission.

Yours faithfully

A handwritten signature in black ink, reading "Robert Hodgkinson". The signature is written in a cursive style with a small dot above the 'i' in "Hodgkinson".

Robert Hodgkinson
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APPENDIX 1

ICAEW COMMENTS ON CESR CONSULTATION PAPER (Ref: CESR/05-428)

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

We agree that the approach to propose additional requirements over and above those already set out in the Regulation, so long as these supplemental requirements are consistent with the approach adopted in the Regulation.

Our reasons for agreeing with this approach are as set out in our letter to CESR of 18 October 2004.

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.

In principle, we consider that the scope of the disclosure requirements for issuers that have a complex financial history should apply to a public offer or admission to trading on a regulated market of any equity security to which the Shares Registration Document applies. However we appreciate that more sophisticated forms of equity security are often only issued to more sophisticated investors who may have need for less information on which to base their investment decision to be disclosed within a prospectus.

Therefore a proposal that the requirements for issuers that have a complex financial history should only apply to a prospectus published in relation to a public offer or admission to trading on a regulated market of shares would provide more flexibility and would reduce the costs of producing historical financial information for a prospectus in relation to more sophisticated forms of equity security.

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 believe that there is a need to distinguish between different types of issuer. So long as the significant business or subsidiary which is the subject matter of the complex financial history is sufficiently material to that issuer to warrant its disclosure in a prospectus all relevant information must be required to be disclosed under the revised regulation to enable a prospective investor to assess adequately his investment decision.

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.

The cases set out could be extended to cover a greater variety of situations. However, the list of cases were all encompassing (which is unlikely to be achieved) it would be possible for an issuer to identify a loophole where a particular situation was not covered and therefore seek to avoid disclosure in respect of historical financial information which is essential to a prospective investor. The underlying principle should be to capture the historical financial information of a business irrespective of its historical structure.

We believe that flexibility is essential in setting guidance for disclosure requirements in respect of complex financial histories. We believe that the guidance should start with a more principles based approach rather than just giving specific examples. Such principles would include, for example, the need for the issuer to consider the materiality of the additional information that is proposed for inclusion in the prospectus in respect of, for example, a significant acquisition during the period under review.

Flexibility will allow competent authorities to consider each case on its own merits within the parameters of the guidance and principles set.

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

In the situation described in "Case 1" we agree with the proposed approach. We suggest that greater clarity could be given on the criteria that should be used for determining "significant" along the lines of the definition provided in the CESR Level 2 regulations and Level 3 recommendations.

Consideration should also be given to defining a "significant business" or "subsidiary" not only on the basis of numerical size tests alone. This should be supported by a set of principles to ensure that companies which appear to be small by reference to net assets or profits, but which undertake a large number of off balance sheet activities (such as special purpose vehicles) are included within the scope of the historical financial information.

Without an amendment to the Regulation to require the issuer which is a new company ("Newco") to "look through" to the business with a trading record which is the real subject of an IPO, companies could exploit this loophole by simply including information on the Newco. An over-riding principle is required to provide prospective investors with sufficient information on which to base their investment decisions. Substance over form is essential.

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

Investors should be provided with historical financial information on a business which is presented in a consistent way to that of the issuer, based on the equivalent accounting policies. None of the options presented provide this as the basic model.

Comparability with the historical financial information of the issuer is essential. We consider that any significant business or subsidiary must prepare its financial information under acceptable accounting standards ie "... according to Regulation (EC) No 1606 / 2002, or if not applicable to a Member State national accounting standards for issuers from the Community". We agree that this financial information, if originally prepared under accounting standards which are different from those of the issuer, must then be conformed to the issuer's accounting standards in some way, preferably by restatement. The three options provided in the consultation paper provide "second best" approaches to a greater or lesser extent.

We do not agree with Option 1 as we consider it confusing to have the historical financial information on the issuer presented in a different GAAP to that used to present the historical financial information of any significant businesses or subsidiaries without any form of restatement, reconciliation or narrative statement.

We do not agree with the proposal suggested in Option 2 that the historical financial information of the issuer can be presented under, say, IFRS, and the historical financial information of subsidiary A and subsidiary B can be presented under different GAAPs, together with some form of statement to conform them, such as by reconciliation. We consider this to be confusing to the potential investor.

Again, in relation to Option 3, we do not consider it helpful to the potential investor to have the historical financial information on any significant businesses or subsidiaries presented under different GAAP to the issuer, unless the historical financial information is restated for easy comparability as we suggest the basic model proposed above. Option 3, however, is the closest to the basic model as it does propose restatement as an option which would allow the historical financial information on all entities presented to be shown on a comparable basis.

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.

We consider that restatement is the preferred option in respect of the question raised in Paragraph 52 but recognise that this is likely to be the more expensive option. However, we do believe that costs must not be the primary influencing factor over what historical financial information is required in the case of a complex financial history or on what basis it is prepared.

We are unable to give any indication of absolute costs as each situation will vary and the costs will depend on a number of factors, including, inter alia, the size and complexity of the significant business or subsidiary. We do not believe that the guidance to be given in this area should be driven by the cost implications of this exercise. What is important is to ensure that the potential investors have sufficient meaningful, reliable information available on which to base their investment decision.

In any event, the financial information of a significant business or subsidiary will have to be prepared in the future under the accounting standards adopted by the issuer if the transaction completes and therefore restatement of at least the latest figures in the historical financial record will normally need restatement for the preparation of the next financial statements.

We do propose, however, that to lighten the potential cost burden, if a three year track record can be provided on the significant business or subsidiary then only the last two years' historic financial information should need to be restated in line with the accounting policies of the issuer. This would be consistent with the Regulation which only requires an issuer to restate its historical financial information for the two most recent years in its three year track record. We further recommend that consideration should be given to requiring only two years of historical financial information on a significant business or subsidiary, restated, with no requirement for a third year of record.

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.

Our preference is for Option 1 as it is consistent with the financial information that is required on the issuer in a prospectus under item 20.1 of Annex 1 of the Regulation. The information to be required in respect of the significant business or subsidiary is not of a pro forma nature and therefore should not be prepared on a comparable basis to the requirements for pro forma financial information but to that for full financial information of an issuer.

We appreciate that this is likely to be the most costly approach but, as for the case of our response to the question included in paragraph 52, we do not believe that the requirement should be driven by cost but by what the potential investor needs for his investment decision. For some companies, for example, the cash flow statement might be an essential statement for the understanding of the business and therefore it cannot be left out for any reason as it would be required to show a true and fair view for the purposes of the prospectus.

We cannot give any guidance on the absolute likely cost implications as this will depend on the size and complexity of the significant business or subsidiary, nor do we believe they are relevant.

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

We believe that the standard of reliance that must be able to be placed on the historical financial information of a significant business or subsidiary must be of the same standard as that for the issuer itself. For example, in the case of an issuer that is a newly formed company for the purposes of effecting an IPO and acquiring a business with a historical track record, it is the historical financial information of the subsidiary rather than that of the issuer which is going to be influential to the potential investor in forming his investment decision.

We also recommend that consideration be given to including the historical financial information of the significant business or subsidiary by inclusion of the audited accounts (including the previously published audit reports) in the prospectus or by reference, as may be done in relation to the issuer's historical financial information. If the significant business or subsidiary's historical financial information is required to be restated and is therefore specifically prepared for the purposes of the prospectus, then it should be reported on by an independent accountant as would be required for the restatement of the issuer's historical financial information.

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.

If either of Options 2 and 3 were to be the recommended options then we would support an auditor's involvement concerning the additional information. For the reasons given in respect of the question raised in paragraph 62, we believe that the additional information must be as robust as possible, especially as it will have been prepared specifically for the purpose of the prospectus.

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?**

In order to ensure a consistent quality of historical financial information with that of the issuer, irrespective of the history of the significant business or subsidiary, we believe that Option (a), a full scope audit, is the appropriate level of assurance. This will also ensure that the potential investor is able to place reliance on the historical financial information of the significant business or subsidiary which may be more important to its investment decision than that of the issuer itself. Please also refer to certain of the answers set out above for comment, in particular, that we support restatement rather than any other option of presentation.

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 proposed requirements as set out in paragraph 67. Of particular importance is the requirement to provide the basis upon which the information has been prepared.

The costs of drawing up this financial information will depend on the size and complexity of each business, inter alia, and therefore we do not comment further on this point.

As for the answer in relation to the question in paragraph 52 set out above, we propose, however, that to lighten the potential cost burden, if a three year track record can be provided on the significant business or subsidiary then only the last two years' historical financial information needs to be restated in line with the accounting policies of the issuer. This would be consistent with the Regulation which only requires an issuer to restate its historical financial information for the two most recent years in its three year track record. Again, as in respect of the answer to the question in paragraph 52 above, we recommend that consideration should be given to requiring only two years of historical financial information on a significant business or subsidiary, restated, with no requirement for a third year of record.

We also recommend that consideration should be given to the appropriateness for the historical financial information on "the complex financial history" to be prepared on a combined or aggregated basis in order for the information to be presented in a form which enables it to be easily analysed, compared and understood, particularly in relation to the financial information that will be published in the next financial statements of the issuer and its group.

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.

As this historical financial information is being prepared specifically for the purpose of the prospectus and will form part of the basis for the investment decision, it is essential that the historical financial information is subject to a full scope audit to ensure that reliance can be placed on it by potential investors. A full scope audit will also ensure a consistent quality of historical financial information with that of the issuer, irrespective of the history of the significant business or subsidiary.

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

We prefer Option 2 as this provides more, relevant information for the potential investor on which to base his investment decision. If the acquisition or disposal is "significant" we do not consider that the reflection of the figures in just the last period or their inclusion in a pro forma statement is sufficient information on which to base an investment decision. Option 2 provides more, relevant information about the significant business.

It would also be helpful to include some specific guidance for the treatment of material disposals.

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.

Our comments in relation to this question are included in the points made above.

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

We agree that with the proposition set out in paragraph 80 (ie in respect of a significant business that is the subject of the matter for the prospectus). However, CESR should provide additional clarity on the definition of an “arrangement to enter into such a transaction” since without this, differing interpretations of the level of “agreement” required to be within the scope of the historical financial information may emerge.

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

We consider that in the situation where the issuer has changed its accounting reference date during the period, the historical financial information should be presented for three accounting periods which should include at least 36 months but not necessarily three calendar years. Our support for 36 months rather than three calendar years is, in our view, a more practical approach as it potentially avoids what could be a major retrospective exercise in re-closing and re-auditing books after a significant time; this would therefore be a lower cost option as well.