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| 15 December 2017 |

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| Response form for the Consultation Paper on draft RTS under the new Prospectus Regulation |
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| Date: 15 December 2017 |

Responding to this paper

ESMA invites responses to the questions set out throughout its Consultation Paper on draft RTS under the new Prospectus Regulation (ESMA31-62-802). Responses are most helpful if they:

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

ESMA will consider all responses received by 9 March 2018.

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:

* Insert your responses to the questions in the Consultation Paper in the present response form.
* Please do not remove tags of the type <ESMA\_QUESTION\_PR\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
* 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.
* When you have drafted your response, name your response form according to the following convention: ESMA\_PR\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_PR\_ABCD\_RESPONSEFORM.
* 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 draft RTS 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 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 the Consultation Paper

The Consultation Paper may be of particular interest to investors, issuers, 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 (Regulation (EU) 2017/1129).

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | Deutsche Bank |
| Activity | Banking sector |
| Are you representing an association? |  |
| Country/Region | Germany |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_ PR\_1>

TYPE YOUR TEXT HERE

<ESMA\_COMMENT\_ PR\_1>

# Key financial information in the summary

1. : Do you agree that the KFI extracted from the issuer’s historical financial information should be sign-posted?

<ESMA\_QUESTION\_PR\_1>

When the issuer is using audited financial information as well as Alternative Performance Measures (APMs), it seems reasonable to use such a sign-posting, so that investors can differentiate the given information. When the issuer is only referring to audited financial information, any additional flagging would be burdensome. In our view, it would be sufficient to just flag APMs that are not contained in the audited financial information rather than the other way around.

<ESMA\_QUESTION\_PR\_1>

1. : Would you suggest the inclusion of specific templates for other types of issuer? Please specify and explain your reasoning.

<ESMA\_QUESTION\_PR\_2>

From our point of view no further templates for other types of issuers are necessary.

<ESMA\_QUESTION\_PR\_2>

1. : Do you agree that cash flow from operations is the most useful measure of cash flow for non-financial entities issuing equity and that cash flow from financing activities and cash flow from investing activities are not so relevant for investors in equity securities?

<ESMA\_QUESTION\_PR\_3>

We agree that cash flow from operations typically is a useful measure. Nevertheless the usefulness of this measure is dependent on its corporate purpose. If a non-financial entity does not have substantial cash flows from operations, the disclosure of the cash flow of operation item in the summary would provide little added value for investors (in extreme cases this number could be zero). We would recommend that in those cases the non-financial entity not only disclose the cash flow from operations but also the cash flow item that would be the most useful measure for investors (cash flow from financing activities or cash flow from investing activities) depending on the nature of the entity in question. This would give investors a better overview of the financial situation on the entity and the issuer more flexibility in the presentation of its financials.

<ESMA\_QUESTION\_PR\_3>

1. : Given the page limit for the summary please provide your views on which items of historical financial information would be most useful for retail investors.

<ESMA\_QUESTION\_PR\_4>

The items necessary for an investor to make an informed assessment of assets and liabilities, profits and losses, financial position, and prospects of the issuer (Art. 6 (1) PR) do not differ depending on the kind of investor. Moreover, it is presumed that a retail investor is likely not to base his investment decision primarily on the historical financial information due to their complexity. Rather we expect a retail investor to focus on the narrative of the prospectus and its summary.

As a general comment on all proposed tables, for better comprehensibility and customary presentation, we would recommend to sort the columns chronologically, i.e. Interim/Year/Comparative Interim/Year -1. This sequence shows the most recent figures (interim) first. And an interim column would not appear warranted where the newest figures are the annual financials, as in this case the prospectus will only contain two, respectively three, years of annual financials. <ESMA\_QUESTION\_PR\_4>

1. : Do you agree with the proposal to allow the use of footnotes to describe APMs or could this result in lengthy footnotes and complicated explanations?

<ESMA\_QUESTION\_PR\_5>

Allowing footnotes would give issuers the possibility to explain the APMs incorporated into the summary. That would strengthen the understandability and investors could comprehend where this information has been taken from. Regarding the length of such footnotes, this problem could be solved in two ways: First, the page limit of the summary will probably prevent lengthy footnotes. Secondly, it is up to the national competent authorities to prevent the inclusion of lengthy footnotes, especially since this information is already incorporated elsewhere in the prospectus. Alternatively, the new RTS could allow a cross-reference to the explanation of the APM in the main body of the prospectus. This appears more appropriate given the purpose of the summary and the page limit. Also, this would avoid a duplication of the – usually quite technical- explanations of APMs

<ESMA\_QUESTION\_PR\_5>

1. : Do you agree that issuers should be given flexibility to present pro forma financial information as additional columns to the relevant tables or as a separate table? If not, should a format be mandated, bearing in mind the page limit for the summary as well as the requirement for the summary to be comprehensible?

<ESMA\_QUESTION\_PR\_6>

We agree that issuers should be given flexibility, if they want to present pro forma financial information. It will support the readability of the summary if the issuer can choose to present the pro forma financial information in a separate table or in additional columns in the relevant table.

<ESMA\_QUESTION\_PR\_6>

1. : Do you agree that complex financial information in the summary should be presented according to its presentation in the prospectus? If not, please specify and provide alternative ways of presentation.

<ESMA\_QUESTION\_PR\_7>

We agree that complex financial information should be presented in the summary according to the presentation in the prospectus.

Where reference is made to an “audit report” we would like to point out that we understand that reference should be made to an “auditor’s report” instead. Under International Standards of Auditing (ISA), the auditor’s report is the key deliverable communicating the results of the audit process to be made available to investors and other financial statement users (see https://www.iaasb.org/new-auditors-report, and particularly ISA 700.20, see http://www.ifac.org/system/files/downloads/a036-2010-iaasb-handbook-isa-700.pdf). Conversely the “audit report” is a quite lengthy document setting out the audit process and the reasoning for the results of the audit and constitutes an internal document between the auditor and the audited company.<ESMA\_QUESTION\_PR\_7>

1. : Which financial measures are most useful for retail investors to determine the health of a credit institution? Do you consider that the CET1 is comprehensible for retail investors? Please specify.

<ESMA\_QUESTION\_PR\_8>

In addition to the ones already selected, the following financial measures could prove useful for investors:

- Common Equity Tier capital in €bn

- Tangible shareholders’ equity in €bn

- Reported liquidity reserves in €bn.

The items necessary for an investor to make an informed assessment do not differ depending on the kind of investor. While comprehending financial measures may generally prove a challenge for some retail investors, this has never been, nor should it be, a reason not to provide this type of information to those that can make good use of it.<ESMA\_QUESTION\_PR\_8>

1. : Do you agree that it should be mandatory for credit institutions to disclose SREP information in relation to Common Tier One Equity, the minimum prudential capital requirements, the Total Capital Ratio and the Leverage Ratio in the summary?

<ESMA\_QUESTION\_PR\_9>

Since this information is already provided by credit institutions, we agree that the disclosure of such information shall be mandatory. This mandatory disclosure would result in a more recognisable presentation of the capitalisation requirements imposed upon an institution by the prudential regulator for investors.

<ESMA\_QUESTION\_PR\_9>

1. : Do you agree with the choice of measures for insurance companies?

<ESMA\_QUESTION\_PR\_10>

No comments.

<ESMA\_QUESTION\_PR\_10>

1. : Do you think it would be useful for retail investors to include a measure of historical performance for closed end funds in the summary?

<ESMA\_QUESTION\_PR\_11>

No comments.

<ESMA\_QUESTION\_PR\_11>

1. : Do you think that investment companies which are subject to capital requirements should be required to include regulated capital ratios in their summary?

<ESMA\_QUESTION\_PR\_12>

No comments.

<ESMA\_QUESTION\_PR\_12>

1. : Would the issuer, offeror or person asking for admission to trading incur costs if the proposed provisions are adopted? If so, please specify the nature of such costs, including quantifying them.

<ESMA\_QUESTION\_PR\_13>

As long as no financial measures are required that do not already exist, the additional costs are negligible. Having said that, the explanation of specific regulatory line items might require additional efforts to draft an explanation. However, if they are generally material for the assessment of such an issuer they will have to be included (and, hence, explained) anyway. Additional drafting costs are difficult to estimate, though, as they largely depend on a case-by-case analysis.

<ESMA\_QUESTION\_PR\_13>

# Data and machine readability

1. : Do you believe that the data related to the amount raised should be made mandatory? Please explain your reasons.

<ESMA\_QUESTION\_PR\_14>

No, we think this point should not be mandatory. It may make sense to submit the amount raised on a mandatory basis in respect of the issuance of equity securities, but this does not apply in those cases where notes, certificates or warrants are being issued on a Final Terms basis. Usually Final Terms will include a maximum number of securities an issuer may sell to the investors, which would be submitted to the NCA. In most cases this maximum amount will not be fully used and is therefore not a viable source of information for the investor.

<ESMA\_QUESTION\_PR\_14>

1. : Do you agree with the data items that have been identified as necessary for the purpose of classification as well as to allow for the compilation of the annual report under Article 47 of the Prospectus Regulation? Would you like to propose any additional items or suggest items that should in your view be deleted? Please explain your reasons.

<ESMA\_QUESTION\_PR\_15>

According to Annex VII the overall number of fields is 33. Considering the number of prospectuses and final terms that are filed with the NCAs this data collection seems quite extensive. If you consider the number of certificates, warrants and notes that will be filed with the NCAs using Final Terms (this number can be over 500.000 per issuer per year) it will put a significant burden on issuers; especially if the issuer (and not the NCA) has to provide all information separately for each security.

<ESMA\_QUESTION\_PR\_15>

1. : Do you agree with the ESMA proposal to maintain the current system in place whereby NCAs submit data to ESMA in XML format as the practical arrangement to ensure that such data is machine readable? Do you agree that, by keeping the data submission system unchanged, adaptation costs are minimised for the market at large?

<ESMA\_QUESTION\_PR\_16>

We agree to maintain the current setup. It is already effective and adaptation costs will be minimised for all market participants.

<ESMA\_QUESTION\_PR\_16>

1. : Do you agree that the proposed amendment to the technical advice on prospectus approval could contribute to provide clarity on the way data referred to in Annex VII are collected by NCAs?

<ESMA\_QUESTION\_PR\_17>

We welcome the proposed amendment as it provides clarity on the way data will be collected. Nevertheless the amount of data requested would be burdensome to provide for issuers, consider the overall number of fields, as mentioned in our response to Q15.

<ESMA\_QUESTION\_PR\_17>

1. : Do you have suggestions in relation to how the efficiency, accuracy and timeliness of the data compilation and submission process can be further improved? In your experience, is there any specific reporting format or standard that you would deem most appropriate in this context?

<ESMA\_QUESTION\_PR\_18>

For multi-issuances it would be advantageous if issuers could provide a data list for all securities included in the Final Terms instead for each security contained in the Final Terms. This would make it less onerous in those cases to provide a data list for each filed final terms instead. The data list in those cases could be a XML file that will include all necessary data for all issued securities. This type of data delivery is common for the information given to the clearing systems(s) and therefore would be something issuers are already familiar with.

Separately, we believe that approved Registration Documents (RDs) and Universal Registration Documents (URDs) should also be submitted to ESMA after approval and published in the Prospectus Register. This would allow an investor to see all approved prospectus documents relating to an issuer in one place. Coupling the upload of RDs and URDs to the approval of a securities note is also less efficient, as RDs and URDs will typically be used for many securities and therefore have to be uploaded many times. <ESMA\_QUESTION\_PR\_18>

# Advertisements

1. : Do you consider that an advertisement should contain at least a hyperlink to the website where it is published and where available and technically feasible additional information that would facilitate tracing the prospectus? Please provide examples of the additional information that you think would be helpful to include in the advertisement.

<ESMA\_QUESTION\_PR\_19>

We agree that advertisements should contain hyperlinks to the webpage where the advertisement is published as well as where the prospectus is or will be available. If the prospectus has been published before the advertisement, this hyperlink can be very precise (so that the prospectus is directly linked). In those cases where the prospectus has not been published, it should be sufficient to give a hyperlink to the webpage on which the prospectus will be published.

Furthermore an advertisement should also include a hyperlink to the webpage where the relevant final terms, in case these have been based on a base prospectus, have been published. In these cases the investor would be able to inform himself about the economic features of the product (by reading the final terms) as well as all other relevant aspects (which are included in the base prospectus).

It would not seem necessary that the advertisement, apart from such a hyperlink, contains additional information to help investors trace the prospectus. Only in those cases where the advertisement does not contain a hyperlink to the prospectus, it would be advantageous for an investor to include such additional information.<ESMA\_QUESTION\_PR\_19>

1. : Do you consider that the definition for complex securities set out in para 140 provides clarity to issuers and would be helpful in deciding when the comprehension alert referred to in Article 8(3)(b) of the PRIIPs Regulation should be included in an advertisement?

<ESMA\_QUESTION\_PR\_20>

We think that this approach would provide clarity under which circumstances a product is considered a complex security.<ESMA\_QUESTION\_PR\_20>

1. : Do you agree with the requirements suggested for Article 11 of the RTS? If not, please provide your reasoning.

<ESMA\_QUESTION\_PR\_21>

We agree with the requirements of Article 12 (1), (3) and (4) of the RTS, but we think that the proposed requirements of Article 12 (2) would be too burdensome (for details see our answer to question 22).

<ESMA\_QUESTION\_PR\_21>

1. : In particular, do you agree with the requirement to include warnings in advertisements? Do you consider that the suggested warnings are fit for purpose in terms of investor protection?

<ESMA\_QUESTION\_PR\_22>

We do not agree that these warnings should be included in advertisements. A reference that the document is an advertisement (Article 12(3)) should be sufficient. It should be clear to investors, before they make an investment decision, that there is a difference between an advertisement and a prospectus.

At most, the proposed warning 2 b) (“potential investors should read the prospectus before making an investment decision”) could be included in advertisements, since it will refer to the prospectus, which contains all necessary information (especially all risk factors) for investors.

It is also questionable whether investors would appropriately consider the warnings, especially as they will unnecessarily lengthen the advertisement and would make it more difficult to read. In addition, most proposed warnings will already be part of the prospectus summary. Including them into advertisements would be duplicative.

Furthermore, the product governance requirements of Article 9 of the Commission Delegated Directive (EU) 2017/593 will ensure that investors are sufficiently protected. The requirements of the Markets in Financial Instruments Directive II (MiFID II) (Art. 24 (3)) and the Delegated Regulation (EU) 2017/565 in Art. 44 do not foresee that advertisements have to contain special warnings either. They only require that the information provided by the issuer is fair, clear and not misleading.

Should ESMA still require to include these additional warnings, they should be kept as short as possible. A viable alternative would be to simply require a reference to a website where such warnings are posted. In a similar context, the RTS supplementing the Market Abuse Regulation (Commission Delegated Regulation (EU) 2016/958) which details how investment recommendations should be presented, could constitute a useful point of reference. It provides that where the required disclosure of conflicts of interest information is too lengthy compared to the length of an investment recommendation, the person who produces recommendations shall state where information on conflicts of interests can be directly and easily accessed. A similar provision for warnings might avoid the incorporation of lengthy cautionary language that may be disproportionate to the size of an advertisement.<ESMA\_QUESTION\_PR\_22>

1. : Would the issuer, offeror or person asking for admission to trading incur costs if the aforementioned provisions are adopted? If so, please specify the nature of such costs, including whether they are one-off or ongoing and, quantify them.

<ESMA\_QUESTION\_PR\_23>

There should be no additional major costs for an issuer if these provisions were to be adopted. Nevertheless, there may be some minor costs to adapt existing systems and workflows.

<ESMA\_QUESTION\_PR\_23>

# Supplements

1. : Do you agree that Article 2 of the First Commission Delegated Regulation should be carried over, in its entirety, to Level 2 under the new regime?

<ESMA\_QUESTION\_PR\_24>

The carrying over of Article 2 of the First Commission Delegated Regulation would provide stability regarding the evaluation if a supplement to the prospectus is necessary. Therefore we are fine with this approach.

<ESMA\_QUESTION\_PR\_24>

1. : Do you agree that the additional requirements identified from ESMA’s draft technical advice should also be included.

<ESMA\_QUESTION\_PR\_25>

As we commented in response to the consultation relating to the draft technical advice, we do not believe that the inclusion of outstanding profit forecasts or profit estimate should be made mandatory for non-equity securities. For cases where the inclusion is mandatory, however, it does make sense to require a supplement also when a forecast or estimate is published after approval of the prospectus.

In this context, we would like to reiterate that particularly in the context of the requirement to publish in a timely manner, a supplement the existing requirement to attach a related report prepared by independent accountants (Regulation 809/2004, annex I 13.2) is burdensome and should be abolished. It stands in contrast to the requirement to publish a supplement without undue delay after the occurrence of a trigger event according to Art. 17 PR. For listed issuers this requirement is also inconsistent with their disclosure obligations under Art. 17 MAR. <ESMA\_QUESTION\_PR\_25>

1. : Do you agree that the publication of audited financial statements by an issuer of retail debt or retail derivative securities should not trigger the requirement to publish a supplementary prospectus?

<ESMA\_QUESTION\_PR\_26>

We agree that it should be in the discretion of an issuer of retail debt or retail derivative securities to publish a supplement in case of the publication of audited financial statements. <ESMA\_QUESTION\_PR\_26>

1. : Would the issuer, offeror or person asking for admission to trading incur costs if the aforementioned provisions are adopted? If so, please specify the nature of such costs, including quantifying them.

<ESMA\_QUESTION\_PR\_27>

We assume that no major costs shall occur by adopting this provision. Especially since these provisions were already in place and issuers had to comply with them.

<ESMA\_QUESTION\_PR\_27>

# Publication

1. : Do you agree that only Article 6(1)(c) and 6(3) of the Second Commission Delegated Regulation need to be carried over to Level 2 under the new regime?

<ESMA\_QUESTION\_PR\_28>

We agree that both clauses shall be carried over. Furthermore, we welcome the proposed changes by ESMA in respect of the usage of hyperlinks. This would make it less burdensome for issuers to draft a prospectus, since they would not have to check the whole document if not allowed hyperlinks are included. Also the clarification in respect of the usage of a disclaimer on the website of the issuer for those investors that shall not be targeted by the offer is advantageous. <ESMA\_QUESTION\_PR\_28>

1. : Do you agree that no other publication provisions of the new Prospectus Regulation need to be specified by way of RTS? If not, please identify the provisions which should be specified.

<ESMA\_QUESTION\_PR\_29>

We think that no other provisions need to be inserted into the RTS.<ESMA\_QUESTION\_PR\_29>

1. : Do you believe that the proposed publication provisions will impose additional costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the type and nature of such costs, including whether they are one-off or on-going, and quantify them.

<ESMA\_QUESTION\_PR\_30>

We do not expect additional costs in respect of the proposed publication provisions.

<ESMA\_QUESTION\_PR\_30>