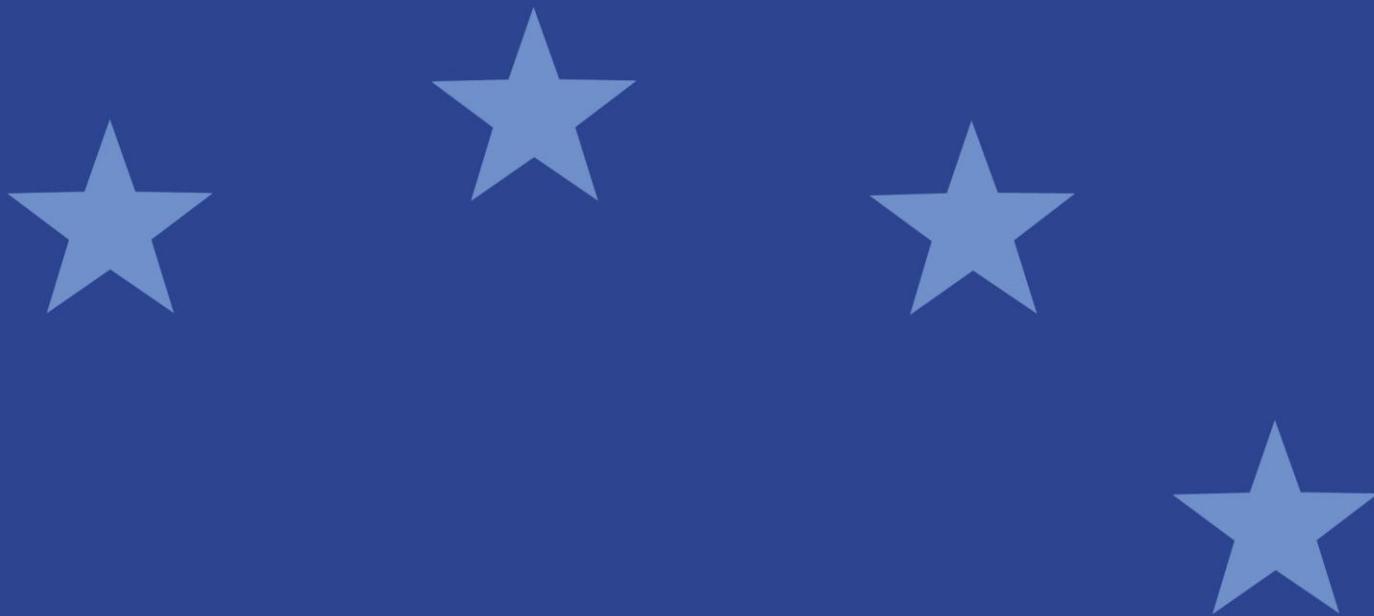




European Securities and
Markets Authority

Consultation Paper

**Draft Regulatory Technical Standards on specific situations that require the
publication of a supplement to the prospectus**



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- indicate the specific question to which the comment relates and respond to the question stated;
- contain a clear rationale, clearly stating the costs and benefits; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **14 June 2013**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically 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 under the heading 'Legal Notice'.

Who should read this paper?

This document will be of interest to all stakeholders. It would primarily be of 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 Directive 2003/71/EC of 4 November 2003 (the Prospectus Directive) as amended by Directive 2010/73/EU and Directive 2010/78/EU and its Regulation (Commission Regulation (EC) No 809/2004) and Delegated Regulations (Commission Delegated Regulation (EC) No 486/2012 and No 862/2012).

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Acronyms and definitions used

Commission Delegated Regulation No 486	Commission Delegated Regulation (EU) No 486/2012 of 30 March 2012 amending Regulation (EC) No 809/2004
Commission Delegated Regulation No 862	Commission Delegated Regulation (EU) No 862/2012 of 4 June 2012 amending Regulation (EC) No 809/2004
CP	Consultation Paper
ESMA	European Securities and Markets Authority
ESMA's Recommendations	ESMA update of the CESR recommendations - The consistent implementation of Commission Regulation (EC) No 809/2004 implementing the Prospectus Directive, Ref. ESMA/2011/81
EU	The European Union
FAQ/Q&A	Frequently Asked Questions, Questions & Answers – both relate to document: Questions and Answers – Prospectuses - 18th updated version – December 2012, Ref. ESMA/2012/855
NCA	National Competent Authority
RTS	Regulatory Technical Standard
TFEU	Treaty on the Functioning of the European Union
The Commission/EC	The European Commission
The Omnibus Directive	Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC
The PD/Prospectus Directive	Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC
The PR/Prospectus Regulation	Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements

I. Executive Summary

Reasons for publication

A procedure was established in Article 16 of the Prospectus Directive (Directive 2003/71/EC) to ensure that every significant new factor, material mistake or inaccuracy relating to information in the prospectus which is capable of affecting the assessment of the securities is mentioned in a supplement to the prospectus. However, a supplement is only required if such an event arises after the approval of the prospectus but before the closing of the offer or the time when trading on a regulated market begins.

Article 16(3) of the Prospectus Directive, as amended by the Omnibus Directive, provides that ESMA shall develop draft regulatory technical standards (RTS) to specify situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published.

This consultation is therefore being conducted in accordance with Article 16(3) of the Prospectus Directive, with the purpose of discharging ESMA's mandate.

Contents

Section II addresses the background for the proposals in the CP and RTS.

Section III sets out the scope of the RTS.

Section IV describes the test that ESMA believes must be performed when one is assessing whether a supplement to a prospectus is required.

Section V describes the information to be included in a supplement, the time constraints concerning the information in supplements and the proposals for the specific situations which systematically require the publication of a supplement.

Next steps

ESMA will consider all feedback received in relation to this consultation when finalising the draft RTS to be submitted to the European Commission by 1 January 2014 for endorsement.

If considered necessary, ESMA may within the above mentioned time limit launch consultations concerning draft RTSs under Article 16(3) of the Prospectus Directive or at a later stage provide further guidance on supplement related issues, which were not the focus of the current consultation.

II. Background

1. With the aim to ensure that any new matter liable to influence the assessment of the investment, arising after the approval of the prospectus but before the closing of the offer or the start of trading on a regulated market, could be properly evaluated by investors, a supplement procedure was established in Article 16 of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (hereinafter the “Prospectus Directive”).
2. Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 introduced the following changes in the Prospectus Directive in order to improve the supplement mechanism:
 - an explicit reference to the possibility to supplement the registration document in Article 9(4);
 - a clarification on the time when the obligation to supplement a prospectus ends in Article 16(1) by stating that “*the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs later*”; and
 - some adjustments in Article 16(2), in order to make clear that the withdrawal right only applies where i) the prospectus relates to an offer of securities to the public and ii) the triggering event occurs before the final closing of the offer to the public and the delivery of the securities.
3. The amended Article 16(2) also states that the 2-day period for the exercise of the right of withdrawal may be extended by the issuer or the offeror and that its final date should be stated in the supplement.
4. The Regulation (EU) No 1095/2010 establishing the European Securities and Markets Authority (ESMA) empowered ESMA to develop draft regulatory technical standards (hereinafter “draft RTS”) where the European Parliament and the Council delegate power to the European Commission (hereinafter “the Commission”) to adopt draft regulatory standards by means of delegated acts under Article 290 TFEU.
5. The Omnibus Directive identified a first set of areas in which consistent technical rules should contribute significantly and effectively to the achievement of the objectives of the relevant legislation.
6. Article 5(7) of the Omnibus Directive inserted a new paragraph 3 into Article 16 of the Prospectus Directive which reads as follows: “*In order to ensure consistent harmonisation, to specify the requirements laid down in this Article and to take account of technical developments on financial markets, ESMA shall develop draft regulatory technical standards to specify situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published. ESMA shall submit those draft regulatory technical standards to the Commission by 1 January 2014*”.
7. For the purpose of discharging its mandate, ESMA has drafted the draft regulatory technical standards which are presented in Annex IV and explained in Sections II, III, IV and V of this document. The cost benefit analysis of this proposal is set out in Annex III.
8. In order for ESMA to better reflect on comments received, please indicate any material concerns over the impact of the proposal, including if you consider it may lead to an unfair or disproportional

tionate financial or administrative burden (making where possible a quantitative assessment of costs in your responses). In addition please also indicate any possible advantages or benefits deriving from the implementation of this proposal.

III. Scope of the RTS

9. As mentioned above in paragraph 5, a new third paragraph in Article 16 of the Prospectus Directive states that ESMA shall develop draft RTS to specify situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires the publication of a supplement to the prospectus.
10. ESMA interprets Article 16(3) of the Prospectus Directive in the sense that the draft RTS should focus on technical rules which provide market participants with more legal certainty to determine whether a particular new factor, mistake or inaccuracy qualifies as a triggering event for producing a supplement to the prospectus in accordance with the first paragraph in Article 16 of the Prospectus Directive¹.
11. According to Article 16(1) of the Prospectus Directive, there are two prerequisites for considering that a new factor, mistake or inaccuracy relating to the information included in the prospectus requires the publication of a supplement. The significant new factor, material mistake or inaccuracy relating to the information included in the prospectus i) has to be capable of affecting the assessment of the securities and ii) arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs later.
12. Regarding the second pre-requisite, ESMA considers that there is no need for further clarification as the amendment in Article 16(1) of the Prospectus Directive has solved any uncertainty with regard to the time when the obligation to supplement a prospectus ends by stating that “the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs later”.
13. However ESMA is aware that the origin of many concerns in relation to the supplement procedure is the lack of certainty with regard to the first prerequisite in Article 16(1) of the Prospectus Directive, i.e. the significance of the new factor or materiality of the mistake or inaccuracy capable of affecting the assessment of the securities. Specifically, market practice has shown that it is not always clear whether the occurrence of a new factor triggers the obligation to publish a supplement. On the other hand, such difficulties are encountered less frequently for mistakes and inaccuracies.

¹ Paragraph 1 in Article 16 of the Prospectus Directive provides: “Every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs later, shall be mentioned in a supplement to the prospectus. Such a supplement shall be approved in the same way in a maximum of seven working days and published in accordance with at least the same arrangements as were applied when the original prospectus was published. The summary, and any translations thereof, shall also be supplemented, if necessary, to take into account the new information included in the supplement”.

14. Therefore ESMA considers that the draft RTS should identify a list of specific situations which should be considered as a significant new factor or a material mistake or inaccuracy and, therefore, systematically require the publication of a supplement.
15. Despite a situation being included in the list, a new prospectus could be required by the competent authority due to lack of consistency, completeness or comprehensibility of the full prospectus.
16. Furthermore, the draft RTS does not deal with situations not included in the list, where a supplement could be required on a case by case basis; or either a supplement or a new prospectus could be required. ESMA is aware that there might be other outstanding issues on supplements (e.g. whether new information on the terms and conditions of the securities and/or the offer should be allowed by means of a supplement) but considers that they would be out of the scope of this draft RTS.
17. Article 16 of the Prospectus Directive does not make a distinction between positive, negative or neutral change when mentioning the assessment of materiality or significance. ESMA understands that:
 - a positive as well as a negative change could be important for investors; and
 - it is difficult to assess what investors perceive as a negative, positive or neutral change as it would depend on their expectations.
18. On this basis, the list of specific situations which systematically require the publication of a supplement does not distinguish between positive and negative changes.
19. In this sense, it is worth recalling that Article 10 of Regulation (EU) No 1095/2010 establishing ESMA states that the content of RTS shall be delimited by the legislative acts on which it is based. Thus any other issue on supplements which is out of the scope of Article 16(3) of the Prospectus Directive will be dealt with, if needed, by means of Recommendations/Guidelines or Questions & Answers at a later stage or following any further mandate from the European Commission. ESMA reserves the right to develop further draft RTS in accordance with Article 16(3) of the Prospectus Directive and the time limit therefore, if needed.
20. For instance, ESMA will monitor and carefully assess the impact on market practice of the entry into force of the Commission Delegated Regulation (EU) No 486/2012 of 30 March 2012 amending Regulation (EC) No 809/2004 (hereinafter the “Commission Delegated Regulation No 486”) with regards to supplements, mainly due to the limitations imposed by such regulation regarding the possibility of including certain information in the final terms (e.g. new terms and conditions, new pay-out structures, indices composed by the issuer, new types of underlying, etc.) as well as the Commission Delegated Regulation (EU) No 862/2012 of 4 June 2012 amending Regulation (EC) No 809/2004 (hereinafter the “Commission Delegated Regulation No 862”).

IV. The test to be performed in Article 16(1) of the Prospectus Directive

21. ESMA believes that it is not possible to refer to materiality thresholds in the draft RTS (e.g. 10% of representative profits and losses) for supplements because:
 - the Prospectus Regime does not include materiality thresholds for prospectuses (except that referred to in paragraph 6 of Article 4a of Commission Regulation (EC) No 809/2004

of 29 April 2004 (hereinafter the “Prospectus Regulation” or “PR”) introduced by the Commission Regulation (EC) No 211/2007 of 27 February 2007²); and

- it would be virtually impossible to determine (i) a unique threshold which is applicable to all the different items of the annexes of the PR or (ii) different thresholds for each of the items of the annexes in the the Prospectus Regulation, as amended.
22. In the absence of definitions for the terms “material” and “significant” in Article 16(1) of the Prospectus Directive, ESMA believes that the test whether a new factor, mistake or inaccuracy qualifies as a triggering event for producing a supplement is the same test as whether information should be included in the prospectus. As a consequence, significance or materiality should be assessed according to the same qualitative and/or quantitative criteria used when drafting the prospectus.
23. In other terms, ESMA is of the opinion that the aforementioned Article 16(1) must be read in conjunction with Article 5(1) of the Prospectus Directive, stating that “the prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities”.
24. Accordingly, ESMA considers that any mistake or inaccuracy should be considered as “material” and any new factor should be considered as “significant” pursuant to Article 16(1) of the Prospectus Directive when the omission of such information prevents investors from making an informed assessment according to article 5(1) of the Prospectus Directive.

V. Specific situations which require a supplement to the prospectus

25. Considering the above, ESMA has identified a short list of situations for which the significance is such that they systematically require issuers, offerors or persons asking for admission to trading to produce a supplement to the prospectus and proposes to include such a list in the draft RTS.
26. ESMA considers that where any of the events referred to in the following list arise or are noted between the time when the prospectus is approved and the final closing of the offer to the public, or as the case may be, the time when trading on a regulated market begins, whichever occurs later, the issuer, offeror or person asking for admission to trading on a regulated market shall publish a supplement.
27. However, where the prospectus consists of separate documents and when the triggering event affecting the information disclosed in the registration document or in any supplement to such registration document occurs before the approval of the securities note, the relevant information in relation to such an event can be provided in the securities note in accordance with Article 12(2) of the Amended Prospectus Directive.
28. **For all other situations which are not included in the list below, it is up to the issuer, the offeror or the person asking for admission to trading on a regulated market to**

² Article 4a(6) in the Prospectus Regulation: *For the purposes of paragraph 5 of this Article, and of item 20.2 of Annex I, a significant gross change means a variation of more than 25%, relative to one or more indicators of the size of the issuer's business, in the situation of an issuer.*

assess their significance or materiality, without prejudice to the powers of the competent authority of the home Member State.

29. The specific situations which ESMA proposes to include in the draft RTS are explained below. Paragraphs in bold include each concrete proposal along with the particular minimum disclosure requirement according to the relevant Registration Document Schedule or Securities Note Schedule of the Prospectus Regulation in relation to the triggering event.
30. ESMA clarifies that a supplement should contain any information necessary for investors to understand the new factor, material mistake or inaccuracy and thereby make an informed assessment according to article 5(1) of the PD. As such the supplement should contain as a minimum the information concerning the triggering event as well as any other objective significant consequences to the information disclosed in the prospectus resulting from such an event.
31. For instance, in case of a change in control of an issuer who is offering or asking for admission to trading of securities covered by Article 4(2) of the PR, a supplement describing the arrangements in relation to such a change in control has to be published. In this case, any other new material information which is a consequence of such an event (e.g. new material conflicts of interest, significant changes in the administrative, management and supervisory bodies, etc.) has also to be included in the supplement.
32. ESMA wishes to clarify that the inclusion of an element in such a list of situations which always require a supplement does not imply that the supplement shall be necessarily approved. It would be the case where the NCA notifies the issuer, offeror or person asking for admission to trading that the supplement is not complete, consistent or comprehensible when read together with the prospectus and the issuer or person responsible for drawing up the prospectus is not able to remedy the findings of the NCA. In such a case, the NCA may require a new prospectus and/or take actions in accordance with Article 21 of the PD.
33. ESMA is aware that the drafting of supplements for the situations included in the list is associated with different costs, mainly due to the variation of disclosure requirements relating to such situations. Therefore it would be important for ESMA to receive specific input on the costs involved in each particular situation.

Q1: Do you agree that a supplement should include the disclosure requirements of the Prospectus Regulation relating to the triggering event and also any other objective consequences deriving from such an event which are capable of affecting the assessment of the relevant securities? If not, please provide the reasoning behind your position.

V.I. Timing issues

34. ESMA is aware of the timing constraints related to the production of the disclosure requirements relating to certain new factors, mistakes or inaccuracies which, in the most extreme situations, might lead to undesirable consequences such as a change of the offer period or even the cancellation of the offer.
35. For instance, looking at the below list of situations that would always require a supplement, it might be the case where the disclosure requirement for the triggering event is new pro forma information prepared in accordance with Annex II of the Prospectus Regulation which has to be elaborated within a very short period of time, in particular where in case of an offer to the public

the event occurs before the final closing of the offer to the public and the delivery of the securities and thus, in accordance with Article 16(2) of the Prospectus Directive as amended, the supplement has to be published to give the opportunity to the investors to withdraw their acceptances.

36. However, ESMA is of the opinion that the significance of any of the situations included in the below list is such that investors cannot make an informed investment decision where the disclosure requirement for the particular event is not included in a supplement to the prospectus. Therefore, the mentioned timing constraints cannot be used as a reason to exclude any situation from the below list, where a supplement is always required, nor as a reason to reduce the associated disclosure requirements.

V.II. List of triggering events

V.II.i. Publication of new annual audited financial statements

37. ESMA considers that incorporating the last annual audited financial statements in accordance with Article 12(2) or Article 16 of the Prospectus Directive, as a way of updating the information on the assets and liabilities, financial position, profits and losses and prospects of the issuer and of any guarantor, is a well-established market practice which ensures to some extent that investors do not base their investment decisions on outdated financial information.
38. Such a practice does not only guarantee that the prospectus contains, at any time, the latest 1-3 annual audited financial statements, but also keeps up to date a number of items required by the different registration document schedules.
39. For example, where the registration document in a prospectus is drawn up in accordance with Annex I of the Prospectus Regulation, at least the following items relate to information which is included in the annual audited financial statements and the annual financial report:
 - statutory auditors (item 2),
 - selected financial information (item 3)
 - description of the principal investments of the issuer (item 5.2.1),
 - description of the principal activities and markets of the issuer and a statement relating to any exceptional factors which have influenced those activities and markets (items 6.1.1. and 6.2. and 6.3.)
 - description of the financial condition of the issuer and information about operating results (items 9.1. and 9.2.),
 - description of research and development policies of the issuer (item 11)
 - disclosure of the number of employees of the issuer and if possible their main category of activity and geographical location (item 17.1.)
 - description of related party transactions (item 19)
 - the amount of dividend per share (item 20.7.1)
 - the history of the share capital of the issuer (item 21.1.7.).
40. However, ESMA considers that for the below situations there would not be an automatic obligation to produce a supplement where the issuer publishes annual financial statements and it would be up to the issuer, offeror or person asking for admission to trading on a regulated market to assess on a case by case basis their significance and/or materiality:

- in the case of an issuer of depositary receipts as neither Annex X nor Annex XXVIII of the Prospectus Regulation requires financial information in relation to the issuer; and
- in the case of an issuer of asset-backed securities where claims of the investors against the issuer are limited to the underlying assets and the issuer is a special purpose vehicle.

With regard to depositary receipts, ESMA would like to clarify that:

- the person responsible for drawing up the prospectus must always produce a supplement after the publication of the annual audited financial statements of the issuer of the underlying shares; and
- the obligation to draw up a supplement shall not apply to the publication of annual audited financial statements by an issuer of depositary receipts as such financial statements are not required by the depositary receipts schedule and this information is not capable of affecting investors' assessment of the securities as the investment is in the underlying shares.

With regard to asset-back securities, ESMA would like to clarify that the person responsible for drawing up the prospectus must always produce a supplement after the publication of the annual audited financial statements of the obligor(s) in accordance with item 2.2.11(a) of Annex VIII. This is because the credit risk is concentrated on a few obligors or on an obligor which has a material portion of the assets.

41. Therefore, ESMA proposes that a supplement should be submitted to the Competent Authority by the issuer, offeror or person asking for admission to trading of the securities as soon as practicable after the publication of the annual audited financial statements of:

- **the issuer or any guarantor or any obligor in accordance with item 2.2.11(a) of Annex VIII; or**
- **the issuer of the underlying shares in case of depositary receipts; or**
- **the issuer of the underlying shares or other transferable securities equivalent to shares in case of securities covered by Article 17(2) of the Prospectus Regulation.**

This obligation would not apply to the publication of annual audited financial statements by issuers of depositary receipts or issuers of asset-backed securities where claims of the investors against the issuer are limited to the underlying assets and the issuer is a special purpose vehicle.

42. Such a supplement shall contain:

- i) where any of the persons mentioned in the bullets in paragraph 41 above published both unconsolidated and consolidated annual audited financial statements, at least, the annual consolidated financial statements and its audit report in accordance with item 20.1 of Annex I, item 20.1 and item 20.1(a) of Annex X, item 13.1 of Annex IV, item 8.2 and item 8.2(a) of Annex VII, item 11.1 of Annex IX, Annex XI, and Annex XXIX and item 15.1 of Annex XXIII.**
- ii) where any of the persons mentioned in the bullets in paragraph 41 above published only unconsolidated annual audited financial statements, at least, the audit report and the financial information as required by the relevant Registration Document Schedule for issuers and/or guarantors that prepare the audited financial information in accordance with item 20.1 of Annex I, item 20.1 and item 20.1(a) of Annex X, item 13.1 of Annex**

IV, item 8.2 and item 8.2(a) of Annex VII, item 11.1 of Annex IX, Annex XI, Annex XXIX and item 15.1 of Annex XXIII.

iii) where any of the persons mentioned in the bullets in paragraph 41 above published the annual audited financial statements and the registration document was drawn up in accordance with any of the proportionate disclosure regime registration document schedules for SMEs and companies with reduced market capitalisation, at least, the audit report, the required statement and where such financial statements can be found in accordance with item 20.1 of Annex XXV, item 13.1 of Annex XXVI, item 11.1 of Annex XXVII and item 20.1 of Annex XXVIII.

43. For the sake of clarification, ESMA is of the opinion that:

- a supplement is always required for the publication of the annual audited financial statements even where the latter confirm a profit estimate previously included in the prospectus. Although this approach could lead to a double requirement for supplements on financial information, ESMA understands that the annual audited financial statements contain further information than the profit estimate which is significant for the investment decision; and
- a supplement is not systematically required for the approval by the issuer's or guarantor's shareholder meeting of the audited annual financial statements of the most recent financial year.

Q2: Do you agree that the publication of audited annual financial statements systematically triggers the obligation to prepare a supplement? If not, please state your reasons.

Q3: Do you agree that issuers of asset-backed securities where claims of the investors against the issuer are limited to the underlying assets and the issuer is a special purpose vehicle only have to prepare a supplement on a case by case basis for audited financial statements? If not, please state your reasons.

Q4: Please list other situations where a supplement would not always be required for the publication of annual audited financial statements, if any.

Q5: Do you believe that there should be a systematic requirement to prepare a supplement for interim financial information? If yes, please provide reasons.

Q6: What do you assess the cost estimate to be to comply with this requirement?

V.II.ii. Profit forecast for equity securities and depositary receipts

44. According to paragraph 44 of ESMA update of the CESR recommendations - The consistent implementation of Commission Regulation (EC) No 809/2004 implementing the Prospectus Directive, Ref. ESMA/2011/81 (ESMA's Recommendations), the publication of a profit forecast would constitute material information for share issues. This is not necessarily the presumption in case of non-equity securities.
45. Although the aforementioned paragraph in the Recommendations only refers to a presumption of materiality for share issues, ESMA is of the opinion that it is necessary to extend this presumption

to all equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts as investors have a direct interest in the underlying shares and thereby in the financial state of the issuer of the underlying shares.

46. **Therefore, ESMA proposes that the publication of a profit forecast triggers the obligation to publish a supplement where a prospectus is drawn up in accordance with the following annexes of the Prospectus Regulation:**
- **a share registration document schedule (Annex I, Annex XXIII or Annex XXV) and a share securities note schedule (Annex III or Annex XXIV); or**
 - **a share registration document schedule (Annex I, Annex XXIII or Annex XXV) and the debt securities note schedule (Annex V or Annex XIII) and the additional information building block on underlying share for some equity securities (Annex XIV); or**
 - **a share registration document schedule (Annex I, Annex XXIII or Annex XXV) and the derivative securities note schedule (Annex XII) and the additional information building block on underlying share for some equity securities (Annex XIV); or**
 - **a depositary receipt schedule (Annex X or Annex XXVIII).**
47. **Such a supplement shall comply, as the case may be, with item 13 of Annexes I, X, XXV and XXVIII or item 8 of Annex XXIII of the Prospectus Regulation.**
48. ESMA wishes to clarify that any modification of an outstanding forecast would be treated as a new profit forecast.

Q7: Do you agree that there should be a systematic requirement to produce a supplement in case of publication of a profit forecast? If not, please state your reasons.

Q8: Do you agree that the systematic requirement to prepare a supplement for a profit forecast should only apply to equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts? If not, please state your reasons.

Q9: What do you assess the cost estimate to be to comply with this requirement?

V.II.iii. Profit estimate for an annual financial period

49. As stated in Article 2((11) of the PR as amended, a “profit estimate” means a profit forecast for a financial period which has expired and for which results have not yet been published.
50. The systematic supplement requirement for a profit forecast is limited to equity securities and depositary receipts. ESMA proposes to expand this requirement for profit estimates to all the securities where the annexes require such information. Profit estimates are by nature more certain than profit forecasts and it would be expected that in most cases the statutory financial information published after estimates would confirm data previously published as estimate (as mentioned in Paragraph 39 of ESMA’s Recommendations).
51. ESMA is of the opinion that having access to the most recent annual financial information (agreed or reported on by the auditor or the independent accountant) concerning the issuer is essential for an informed investment decision. Moreover, the involvement of auditors provides further

credibility to the estimates. Once made available, the mentioned profit estimate would constitute the most updated financial information in relation to the recent financial year.

52. Given the proximity to the final audited financial information, the estimates provide an insight to the correctness or change to former estimates by the issuer on its financial situation allowing for a potential reassessment of the basis of the investment decision by the investors. Therefore, for consistency reasons the systematic obligation to produce a supplement should apply in the same circumstances where a supplement in relation to the publication of annual audited financial information would be required.
53. ESMA's Questions and Answers on Prospectuses, 18th updated version from December 2012, Ref. ESMA/2012/855 (ESMA Q&A) No 19 sets out that there is no systematic requirement to supplement the prospectus when interim financial statements are produced as this will depend on the circumstances of the case. ESMA maintains the opinion that it is not necessary to systematically produce a supplement for a profit estimate related to an interim financial period. Any amendments to interim estimates would also need to be assessed on a case by case basis. Moreover, this is in line with ESMA's proposal to not include interim financial information in the list of situations which systematically require the publication of a supplement.
54. **In case the issuer³ or any guarantor or any obligor in accordance with item 2.2.11(a) of Annex VIII, or the issuer of the underlying shares in case of depositary receipts, or the issuer of the underlying shares or other securities equivalent to shares in case of securities covered by Article 17(2) of the Prospectus Regulation publishes a profit estimate for an annual financial period, ESMA proposes that a supplement shall be submitted to the home competent authority by the issuer, offeror or person asking for admission to trading of the securities, where the prospectus is drawn up in accordance with the following registration document schedules: Annex I, IV, IX, XI, XXIII, XXV, XXVI, XXVII and XXIX or in accordance with a depositary receipts schedule (Annex X or Annex XXVIII) or in accordance with the additional building block for guarantees (Annex VI).**
55. **Such a supplement shall comply, as the case may be, with Annex I, item 13; Annex IV, item 8; Annex IX, item 9; Annex X, item 13; Annex XI, item 8; Annex XXIII, item 8; Annex XXV, item 13; Annex XXVI, item 9; Annex XXVII, item 8; Annex XXVIII, item 13; Annex XXIX, item 8.**
56. Due to the nature of the profit estimate for an annual financial period, ESMA has understood that it is unlikely that a modification thereof would occur. Therefore, ESMA considers that this situation should be assessed on a case by case basis.

Q10: Do you agree that there should be a systematic requirement to prepare a supplement for a profit estimate in relation to the annual financial period? If not, please state your reasons.

Q11: Do you agree that the systematic requirement to prepare a supplement for annual profit estimates covered by e.g. Annex I, item 13.2 subparagraph 1 (referring to profit estimates for which a report of an auditor is required) should apply to a prospectus drawn up in accordance with all the schedules referred to in paragraph 54 or should this requirement be limited to equity securities? Please state your rea-

³ In case of depositary receipts, the reference to the "issuer" should, in accordance with Recital 15 of the PR, be understood as "issuer of the underlying shares".

sons.

Q12: Do you agree that the systematic requirement to prepare a supplement for financial information relating to the previous financial year covered by e.g. Annex I, item 13.2 subparagraph 2 (referring to profit estimates for which no report of an auditor is required) should apply to a prospectus drawn up in accordance with all the schedules referred to in paragraph 54 or should this requirement be limited to equity securities? Please state your reasons.

Q13: Do you believe that there should be a systematic requirement to prepare a supplement for interim profit estimates? If yes, please provide reasons.

Q14: What do you assess the cost estimate to be to comply with this requirement?

V.II.iv. Change in control of the issuer for equity securities and depositary receipts

57. ESMA considers that a change in control of the issuer's equity in accordance with national law where the offer or admission to trading refers to securities covered by Article 4(2)(1) and Article 17(2) of the PR or depositary receipts is material.
58. The change in control of the issuer is a non-harmonised concept across Europe and therefore the situations must be assessed on a national law basis.
59. Although a change in control of the issuer can affect the informed assessment of any type of securities, ESMA is of the opinion that equity securities and depositary receipts are, in general, more price sensitive to this situation.
60. This is consistent with the fact that the Prospectus Regulation requires in the share registration schedules a higher level of disclosure in relation to certain aspects of a company which are more likely to be affected after a change in control than what is required in relation to these issues in the registration documents schedules for debt and derivative securities. Such disclosure requirements in Annex I of the PR relate to the administrative, management and supervisory bodies and senior management, remuneration and benefits, board practices, major shareholders and related party transactions.
61. Investors need to know the identity of the controller entity behind the issuer as this may affect, for example, the business or corporate strategy and the dividend policy.
62. **Therefore, ESMA considers that a change in control of the issuer or of the issuer of the underlying shares in case of depositary receipts or of the issuer of the underlying shares or other transferable securities equivalent to shares in case of securities covered by Article 17(2) of the Prospectus Regulation triggers the obligation to produce a supplement where a prospectus is drawn up in accordance with:**
 - a share registration document schedule (Annex I, Annex XXIII or Annex XXV) and a share securities note schedule (Annex III or Annex XXIV); or
 - a share registration document schedule (Annex I, Annex XXIII or Annex XXV) and the debt securities note schedule (Annex V or Annex XIII) and the additional information building block on underlying share for some equity securities (Annex XIV); or

- a share registration document schedule (Annex I, Annex XXIII or Annex XXV) and the derivative securities note schedule (Annex XII) and the additional information building block on underlying share for some equity securities (Annex XIV); or
 - a depositary receipt schedule (Annex X or Annex XXVIII).
63. Such a supplement shall include the description of any arrangements, known to the issuer, in relation to such change in control.

Q15: Do you agree that there should be a systematic requirement to produce a supplement in case of a change in control of the issuer? If not, please state your reasons.

Q16: Do you agree that the systematic requirement to prepare a supplement in case of change in control of the issuer should only apply to equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts? If not, please state your reasons.

Q17: What do you assess the cost estimate to be to comply with this requirement?

V.II.v. Public takeover bids for equity securities and depositary receipts

64. A takeover bid is related to the situation of change in control of the issuer. In accordance with Article 2(1) a) of the Takeover Bids Directive 2004/25/EC, ‘takeover bid’ or ‘bid’ shall mean “a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law”.
65. ESMA considers that it is essential to have in the supplement the price or exchange terms attached to such an offer because it shows that someone (an offeror) is willing to pay a certain amount of money within certain conditions for each share of the issuer.
66. ESMA is of the opinion that even though the depositary receipts are not considered as equity securities from the Prospectus Directive perspective, the disclosure requirements in the Prospectus Regulation are the same and therefore the need for a supplement should be the same.
67. In order to be consistent with the existing disclosure requirements in the PR, ESMA believes there has to be a supplement requirement at the time of the launch of a public takeover bid and when the outcome thereof is clear. This potentially creates a double situation of withdrawal rights for investors but ESMA is of the opinion that this information is essential for an informed investment decision.
68. **ESMA proposes that i) any new public takeover bid by third parties, as defined in Article 2(1) a) of the Takeover Bids Directive 2004/25/EC in respect of the issuer’s equity or the equity of the issuer of the underlying shares in case of depositary receipts or the equity of the issuer of the underlying shares or other transferable securities equivalent to shares in case of securities covered by Article 17(2) of the Prospectus Regulation and ii) the outcome of any public takeover bid, shall be consid-**

ered as significant and thus a triggering event to produce a supplement where the prospectus is drawn up in accordance with the annexes listed in Paragraph 61.

69. Such supplement has to comply, as the case may be, with the information required by:
- item 4.10⁴ in Annex III, item 27.13 in Annex X and Annex XXVIII or item 1.10 in Annex XIV; and
 - item 18.4 of Annex I where either the registration document is drawn up in accordance with such annex or where item 2 in Annex XIV applies.

Q18: Do you agree that there should be a systematic requirement to produce a supplement in case of a public takeover bid? If not, please state your reasons.

Q19: Do you agree that the systematic requirement to prepare a supplement in case of a public takeover bid should only apply to equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts? If not, please state your reasons.

Q20: What do you assess the cost estimate to be to comply with this requirement?

V.II.vi. Working Capital Statements for certain equity securities

70. Where in an approved prospectus which relates to shares and other transferable securities equivalent to shares, the issuer has stated that, in its opinion, the working capital is sufficient for its present requirements and if such statement is not valid anymore, due to the occurrence of a new factor or the discovery of a mistake or inaccuracy in such prospectus, ESMA is of the opinion that the issuer shall draw up a supplement. In such situations, investors may reassess their investment decision given that they would no longer have comfort in the issuer's ability to access cash and other available liquid resources to meet its liabilities.
71. On the other hand, a qualified working capital statement being changed to a clean working capital statement is capable of affecting the investment decision (in particular of potential new investors) as it implies that the issuer's financial position is improving.
72. ESMA submitted its Technical Advice⁵ for possible delegated acts on convertible/exchangeable debt securities to the Commission advising that prospectuses for convertible/exchangeable debt securities should include working capital statements. In line with this, ESMA considers that the mentioned supplement extends also to such prospectuses.
73. **Where in an approved prospectus which relates to shares and other transferable securities equivalent to shares in accordance with Article 4(2)(1) and convertible/exchangeable debt securities in accordance with Article 17(2) of the Prospectus Regulation the working capital statement proves not to be valid anymore, ESMA considers that the issuer has to publish a supplement.**

⁴ An indication of public takeover bids by third parties in respect of the issuer's equity, which have occurred during the last financial year and the current financial year. The price or exchange terms attaching to such offers and the outcome thereof must be stated.

⁵ [ESMA/2012/864; December 2012]

74. **Such a supplement shall include an explanation of the new factor, mistake or inaccuracy and update the prospectus, in accordance with item 3.1 in Annex III and Annex XXIV.**

Q21: Do you agree that there should be a systematic requirement to draw up a supplement in case of a positive and a negative change to the issuer's working capital statement? If not, please indicate your reasons.

Q22: Do you agree that the systematic requirement to prepare a supplement in case of a positive and a negative change to the issuer's working capital statement should apply to equity securities covered by 4(2)(1) and convertible/exchangeable debt securities in accordance with Article 17(2) of the Prospectus Regulation? If not, please state your reasons.

Q23: What do you assess the cost estimate to be to comply with this requirement?

V.II.vii. Admission to trading or offer to the public in an additional EU member state

75. Where the issuer is seeking admission to trading on (an) additional EU regulated market(s) than the one(s) foreseen in the prospectus or an offer to the public in (an) additional EU Member State/s than the one(s) foreseen in the prospectus, the latter might not include all the relevant information in relation to those jurisdictions as required by the relevant securities note schedule. Without this information, the notification in accordance with Article 18 of the Prospectus Directive cannot be performed. Therefore a supplement would be required.
76. In case of a base prospectus, this obligation shall not apply where the missing information can be included in the final terms. For instance, it would be the case of an application for admission to trading on an additional EU regulated market than the one(s) foreseen in the prospectus where i) the application for admission to trading on the regulated market is referred to in the final terms and ii) the base prospectus already contains the required information on taxes with respect to the country where the additional EU regulated market is located.
77. **Therefore, ESMA proposes that a supplement shall be required where an issuer is seeking admission to trading on (an) additional EU regulated market(s) or intending to make an offer to the public in (an) additional EU Member State(s) than the one(s) foreseen in the prospectus.**
78. **Such a supplement shall contain the information required by the Prospectus Regulation with respect to the application for admission to trading on a regulated market and/or the offer to the public in such EU Member State which was not included in the prospectus or base prospectus.**

Q24: Do you agree that a supplement should always be required where an issuer is seeking admission to trading on (an) additional EU regulated market(s) or intending to make an offer to the public in (an) additional EU Member State(s) than the one(s) foreseen in the prospectus? If not, please state your reasons.

Q25: What do you assess the cost estimate to be to comply with this requirement?

V.II.viii. New significant financial commitment for equity securities

79. As already mentioned in Paragraph 20 of this Consultation Paper, Paragraph 6 of Article 4a of the Prospectus Regulation introduced by the Commission Regulation (EC) No 211/2007 of 27 February 2007 contains a threshold for the determination of significant gross changes in the context of significant financial commitments.
80. Concretely, it stated that *“for the purposes of paragraph 5 of this Article, and of item 20.2 of Annex I, a significant gross change means a variation of more than 25 %, relative to one or more indicators of the size of the issuer’s business, in the situation of an issuer”*.
81. In line with the aforementioned Article 4a of the Prospectus Regulation, ESMA considers that a supplement shall be required in case of a new significant financial commitment which is likely to give rise to a significant gross change for securities covered by Article 4(2)(1) and Article 17(2) of the Prospectus Regulation. Moreover, ESMA considers that it is important to illustrate the changes to the issuer’s financial position in such a situation so that investors have all necessary information for their investment decision.
82. **Therefore, ESMA proposes that where the issuer of securities covered by Article 4(2)(1) or the issuer of the underlying shares or other transferable securities equivalent to shares in case of securities covered by Article 17(2) of the Prospectus Regulation makes a new significant financial commitment which is likely to give rise to a significant gross change, pursuant to Paragraph 6 of Article 4a of the Prospectus Regulation, the issuer shall publish a supplement.**
83. **Such a supplement shall comply with Article 4a of the Prospectus Regulation and may therefore require pro forma information prepared in accordance with Annex II of the Prospectus Regulation.**

Q26: Do you agree that there should be a systematic requirement to draw up a supplement in case of a new significant financial commitment which is likely to give rise to a significant gross change? If not, please indicate your reasons.

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

Q28: What do you assess the cost estimate to be to comply with this requirement?

V.II.ix. Any judgment or concluding event of governmental, legal or arbitration proceedings already disclosed in the prospectus

84. All registration document schedules of the Prospectus Regulation require the same degree of information on any governmental, legal or arbitration proceedings which may have or have had in a recent past significant effects on the issuer and/or the group’s financial position or profitability. On this basis, ESMA has not identified any reason to differentiate between equity and debt securities in the situation of supplements.
85. The prospectus discloses only material proceedings. ESMA assesses that an investor will need to know the results of such proceedings when they occur after the approval of the prospectus in order to assess their specific impact on the issuer. Therefore, any judgment or concluding event on

such proceedings, even if it is subject to appeal, is deemed to be significant information that can impact the investment decision.

86. ESMA proposes that “any judgment or concluding event” would have to be disclosed. This means no differentiation between changes at individual stages of a proceeding and no distinction between a positive, negative or neutral result as the latter is a matter of investor perception (please see the reasons in Paragraph 17 – 18). A neutral result is to be understood as a judgment or concluding event that does not alter the information already set out in the prospectus.
87. The reference to “any judgment or concluding event” is to be understood as not only the final conclusion of the proceedings but also changes in the status at the different stages of such proceedings, including in the course of an appeal process or a settlement agreement. The proceedings covered by this disclosure requirement may take place over a long period of time where the conclusion of proceedings is reached outside the period of the offer. However, the interim judgments or concluding events provide insights to the conclusion at certain stages of a proceeding and influence the assessment of the issuer at that particular point in time by e.g. informing on the likelihood of the issuer’s view of a situation being correct.
88. ESMA does not envisage that every decision made by any party to a proceeding during the process should trigger a systematic supplement requirement, e.g. a decision to accept further material into evidence during a court proceeding. Such a requirement would be unduly cumbersome on issuers. Furthermore, it could potentially harm investor protection by making available to investors 1) excessive amounts of information and 2) information without the ability to influence an investment decision.
89. Furthermore, different EU jurisdictions have different types of proceedings where the understanding of terms such as the “decision”, “final decision” or “outcome” may vary. Applying such a term could therefore lead to divergent practices whereby its application as a criterion for the systematic supplement would be difficult.
90. ESMA clarifies that despite a proceeding not being included in the prospectus, a judgment or concluding event on a proceeding may be material. Whether a supplement is required will be based on a case by case assessment in accordance with Article 16 of the PD.
91. **Accordingly, ESMA considers that any judgment or concluding event, even if subject to appeal, , in the course of any governmental, legal or arbitration proceedings already disclosed in the prospectus should be included in a supplement.**

Q29: Do you agree that issuers should always prepare a supplement for any judgment or concluding event, even if subject to appeal, in governmental, legal or arbitration proceedings already disclosed in the prospectus? If not, please indicate your reasons.

Q30: Do you agree with the triggering elements as set out in Paragraph 87? If not, please indicate your reasons.

Q31: ESMA does not make a distinction between equity and debt securities. Do you believe such a distinction should be made? If yes, please state your reasons.

Q32: What do you assess the cost estimate to be to comply with this requirement?

V.II.x. Increase in aggregate nominal amount of the programme

92. The Prospectus Regulation as amended does not require the inclusion of an aggregate amount of the programme in the base prospectus. As such, ESMA does not perceive the aggregate amount of the programme to form part of the terms and conditions of an offer. Under the base prospectus

regime the amount of the offer is specified in the final terms. However, there exists a practice to include such information in the base prospectus on a voluntary basis. By including this information the issuer has assessed that this information was important to the investor in order to make an informed decision in accordance with Article 5((1) of the PD. As proposed in the definition in this CP, the assessment of whether a supplement is required is the same as when assessing whether information is to be included in the prospectus at the time of approval.

93. Furthermore, by indicating to the market the maximum amount of the programme the issuer provides the investor with an insight to its funding needs. An increase of the aggregate amount of the programme can highlight potential modifications of the funding needs which could be the case when the issuer requires further funding that he was not aware of. On the other hand, it can also be due to a great interest in the programme or the opportunity to finance further investments.
94. Moreover, there exists a market practice to provide a supplement with such information either on a voluntary basis or at the request of the competent authority.
95. **Therefore, ESMA proposes that a supplement is required when the issuer increases the aggregate nominal amount of the programme.**

Q33: Do you agree that a supplement should always be required in case of an increase of the aggregate nominal amount of the programme? If not, please state your reasons.

Q34: What do you assess the cost estimate to be to comply with this requirement?

V.II.xi. Other situations

96. ESMA has identified the above short list of situations which systematically require a supplement to the prospectus. ESMA takes the opportunity to ask if respondents believe that there are other situations where the significance is such that they should also be incorporated in the list.

Q35: Which additional elements should be included in the list above that systematically trigger the need to produce a supplement? Please indicate any arguments which support the inclusion of such elements.

ANNEX I SUMMARY OF QUESTIONS

Q1: Do you agree that a supplement should include the disclosure requirements of the Prospectus Regulation relating to the triggering event and also any other objective consequences deriving from such an event which are capable of affecting the assessment of the relevant securities? If not, please provide the reasoning behind your position.

Q2: Do you agree that the publication of audited annual financial statements systematically triggers the obligation to prepare a supplement? If not, please state your reasons.

Q3: Do you agree that issuers of asset-backed securities where claims of the investors against the issuer are limited to the underlying assets and the issuer is a special purpose vehicle only have to prepare a supplement on a case by case basis for audited financial statements? If not, please state your reasons.

Q4: Please list other situations where a supplement would not always be required for the publication of annual audited financial statements, if any.

Q5: Do you believe that there should be a systematic requirement to prepare a supplement for interim financial information? If yes, please provide reasons.

Q6: What do you assess the cost estimate to be to comply with this requirement?

Q7: Do you agree that there should be a systematic requirement to produce a supplement in case of publication of a profit forecast? If not, please state your reasons.

Q8: Do you agree that the systematic requirement to prepare a supplement for a profit forecast should only apply to equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts? If not, please state your reasons.

Q9: What do you assess the cost estimate to be to comply with this requirement?

Q10: Do you agree that there should be a systematic requirement to prepare a supplement for a profit estimate in relation to the annual financial period? If not, please state your reasons.

Q11: Do you agree that the systematic requirement to prepare a supplement for annual profit estimates covered by e.g. Annex I, item 13(2) subparagraph 1 (referring to profit estimates for which a report of an auditor is required) should apply to a prospectus drawn up in accordance with all the schedules referred to in paragraph 54 or should this requirement be limited to equity securities? Please state your reasons.

Q12: Do you agree that the systematic requirement to prepare a supplement for financial information relating to the previous financial year covered by e.g. Annex I, item 13(2) subparagraph 2 (referring to profit estimates for which no report of an auditor is required) should apply to a prospectus drawn up in accordance with all the schedules referred to in paragraph 54 or should this requirement be limited to equity securities? Please state your reasons.

Q13: Do you believe that there should be a systematic requirement to prepare a supplement for interim profit estimates? If yes, please provide reasons.

Q14: What do you assess the cost estimate to be to comply with this requirement?

Q15: Do you agree that there should be a systematic requirement to produce a supplement in case of a change in control of the issuer? If not, please state your reasons.

Q16: Do you agree that the systematic requirement to prepare a supplement in case of change in control of the issuer should only apply to equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts? If not, please state your reasons.

Q17: What do you assess the cost estimate to be to comply with this requirement?

Q18: Do you agree that there should be a systematic requirement to produce a supplement in case of a public takeover bid? If not, please state your reasons.

Q19: Do you agree that the systematic requirement to prepare a supplement in case of a public takeover bid should only apply to equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts? If not, please state your reasons.

Q20: What do you assess the cost estimate to be to comply with this requirement?

Q21: Do you agree that there should be a systematic requirement to draw up a supplement in case of a positive and a negative change to the issuer's working capital statement? If not, please indicate your reasons.

Q22: Do you agree that the systematic requirement to prepare a supplement in case of a positive and a negative change to the issuer's working capital statement should apply to equity securities covered by 4(2)(1) and convertible/exchangeable debt securities in accordance with Article 17(2) of the Prospectus Regulation? If not, please state your reasons.

Q23: What do you assess the cost estimate to be to comply with this requirement?

Q24: Do you agree that a supplement should always be required where an issuer is seeking admission to trading on (an) additional EU regulated market(s) or intending to make an offer to the public in (an) additional EU Member State(s) than the one(s) foreseen in the prospectus? If not, please state your reasons.

Q25: What do you assess the cost estimate to be to comply with this requirement?

Q26: Do you agree that there should be a systematic requirement to draw up a supplement in case of a new significant financial commitment which is likely to give rise to a significant gross change? If not, please indicate your reasons.

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

Q28: What do you assess the cost estimate to be to comply with this requirement?

Q29: Do you agree that issuers should always prepare a supplement for any judgment or concluding event, even if subject to appeal, in governmental, legal or arbitration proceedings already disclosed in the prospectus? If not, please indicate your reasons.

Q30: Do you agree with the triggering elements as set out in Paragraph 87? If not, please indicate your reasons.

Q31: ESMA does not make a distinction between equity and debt securities. Do you believe such a distinction should be made? If yes, please state your reasons.

Q32: What do you assess the cost estimate to be to comply with this requirement?

Q33: Do you agree that a supplement should always be required in case of an increase of the aggregate nominal amount of the programme? If not, please state your reasons.

Q34: What do you assess the cost estimate to be to comply with this requirement?

Q35: Which additional elements should be included in the list above that systematically trigger the need to produce a supplement? Please indicate any arguments which support the inclusion of such elements.



ANNEX II - LEGISLATIVE MANDATE TO DEVELOP TECHNICAL STANDARDS

The Regulation (EU) No 1095/2010 establishing the European Securities and Markets Authority empowered ESMA to develop draft regulatory technical standards where the European Parliament and the Council delegate power to the Commission to adopt regulatory standards by means of delegated acts under Article 290 TFEU.

Article 5(7) of the Omnibus Directive inserted a third paragraph in Article 16 of the Prospectus Directive which stated that: *“ESMA shall develop draft regulatory technical standards to specify situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published. ESMA shall submit those draft regulatory technical standards to the Commission by 1 January 2014”*.

ANNEX III - COST-BENEFIT ANALYSIS

1. Systematic requirement for a supplement

Risk addressed / Policy objective

- Level playing field / Investor protection / Disclosure regime

Scope issues

- Rules on specific situations requiring a supplement to the prospectus to be published

Proposal	Benefits	Costs	Evidence
<p>Systematic supplement requirement in certain situations – the overarching issues relating to all supplements</p>	<p>1. A systematic requirement to produce a supplement provides for a harmonised approach across the EU and legal certainty that at minimum a supplement is required for a number of specific situations.</p> <p>2. A supplement ensures that investors have access to up-to-date information subject to the same liability regime as for the prospectus prior to making their (final) investment decision.</p> <p>3. Investors that have already subscribed for the securities before the supplement is published have the right to withdraw their acceptances when presented with significant information contained in the supplement provided the new factor arose before the final closing of the offer and the delivery of the securities.</p> <p>4. A supplement ties all necessary information concerning the issuer and the securities in one place, namely the prospectus, providing a full set of information irrespective of whether certain information is already publicly available outside the Prospectus Regime.</p> <p>5. The competent authority ensures that the information contained in the supplement is complete,</p>	<p>1. Issuers must bear the direct costs of drafting the supplement itself (not including any compliance costs, i.e. costs connected to preparing information specifically required due to a supplement requirement) which on average amounts to around 19,000 EUR. A more accurate cost estimate regarding the specific requirement to draw up a supplement can only be given following the feedback of market participants.</p> <p>2. The range of an approval fee for submitting a supplement for approval by a competent authority is from 0 - 1,500 EUR.</p>	<p>1. Page 48 of the DG Internal Market and Services Study on the impact of the Prospectus Regime on EU Financial Markets Final Report 2008.</p> <p>2. Data collected from the competent authorities on the fees for approval of supplements.</p>

	comprehensible and consistent.		
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2. Publication of new annual audited financial statements

Risk addressed / Policy objective

- Level playing field / Investor protection / Disclosure regime

Scope issues

- Specific situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published

Proposal	Benefits	Costs	Evidence
<p>Require the systematic publication of a supplement in situation of publication of new annual audited financial statements as proposed in Paragraph 41-42 of the consultation paper</p>	<ol style="list-style-type: none"> 1. Supplementing a prospectus with the most recent annual audited financial statements keeps up to date a number of items required by the different registration document schedules. 2. The requirement to always supplement the prospectus with the most recent annual audited financial statements guarantees, at all times, that the latest 1-3 annual audited financial statements are included in the prospectus. This is not only needed for investors who have already subscribed for the securities but also for those who would do so in the future. 3. The far-reaching harmonised scope of this information and the audit report provided by an independent entity guarantee a high level of investor protection. 4. Supplementing a prospectus with annual audited financial statements, would increase the transparency of the issuer's situation and prevent an information asymmetry between the issuer and investors. 5. Issuers of asset-backed securities, where claims of the investors are limited to the underlying assets, will not be subject to a systematic re- 	<ol style="list-style-type: none"> 1. The proposed RTS would not require preparing annual audited financial statements as they are already published as required by other national or EU pieces of legislation. 2. As current market practice is to publish a supplement where the issuer or any guarantor has published new annual audited financial statements, there should, in general, not be an increase in the number of the supplements required from issuers. 3. The proposed requirement may result in an increase in costs for issuers as they will have to publish supplements for the publication of new audited financial statements by any obligors concerned. This is not necessarily the current practice. 	<ol style="list-style-type: none"> 1. Competent authorities' experience. 2. Feedback from the consultation.

	<p>quirement to publish a supplement with regard to their audited financial statements and so will be alleviated of the associated costs, but instead will have to consider, on a case by case basis, whether a supplement is needed.</p> <p>6. In case of asset-backed securities where the credit risk relies on few obligors, the new annual audited financial statements of such obligors influence the risk assessment of the investment.</p> <p>7. Investors would have the possibility to compare the annual audited financial statements with previous profit forecasts or estimates of the issuer (if any) or with annual audited financial statements of similar type issuers.</p>		
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3. Profit forecast for equity securities and depositary receipts

Risk addressed / Policy objective

- Level playing field / Investor protection / Disclosure regime

Scope issues

- Specific situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published

Proposal	Benefits	Costs	Evidence
<p>Require the systematic publication of a supplement in situation of publication of a profit forecast as proposed in Paragraph 46-47 of the consultation paper</p>	<p>1. The publication of a profit forecast is the responsibility of the issuer and persons responsible for the prospectus and due care and diligence must be taken to ensure that profit forecasts are not misleading to investors. The auditor's report and further information on underlying assumptions provides further credibility to the forecast.</p> <p>2. Profit forecasts are significant especially for retail investors as they set out the future situation of the issu-</p>	<p>1. Following ESMA's Recommendations for shares, it is market practice to produce a supplement for equity securities and therefore it is unlikely that there will be any additional significant costs to issuers.</p>	<p>1. Competent authorities' experience.</p> <p>2. Paragraph 43 of ESMA's Recommendations of March 2011 (initially introduced by CESR guidance of February 2005).</p> <p>3. ESMA Q&A No 20 (approved by CESR in 2007) stating that the profit forecast constitutes material information.</p> <p>4. Feedback from the consultation.</p>

	er as assessed by the issuer. 3. Investors would have the possibility to compare the profit forecast for which the supplement is drawn up with previous profit forecasts of the issuer (if any) or other forecasts drawn up according to the same rules and disclosure requirements.		
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4. Profit estimate for an annual financial period

Risk addressed / Policy objective

- Level playing field / Investor protection / Disclosure regime

Scope issues

- Specific situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published

Proposal	Benefits	Costs	Evidence
Require the systematic publication of a supplement in situation of publication of a profit estimate as proposed in Paragraph 54-55 of the consultation paper	<p>1. The annual profit estimates constitute the most up to date annual information of the issuer, guarantor or obligor providing the preliminary annual results of the issuer.</p> <p>2. Involvement of auditors provides further credibility to such estimates, where required by the Prospectus Regulation.</p> <p>3. Investors would have the possibility to compare the profit estimates for which the supplement is drawn up with previous profit forecasts of the issuer (if any) or with estimates of other issuers.</p>	<p>1. Involvement of auditors with regard to estimates will result in additional costs for issuers. The amount of costs is unknown and awaits feedback from the stakeholders.</p> <p>2. However, following the coming into force of Commission Delegated Regulation (EU) No 862/2012, Annex I, item 13.2, second paragraph of the Prospectus Regulation now provides a less onerous disclosure regime for profit estimates in certain circumstances.</p>	<p>1. Feedback from the consultation.</p>

5. Change in control of the issuer for equity securities and depositary receipts

Risk addressed / Policy objective

- Level playing field / Investor protection / Disclosure regime

Scope issues

- Specific situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published

Proposal	Benefits	Costs	Evidence
Change in control of the issuer in case of equity securities or in case of depositary receipts as proposed in Paragraph 62-63 of the consultation paper	1. Knowledge of who controls the issuer benefits investors because such control may affect the business, the financial strategy performed and may also have an impact on the dividend policy.	1. Currently, providing this information through a supplement is a market practice. Furthermore, it would occur rarely and therefore the proposal does not imply additional costs for issuers.	1. Feedback from the consultation. 2. Experience of competent authorities.

6. Public takeover bids for equity securities and depositary receipts

Risk addressed / Policy objective

- Level playing field / Investor protection / Disclosure regime

Scope issues

- Specific situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published

Proposal	Benefits	Costs	Evidence
Announcement of public takeover bids and their final outcome, in case of equity securities or in case of depositary receipts as proposed in Paragraph 68-69 of the consultation paper	1. Where a takeover bid is launched over the shares of the issuer (or over the underlying shares of the issuer in case of depositary receipts), the investors need to know who is launching such an offer and its price. 2. Withdrawal rights have particular importance in this situation as investors may have subscribed for equity securities at a higher price than the one that is being proposed under the terms of the public takeover bid.	1. The information included in the supplement is already available according to the Takeover Bid Directive. 2. ESMA does not expect an increase in the number of supplements as it is a market practice to publish a supplement when there is a public takeover bid.	1. Feedback from the consultation. 2. Experience of competent authorities.

7. Working capital statements for certain equity securities

Risk addressed / Policy objective

- Level playing field / Investor protection / Disclosure regime

Scope issues

- Specific situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published

Proposal	Benefits	Costs	Evidence
Systematic re-	1. Any change in a clean	1. The amount of costs of a	1. Feedback from the

<p>requirement to produce a supplement for a change in the working capital statement as proposed in Paragraph 73-74 of the consultation paper</p>	<p>working capital statement would immediately question the issuer's ability to access cash and other available liquid resources in order to meet its liabilities as they fall due. Therefore, investors should be informed of such a development and how additional working capital will be provided as soon as practicable after the occurrence of such a change.</p> <p>2. Furthermore, investors are also interested in situations where a qualified working capital statement becomes clean, as such a development may induce new investors to subscribe for the securities or existing investors to increase their orders.</p>	<p>supplement for this situation cannot be determined at this stage and awaits feedback from the stakeholders.</p> <p>2. ESMA does not expect a significant increase in the number of supplements as changes in the working capital statement are only likely to occur on some rare occasions due to their reliability.</p> <p>3. ESMA acknowledged that time constraints may arise (i) in case of a clean working capital statement particularly as it is expected that the issuer would have to undertake adequate procedures to support such statement; and (ii) in case of a qualified working capital statement it would also be expected that the issuer provides a detailed action plan on how it intends to rectify the shortfall in the working capital statement.</p>	<p>consultation</p> <p>2. Experience of competent authorities</p>
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8. Admission to trading or offer to the public in an additional EU member state

Risk addressed / Policy objective

- Level playing field / Investor protection / Disclosure regime

Scope issues

- Specific situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published

Proposal	Benefits	Costs	Evidence
<p>Systematic requirement to produce a supplement for admission to trading in (an) additional EU Member State(s) or offer to the public in (an) additional EU Member State(s) as proposed in Paragraph 77-78 of the consultation</p>	<p>1. As information on the additional jurisdictions is a requirement for the notification of the prospectus, a supplement is the least expensive manner of complying with such a requirement.</p> <p>2. Investors who have already subscribed for the securities will know that the potential investor base has been expanded.</p>	<p>1. There are costs for expanding an offer abroad such as the provision of further tax information. Such costs are not different from the costs of including such information in the original prospectus. As applying for an admission to trading on an additional regulated market in (an) additional EU Member State(s) or for a public offer in (an) additional EU Member State(s) is the</p>	<p>1. Article 18 of the Prospectus Directive</p> <p>2. Commission Delegated Regulation 862 and ESMA Q&A no 45 regarding withholding tax.</p>

paper	3. Investors of all Member States where the public offer and/or admission to trading occur would have access to the same information which would then be set out in the prospectus and its related supplement(s).	choice of the issuer, he must endure such costs.	
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9. New significant financial commitment for equity securities

Risk addressed / Policy objective

- Level playing field / Investor protection / Disclosure regime

Scope issues

- Specific situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published

Proposal	Benefits	Costs	Evidence
Systematic requirement to produce a supplement for new significant financial commitment for equity securities as proposed in Paragraph 82-83 of the consultation paper	1. Investors will be able to assess how the financial situation of the issuer would have been affected by the commitment and get an insight of the full picture of the issuer after the transaction is performed.	1. Involvement of auditors with regard to pro forma information will result in costs for issuers. The amount of costs is unknown and awaits feedback from the stakeholders. 2. However, ESMA does not expect a substantial increase in the number of supplements due to the time constraints for preparing the supplement and the complexity of the issue.	1. Article 4((a) of the Prospectus Regulation. 2. Experience of competent authorities.

10. Any judgment or concluding event in governmental, legal or arbitration proceedings already disclosed in the prospectus

Risk addressed / Policy objective

- Level playing field / Investor protection / Disclosure regime

Scope issues

- Specific situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published

Proposal	Benefits	Costs	Evidence
Systematic requirement to produce a supplement for any judgment or con-	1. Where governmental, legal or arbitration proceedings which may have or have had in a recent past significant effects on the	1. ESMA is conscious that this proposal may result in a possible increase of the total costs of these supplements	1. Experience of competent authorities. 2. Feedback from the consultation.

<p>cluding event in governmental, legal or arbitration proceedings already disclosed in the prospectus as proposed in Paragraph 91 of the consultation paper</p>	<p>issuer and/or the group's financial position or profitability have already been disclosed in the prospectus, ESMA expects that investors are interested in the result of such proceedings.</p> <p>2. Sometimes issuers provide excessive disclosure on their governmental, legal and arbitration proceedings in the prospectus without distinguishing them according to their materiality. Therefore, the requirement to systematically produce a supplement for any judgment or concluding event in governmental, legal or arbitration proceedings may effectively limit such non-material disclosure in the prospectus.</p>	<p>resulting from an increase in their number. However, the drafting cost of each particular supplement is expected to remain the same. With regard to the extent of this increase, ESMA awaits the feedback of the stakeholders.</p>	
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11. Increase in the aggregate amount of the programme

Risk addressed / Policy objective

- Level playing field / Investor protection / Disclosure regime

Scope issues

- Specific situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published

Proposal	Benefits	Costs	Evidence
<p>Systematic requirement to produce a supplement for an increase in the aggregate amount of the programme as proposed in Paragraph 95 of the consultation paper</p>	<p>1. Investors should be informed of an increase of the aggregate amount of the programme as this can be an indicator of:</p> <ul style="list-style-type: none"> - the necessity to finance the issuer's principal future investments on which the issuer's management body has already made full commitments (the Prospectus Regulation also requires information regarding the anticipated sources of funds to fulfil those commitments); - a potential need for funding due to the occurrence of negative developments in the issuer's business and/or market situation since the 	<p>1. Very limited costs are expected due to the nature of the information required for these supplements.</p> <p>2. Currently, the vast majority of competent authorities require a supplement for an increase of the aggregate maximum amount of the program. Therefore, ESMA does not expect a substantial increase in the number of supplements.</p>	<p>1. Experience of competent authorities.</p>

	time of approval of the base prospectus; - a successful placement of offers under the base prospectus.		
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ANNEX IV – DRAFT REGULATORY TECHNICAL STANDARD

Draft

COMMISSION DELEGATED REGULATION (EU) No .../..

of [...]

supplementing Directive 2003/71/EC of the European Parliament and of the Council with regard to regulatory technical standards for publication of supplements to prospectuses

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading amending Directive 2001/34/EC¹, and in particular Article 16(3) thereof,

Whereas:

- (1) Directive 2003/71/EC harmonises requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State.
- (2) Directive 2003/71/EC also requires publication of supplements to the prospectus mentioning every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs later.
- (3) In order to ensure consistent harmonisation, to specify the requirements laid down in Directive 2003/71/EC and to take account of technical developments on financial markets, it is necessary to specify situations where publication of supplements to the prospectus is required.
- (4) It is not possible to identify all the situations in which a supplement to the prospectus is required as this may depend on the issuer and securities involved. Therefore, this Regulation establishes the minimum situations where a supplement is required. Directive 2003/71/EC does not use investor perception to distinguish between changes to information and therefore it is not appropriate to introduce such a distinction in this Regulation nor is it always possible to assess investor perception in relation to such changes.
- (5) Annual audited financial statements play a crucial role in making investment decisions. In order to ensure that investors base their investment decisions on the most recent financial information, new annual audited financial statements of an issuer, guarantor, issuers of underlying shares in the case of depositary receipts, certain issuers of underlying shares in the case of convertible securities and certain obligors in the case of asset backed securities published after the approval of the prospectus should be incorporated in a supplement to the prospectus.
- (6) In order to take account of the ability of profit forecasts to influence an investment decision, issuers of equity securities or issuers of the underlying shares in case of depositary receipts

¹ OJ L 345, 31.12.2003, p.64.

should ensure that their published profit forecasts are included in a supplement to the prospectus.

- (7) The nature of a profit estimate is providing information on the anticipated results for a financial period which has expired. As a consequence, a profit estimate for an annual financial period constitutes the most updated annual financial information concerning an issuer, guarantor or obligor. Therefore, a supplement should be published where a profit estimate for an annual financial period has been published by an issuer, guarantor, issuers of underlying shares in the case of depositary receipts, certain issuers of underlying shares in the case of convertible securities and certain obligors in the case of asset backed securities.
- (8) Information concerning the identity of the main shareholder(s) or any controlling entity of the issuer is vital for an informed assessment of the issuer, in case of any type of security. However, a situation of a change of control of the issuer is particularly significant where the offer refers to equity securities and depositary receipts as these types of securities are, in general, more price sensitive to this situation. Therefore, a supplement should be published where there is a change of control of an issuer of equity securities or an issuer of underlying shares in the case of depositary receipts.
- (9) Where a new public takeover bid in relation to the issuer's equity, or the equity of the issuer of the underlying shares in the case of depositary receipts, is announced, it is essential that potential investors assessing an outstanding offer of equity securities or depositary receipts are in a position to compare the terms and conditions of such an offer with the price or exchange terms attached to the public takeover bid. Moreover, the result of a public takeover bid is also significant for the investment decision as investors should know whether it implies or not a change in control of the issuer.
- (10) Where the working capital statement is not valid anymore, this Regulation should enable investors to reassess their investment decisions in light of the new information on the issuer's ability to access cash and other available liquid resources to meet its liabilities.
- (11) Investors in all Member States, where an offer to the public or admission to trading on a regulated market is sought, should have access to equal and Member State specific information. Provision of Member State specific information is also mandatory to enable notification pursuant to Article 18 of Directive 2003/71/EC. In situations where, after the approval of a prospectus, an issuer or offeror decides to offer the securities in Member States other than those provided for in the prospectus, or apply for admission to trading of the securities on regulated markets in EU Member States other than those provided for in the prospectus, there is an obligation to provide such information in a supplement to the prospectus.
- (12) The financial position or the business of the entity is likely to be affected by a significant financial commitment. Therefore, investors should be entitled to receive additional information on the consequences thereof.
- (13) The prospectus includes information on governmental, legal or arbitration proceedings, which are pending, threatened or on-going of which the issuer is aware, where such proceedings may have, or have had in a recent past significant effects on the issuer or the group's financial position or profitability. Therefore, it is appropriate to ensure that investors receive a supplement providing information on any judgment or other concluding events of those proceedings that occur after the approval of the prospectus. Information is to be provided regardless of the impact on the financial position or profitability of the issuer or the group or whether that judgment or event is subject to appeal, as this information can impact on the investment decision.
- (14) An increase of the aggregate nominal amount of an offering programme provides insights to an issuer's necessity for financing or an increase in demands for the issuer's securities. Therefore, where the aggregate nominal amount of an offering programme is included in the prospectus, an increase thereof should be included in a supplement to the prospectus.
- (15) The provision of full information concerning the securities and the issuers of securities promotes the protection of investors. Moreover, it provides an effective means of collecting related information concerning a significant new factor, material mistake or inaccuracy relating to the information in the prospectus in one place. It is therefore appropriate that a

supplement drawn up on the basis of this Regulation should include any information needed to take into account the information on the specific situation(s) that triggered the supplement.

- (16) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (17) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and the Council².

HAS ADOPTED THIS REGULATION:

Article 1 –

Subject matter and scope

1. This Regulation establishes regulatory technical standards specifying situations in which the publication of a supplement to the prospectus is mandatory as well as minimum disclosure requirements for such supplements.

Article 2 –

Obligation to publish a supplement

1. A supplement to the prospectus shall be published in the following situations:

(a) where new annual audited financial statements are published by:

(i) an issuer;

(ii) a guarantor;

(iii) an obligor in accordance with item 2.2.11(a) of Annex VIII of Regulation (EC) No 809/2004;

(iv) an issuer of the underlying shares or other transferable securities equivalent to shares in case of securities covered by Article 17(2) of the Regulation (EC) No 809/2004; or.

(v) an issuer of the underlying shares where the prospectus is drawn up in accordance with the depositary receipt schedule, set out in Annexes X or XXVIII of Regulation (EC) No 809/2004.

(b) where a profit forecast is published by:

(i) an issuer where a prospectus relates to shares and other transferable securities equivalent to shares in accordance with Article 4(2)(1) of Regulation (EC) No 809/2004;

(ii) an issuer of the underlying shares or other transferable securities equivalent to shares where a prospectus relates to securities covered by Article 17(2) of Regulation (EC) No 809/2004; or

² OJ L 331, 15.12.2010 p.4

(iii) an issuer of the underlying shares where the prospectus is drawn up in accordance with the depositary receipt schedule, set out in Annexes X or XXVIII of Regulation (EC) No 809/2004;

(c) where a profit estimate for an annual financial period is published by:

(i) an issuer where the prospectus is drawn up in accordance with the registration document schedules set out in Annexes I, IV, IX, XI, XXIII, XXV, XXVI, XXVII and XXIX to Regulation (EC) No 809/2004;

(ii) a guarantor where the prospectus includes the additional building block for guarantees, set out in Annex VI to Regulation (EC) No 809/2004;

(iii) an issuer of the underlying shares or other transferable securities equivalent to shares where a prospectus relates to securities covered by Article 17(2) of Regulation (EC) No 809/2004;

(iv) an issuer of the underlying shares where the prospectus is drawn up in accordance with the depositary receipt schedule, set out in Annexes X or XXVIII to Regulation (EC) No 809/2004; or

(v) an obligor in accordance with item 2.2.11(a) of Annex VIII to Regulation (EC) No 809/2004;

(d) where there is a change in control in respect of:

(i) an issuer where a prospectus relates to shares and other transferable securities equivalent to shares in accordance with Article 4(2)(1) of Regulation (EC) No 809/2004;

(ii) an issuer of the underlying shares or other transferable securities equivalent to shares where a prospectus relates to securities covered by Article 17(2) of Regulation (EC) No 809/2004; or

(iii) an issuer of the underlying shares where a prospectus is drawn up in accordance with a depositary receipt schedule, set out in Annexes X or XXVIII of Regulation (EC) No 809/2004;

(e) where there is any new public takeover bid by third parties, as defined in Article 2(1) a) of Directive 2004/25/EC of the European Parliament and the Council³ and the outcome of any public takeover bid in respect of:

(i) the issuer's equity where a prospectus relates to shares and other transferable securities equivalent to shares with Article 4(2)(1) of Regulation (EC) No 809/2004;

(ii) the equity of the issuer of the underlying shares or other transferable securities equivalent to shares where a prospectus relates to securities covered by Article 17(2) of Regulation (EC) No 809/2004; or

(iii) the equity of the issuer of the underlying shares where a prospectus is drawn up in accordance with the depositary receipt schedule, set out in Annexes X or XXVIII to Regulation (EC) No 809/2004;

(f) where the working capital statement proves not to be valid anymore where the prospectus relates to shares and other transferable securities equivalent to shares in accordance with Article 4(2)(1) and convertible or exchangeable debt securities in accordance with Article 17(2) of Regulation (EC) No 809/2004;

³ OJ L 142 30.4.2004 p.12



(g) where an issuer is seeking admission to trading on (an) additional regulated Union market(s) in (an) additional Member State(s) or intending to make an offer to the public in (an) additional Member State(s) other than the one(s) provided for in the prospectus;

(h) where a new significant financial commitment is undertaken which is likely to give rise to a significant gross change pursuant to Article 4a(6) of Regulation (EC) No 809/2004 and the prospectus relates to shares and other transferable securities equivalent to shares and in accordance with Article 4(2)(1) and other equity securities in accordance with Article 17(2) of Regulation (EC) No 809/2004;

(i) where there is a judgment or other concluding event in any pending, threatened or on-going governmental, legal or arbitration proceedings already disclosed in the prospectus, regardless of whether that judgment or event is subject to appeal; and

(j) where the aggregate nominal amount of the programme is increased.

2. For the purposes of point (i) of point (a) of paragraph 1, the obligation to publish a supplement shall not apply in case of annual audited financial statements published by issuers of depositary receipts or issuers of asset backed securities where claims of the investors are limited to the underlying assets and the issuer is a special purpose vehicle.

Article 3 –

Content of the supplement

A supplement published pursuant to Article 2 shall contain the following information:

- (a) information in accordance with the minimum disclosure requirements set out in the Annex;
- (b) any other information in relation to the information disclosed in the prospectus that needs to be supplemented in order to take into account the information included pursuant to point (a)

Article 4 –

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Commission
The President*

*[For the Commission
On behalf of the President*

[Position]

ANNEX I

Minimum disclosure requirements referred to in Article 3

1.	PUBLICATION OF NEW ANNUAL AUDITED FINANCIAL STATEMENTS BY THE ISSUER OR BY ANY GUARANTOR OR BY ANY OBLIGOR OR BY THE ISSUER OF THE UNDERLYING SHARES REFERRED TO IN ARTICLE 2(a)
1.1	Where the issuer or any guarantor or any obligor in accordance with item 2.2.11(a) of Annex VIII to Regulation (EC) 809/2004 or the issuer of the underlying shares where the prospectus is drawn up in accordance with the depositary receipt schedule or the issuer of the underlying shares or other transferable securities equivalent to shares in case of securities covered by Article 17(2) of Regulation (EC) 809/2004 publishes both unconsolidated and consolidated annual audited financial statements, at least, the annual consolidated financial statements and its audit report in accordance with item 20.1 of Annex I, item 20.1 and item 20.1(a) of Annex X, item 13.1 of Annex IV, item 8.2 and item 8.2(a) of Annex VII, item 11.1 of Annex IX, Annex XI, and Annex XXIX and item 15.1 of Annex XXIII to Regulation (EC) No 809/2004.
1.2	Where the issuer or any guarantor or any obligor in accordance with item 2.2.11(a) of Annex VIII to Regulation (EC) 809/2004 or the issuer of the underlying shares where the prospectus is drawn up in accordance with the depositary receipt schedule or the issuer of the underlying shares or other transferable securities equivalent to shares in case of securities covered by Article 17(2) of Regulation (EC) 809/2004 publishes only unconsolidated annual audited financial statements, at least, the audit report and the financial information as required by the relevant registration document schedule for issuers and/or guarantors that prepare the audited financial information in accordance with item 20.1 of Annex I, item 20.1 and item 20.1(a) of Annex X, item 13.1 of Annex IV, item 8.2 and item 8.2(a) of Annex VII, item 11.1 of Annex IX, Annex XI and Annex XXIX and item 15.1 of Annex XXIII to Regulation (EC) No 809/2004.
1.3	Where the issuer or any guarantor or any obligor in accordance with item 2.2.11(a) of Annex VIII to Regulation (EC) 809/2004 or the issuer of the underlying shares where the prospectus is drawn up in accordance with the depositary receipt schedule or the issuer of the underlying shares or other transferable securities equivalent to shares in case of securities covered by Article 17(2) of Regulation (EC) 809/2004 publishes the annual audited financial statements and the registration document was drawn up in accordance with any of the proportionate disclosure regime registration document schedules for SMEs and companies with reduced market capitalisation, at least, the audit report, where such financial statements can be found and the required statement in accordance with the first paragraph in item 20.1 of Annex XXV, item 13.1 of Annex XXVI, item 11.1 of Annex XXVII and item 20.1 of Annex XXVIII to Regulation (EC) No 809/2004.
2.	PUBLICATION OF A PROFIT FORECAST REFERRED TO IN ARTICLE 2(b) As the case may be, item 13 of Annexes I, X, XXV and XXVIII or item 8 of Annex XXIII to Regulation (EC) No 809/2004.
3.	PUBLICATION OF A PROFIT ESTIMATE FOR AN ANNUAL FINANCIAL PERIOD REFERRED TO IN ARTICLE 2(c) As the case may be, item 13 of Annexes I, X, XXV and XXVIII; item 9 of Annexes IV, XI,

	XXIII, XXVII and XXIX; or item 8 of Annexes IX and XXVI to Regulation (EC) No 809/2004.
4.	CHANGE IN CONTROL OF THE ISSUER OR THE ISSUER OF THE UNDERLYING SHARES REFERRED TO IN ARTICLE 2(d)The description of any arrangements, known to the issuer, in relation to such change in control.
5.	ANY NEW PUBLIC TAKEOVER BID BY THIRD PARTIES, AS DEFINED IN ARTICLE 2(1) a) OF DIRECTIVE 2004/25/EC AND THE OUTCOME OF ANY PUBLIC TAKEOVER BID REFERRED TO IN ARTICLE 2(e)
5.1	In case of a new public takeover bid, the information required by item 4.10 of Annex III; item 27.13 of Annexes X and XXVIII; or item 1.10 of Annex XIV to Regulation (EC) No 809/2004 and the description of any arrangements, known to the issuer, the operation of which may at a subsequent date result in a change in control of the issuer or of the issuer of the underlying shares where the prospectus is drawn up in accordance with the depositary receipt schedule or the issuer of the underlying shares or other transferable securities equivalent to shares in case of securities covered by Article 17(2) of Regulation (EC) 809/2004 resulting from such public takeover bid.
5.2	Where the outcome of a public takeover bid is the change in control of the issuer of the underlying shares where the prospectus is drawn up in accordance with the depositary receipt schedule or of the issuer of the underlying shares or other transferable securities equivalent to shares in case of securities covered by Article 17(2) of Regulation (EC) 809/2004, the description of any arrangements, known to the issuer, in relation to such a change in control resulting from the public takeover bid.
5.3	Information on the outcome of the public takeover bid where it does not result in a change in control of the issuer or of the issuer of the underlying shares where the prospectus is drawn up in accordance with the depositary receipt schedule or of the issuer of the underlying shares or other transferable securities equivalent to shares in case of securities covered by Article 17(2) of Regulation (EC) 809/2004.
6.	WHERE THE WORKING CAPITAL STATEMENT PROVES NOT TO BE VALID ANYMORE REFERRED TO IN ARTICLE 2(f) An explanation of the new factor, mistake or inaccuracy and update of the statement required by item 3.1 of Annexes III and XXIV to Regulation (EC) No 809/2004.
7.	WHERE AN ISSUER IS SEEKING THE ADMISSION TO TRADING ON (AN) ADDITIONAL EU REGULATED MARKET(S) IN (AN) ADDITIONAL EU MEMBER STATE(S) OR INTENDING TO MAKE AN OFFER TO THE PUBLIC IN (AN) ADDITIONAL EU MEMBER STATE(S) THAN THE ONE(S) FORESEEN IN THE PROSPECTUS REFERRED TO IN ARTICLE 2(g) The information required by Regulation (EC) No 809/2004 with respect to the application for admission to trading on a regulated market and/or the offer to the public in such EU Member State which was not included in the prospectus or base prospectus and cannot only be included in the final terms.
8.	NEW SIGNIFICANT FINANCIAL COMMITMENT WHICH IS LIKELY TO GIVE RISE TO A

	SIGNIFICANT GROSS CHANGE REFERRED TO IN ARTICLE 2(h) Information required by Article 4a of Regulation (EC) No 809/2004.
9.	ANY CHANGE IN STATUS OF GOVERNMENTAL, LEGAL OR ARBITRATION PROCEEDINGS ALREADY DISCLOSED IN THE PROSPECTUS REFERRED TO IN ARTICLE 2(i) Information regarding such outcome of the particular proceeding.
10.	INCREASE IN AGGREGATE AMOUNT OF THE PROGRAMME REFERRED TO IN ARTICLE 2(j) The new aggregate amount of the programme.

ANNEX V –LEGAL REFERENCES

Level 1

Directive **2001/34/EC** of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:184:0001:0066:EN:PDF>

Directive **2003/71/EC** (*the Prospectus Directive*) of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:345:0064:0089:EN:PDF>

Article 5(1) - The prospectus

1. Without prejudice to Article 8(2), the prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities. This information shall be presented in an easily analysable and comprehensible form.

Article 12 - Prospectuses consisting of separate documents

1. An issuer which already has a registration document approved by the competent authority shall be required to draw up only the securities note and the summary note when securities are offered to the public or admitted to trading on a regulated market.

2. In this case, the securities note shall provide information that would normally be provided in the registration document if there has been a material change or recent development which could affect investors' assessments since the latest updated registration document or any supplement as provided for in Article 16 was approved. The securities and summary notes shall be subject to a separate approval.

3. Where an issuer has only filed a registration document without approval, the entire documentation, including updated information, shall be subject to approval.

Article 16 - Supplements to the prospectus

1. Every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, shall be mentioned in a supplement to the prospectus. Such a supplement shall be approved in the same way in a maximum of seven working days and published in accordance with at least the same arrangements as were applied when the original prospectus was published. The summary, and any translations thereof, shall also be supplemented, if necessary to take into account the new information

included in the supplement.

2. Where the prospectus relates to an offer of securities to the public, investors who have already agreed to purchase or subscribe for the securities before the supplement is published shall have the right, exercisable two working days after the publication of the supplement, to withdraw their acceptances, provided that the new factor, mistake or inaccuracy referred to in paragraph 1 arose before the final closing of the offer to the public and the delivery of the securities. That period may be extended by the issuer or the offeror. The final date of the right of withdrawal shall be stated in the supplement.

Article 21 – Powers

1. Each Member State shall designate a central competent administrative authority responsible for carrying out the obligations provided for in this Directive and for ensuring that the provisions adopted pursuant to this Directive are applied. However, a Member State may, if so required by national law, designate other administrative authorities to apply Chapter III. These competent authorities shall be completely independent from all market participants. If an offer of securities is made to the public or admission to trading on a regulated market is sought in a Member State other than the home Member State, only the central competent administrative authority designated by each Member State shall be entitled to approve the prospectus.

1a. The competent authorities shall cooperate with ESMA for the purposes of this Directive, in accordance with Regulation (EU) No 1095/2010.

1b. The competent authorities shall without delay provide ESMA with all information necessary to carry out its duties, in accordance with Article 35 of Regulation (EU) No 1095/2010.

2. Member States may allow their competent authority or authorities to delegate tasks. Except for delegation of the publication on the Internet of approved prospectuses and the filing of prospectuses as mentioned in Article 14, any delegation of tasks relating to the obligations provided for in this Directive and in its implementing measures shall be reviewed, in accordance with Article 31 by 31 December 2008, and shall end on 31 December 2011. Any delegation of tasks to entities other than the authorities referred to in paragraph 1 shall be made in a specific manner stating the tasks to be undertaken and the conditions under which they are to be carried out. These conditions shall include a clause obliging the entity in question to act and be organised in such a manner as to avoid conflict of interest and so that information obtained from carrying out the delegated tasks is not used unfairly or to prevent competition. In any case, the final responsibility for supervising compliance with this Directive and with its implementing measures and for approving the prospectus shall lie with the competent authority or authorities designated in accordance with paragraph 1. The Member States shall inform the Commission, ESMA and the competent authorities of other Member States of any arrangements entered into with regard to delegation of tasks, including the precise conditions regulating such delegation.

3. Each competent authority shall have all the powers necessary for the performance of its functions. A competent authority that has received an application for approving a prospectus shall be empowered at least to:

(a) require issuers, offerors or persons asking for admission to trading on a regulated market to include in the prospectus supplementary information, if necessary for investor protection;

(b) require issuers, offerors or persons asking for admission to trading on a regulated market, and the persons that control them or are controlled by them, to provide information and documents;

(c) require auditors and managers of the issuer, offeror or person asking for admission to trading on a regulated market, as well as financial intermediaries commissioned to carry out the offer to the public or ask for admission to trading, to provide information;

(d) suspend a public offer or admission to trading for a maximum of 10 consecutive working days on any single occasion if it has reasonable grounds for suspecting that the provisions of this Directive have been infringed;

(e) prohibit or suspend advertisements for a maximum of 10 consecutive working days on any single occasion if it has reasonable grounds for believing that the provisions of this Directive have been infringed;

(f) prohibit a public offer if it finds that the provisions of this Directive have been infringed or if it has reasonable grounds for suspecting that they would be infringed;

(g) suspend or ask the relevant regulated markets to suspend trading on a regulated market for a maximum of 10 consecutive working days on any single occasion if it has reasonable grounds for believing that the provisions of this Directive have been infringed;

(h) prohibit trading on a regulated market if it finds that the provisions of this Directive have been infringed;

(i) make public the fact that an issuer is failing to comply with its obligations.

Where necessary under national law, the competent authority may ask the relevant judicial authority to decide on the use of the powers referred to in points (d) to (h) above.

4. Each competent authority shall also, once the securities have been admitted to trading on a regulated market, be empowered to:

(a) require the issuer to disclose all material information which may have an effect on the assessment of the securities admitted to trading on regulated markets in order to ensure investor protection or the smooth operation of the market;

(b) suspend or ask the relevant regulated market to suspend the securities from trading if, in its opinion, the issuer's situation is such that trading would be detrimental to investors' interests;

(c) ensure that issuers whose securities are traded on regulated markets comply with the obligations provided for in Articles 102 and 103 of Directive 2001/34/EC and that equivalent information is provided to investors and equivalent treatment is granted by the issuer to all securities holders who are in the same position, in all Member States where the offer to the public is made or the securities are admitted to trading;

(d) carry out on-site inspections in its territory in accordance with national law, in order to verify compliance with the provisions of this Directive and the delegated acts referred to therein. Where necessary under national law, the competent authority or authorities may use this power by applying to the relevant judicial authority and/or in cooperation with other authorities.

In accordance with Article 21 of Regulation (EU) No 1095/2010, ESMA shall be entitled to participate in on-site inspections referred to in point (d) where they are carried out jointly by two or more competent authorities.

5. Paragraphs 1 to 4 shall be without prejudice to the possibility for a Member State to make separate legal and administrative arrangements for overseas European territories for whose external relations that Member State is responsible.

Directive **2004/25/EC** of the European Parliament and of the Council of 21 April 2004 on takeover bids

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:142:0012:0023:EN:PDF>

Article 2(1) a – Definitions

1. For the purposes of this Directive:

(a) ‘takeover bid’ or ‘bid’ shall mean a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law;

Directive **2010/73/EU** (*the Amending Prospectus Directive*) of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:327:0001:0012:EN:PDF>

Directive **2010/78/EU** (*the Omnibus Directive*) of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority)

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:331:0120:0161:EN:PDF>

Article 5(7) - Amendments to Directive 2003/71/EC

In Article 16, the following paragraph is added:

‘3. In order to ensure consistent harmonisation, to specify the requirements laid down in this Article and to take account of technical developments on financial markets, ESMA shall develop draft regulatory technical standards to specify situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published. ESMA shall submit those draft regulatory technical standards to the Commission by 1 January 2014.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.’

Regulation (EU) **No 1095/2010** of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:331:0084:0119:EN:PDF>

Level 2

Commission Regulation (EC) **No 809/2004** (*the Prospectus Regulation*) of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:215:0003:0103:EN:PDF>

Article 4(2) – Share registration document schedule

2. The schedule set out in paragraph 1 shall apply to the following:

1. shares and other transferable securities equivalent to shares;
2. other securities which comply with the following conditions:

(a) they can be converted or exchanged into shares or other transferable securities equivalent to shares, at the issuer's or at the investor's discretion, or on the basis of the conditions established at the moment of the issue, or give, in any other way, the possibility to acquire shares or other transferable securities equivalent to shares; and

(b) provided that these shares or other transferable securities equivalent to shares are or will be issued by the issuer of the security and are not yet traded on a regulated market or an equivalent market outside the Community at the time of the approval of the prospectus covering the securities, and that the underlying shares or other transferable securities equivalent to shares can be delivered with physical settlement.

Article 17(2) - Additional information building block on the underlying share

2. The additional information referred to in the first subparagraph of paragraph 1 shall only apply to those securities which comply with both of the following conditions:

1. they can be converted or exchanged into shares or other transferable securities equivalent to shares, at the issuer's or at the investor's discretion, or on the basis of the conditions established at the moment of the issue or give, in any other way, the possibility to acquire shares or other transferable securities equivalent to shares; and
2. provided that these shares or other transferable securities equivalent to shares are or will be issued by the issuer of the security or by an entity belonging to the group of that issuer and are not yet traded on a regulated market or an equivalent market outside the Community at the time of the approval of the prospectus covering the securities, and that the underlying shares or other transferable securities equivalent to shares can be delivered with physical settlement.

Annex VIII – Minimum disclosure requirements for the asset-backed securities additional build-

ing block

2.2.11 Where the assets comprise obligations of 5 or fewer obligors which are legal persons or where an obligor accounts for 20% or more of the assets, or where an obligor accounts for a material portion of the assets, so far as the issuer is aware and/or is able to ascertain from information published by the obligor(s) indicate either of the following:

(a) information relating to each obligor as if it were an issuer drafting a Registration Document for debt and derivative securities with an individual denomination of at least EUR 100 000;

(b) if an obligor or guarantor has securities already admitted to trading on a regulated or equivalent market or the obligations are guaranteed by an entity admitted to trading on a regulated or equivalent market, the name, address, country of incorporation, nature of business and name of the market in which its securities are admitted.

Level 3

ESMA update of the CESR **Recommendations** - The consistent implementation of Commission Regulation (EC) No 809/2004 implementing the Prospectus Directive

http://www.esma.europa.eu/system/files/11_81.pdf

44. CESR considers that there is a presumption that an outstanding forecast made other than in a previous prospectus will be material in the case of share issues (especially in the context of an IPO). This is not necessarily the presumption in case of non-equity securities.

Questions and Answers Prospectuses - 18th updated version – December 2012

<http://www.esma.europa.eu/system/files/2012-855.pdf>

20. Supplement to prospectuses: profit forecast

Date last updated: February 2007

Q) Is the publication of a profit forecast before the final closing of the offer, a significant new factor that requires the publication of a supplement in accordance with Article 16, given that, under the Regulation, the insertion of a profit forecast in a prospectus is optional?

A) Paragraph 44 of ESMA's recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses n° 809/2004 (ESMA 2011/81) states:

“ESMA considers that there is a presumption that an outstanding forecast made other than in a previous prospectus will be material in the case of shares issues (especially in the context of an IPO). This is not necessarily the presumption in case of non-equity securities”.

Although it is up to the issuer to decide when a supplement is needed, according to that statement, there would be a presumption in the case described in the ESMA's recommendations that the publication of a profit forecast before the final closing of the offer would constitute material information. Therefore, in such a case a supplement should be prepared including the profit forecast and complying with Item 13 of Annex I of the Regulation.

