

European Securities and Markets Authority (ESMA)
via: www.esma.europa.eu/consultation

Date 28 June 2013
Reference BR1957

Subject: ESMA consultation prospectus supplement

Dear Sir, Madam,

On behalf of the Dutch Banking Association ('NVB')¹ I would like to thank you for giving us the opportunity to provide you with our feedback on the consultation paper 'Draft Regulatory Technical Standards on specific situations that require the publication of a supplement to the prospectus'.

The NVB welcomes the regulatory initiative to harmonize the interpretation of requirements to publish a supplement to securities prospectuses. We also welcome the fact that the task of drafting regulatory technical standards – in order to achieve the aforementioned harmonization – has been entrusted to the European Securities and Markets Authority ('ESMA'). In order to support ESMA in the process leading to the Regulatory Technical Standards we would like to share our comments hereunder.

General considerations

- The NVB understands the objective of article 16(2) of the Omnibus Directive 2010/78/EU is to ensure consistent harmonization in respect of article 16 of the Prospectus Directive 2003/71/EC (as amended) ('Prospectus Directive') and ESMA has therefore been given the task to develop technical standards specifying identifiable events which trigger the publication of a supplement. To address this, ESMA has identified a list of events which systematically require the publication of a supplement to a prospectus. The events mentioned on this list come on top of those events which still have to be tested on a case by case basis against article 16 and issuers therefore will still be required to test for each new factor, mistake or inaccuracy if it triggers the requirement to publish a supplement to a prospectus.

¹ The Nederlandse Vereniging van Banken (NVB) is the representative voice of the Dutch banking community with over 90 member firms, large and small, domestic and international, carrying out business in the Dutch market and overseas. The NVB strives towards a strong, healthy and internationally competitive banking industry in the Netherlands, whilst working towards wider single market aims in Europe.

- We note that our focus is on Dutch bank issuers of debt securities (mostly senior unsecured) only. Furthermore we note that most debt issuance programs of Dutch bank issuers are targeted at wholesale investors to which retail withdrawal rights set out in article 16 of the Prospectus Directive are not applicable.
- If the draft Regulatory Technical Standards ('RTS') would be finalized in its current form, the European Economic Area ('EEA') will likely see a harmonized practice for the publication of supplements for the events listed therein.
- However, whether ESMA's proposed list will reach its goal of consistent and harmonized production of supplements across the EEA depends largely on whether the list accounts for the main events for which issuers publish supplements. The NVB notes that the draft RTS does not mention whether ESMA has performed research which events in practice lead to supplements, for example if there is a difference in such practice between financial institutions and corporate issuers, equity and debt securities or across different jurisdictions. The draft RTS is unclear whether the main triggering events are still case-by-case events which are not listed by ESMA. The NVB would welcome any insight into any research ESMA has conducted in this respect.
- The NVB notes that ESMA has mainly identified triggering events which are derived from the formal disclosure requirements in the Prospectus Regulation (e.g. annual accounts, profit forecasts, working capital and litigation statements). To a lesser extent, ESMA has specified events which are not directly referenced in the annexes from the Prospectus Regulation (e.g. public takeover bids and change of control events). In NVB's view there is no clear argumentation set out in the draft RTS what ESMA's considerations are for picking those situations that it did. The NVB would welcome further insight into ESMA's considerations that led to the compilation of the listed events.
- ESMA states in paragraph 22 as the test for whether a new factor, mistake or inaccuracy qualifies as a triggering event for producing a supplement should be identical to the test whether information should be included in the prospectus. Accordingly, any factual change to the original information in the prospectus would trigger the requirement to produce a supplement. This would mean that any mistake or inaccuracy would be considered as "material". Rather than defining the terms "material" and "significant" NVB favors to leave it to the issuer, the offeror or the person asking for admission to trading on a regulated market to assess whether a new fact is "material" or "significant".

Civil liability

In the experience of the NVB, the main drivers for publication of supplements under debt issuance programmes is twofold. First of all, there is a regulatory driver being the requirement under article 16 of the Prospectus Directive as laid down in the national laws of the member states. In order to comply with this requirement debt issuers must monitor during the life of the programme (whenever there is a public offer or admission to trading) if an event occurs that triggers a supplement and, if it does, publish a supplement to the prospectus in a timely and comprehensible manner. If the issuer does not comply with this requirement it may become subject to enforcement actions from the

competent authority (which may impose, for example, administrative fines). The second main driver is civil liability towards investors for the contents of the prospectus. Issuers must determine on a case-by-case basis whether an event must be considered “supplement-worthy” and very often these discussions are focused on civil liability rather than alone on the requirements set out in article 16. The question that is repeatedly raised is:

“would not-including a new factor expose the issuer to claims from investors on the basis that, if the investors would have known the information that was not, or not accurately, disclosed to them in the prospectus, they would not have bought the securities”.

Civil liability is therefore a main driver for the publication of a supplement. The civil liability for the contents of the prospectus however is an issue of national law. Therefore it is doubtful whether the proposed list will contribute to a more harmonized practice to the extent expected by ESMA.

Costs estimate

- Preparation and publication of a supplement comes at a cost, which include legal fees, listing agent fees, translation fees, competent authority approval fees. When an issuer has various debt issuance programmes, as set out below, not one but multiple supplements need to be produced for which the aggregate direct costs may range from EUR 5,000 – 15,000.
- The costs element of a supplement will be magnified where an issuer has various debt issuance programmes. As the issuer seeks to keep its disclosure consistent across its various debt issuance programmes, an issuer disclosure related supplement will trigger multiple other debt issuer programmes to be supplemented as a result thereof. By way of background, bank issuers often have diversified funding structures to tap capital from different investors and/or markets. Those funding structures will usually be set-up on a programme basis rather than on a standalone basis. Examples of the various debt issuance programmes which a bank issuer may run are: general senior unsecured funding programme; market specific programmes (e.g. U.S. medium term notes programme, Swiss programme or Italian registered programme); covered bond programme; structured notes programmes (notes/certificants/warrants with derivative elements); issuer specific programmes; retail or wholesale specific programmes; subordinated debt programmes, programmes for tax driven bonds (e.g. green bonds).

Passporting considerations

- Some issuers maintain various debt issuance programmes that are comprised of a general base prospectus and a registration document (which is incorporated by reference into the base prospectus). Usually such various programmes each have their own base prospectus which include the same registration document. Upon the occurrence of a triggering event not only the registration document must be supplemented but also the various base prospectuses. The background to this is that a registration document cannot be passported into other EEA jurisdictions; only the base prospectus itself may be passported under the

Prospectus Directive. To make the supplemented registration document part of the passported base prospectus, each base prospectus is to be supplemented to specifically include the registration document supplement. The base prospectus supplement is subsequently passported into the various EEA jurisdictions. In other words, the issuer cannot just issue one disclosure supplement but has to prepare, seek approval for and publish multiple supplements (see also the previous bullet). This generally leads to an overload of administrative work at competent authorities and sometimes is the main reason that supplements cannot be published in a timely manner. The NVB requests ESMA to provide practical guidance for issuers and competent authorities to address this problem.

- There is no harmonized approach by competent authorities with respect to including financial information by way of incorporation by reference. For example, the NVB notes that the Italian CONSOB does not allow supplements to include financial information through incorporation by reference, while this practice is well accepted by the Dutch AFM. Instead, CONSOB requires issuers to revise and update the relevant financial sections from the registration document and then include those updated sections in the supplement. For debt issuance programmes this means that it takes various weeks to draft a supplement that includes new (interim) financial information. The NVB requests ESMA to provide harmonized guidance for issuers and competent authorities to address this problem.

Responses to consultation questions

1: 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.

In response to this question the NVB in particular wants to raise the statements that are made by ESMA under paragraphs 22, 23 and 24 in the draft RTS. It is not entirely clear to the NVB what ESMA aims to convey in these paragraphs, but if taken very literally these could mean that the supplement in itself must comply in full with all the disclosure requirements of the Prospectus Regulation. As described in paragraph 31 of the draft RTS, this could mean that the issuer should also include information in the supplement that covers all other thinkable consequences. This could be understood as a requirement to provide continuously updated information on the disclosure elements from the Prospectus Regulation, irrespective of the question whether such information meets the requirements of article 16 of the Prospective Directive. The NVB would not agree with such a view. In the NVB's view the supplement must be read together with the prospectus and should only disclose the triggering event and any other objective consequences provided that these are "capable of affecting the assessment of the relevant securities". The term 'supplement' literally implies that it is supplemental to the main document, being the (base) prospectus. The latter test should be a materiality test that is a higher test than the test what information should generally be included in the original prospectus. It is in the interest of investors that supplements are clear, comprehensible and, if possible, short. Too much information may overwhelm and harm the investor's investment decision. The NVB would welcome any clarification from ESMA that this is not the intention of the draft RTS.

In short, the issuer should be allowed room for discretion which sections in the original prospectus should be revised and updated through the supplement. The basis for this is that the issuer is best placed to decide which information can affect an investor's investment decision in the securities. This is also in the investors' interests who will value clear, comprehensible and, if possible, short from supplements over long form prospectus like supplements.

2: 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.

Most Dutch issuers of debt securities already publish a supplement upon the publication of their annual results, so this is already practice and therefore there is no need to introduce a systematic requirement. See however also our response under question 4 below.

3: 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.

The NVB agrees with a carve-out for 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. Another relevant aspect is that securitizations are often set up as stand alone transactions rather than programmes and therefore the issues presented by supplements are less apparent.

4: Please list other situations where a supplement would not always be required for the publication of annual audited financial statements, if any.

The issuer may publish quarterly statements and the quarterly statement issued for the fourth quarter may include information on year-end basis that materially matches or overlaps the issuer's annual statements. If the quarterly information is already supplemented there is no need or added value to also include supplement the annual statements.

In circumstances where an issuer is a finance company of the issuer, the securities of which are guaranteed by a parent company, the publication of the finance company's audited annual financial statements might not constitute a significant new change. Only the guarantor's audited annual financial statements will constitute a significant new factor and will trigger a supplement for the finance company.

In case the issuer already published a supplement for a profit estimate in relation to the annual financial period, and the full financial statements are published at a later time, the significant new change would in principle already be captured by the supplement in respect of the profit estimate. The NVB feels that in such circumstances the publication of a supplement for the financial statements itself no longer meets the requirements set out in article 16 Prospectus Directive, also given the fact that financial statements itself are required to be published in accordance with other rules and regulations.

The issuer may publish quarterly statements and the quarterly statement issued for the fourth quarter may include information on year-end basis that materially matches or overlaps the issuer's annual statements. If the quarterly information is already supplemented there is no need or added value to also supplement the annual statements. By way of example, an issuer publishes a quarterly

report including reviewed figures in February covering the last quarter of the previous year as well as year-end data. Two months later in April, the issuer publishes the annual report including audited figures, which are substantially the same as the quarterly report. Under the current article 16, the issuer can take the position that the prospectus or registration document only needs to be supplemented when the fourth quarter figures are published in February, but pursuant to the draft RTS the issuer would have to publish another supplement in April for the annual report including audited figures covering materially the same. The second supplement does not provide the investor with new information and therefore does not have a clear benefit for the investor.

A related example is where the issuer already published a supplement for a profit estimate in relation to the annual financial period, and the full financial statements are published at a later time. The significant new change would in principle already be captured by the supplement in respect of the profit estimate.

The NVB feels that in circumstances described above the publication of a supplement for the financial statements itself no longer meets the requirements set out in article 16 Prospectus Directive, also given the fact that financial statements itself are required to be published in accordance with other rules and regulations (e.g. national law and the Transparency Directive 2004/109/EC).

In circumstances where an issuer is a finance company of the issuer, the securities of which are guaranteed by a parent company, the publication of the finance company's audited annual financial statements might not constitute a significant new change. Only the guarantor's audited annual financial statements will constitute a significant new factor and will trigger a supplement for the finance company.

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

The NVB does not support a systematic requirement to prepare a supplement for interim financial statements. Whether the interim financial information triggers a supplement should be assessed by the issuer on a case-by-case basis.

The NVB also draws attention to the current review of the Transparency Directive 2004/109/EC where the EU Commission has reached political agreement on certain amendments, including the abolition of the requirement to produce interim management statements or quarterly reports.

6: What do you assess the cost estimate to be to comply with this requirement?

Assuming that the final RTS will dictate that (i) finance companies must publish supplements in respect of annual statements even when the securities have the benefit of a parent guarantee and (ii) issuers must publish supplements in respect of interim financial information, the number of supplements would increase substantially. This will lead to substantial additional costs for the issuer (legal fees, listing agent fees, translation fees, competent authority approval fees) and substantial additional workload for the departments involved at the issuer and competent authority.

7: Do you agree that there should be a systematic requirement to produce a supplement in case of publication of a profit forecast? If not, please state your reasons.

No comments.

8: Do you agree that the systematic requirement to prepare a supplement for a profit forecast should only apply to equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts? If not, please state your reasons.

The NVB agrees to the presumption made by ESMA in the draft RTS under paragraph 44 that a *profit forecast* is not necessarily material information for debt securities.

9: What do you assess the cost estimate to be to comply with this requirement?

No comments.

10: 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.

Most Dutch issuers of debt securities which provide a profit estimate already publish a supplement in connection therewith, so there is no need to introduce a systematic requirement.

11: Do you agree that the systematic requirement to prepare a supplement for annual profit estimates covered by e.g. Annex I, item 13(2) subparagraph 1 (referring to profit estimates for which a report of an auditor is required) should apply to a prospectus drawn up in accordance with all the schedules referred to in paragraph 54 or should this requirement be limited to equity securities? Please state your reasons.

Similar to the analysis of a profit forecast, the systematic requirement to prepare a supplement for annual profit estimates should not apply to prospectuses for debt securities.

12: Do you agree that the systematic requirement to prepare a supplement for financial information relating to the previous financial year covered by e.g. Annex I, item 13(2) subparagraph 2 (referring to profit estimates for which no report of an auditor is required) should apply to a prospectus drawn up in accordance with all the schedules referred to in paragraph 54 or should this requirement be limited to equity securities? Please state your reasons.

Same response as under 11.

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

Same response as under 11.

14: What do you assess the cost estimate to be to comply with this requirement?

No comments.

15: Do you agree that there should be a systematic requirement to produce a supplement in case of a change in control of the issuer? If not, please state your reasons.

No comments.

16: Do you agree that the systematic requirement to prepare a supplement in case of change in control of the issuer should only apply to equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts? If not, please state your reasons.

The NVB agrees with ESMA that there should be no systematic requirement to prepare a supplement for a change of control of the issuer in the case of debt securities.

17: What do you assess the cost estimate to be to comply with this requirement?

No comments.

18: Do you agree that there should be a systematic requirement to produce a supplement in case of a public takeover bid? If not, please state your reasons.

No comments.

19: Do you agree that the systematic requirement to prepare a supplement in case of a public takeover bid should only apply to equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts? If not, please state your reasons.

The NVB agrees with ESMA that there should be no systematic requirement to prepare a supplement for a public takeover bid in the case of debt securities.

20: What do you assess the cost estimate to be to comply with this requirement?

No comments.

21: Do you agree that there should be a systematic requirement to draw up a supplement in case of a positive and a negative change to the issuer's working capital statement? If not, please indicate your reasons.

No comments.

22: Do you agree that the systematic requirement to prepare a supplement in case of a positive and a negative change to the issuer's working capital statement should apply to equity securities covered by 4(2)(1) and convertible/exchangeable debt securities in accordance with Article 17(2) of the Prospectus Regulation? If not, please state your reasons.

The NVB agrees with ESMA that there should be no systematic requirement to prepare a supplement for a positive or negative change to the issuer's working capital statement in the case of debt securities.

23: What do you assess the cost estimate to be to comply with this requirement?

No comments.

24: 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) foreseen in the prospectus? If not, please state your reasons.

No comments.

25: What do you assess the cost estimate to be to comply with this requirement?

No comments.

26: Do you agree that there should be a systematic requirement to draw up a supplement in case of a new significant financial commitment which is likely to give rise to a significant gross change? If not, please indicate your reasons.

No comments.

Q27: Do you agree that the systematic requirement to produce a supplement for a significant financial commitment should apply to issuers covered by Article 4(2)(1) and Article 17(2) of the Prospectus Regulation? If not, please indicate your reasons.

The NVB agrees with ESMA that there should be no systematic requirement to prepare a supplement for a significant financial commitment in the case of debt securities.

28: What do you assess the cost estimate to be to comply with this requirement?

No comments.

29: 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.

It should be for the issuer to decide on a case-by-case basis whether the judgment meets the article 16 materiality test, the reasons being that (a) the judgment could be insignificant or not capable of affecting the assessment of the securities, (b) an interim decision could be immaterial to investors, e.g. in case of a procedural decision, or (c) a final judgment could merely be a confirmation of an earlier judgment by a lower court where the earlier judgment was already disclosed in the prospectus (called a “neutral result” in paragraph 86 of the draft RTS).

This requirement would lead to an overload of supplements and therefore be overly burdensome on issuers and would only confuse investors as they will be confronted with excessive amounts of information which may be incomprehensible in terms of significance.

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

Interim judgments may provide valuable information for the investor on the possible outcome of a proceeding, however, interim judgments could also be mere procedural steps that do not provide any information on the possible outcome. Interim judgments could thus include information which is not significant or material for investors. The NVB for that reason does not support ESMA’s suggestion that interim judgments should be systematic triggering elements. As set out in the response under paragraph 29 above, this requirement would lead to an overload of supplements and therefore be overly burdensome on issuers and only confuse investors as they will be confronted with excessive amounts of information which may be incomprehensible in terms of significance.

31: ESMA does not make a distinction between equity and debt securities. Do you believe such a distinction should be made? If yes, please state your reasons.

Investors in debt securities may take a different view on governmental, legal or arbitration proceedings than investors in equity securities. It may be the case that a particular judgment only affects the assessment of equity securities but not debt securities, this will depend on the nature and subject of the proceedings. The NVB therefore believes that the test for debt securities should be different than for equity securities in respect of governmental, legal or arbitration proceedings.

32: What do you assess the cost estimate to be to comply with this requirement?

Probably this element of the draft RTS would have the biggest costs impact as the NVB foresees a dramatic increase of supplements if included in the final RTS in its current form.

33: 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 NVB agrees that an increase of the aggregate nominal amount of a programme generally triggers a supplement. This is also already market practice in The Netherlands and is already laid down in the programme documentation.

34: What do you assess the cost estimate to be to comply with this requirement?

No comments.

35: Which additional elements should be included in the list above that systematically trigger the need to produce a supplement? Please indicate any arguments which support the inclusion of such elements.

No comments.

Yours Sincerely,



Wim Mijs

Chief executive of the Dutch Banking Association