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| 6 July 2017 |

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| Response form for the Consultation Paper on  format and content of the prospectus |
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| Date: 6 July 2017 |

Responding to this paper

ESMA invites responses to the questions set out throughout this Consultation Paper. Responses are most helpful if they:

1. respond to the question stated;
2. contain a clear rationale; and
3. describe any alternatives ESMA should consider.

ESMA will consider all responses received by 28 September 2017.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the form “Response form\_Consultation Paper on format and content of the prospectus”, available on ESMA’s website alongside the present Consultation Paper ([www.esma.europa.eu](http://www.esma.europa.eu) 🡪 ‘Your input – Open consultations’ 🡪 ‘Consultation on technical advice under the new Prospectus Regulation’).
2. Please do not remove tags of the type <ESMA\_QUESTION\_FAC\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA\_FAC\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_FAC\_ABCD\_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA’s website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input – Open consultations’ 🡪 ‘Consultation on technical advice under the new Prospectus Regulation’).

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly indicate by ticking the appropriate checkbox on the website submission page if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Data protection’.

Who should read this Consultation Paper

This Consultation Paper may be of particular interest to investors, issuers, including issuers already admitted to trading on a regulated market or on a multilateral trading facility, offerors or persons asking for admission to trading on a regulated market as well as to any market participant who is affected by the new Prospectus Regulation.

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | PricewaterhouseCoopers GmbH Wirtschaftsprüfungsgesellschaft |
| Activity | Audit/Legal/Individual |
| Are you representing an association? |  |
| Country/Region | Germany |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_FAC\_1>

Ladies and Gentlemen,

We are pleased to have the opportunity to respond to your request for comments on the consultation paper on format and content of the prospectus dated July 6, 2017.

Our response represents the views of the PwC network of firms across Europe. We do this not only in our capacity as auditors, but also as experts in supporting clients in capital market transactions.

In particular, we would like to draw your attention to our response in connection with the inclusion of profit forecasts into prospectuses and whether such forecasts should be reported on (Question 14).

Should you wish to discuss our response, please contact Nadja Picard ([nadja.picard@pwc.com](mailto:nadja.picard@pwc.com)) or Christian Schloetterer ([christian.schloetterer@pwc.com](mailto:christian.schloetterer@pwc.com)).

Yours faithfully

PricewaterhouseCoopers GmbH Wirtschaftsprüfungsgesellschaft

<ESMA\_COMMENT\_FAC\_1>

1. : Do you agree with the proposal that cover notes be limited to 3 pages? If not, what do you consider to be an appropriate length limit for the cover note? Could you please explain your reasoning, especially in terms of the costs and benefits implied?

<ESMA\_QUESTION\_FAC\_1>

We disagree. We noted in our practice, that many prospectuses in the past included cover pages on a voluntary basis and with a limited volume. Based on this observation, we do not see a necessity to limit the pages for a cover note. A limitation would only increase the drafting effort to stay within the limit.

It would be useful though to provide more guidance what the cover note should include. This is partially already done with respect to the content of the disclosure regarding NCA scrutiny, see also recital 56 of the Consultation Paper.

However, if prospectuses should become more accessible to retail investors, a more detailed disclosure in that regard would be desirable.

<ESMA\_QUESTION\_FAC\_1>

1. : Would a short section on “how to use the prospectus” make the base prospectus more accessible to retail investors? If so, should it be limited to base prospectuses? Would this imply any material cost for issuers? If yes, please provide an estimate of such cost.

<ESMA\_QUESTION\_FAC\_2>

We deem the practical advantages of this section limited, since we cannot anticipate how a respective section will be ultimately phrased. Further guidance by ESMA on the content of such paragraph would be highly appreciated.

“Retail investor” comprises an extremely broad investor basis and, consequently, it is not clear which experience levels with prospectuses and their content should be assumed for drafting such a section.

We do not see a practical reason why this should be limited to base prospectuses.

We do not expect any significant additional costs, since issuers, offerors or persons asking for admission to trading will likely use standard wording in which they will follow market standard and requirements set by NCAs.

<ESMA\_QUESTION\_FAC\_2>

1. : Should the location of risk factors in a prospectus be prescribed in legislation or should issuers be free to determine this? If it should be set out in legislation, what positioning would make it most meaningful?

<ESMA\_QUESTION\_FAC\_3>

Risk factors are one of the most important sections in a prospectus. It is of absolute importance for investors to make an informed investment decision, taking into account all risks involved in such investment. Unfortunately, risk factors under the current legislation are usually partly generic and serve the purpose of protecting against liability rather than informing the investor.

We agree that risk factors should be specific and relevant to the issuer and/or the security and be prioritized in relation to the possible impact.

In this context, the point of ESMA to provide general information about the business of the issuer or the nature of the securities before describing the risks attached to them, is a valid one and the prescription of the location by law would be desirable.

The risk factors should, therefore, follow the description of the offer and the business section in the main body of a prospectus, as that would set the context in which the risk factors can be understood. Furthermore, we would propose that the cover note should include a reference to the risk factors with the recommendation to consider them before making an investment decision.

<ESMA\_QUESTION\_FAC\_3>

1. : Should the URD benefit from a more flexible order of information than a prospectus?

<ESMA\_QUESTION\_FAC\_4>

If the purpose of the URD is to use it both for transactions and the disclosure requirements under the Transparency Directive[[1]](#footnote-2), it should be easy for investors and other stakeholders to find the information they look for. That is only possible if there is a reliable structure.

However, from our experience, the structure of prospectuses under current market practice seldom follow the structure of the annexes in the current Prospectus Directive. This indicates that it is not seen as user friendly.

Therefore, we would propose that a new fixed order that is close to the current market practice, should be developed and made compulsory for the URD to support its purpose.

<ESMA\_QUESTION\_FAC\_4>

1. : Would a standalone and prominent use of proceeds section be welcome for investors?

<ESMA\_QUESTION\_FAC\_5>

In some jurisdictions, a standalone ‘Use of Proceeds’ section is already market standard and it would also be consistent with market practice for international private securities offering documents. Therefore, it would be welcome for investors.

<ESMA\_QUESTION\_FAC\_5>

1. : Is the list of “additional information” in Article XXI of the Commission Regulation fit for purpose? What other types of additional information should be included in a replacement annex?

<ESMA\_QUESTION\_FAC\_6>

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<ESMA\_QUESTION\_FAC\_6>

1. : Are the definitions proposed to be carried over to the new regime, and new definitions proposed adequate? Should any additional definitions be added?

<ESMA\_QUESTION\_FAC\_7>

The definition of ‘profit forecast’ should be limited to information pertaining to the current or immediate subsequent financial year. Any period beyond that has more the character of a plan or intention and less that of a (reliable) forecast. This would help alleviate some of the challenges that have been faced by issuers when applying the current definition to prospective financial information that has been required to be made public under the securities laws of some European jurisdictions.

Consequently, our proposal is to delete the reference to financial periods subsequent to the current or immediate subsequent period and the definition would then read as follows:

“[…] likely level of profits or losses for the current or immediate subsequent financial period ~~and/or financial periods subsequent to that period~~, or contains data from which […]”.

<ESMA\_QUESTION\_FAC\_7>

1. : What is the overall impact of the above technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that the proposed technical advice will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_8>

Once issuers and advisers have got used to the proposed new formats, we do not anticipate a significant change in terms of costs and benefits to issuers on an ongoing basis.

<ESMA\_QUESTION\_FAC\_8>

1. : Do you agree that the scope of NCA approval should be included in the cover note? If not, please provide your reasoning.

<ESMA\_QUESTION\_FAC\_9>

We agree that such disclosure may be beneficial. However, we would propose that the language describing scope of the NCA’s approval should be more detailed and elaborate as compared to your proposal in no. 56 of the consultation paper which for example lacks any further explanations on the contents of the standards of completeness, comprehensibility and consistency and any clarification that the factual correctness of the content is not in the scope of the NCA’s approval.

At the same time, it is important that such language is prescribed by either ESMA or the NCA, to which the preparer of the prospectus can refer to, since it is not a preparer’s responsibility to assess and describe the scope of NCA approval.

<ESMA\_QUESTION\_FAC\_9>

1. : Do you agree that the requirement for issuers of equity and retail non-equity to include selected financial information in the prospectus can be removed without significantly altering the benefits to investors?

<ESMA\_QUESTION\_FAC\_10>

We believe that it is beneficial to the investors and other users of a prospectus to see financial information compactly presented for several periods side by side, especially where the financial track record is represented by three separate sets of financial statements AND to be able to comment on any possible lack of comparability of such information. Therefore, we believe that providing tables that compare the most significant financial and non-financial data is very useful.

However, in cases where this level and detail of information is presented already elsewhere in the prospectus, e.g. the summary or the OFR, a reference to such information should be provided instead of repeating the information.

<ESMA\_QUESTION\_FAC\_10>

1. : Do you agree that issuers should be required to include their website address in the prospectus? Do you agree that issuers should be required to make documents on display electronically available? Would these requirements imply any material additional costs to issuers?

<ESMA\_QUESTION\_FAC\_11>

We agree; a reference to a website of the issuer, if such website exists, is desirable.

We agree; documents on display in electronic form should be a requirement, but already done so by most issuers.

We believe that there would be no material additional costs.

<ESMA\_QUESTION\_FAC\_11>

1. : Do you consider that a description of material past investments is necessary information for the purpose of the prospectus?

<ESMA\_QUESTION\_FAC\_12>

We do not consider a description of material past investments a necessary information *per se*. We do consider detailed information on capital expenditures essential, but any duplication of this information is unnecessary and increases the risk of inconsistency (e.g. between suggested new item 5.2 and suggested new item 10.2).

<ESMA\_QUESTION\_FAC\_12>

1. : Do you agree with the proposal to align the OFR requirement with the management reports required under the Accounting Directive? Would this materially reduce costs for issuers?

<ESMA\_QUESTION\_FAC\_13>

We do agree that the requirements for the OFR should be further aligned with the requirements for the management report under the Accounting Directive.

We, however, propose to adapt the language in suggested new item 9.1 so that it only pertains to the part of the management report that reflects the requirements of the Accounting Directive. This restriction is necessary since in some jurisdictions national regulatory requirements increase the content of the management report beyond the requirements of the Accounting Directive.

The current phrasing would lead to the undesired result that information that would normally not be included in an OFR such as a prognosis report required of German companies would need to be included in the OFR going forward.

We would suggest to amend the last sentence of item 9.1 to read as follows:

“Item 9.1 may be satisfied through the inclusion of the information included in the management report ~~referred to~~ required by Articles 19 and 29.1 of Directive 2013/34/EU.”

<ESMA\_QUESTION\_FAC\_13>

1. : Do you agree with ESMA’s proposal to require outstanding profit forecasts for both equity and non-equity issuance to be included? Do you agree with the deletion of the obligation to include an accountant’s or an auditor’s report for equity and retail non-equity? Please provide an estimate of the benefits for the issuers arising from the abovementioned proposals. Would these requirements significantly affect the informative value of the prospectus for investors?

<ESMA\_QUESTION\_FAC\_14>

***1. Guidance on outstanding profit forecasts desired:***

ESMA should make a clear statement and propose a clear guidance as to when a profit forecast is outstanding in order to reduce uncertainty.

In some countries issuers and auditors have to determine on a case by case basis what procedures need to be performed to report on the proper compilation of the profit forecast. Having an obligation set in the Regulation could lead to a common framework for the procedures to be performed.

***2. Compulsory inclusion of outstanding profit forecasts in equity prospectuses:***

We agree with respect to the compulsory inclusion of outstanding profit forecasts in equity prospectuses.

***3. No compulsory inclusion of profit forecasts in non-equity prospectuses:***

We disagree with respect to the compulsory inclusion of profit forecasts in non-equity prospectuses. The future performance of the issuer is not as important for non-equity investors as for an equity investor. For a non-equity investor the issuer’s ability to pay the coupon is much more important. Therefore, cashflow management and indebtedness are in the focus. To include profit forecasts in non-equity prospectuses would of little value to the investors.

***4. Benefits of Auditor’s Reports on the proper compilation of Profit Forecasts:***

Whilst we understand the motivation for removing the requirement of auditing on profit forecast in general, we do not deem it prudent to include profit forecasts in a prospectus without the obligation to have it reported on by an independent third party as it would reduce the level of confidence for investors especially where issuers have chosen to include profit forecasts in a prospectus. In this regard, it is important to understand that the requirement for a report on profit forecasts was introduced in order to protect investors by increasing due diligence on the preparation of a forecast.

Investor’s reliance on this kind of information is very high. All other information included in a prospectus that is as specific and as important for the investment decision requires an opinion of an independent third party (audit of financial statements, of pro forma financial information or valuation).

Issuers often have very diverse planning systems and their knowledge towards the requirements of a profit forecast in accordance with the Prospectus Directive and the difference between this and a forecast given to the market in the normal course of business due to national requirements is often limited. Without the assistance of advisors reliance and comparability of profit forecasts will be limited. Without the obligation to have the proper compilation of a profit forecast audited, there is limited incentive for the issuers and other parties involved to perform due diligence on such information.

This is especially important where an issuer voluntarily chooses to include a profit forecast only in a prospectus in order to explicitly support the offering of the securities in question.

***5. Our alternative suggestion:***

We do understand that requiring auditors to report on outstanding forecasts can be perceived as a burden to issuers and one option would be to remove the reporting requirement in such cases.

A removal of the reporting requirement on outstanding profit forecasts could be achieved by reinstating the first paragraph of existing item 13.2 with the following modifications included at the start:

“Where an issuer chooses to include a new profit forecast or a new profit estimate, a report prepared by independent accountants or auditors stating that in the opinion of the independent accountants or auditors the forecast or estimate has been properly compiled on the basis stated, and that the basis of accounting used for the profit forecast or estimate is consistent with the accounting policies of the issuer.”

And inserting the following words at the start of item 13.3 :

“Where the issuer includes a previously published profit forecast or estimate pursuant to point 13.1, the prospectus shall include a statement that the profit forecast or estimate has been compiled on the basis stated and prepared on a basis i) comparable with the annual financial statements and ii) consistent with the issuer’s accounting policies”.

Such a change would also have the benefit of eliminating any duplication of reporting requirements. For example, in Germany the auditors are legally required to address the prognosis report included in a German company’s management report. It would in any case have to be made clear that such already existing auditor’s report would be sufficient for reporting in the prospectus, as well, provided that it meets the same requirements as those for reporting on the proper compilation of a profit forecast.

Such change would also avoid fourth quarter or preliminary announcements of annual results being needed to be reported on taking away the need for the additional language inserted into the existing item 13.2 addressing concerns over the impact of a fourth quarter or preliminary announcement being seen as a profit estimate.

To be in a position to issue the report, auditors do challenge the robustness of the preparation process and the list of assumptions, including making sure that the assumptions are correctly described, which provides added value to prospective investors and additional comfort to the regulator.

***6. Effort/Costs:***

The timely effort going into the audit of a profit forecast can be considerable and can take up to several weeks. However, in comparison to the overall costs of an IPO it is not a significant part.

From our point of view, it is quite likely that underwriting banks will nevertheless ask for auditors to be engaged to provide a “private report” to support their diligence obligations which is why the anticipated cost saving may not be achieved in practice.

<ESMA\_QUESTION\_FAC\_14>

1. : Do you agree with the proposal to explain any ‘emphasis of matter’ identified in the audit report?

<ESMA\_QUESTION\_FAC\_15>

Investors may automatically assume that audit reports are issued under the Audit Directive and Audit Regulation. Where this is the case, we are of the opinion that a requirement to make further explanations regarding modifications and qualifications of the audit opinion (including any emphasis of matter paragraphs) should not be necessary, since the audit opinion is designed to be self explanatory.

We, however, agree that if audit reports are issued under a different set of rules than Audit Directive and Audit Regulation, an explanation may be useful to provide full clarity on the underlying issues.

<ESMA\_QUESTION\_FAC\_15>

1. : Should there be mandatory disclosure of the size of shareholdings pre and post issuance where a major shareholder is selling down? Would this requirement imply any material additional costs to issuers?

<ESMA\_QUESTION\_FAC\_16>

We agree that the information on the size of shareholdings after the issuance might be of additional value to the investor. However, depending on the actual structure of the transaction, this information might not be available, or only available as an assumption, at the time of the prospectus. In addition, when a registration document is approved at an earlier time, this information might not be available at all. Therefore, we suggest that this requirement should rather be introduced in the securities note and should be restricted to the extent possible.

<ESMA\_QUESTION\_FAC\_16>

1. : Do you consider that the new requirement to disclose potential material impacts on the corporate governance would provide valuable information to investors?

<ESMA\_QUESTION\_FAC\_17>

We agree.

<ESMA\_QUESTION\_FAC\_17>

1. : Do you agree with the proposal to clarify the requirement for restated financial information?

<ESMA\_QUESTION\_FAC\_18>

We agree that clarification regarding the restatement is necessary.

The language in suggested new item 20.1 under the heading “Change of accounting framework” is repetitive with the first and the second paragraphs covering the same point in different language.

We prefer the phrasing of the new second paragraph and, therefore, recommend that the first paragraph should be deleted.

With regard to the second paragraph, the first sentence is misleading as IFRS itself can require the issuer to restate financial statements if changes in the framework apply. We suggest that this sentence should be replaced in its entirety by the following sentence:

“It is not required to restate audited financial statements due to changes within the accounting framework solely for purposes of the prospectus.“

and should be moved to the end of the paragraph as last sentence.

We would also suggest to amend the current second sentence to make it clear that it should be the accounting policies to be adopted in preparing the next set of financial statements and thereby avoiding any implicit suggestion that the prospectus requirements may override transitional provisions provided for in the applicable reporting framework. The text can be simplified to read:

“If an issuer intends, or is required, to change the accounting standards framework in its next financial statements, the last year’s financial statements in the registration document, including comparative information for the previous year, must be presented in accordance with the new accounting standards framework as well as any legislation applicable to such financial statements.”

<ESMA\_QUESTION\_FAC\_18>

1. : Do you agree with the lighter requirement in relation to replication of the issuer’s M&A in the prospectus? Would this significantly affect the informative value of the prospectus for investors?

<ESMA\_QUESTION\_FAC\_19>

We agree. We do not anticipate that such lighter requirements would significantly affect the informative value of the prospectus for investors.

<ESMA\_QUESTION\_FAC\_19>

1. : Should any further changes be made to the share registration document? Please advise of any costs and benefits implied by the further changes you propose.

<ESMA\_QUESTION\_FAC\_20>

**1.**

We do not deem a specific section on Employees being useful for investors. It is not included in other annexes and

* Item 17.1 often duplicates information already included in the management report (as part of the report on corporate social responsibility) and/or in the notes to the financial statements and/ or under items 9.1/9.2 where staff costs are analysed.
* Item 17.2 may be more relevant if included within item 14.1.

**2.**

* In item 20.1 we note that you have changed the term “historical financial information” to “annual financial statements”. We would suggest that you delete the “annual” throughout the whole schedule as financial statements can be for periods other than one year.
* The 36 month rule in the second point in this item then makes sense. In that sentence we would suggest to include “financial” in the clause:

“the audited financial statements shall cover at least 36 months,”

* Again in item 20.1, we note that you have deleted the requirement for an issuer that has been operating for less than one year to include audited financial statements in its prospectus. We agree that this provision was unclear but do believe that where issuers have not been required to prepare financial statements that they should be required to include financial information in the prospectus. One way you could achieve this is by amending the text from the existing item 20.6 as follows:

“If the registration document is dated more than nine months after the date of incorporation of the issuer or the date to which the last audited financial statements were prepared, it must contain interim information, …”

**3.**

* We note that the new text inserted into what was item 20.6 includes the following:
* “Interim financial information should be prepared in accordance with the requirements of the Accounting Directive or IFRS as the case may be.”
* Whilst IFRS includes a standard specific to interims (IAS 34), the Accounting Directive makes no reference to interim financial information. As a result, we would interpret the new requirement as requiring EU domiciled non-IFRS reporters to prepare any interim financial information as if they were their annual accounts. This is clearly quite onerous and exceeds that required of IFRS reporters where summary financial statements may be prepared. We would recommend that you include text consistent with that in Article 5 of the Transparency Directive. The text should then be amended along the following lines:

“For issuers required to use IFRS interim financial information should be prepared in accordance with applicable IFRS.

For issuers required to use the Accounting Directive interim financial information should be prepared on a basis consistent with that adopted in their financial statements and comprise a condensed set of financial statements that must contain, as a minimum the following:

(a) a condensed balance sheet;

(b) a condensed profit and loss account; and

(c) explanatory notes on these accounts.”

<ESMA\_QUESTION\_FAC\_20>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_21>

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<ESMA\_QUESTION\_FAC\_21>

1. : Do you consider that the requirement for a working capital statement should be different in the case of credit institutions and insurance companies?

<ESMA\_QUESTION\_FAC\_22>

We note that you have introduced this question without any explanation of the point in question. However, following the implementation of the Prospectus Directive in 2005, the requirement for a working capital statement was included in the prospectus disclosure requirements, which from our recollection was completely new for some European jurisdictions. For other European jurisdictions such as Ireland and the UK the requirement extended for the first time to banks and insurance companies. Since that time extensive market practice has developed, notably in Ireland and the UK where third party diligence is required in support of other regulatory obligations when prospectuses are issued, that provides a basis that supports the making of a working capital statement by a bank or insurance company.

We believe that to remove this requirement would take away information that is currently seen by investors as useful. We recommend that ESMA considers providing Level 3 guidance that would provide a consistent basis for the making of working capital statements by banks and insurance companies. We would be delighted to meet with you to share our experience in this regard.

<ESMA\_QUESTION\_FAC\_22>

1. : Do you agree that issuers should be required to update their capitalisation and indebtedness table if there are material changes within the 90 day period? Would this imply any material additional cost to issuers? If yes, please provide an estimation.

<ESMA\_QUESTION\_FAC\_23>

We understand why disclosing material changes in capitalization and indebtedness could be useful to investors. However, capturing the necessary data to a level of granularity necessary to make the extent of disclosure required by paragraph 127 of the ESMA update of the CESR recommendations (ESMA/2013/319) assuming these are retained on implementation of the new Regulation may prove quite challenging and costly for many issuers. We do not agree that it is necessary require issuers to update the table.

An alternative solution to a specific material change requirement in new item 3.2 would be to move the existing Annex I item 20.9 significant change statement requirement to the securities note annex and to make it clear through Level 3 measures that by financial position it is expected that an issuer’s capitalisation and indebtedness would be covered. Indeed, this disclosure is more appropriately included in the securities note annex as that is the time at which such information is relevant to an investor. Disclosure in a registration document that may have been published before a securities offering has been concluded is of little relevance to investors.

In passing, we would note that paragraph 127 of the ESMA Update of the CESR Recommendations also includes text allowing the capitalisation component of the statement to be drawn up as at the date of the issuer’s last published financial information where this was before the 90 day period commenced. We believe you should regularise this by separating out to two requirements to differentiate capitalisation from indebtedness. This could be achieved by deleting “capitalisation and” from the first paragraph of point 3.2 and by including a new paragraph as follows:

“A statement of capitalisation as of the date of the last published annual or interim financial information.”

<ESMA\_QUESTION\_FAC\_23>

1. : Do you consider the changes to dilution requirements would be helpful to investors at the same time as being feasible to provide for issuers?

<ESMA\_QUESTION\_FAC\_24>

We disagree with the requirement stipulated in new suggested item 9.1 b) regarding net asset value per share, because the net asset value per share has no relation to the offer price and will vary significantly from issuer to issuer even within the same industry. This item very much depends on the corporate acquisition and M&A history of the issuer (values may differ significantly if a company has been previously experienced a change in its shareholders composition or has acquired significant subsidiaries (and when within the time periods to be covered in a prospectus)). Such variation, however, is solely driven by accounting requirements and not by the actual share price or fair value of the company.

Please also, see answer to question 16.

<ESMA\_QUESTION\_FAC\_24>

1. : Do you agree that the information solicited by item 9.2 is important for investors?

<ESMA\_QUESTION\_FAC\_25>

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<ESMA\_QUESTION\_FAC\_25>

1. : Do you consider that any further changes be made to the equity securities note? Please advise of any costs and benefits that would be incurred by the further changes you propose.

<ESMA\_QUESTION\_FAC\_26>

1) We would deem it useful to clarify whether the working capital statement under new suggested item 3.1 needs to be made with or without consideration of the proceeds of the transaction itself.

2) It is possible that an issuer could choose to include pro forma financial information in a securities note for example to illustrate the impact of the receipt of securities issue proceeds on its balance sheet or income statement. Consistent with response to question 54 in ESMA’s Prospectuses: Questions and Answers (ESMA/2016/1674) an item should be included as follows:

“Any Pro forma financial information is to be presented as set out in Annex 12 and must include the information included therein including the report prepared by independent accountants or auditors.”

<ESMA\_QUESTION\_FAC\_26>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_27>

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<ESMA\_QUESTION\_FAC\_27>

1. : Do you agree with the proposal to delete disclosure on principal investments and replace this with a requirement to provide details on the issuer’s funding structure and borrowing requirements? Would this significantly affect the informative value of the prospectus for investors?

<ESMA\_QUESTION\_FAC\_28>

We agree. Please see also our answer to question no. 12.

<ESMA\_QUESTION\_FAC\_28>

1. : Do you agree that an issuer of retail non-equity should be required to include a credit rating previously assigned to it in the prospectus?

<ESMA\_QUESTION\_FAC\_29>

We would deem an existing credit rating as a material information in connection with the issuance of non-equity instruments. Therefore, we would expect it to be included in non-equity prospectuses irrespective of whether there is a specific requirement in for it in the directive or not.

<ESMA\_QUESTION\_FAC\_29>

1. : Do you agree with the proposal to remove the requirement for profit forecasts and estimates to be reported on? Would this significantly affect the informative value of the prospectus for investors?

<ESMA\_QUESTION\_FAC\_30>

As noted in our response to question no. 14 we believe that where an issuer chooses to include a profit forecast in a prospectus investors benefit from the fact that assurance is provided on the proper compilation of a profit forecast.

<ESMA\_QUESTION\_FAC\_30>

1. : Do you agree with the proposal that outstanding profit forecasts and estimates should be included in the registration document?

<ESMA\_QUESTION\_FAC\_31>

We disagree with the proposal to require outstanding forecasts to be included in non-equity prospectuses.

In the past, there was a difference in the view of ESMA regarding profit forecasts in connection with equity as compared to non-equity instruments, in connection with the question whether an outstanding profit forecast would have to be included in the prospectus. The reason for this difference was, to our understanding, that with non-equity instruments the performance of the company in the next period was less important than in connection with equity. Therefore, an outstanding profit forecast was considered material information for an equity prospectus, but not for a non-equity prospectus.

In our opinion, this reasoning still has merit and this distinction should be the decisive one.

<ESMA\_QUESTION\_FAC\_31>

1. : Do you agree with the deletion of the disclosure requirement related to board practices? Would this significantly affect the informative value of the prospectus for investors?

<ESMA\_QUESTION\_FAC\_32>

We agree. It would not significantly affect the informative value of the prospectus for investors.

<ESMA\_QUESTION\_FAC\_32>

1. : Do you consider that any further changes should be made to the retail debt and derivatives registration document? Please advise of any costs and benefits that would be incurred by the further changes you propose.

<ESMA\_QUESTION\_FAC\_33>

It is possible that an issuer could choose to include pro forma financial information in a registration document for example to illustrate the impact of a transaction on its balance sheet or income statement. Consistent with response to question 54 in ESMA’s Prospectuses: Questions and Answers (ESMA/2016/1674) an item should be included as follows:

“Any Pro forma financial information is to be presented as set out in Annex 12 and must include the information included therein including the report prepared by independent accountants or auditors.”

There would be no additional cost as this is already required.

<ESMA\_QUESTION\_FAC\_33>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_34>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_34>

1. : Do you agree with the removal of the requirement for wholesale non-equity issuers to restate their financial statements? Would this significantly affect the informative value of the prospectus for investors?

<ESMA\_QUESTION\_FAC\_35>

We do not agree with the removal of the requirement. There are a number of instances where it makes sense to differentiate between the requirements for retail debt and wholesale debt, where institutional investors need less information to make an informed investment decision but, from our view, the removal of the obligation to restate financial statement is not such a case.

A removal would effect that an issuer who reports under national GAAP and offers debt instruments to institutional investors and admits these instruments to a regulated market afterwards, would prepare the prospectus on the basis of national GAAP figures only. All models prepared by investors or analysts would be based on these figures. As soon as the instruments would be admitted to regulated market, the issuer would need to report under IFRS. All trend information would be no longer applicable and all models would not hold up anymore. This may cause a lack of confidence and may adversely affect markets.

<ESMA\_QUESTION\_FAC\_35>

1. : Do you consider that any further changes be made to the wholesale debt and derivatives registration document? Please advise of any costs and benefits that would be incurred by the further changes you propose.

<ESMA\_QUESTION\_FAC\_36>

It is possible that an issuer could choose to include pro forma financial information in a registration document for example to illustrate the impact of a transaction on its balance sheet or income statement. Consistent with response to question 54 in ESMA’s Prospectuses: Questions and Answers (ESMA/2016/1674) an item should be included as follows:

“Any Pro forma financial information is to be presented as set out in Annex 12 and must include the information included therein including the report prepared by independent accountants or auditors.”

There would be no additional cost as this is already required.

<ESMA\_QUESTION\_FAC\_36>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_37>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_37>

1. : Do you agree with the way in which disclosure on taxation has been reduced? Would this significantly affect the informative value of the prospectus for investors?

<ESMA\_QUESTION\_FAC\_38>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_38>

1. : Do you consider there are any negative consequences of the requirement to make details on representation of security holders available electronically and free of charge? Would this imply any material additional costs to issuers? If yes, please provide an estimation.

<ESMA\_QUESTION\_FAC\_39>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_39>

1. : Do you consider that expenses charged to the purchaser should also include implicit costs i.e. those costs included in the price (item 5.3.1)?

<ESMA\_QUESTION\_FAC\_40>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_40>

1. : Do you agree with the proposal that the issue price of the securities to be included in the prospectus in the case of an admission to trading?

<ESMA\_QUESTION\_FAC\_41>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_41>

1. : Do you consider that any further changes be made to the retail debt and derivatives securities note? Please advise of any costs and benefits that would be incurred by the further changes you propose.

<ESMA\_QUESTION\_FAC\_42>

It is possible that an issuer, having already published a registration document, could choose to include pro forma financial information in a securities note for example to illustrate the impact of the receipt of securities issue proceeds on its balance sheet or income statement. Consistent with response to question 54 in ESMA’s Prospectuses: Questions and Answers (ESMA/2016/1674) an item should be included as follows:

“Any Pro forma financial information is to be presented as set out in Annex 12 and must include the information included therein including the report prepared by independent accountants or auditors.”

There would be no additional cost as this is already required.

<ESMA\_QUESTION\_FAC\_42>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_43>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_43>

1. : Do you consider that any further changes be made to the wholesale debt and derivatives securities note? Please advise of any costs and benefits that would be incurred by the further changes you propose.

<ESMA\_QUESTION\_FAC\_44>

It is possible that an issuer, having already published a registration document, could choose to include pro forma financial information in a securities note for example to illustrate the impact of the receipt of securities issue proceeds on its balance sheet or income statement. Consistent with response to question 54 in ESMA’s Prospectuses: Questions and Answers (ESMA/2016/1674) an item should be included as follows:

“Any Pro forma financial information is to be presented as set out in Annex 12 and must include the information included therein including the report prepared by independent accountants or auditors.”

There would be no additional cost as this is already required.

<ESMA\_QUESTION\_FAC\_44>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_45>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_45>

1. : Do you agree with the proposal to make derivate disclosures a building block?

<ESMA\_QUESTION\_FAC\_46>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_46>

1. : Do you agree with the proposal to reclassify the how the return on derivatives take place from B to A? If not, please explain why.

<ESMA\_QUESTION\_FAC\_47>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_47>

1. : Do you consider agree with ESMA’s proposals to enhance the disclosure in relation to situations where investors may lose all or part of their investment?

<ESMA\_QUESTION\_FAC\_48>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_48>

1. : Do you consider that the requirements should be different where the return of the investment is linked to the credit of other assets (i.e. credit linked securities) than where the return is linked to the value of a security?

<ESMA\_QUESTION\_FAC\_49>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_49>

1. : Do you consider that any further changes be made to the derivatives securities building block? Please advise of any costs and benefits that would be incurred by the further changes you propose.

<ESMA\_QUESTION\_FAC\_50>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_50>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_51>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_51>

1. : Do you agree with the proposed amendments to the annex relating to the underlying share?

<ESMA\_QUESTION\_FAC\_52>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_52>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_53>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_53>

1. : Do you agree that the annex for third countries and their regional and local authorities should remain unchanged (with the exception of the reference to Member States)?

<ESMA\_QUESTION\_FAC\_54>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_54>

1. : Do you agree with the proposal relating to the asset backed securities registration document?

<ESMA\_QUESTION\_FAC\_55>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_55>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_56>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_56>

1. : Do you agree with the proposal relating to the asset backed securities building block?

<ESMA\_QUESTION\_FAC\_57>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_57>

1. : Do you agree with the proposal to allow reduced disclosure where the securities comprising the assets are listed on an SME Growth Market?

<ESMA\_QUESTION\_FAC\_58>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_58>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_59>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_59>

1. : Do you agree with the amendments to the pro forma building block? Should any further amendments be made to this annex? Please advise of any costs and benefits implied by the further changes you propose.

<ESMA\_QUESTION\_FAC\_60>

1. In item 7 “Requirements for additional information” should be further clarified.

2. Please also further clarifiy, what “if applicable, the financial statements […] of the (to be) acquired business” means. It is unclear, as to when this requirement is applicable.

3. We wonder whether you intend to require the inclusion of the financial statements of the acquired business or entity as a whole for all acquisitions or would it be limited to acquisitions over a certain threshold? Would an auditor’s review or audit report be required on these underlying financial statements? Any clarification in that regard would be highly appreciated.

4. Furthermore, we propose to clarify that any pro forma financial information included in a non-equity prospectus should comply with the requirements set out in the pro forma building block.

5. Please clarify, that “accounting policy adjustments” in item 1(b) no.2 are such adjustments that may have to be applied to the financial statements of a target.

6. Please also clarify in this sentence, that such accounting policy adjustments could also be included in the notes to the pro forma financial information, instead of in a column on the face of the pro forma financial information.

<ESMA\_QUESTION\_FAC\_60>

1. : Do you agree that the additional building block for guarantees does not need to change other than the minor amendments proposed by ESMA?

<ESMA\_QUESTION\_FAC\_61>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_61>

1. : Do you think that depository receipts are similar enough to equity economically to require the inclusion of a working capital statement and / or a capitalisation and indebtedness statement? Please advise of any costs and benefits that would be incurred as a result of this additional disclosures.

<ESMA\_QUESTION\_FAC\_62>

As there is no requirement for the underlying to be separately listed and therefore subject to any securities market regulations, we agree that there should be a requirement for a working capital statement to be included.

<ESMA\_QUESTION\_FAC\_62>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_63>

We note that you have mirrored the changes to the profit forecast and historical financial information requirements in this schedule that have been proposed in the share registration document. We would refer you to our responses in that regard that address these paragraphs.

In addition, it is possible that an issuer, having already published a registration document, could choose to include pro forma financial information in a depositary receipt prospectus for example to illustrate the impact of a transaction or the receipt of the securities issue proceeds on its balance sheet or income statement. Consistent with response to question 54 in ESMA’s Prospectuses: Questions and Answers (ESMA/2016/1674) an item should be included as follows:

“Any Pro forma financial information is to be presented as set out in Annex 12 and must include the information included therein including the report prepared by independent accountants or auditors.”

There would be no additional cost as this is already required.

<ESMA\_QUESTION\_FAC\_63>

1. : Do you agree with the changes proposed by ESMA for collective investment undertakings?

<ESMA\_QUESTION\_FAC\_64>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_64>

1. : Is greater alignment with the requirements of AIFMD necessary? If so, where?

<ESMA\_QUESTION\_FAC\_65>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_65>

1. : Do you agree with the proposal to allow reduced disclosure where the securities issued by the underlying issuer/collective investment undertaking/counterparty are listed on an SME Growth Market?

<ESMA\_QUESTION\_FAC\_66>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_66>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_67>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_67>

1. : Do you consider that any changes are required to the existing regime for convertible and exchangeable securities? If so, please specify.

<ESMA\_QUESTION\_FAC\_68>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_68>

1. : Do you consider that any other types of specialist issuers which should be added? If so, please specify.

<ESMA\_QUESTION\_FAC\_69>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_69>

1. : Do you agree with ESMA’s proposal not to develop a schedule for securities issued by public international bodies and for debt securities guaranteed by a Member State of the OECD?

<ESMA\_QUESTION\_FAC\_70>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_70>

1. : Do you agree that the URD disclosure requirements should be based on the share registration document plus additional disclosure items?

<ESMA\_QUESTION\_FAC\_71>

Ideally, there should be no additional information required beyond that of the share registration document. Otherwise, it defies the purpose of the URD. But please refer to our answer to question no.13.

<ESMA\_QUESTION\_FAC\_71>

1. : Should the URD schedule contain any further disclosure requirements?

<ESMA\_QUESTION\_FAC\_72>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_72>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_73>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_73>

1. : Do you consider that the proposed disclosure is sufficiently alleviated compared to the full regime? If not, where do you believe that additional simplification can be made? Please advise of any costs and benefits implied by the further changes you propose.

<ESMA\_QUESTION\_FAC\_74>

Item 11.4 now seems to duplicate 6.1./6.2 and we would suggest to delete this item as well.

<ESMA\_QUESTION\_FAC\_74>

1. : Should secondary disclosure differ depending on whether the issuer is listed on a regulated market or on an SME Growth Market?

<ESMA\_QUESTION\_FAC\_75>

We do not think that an alleviated disclosure regime should be available for SME growth market issuers. On growth markets the control over the disclosure is up to the operator of that market, who at the same time has a financial interest in keeping the regulatory pressure low.

An issuer on a regulated market is legally required to disclose information in accordance with the Transparency directive. Compliance with such disclosure requirements is controlled by a governmental independent regulator. This is not the case for SME growth markets, which are in most cases exchange regulated markets.

Therefore, the disclosure requirements for secondary offerings of growth market issuers should insure, that the necessary amount of information is included in the prospectus and not rely on unregulated disclosure.

<ESMA\_QUESTION\_FAC\_75>

1. : Do you consider that item 9.3 (information on corporate governance) is necessary?

<ESMA\_QUESTION\_FAC\_76>

We agree.

<ESMA\_QUESTION\_FAC\_76>

1. : Do you consider that information on material contracts is necessary for secondary issuance?

<ESMA\_QUESTION\_FAC\_77>

We consider information on material contracts as important for an investor in a primary issuance as for an investor in a secondary issuance.

<ESMA\_QUESTION\_FAC\_77>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_78>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_78>

1. : Do you consider that there is further scope for alleviated disclosure in the securities note ? Please advise of any costs and benefits implied by the further changes you propose.

<ESMA\_QUESTION\_FAC\_79>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_79>

1. : Is a single securities note, separated by security type, clear or would it be preferable to have multiple securities note schedules?

<ESMA\_QUESTION\_FAC\_80>

It seems preferable to us to limit the number of schedules overall and keep only one schedule for all secondary issuances.

<ESMA\_QUESTION\_FAC\_80>

1. : What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

<ESMA\_QUESTION\_FAC\_81>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_81>

1. Directive 2013/50/EU. [↑](#footnote-ref-2)