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| 13 July 2018 |

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| Response form for the Consultation Paper on Guidelines on risk factors under the Prospectus Regulation  |
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| Date: 13 July 2018 |

Responding to this paper

ESMA invites responses to the questions set out throughout its Consultation Paper on Guidelines on risk factors under the Prospectus Regulation. 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 05 October 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\_GRF\_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\_GRF\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_GRF\_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 Guidelines on risk factors under the 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

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

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| Name of the company / organisation | De Brauw Blackstone Westbroek |
| Activity | Audit/Legal/Individual |
| Are you representing an association? |[ ]
| Country/Region | Netherlands |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_GRF\_1>

TYPE YOUR TEXT HERE

<ESMA\_COMMENT\_GRF\_1>

*Specificity*

1. : Do you agree with the suggested draft guidelines on specificity? If not, please provide your reasoning.

<ESMA\_QUESTION\_GRF\_1>

In principle, we agree with the suggested draft guidelines on specificity. However, ESMA's guidance states that risk factors should not merely be copied from other documents published by other issuers or the same issuer previously if they are not relevant to the issuer/guarantor and/or the securities. This may suggest that risk factors may never be copied from previous prospectuses. We believe, however, that with regard to certain types of risk factors (e.g. a risk factor concerning that an active market for the shares may not develop or a risk factor concerning price fluctuations), standard language should still be allowed to be copied, where such risk factors are relevant to the issuer/guarantor and/or the securities. Such consistency in risk factor language actually adds to transparency, as the market will be able to recognize such risk factors and properly assess the risk described. As such, we do not think a blanket ban on copying risk factors is in the best interest of market participants. We suggest to make clear what kind of boilerplate risk factors may or may not be copied. <ESMA\_QUESTION\_GRF\_1>

*Materiality*

1. : Do you agree with the suggested draft guideline 3? If not, please provide your reasoning.

<ESMA\_QUESTION\_GRF\_2>

It is not entirely clear to us how the IFRS conceptual framework may be used in practice. Does this mean, for example, that we should align thresholds with the financial statements prepared on the basis of IRFS and/or that auditors should be more closely involved when drafting the risk factors? The work of an auditor in an IPO relates to the financial statements and not to the offering itself, and hence is fundamentally different compared to the drafting of a prospectus, including the risk factors. In practice, different thresholds for materiality for the financial statements and for risk factors exist. Using the same thresholds may lead to even more cumbersome risk factor sections. If the IFRS framework for "materiality" may be used by analogy, it should be made completely clear what the "framework" is, for example by incorporating the framework text in the guidelines. We believe the analogy to IFRS without copying the relevant texts may cause more confusion than clarity. We suggest ESMA to be cautious in this respect.

<ESMA\_QUESTION\_GRF\_2>

1. : Do you agree with the suggested draft guideline 4 on quantitative information? If not, please provide your reasoning.

<ESMA\_QUESTION\_GRF\_3>

No, we do not entirely agree with this guideline. It should be up to the issuer whether to use either quantitative or qualitative information – the issuer is best positioned to determine what would be the most relevant information for potential investors. Mandatory disclosure of quantitative information could be particularly burdensome (e.g., extra research if not already in annual accounts) and often very sensitive for the issuer (e.g., competitive and litigation risk). In addition, it is unclear what is meant with "Where available" in ESMA's additional information to the guideline "***Where available****, the disclosure of quantitative information should be included.*" Does this mean that the issuer has an obligation to actively assess the impact of the risk even if no number is disclosed in the financial statements? Given the difficulty of quantifying risks, in particular risks that may only materialize in the mid- or long term, there is a risk of forcing issuers to disclose unsubstantiated quantitative information or misinforming the public. We suggest to change the guideline such that quantitative information should only be included to the extent that this information is included in the financial statements, or if ESMA believes this is not the right approach, to change the guideline as follows: change "***Where available***(…)" to "*Where* ***appropriate*** (…)".

<ESMA\_QUESTION\_GRF\_3>

1. : Do you agree with the suggested draft guideline 5 on mitigating language? If not, please provide your reasoning.

<ESMA\_QUESTION\_GRF\_4>

We agree with this suggested draft guideline.

<ESMA\_QUESTION\_GRF\_4>

*Corroboration*

1. : Do you agree with the suggested draft guideline 6 on corroboration of specificity and materiality? If not, please provide your reasoning.

<ESMA\_QUESTION\_GRF\_5>

We agree with this suggested draft guideline. In para. 37 ESMA briefly states that the concept of materiality may be affected by the passage of time. We believe it would be useful if ESMA could elaborate on this point and possibly include such elaboration in the Draft Guidelines themselves.

<ESMA\_QUESTION\_GRF\_5>

*Presentation of risk factors across categories*

1. : Do you agree with the suggested draft guidelines on Presentation of risk factors across categories? If not, please provide your reasoning.

<ESMA\_QUESTION\_GRF\_6>

In principle we agree to presenting risk factors across categories. However, we do see a danger in creating too many categories. This may conflict with the principle expressed by ESMA of presenting the most material risk factors first. Each category may present the most material risk factors in that category first, but it may cause highly material risk factors to be presented further down in the prospectus, if they are part of one of the later categories.

<ESMA\_QUESTION\_GRF\_6>

1. : Do you agree with that the number of categories to be included in a risk factor section, should not usually exceed 10? If not, please provide your reasoning.

<ESMA\_QUESTION\_GRF\_7>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_GRF\_7>

*Focused/concise risk factors*

1. : Do you agree with the suggested draft guidelines on focused/concise risk factors? If not, please provide your reasoning.

<ESMA\_QUESTION\_GRF\_8>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_GRF\_8>

*Summary*

1. : Do you agree with the suggested draft guideline on risk factors in the summary? If not, please provide your reasoning.

<ESMA\_QUESTION\_GRF\_9>

The summary of the prospectus should contain a brief description of the most material risk factors. We wonder how this would work in relation to guideline 7 (risk factors in the risk factor section should be presented across categories with the most material risk factors presented first)? We suggest that ESMA provides guidance on whether it prefers the risk factors in the summary to be in order of materiality or in an order consistent with the risk factor chapter in the main body of the prospectus (which is divided into categories and hence likely not strictly in order of materiality.

<ESMA\_QUESTION\_GRF\_9>

*General*

1. : Do you agree with the proposed draft guidelines? Have you any further suggestions with regard to draft guidelines addressing a particular section or the guidelines in general?

<ESMA\_QUESTION\_GRF\_10>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_GRF\_10>

1. : Do you believe that market participants will bear any additional cost as an indirect effect of the suggested draft guidelines? If yes, please indicate the nature of such costs and provide an estimation.

<ESMA\_QUESTION\_GRF\_11>

Yes. In case issuers will for example be required to include quantitative information (guideline 4) they may need to engage in more/further research/analysis to be able to provide the information. This might result in significant additional costs for the issuer.

<ESMA\_QUESTION\_GRF\_11>