



European Securities and  
Markets Authority

## Response form for the Consultation Paper on format and content of the prospectus



## Responding to this paper

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

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

ESMA will consider all responses received by 28 September 2017.

## Instructions

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

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

## Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly indicate by ticking the appropriate checkbox on the website submission page if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confi-



dential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

### **Data protection**

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

### **Who should read this Consultation Paper**

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



## General information about respondent

Name of the company / organisation	Association for Financial Markets in Europe
Activity	Banking sector
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Europe

## Introduction

*Please make your introductory comments below, if any:*

<ESMA\_COMMENT\_FAC\_1>

The Association for Financial Markets in Europe (AFME) represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors, and other financial market participants. It advocates stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is registered on the EU Transparency Register, registration number 65110063986-76.

AFME has commented in its response on matters affecting equity securities and depositary receipts, as well as asset-backed securities. It has therefore not provided responses to those questions which cover areas outside these products.

As a general comment AFME notes that while the new regime will bring in numerous changes to the prospectus format and content, the majority of these changes are, in AFME's view, incremental improvements. In addition, AFME notes that ESMA has retained the current disclosure annexes as these are understood by the market and only requires disclosure of a specific item to the extent that it is relevant to the Article 6 disclosure test for the relevant type of security.

We would make the following high-level general comments, by way of introduction.

### **(1) Simplified prospectus disclosure - importance of maintaining flexibility to disclose additional information**

In AFME's view, while the simplified disclosure which is being suggested may be helpful for certain issuers, there will be many occasions where issuers will want to include additional information to that required by Annexes 18 and 19 or to reflect requirements and practices (including ordering of information) in other markets. It is therefore important that, as contemplated at Level 1, the Commission and ESMA ensure that National Competent Authorities (NCAs) allow issuers to include additional disclosure, where appropriate, or permit derogations, where necessary, to track the disclosure requirements of other markets.

In particular, many larger issuers have a significant US investor base that they need to access when undertaking a secondary issuance. A proportionate disclosure regime which does not allow for taking account of the US disclosure requirements would not be used by issuers seeking to access US investors, as the resulting prospectus would only be suitable for use in connection with European issuance.

For reference, a short list of areas of difference in Rule 144A disclosure is set out below.

- Risk Factors - SEC guidance and US practice in respect of risk factor disclosure requires the risk factors to be succinct (without extensive factual background, which can be cross-referred to), to focus only on the risk presented (without mitigants, which can be presented elsewhere in the document, without being cross-referred to) and to be topically arranged in order from most to least material.
- Forward-Looking Statements - US statutory safe harbours precludes civil liability for material mis-statements or omissions in such statements if, among other things, they are identified as forward-looking statements and are accompanied by meaningful cautionary statements - this drives certain US practice in respect of cautionary language and disclaimers around the use of all information in a prospectus which does not speak strictly to present or historical facts.
- OFR - an extensive body of specific SEC guidance in respect of financial disclosure requires the OFR discussion to be formulated in a certain style and to a level of detail in certain respects above and beyond what is required in the Prospectus Directive. In particular, disclosure on the key factors impacting the issuer's financial results, the comparative results of operations disclosure, coverage of the issuer's critical accounting policies and of liquidity and cash flows are all typically drafted according to US practice.
- Pro forma and stand alone financial statements of acquired companies - Regulation S-X governs the use of pro forma and stand alone financial statements in SEC registered disclosure, and is applied to assess Rule 144A / 10b-5 disclosure requirements outside the United States. The standards applied by Regulation S-X to require pro forma and stand alone financial statements vary in certain cases from those required in the equivalent situation in a PD-governed prospectus, and the US thresholds are generally applied in a Rule 144A / 10b-5 disclosure document
- Industry Guides - in respect of certain industries (e.g. banks, mineral extraction companies) the SEC has certain industry-specific disclosure requirements which are made reference to in Rule 144A / 10b-5 disclosure practice even outside the context of SEC registered transactions.

## **(2) Universal Registration Document or URD**

Aside from markets like France where there is already a practice of making annual disclosures in a registration document format, AFME considers that it is unlikely that the new URD regime will trigger a change in approach across all of the EEA, as a result of the following factors:

- issuers rarely require a prospectus every year for an equity issuance and therefore the production of an annual URD, as required by the Level 1 Regulation, may prove inefficient; and
- even where an issuer has prepared a URD, in order to publish a prospectus it will be necessary to publish a securities note and, in most cases, a summary, and these will have to be approved by the relevant NCA. It is also unclear whether a URD will have to be approved again when it is part of a prospectus. Accordingly, there may be limited time advantages to preparing a URD.



### (3) ESMA Q&A on Prospectuses

The ESMA Q&A issued under the existing Prospectus Directive regime contain a significant amount of useful guidance. AFME's view is that it would be helpful if these were updated and carried forward under the new regime.

AFME understands that ESMA is proposing to issue guidance to national competent authorities regarding the application of the two exemptions which came into effect on 20 July 2017, to ensure a common approach amongst NCAs.

Specific areas of focus for ESMA are as follows:

- to remind the NCAs of the ESMA Q&A (31) that already exists regarding how the "up to" limits should be calculated over a 12 month period. As the ESMA Q&A only addresses issuances that are eligible to benefit from the exemption up to the publication of a prospectus, it would be helpful to confirm the position post-prospectus.
- to clarify the interpretation of Article 1.6 regarding when it is and is not possible to combine Art 1.5 (a) and (b). The Commission's intention is that the provision means that, if you reach 19% under Art 1.5 (a) you would only have 1% to utilise, in the context of Art 1.5 b(b), in the same period. AFME believes that ESMA should explain this to the NCAs. It will also be necessary to make it clear that Art. 1.6 was intended to take effect on 20 July 2017.
- the omission of any reference to the restriction in Article 1.6 from Art 49(2) seems to be a drafting error as it is meant to enter into force in July 2017.
- provide clarification around what is meant by "deferred admission" in Art 1.6 – which in AFME's view should be read as meaning securities issued on x date which are for whatever reason not listed until y date, rather than catching shares which may be listed at a later date, such as the time at which the conversion trigger under a convertible bond is met, which can be years after the original convertible bond issue.

The above points were raised by AFME/Allen & Overy in its interactions with ESMA prior to the consultation. AFME would be pleased to continue to work further with ESMA, on an informal basis, to assess which of the other ESMA Q&A should be updated and retained.

<ESMA\_COMMENT\_FAC\_1>

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

<ESMA\_QUESTION\_FAC\_1>

AFME disagrees with the proposal. There is no requirement at Level 1 for a cover note and AFME does not believe that this should now be mandated through delegated acts or guidance.

AFME has a preference for maintaining the status quo, as the introductory pages of the prospectus tend to follow an established approach in equity capital markets transactions. This section would typically include a statement that the prospectus has the status of a Prospectus Directive prospectus, a skeleton summary of information about the deal and its key features, a list of banks and their roles together with rubrics and disclaimers.

In particular, any cover note should be capable of including the important disclaimers necessary to deal with the admission and liability regimes of the relevant markets and jurisdictions, which will vary from deal to deal and may need to exceed three pages. Such disclaimers are important to ensure that it is clear to investors, among other things:

- whether or not they are eligible to participate in the transaction (e.g. jurisdictions that are excluded or for which specific qualifications are required);
- which are the key sections to review (such as risk factors);
- who has prepared and is responsible for the prospectus or parts of it (i.e. the issuer and its directors, auditors, experts) and who is not (i.e. the underwriters);
- any information that may be subject to greater potential uncertainty, such as market information and forward looking information;
- that the prospectus does not contain any recommendations and none of the issuer nor underwriters are acting for or providing any advice to investors (especially relevant for secondary issuance prospectuses which retail investors may easily confuse with takeover documents and shareholder circulars which generally do include recommendations/ advice).

AFME therefore disagrees with the suggestion that so-called "disclaimers" should not appear in the front "cover note" segment of the prospectus. There are legal reasons why an issuer and underwriters would want to give prominence to disclaimers as certain cases, which support the effectiveness of disclaimers, have referenced the need for them to be "clear" and "prominent".

In certain markets like France, it is already customary to include prescribed wording to disclose the role of the competent authority in the prospectus approval process, in the introductory pages.

Subject to the above, as investors are required to read the whole prospectus before making an investment decision, there is no reason, as a matter of law, why the introductory pages should be limited in length and "excess" information provided in a separate section.

In the event that ESMA disagrees with AFME's view that there should not be any Level 2 legislation governing cover notes, AFME suggests that the content requirements for cover notes for prospectuses for equity

and non-equity securities are dealt with separately, since the typical quantity and nature of disclaimers required (and which are customary) vary considerably between prospectuses for equity and non-equity securities.

<ESMA\_QUESTION\_FAC\_1>

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

<ESMA\_QUESTION\_FAC\_2>

AFME considers that, if a prospectus is drafted in a clear and easily comprehensible way, as required by the Prospectus Regulation, such a section should be unnecessary. An issuer seeking to target an exclusively or predominantly retail audience should be free to add such a section. However, requiring one would potentially add unnecessary wording and cost.

AFME notes that many issuers use the advertisements regime to generate guides for shareholders with respect to equity capital raisings. We believe that this practice is likely to continue under the new regime.

<ESMA\_QUESTION\_FAC\_2>

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

<ESMA\_QUESTION\_FAC\_3>

Given that many investors read soft copies of prospectuses and find the information most relevant to them via search functions, AFME’s view is that regulating the order of information within the prospectus, save regarding disclaimers (see response to question 1 above), is unnecessary. Risk factor location should not be a concern for investor protection if they are clearly highlighted in the contents and referred to, as appropriate, throughout the prospectus. Subject to the above, AFME has no objection to the location proposed in the Consultation, although we note that almost all prospectuses already follow this approach.

<ESMA\_QUESTION\_FAC\_3>

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

<ESMA\_QUESTION\_FAC\_4>

Until URD utilisation has increased across Europe, AFME is uncertain as to whether promoting a flexible order should be the next step. It may encourage use of the URD if issuers can be confident that National Competent Authorities will take a consistent approach to approval. Anything that detracts from uniformity in NCA's practices in this regard, in AFME’s view, is undesirable.

<ESMA\_QUESTION\_FAC\_4>

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

<ESMA\_QUESTION\_FAC\_5>



AFME has no issue with ESMA's suggestion that the use of proceeds section be given greater prominence. Even so, it does not favour an overly precise requirement to delineate proceeds in all situations (i.e. general corporate purposes can be a legitimate use).

<ESMA\_QUESTION\_FAC\_5>

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

<ESMA\_QUESTION\_FAC\_6>

AFME's view is that the list of items of additional information could usefully be expanded. An example of a useful addition to the list would be the bespoke selling restrictions relevant to the particular transaction.

<ESMA\_QUESTION\_FAC\_6>

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

<ESMA\_QUESTION\_FAC\_7>

AFME has the following comments on the Level 1 definitions set out below:

*The definition of “advertisement”*

AFME understands that the topic of advertisements is to be included in the second mandate from the Commission to ESMA and is therefore not being addressed in the Consultation. Accordingly, AFME restricts its comments to noting (as previously advised in our briefing paper dated June 2017) that the change in the definition of “advertisement” to capture a ‘communication’ rather than an ‘announcement’ means that it risks capturing bilateral communications (written or oral). AFME considers that the impact of this would be disproportionate and may have an impact on the effectiveness of the market soundings regime under the Market Abuse Regulation, which provides a regulatory framework for private bilateral communications. As a way of clarifying this point, AFME proposes that advertisements are interpreted as being communications that are publicly or otherwise widely disseminated.

*The definition of “offer of securities to the public”*

AFME notes the change to the introduction to Article 23(2) of the Prospectus Regulation which provides that withdrawal rights arise “where the prospectus relates to an offer of securities to the public”.

AFME considers that withdrawal rights should not apply in the context of admission-only prospectus supplements. AFME believes it would be illogical for investors to have walkaway rights after the publication of a supplement when no prospectus was required purely in relation to a public offer. AFME would be grateful if ESMA could confirm that it agrees with this interpretation.

<ESMA\_QUESTION\_FAC\_7>

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

<ESMA\_QUESTION\_FAC\_8>

AFME notes that changes to the Annexes for equity issuance which require additional or different disclosure are likely to create additional costs in the short term as the market and national competent authorities adjust to them. These costs are likely to vary from issuer to issuer and may also differ from jurisdiction to jurisdiction, if national competent authorities take differing approaches to the interpretation of new provisions.

Issuers are likely to require guidance on certain changes; one example is with respect to the proposed need for disclosure of financial and non- financial objectives and what test would need to be met to require their inclusion in the prospectus, in particular, where these objectives may not be formal or specific. We expand on this point below in the response to Q20.

<ESMA\_QUESTION\_FAC\_8>

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

<ESMA\_QUESTION\_FAC\_9>

AFME notes that, in France, the AMF has its own form of such cover page wording. Subject to allowing any such established market practice to continue, in the relevant jurisdiction, AFME has no objection to the inclusion of wording confirming the scope of NCA approval to be included in the prospectus.

AFME recommends that it should be apparent on the face of each prospectus that the document has the status of a prospectus.

<ESMA\_QUESTION\_FAC\_9>

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

<ESMA\_QUESTION\_FAC\_10>

Yes. AFME supports this change, to remove duplication.

<ESMA\_QUESTION\_FAC\_10>

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

<ESMA\_QUESTION\_FAC\_11>

AFME recommends that ESMA's proposal of including a website address for the issuer in the prospectus, with a disclaimer that the website does not form part of the prospectus, should be expanded to require the website address wording to be placed next to the company's registered office information and to require insertion of wording making it clear that the information in the website is not incorporated by reference (ESMA's stated intention).



This is because AFME believes that ESMA's proposal gives rise to an enhanced risk that investors may seek to claim that they have relied on information available on the website despite the existence of disclaimers in the prospectus, as well as potential liability concerns as information on the website will not have been prepared to prospectus standard.

It is also possible that experts will be reluctant to supply reports or advice to issuers if they must now be made available electronically, to all investors, rather than being available in hard copy only.

AFME supports the suggestion that documents on display should be made available electronically but only so far as relates to documents which it is mandatory to put on display. AFME is unable to comment on whether this approach will generate material additional costs.

<ESMA\_QUESTION\_FAC\_11>

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

<ESMA\_QUESTION\_FAC\_12>

AFME's view is that, to avoid duplication, there is no need for a specific disclosure requirement on this topic, as the issuer would be required to provide this item of information (if relevant) to satisfy the necessary information test under Article 6.

<ESMA\_QUESTION\_FAC\_12>

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

<ESMA\_QUESTION\_FAC\_13>

For those issuers who are subject to the Accounting Directive, AFME supports ESMA's proposal as it is likely to facilitate incorporation by reference of the management report from the issuer's annual report and accounts in lieu of preparing a significant portion of the OFR for a prospectus for secondary equity capital raising.

AFME would however note the following potential issues in relation to such convergence:

- A Prospectus Regulation OFR is required to include significant additional disclosure to a management report under items 9.2 (Operating Results) and 10 (Capital Resources). The significant factors affecting results disclosure (9.2.1) is arguably one of the most important sections in a prospectus, drawing together the issuer's historical results, future trends and risk factors into a concise summary of what drives its revenues and profits, and the capital resources section is generally highly relevant to an issuer that is seeking to raise additional capital. The omission of these sections from a prospectus could adversely affect an investor's ability to understand an issuer's financial position and results, and AFME therefore recommends that these sections be mandatory for inclusion in a simplified prospectus, even if ESMA concludes that the remainder of the OFR is not required due to the availability of the Accounting Directive management report. In addition, without the inclusion a full OFR, the resulting prospectus would be out of line with best international practice, including for European issuers looking to access the US market via a Rule 144A issuance where the inclusion of a full OFR is necessary.

- An issuer takes on prospectus liability for such information incorporated by reference, including statements that would not normally make their way into a registration document containing an OFR. Generally, it would be helpful to receive guidance from ESMA, to the extent practicable, on the application of liability regimes to the disclosure requirements. For example, the level of liability attached to annual reports in a number of jurisdictions is significantly different from that attached to prospectuses (the latter being more strict), which will have implications where there is convergence through the OFR disclosures.

AFME also considers that there may be scope for confusion as to the requirement in item 9.1 of Annex I to include ‘a fair review...for each year and interim period, including the causes of material changes’ and item 9.2.2 of Annex I to include ‘[a narrative discussion of] material changes in net sales or revenues’. In AFME’s view, an OFR should always include a narrative discussion of changes in an issuer’s income statement line items from year to year (and interim period to interim period where applicable), other than where such changes or line items are immaterial. AFME would encourage ESMA to clarify this in the Level 2 legislation or by way of Level 3 guidance on the interpretation and interaction between items 9.1 and 9.2.2.

<ESMA\_QUESTION\_FAC\_13>

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

<ESMA\_QUESTION\_FAC\_14>

In summary, AFME does not agree with the proposals.

Taking ESMA’s second point first, AFME’s view is that the requirement for an independent auditor's report on a profit forecast which is included in the prospectus adds sufficient value for investors and other market participants to justify retaining it. The existence of a third party opinion on the forecast, and the assumptions that underpin it, ensures that a certain degree of rigour is followed in the process of compiling the forecast and consequently, in AFME’s view, provides significant benefit to investors. In addition, there is a practical concern that the absence of a specific regulatory requirement might result in auditors becoming reluctant to supply the comfort which an issuer or underwriters would require before proceeding with an issue and the lack of independent verification by auditors may result in the proliferation of forecasts which are less reliable than where an auditor’s report is prepared, ultimately to the detriment of market participants. AFME therefore disagrees with ESMA's proposal for deleting the mandatory auditor's report requirement with respect to a profit forecast which is included in a prospectus.

Our understanding is that reporting accountants and auditors would be unlikely to agree to public disclosure of a profit forecast report where it is not a legal or regulatory requirement. This is important as many issuers are currently reluctant to include projections or forecasts in prospectuses because of the potential difficulty of establishing a reasonable care defence against investors who sue with the benefit of hindsight, in circumstances where the forecast has turned out to be wrong. ESMA's approach does not address this potential liability should a forward-looking statement prove to be incorrect.

If the requirement for an auditor's report in this context is removed, AFME notes that ESMA proposes that an issuer would continue to have to include appropriate assumptions and to ensure that the forward looking information is prepared on a consistent basis with the audited financial statements. However, this should in

any event be the case as any material assumptions should be disclosed for all forward looking financial information. Therefore, we do not consider that this would in practice fill the potential gap left by dropping the requirement for an auditor's report.

AFME also notes that one of the justifications cited for dropping the requirement for a profit forecast report is that it can result in additional expense and potential delay for secondary issuances. In this context, AFME does not consider that where an issuer has previously published a "profit forecast" (as defined by ESMA) that remains outstanding, this should be mandatorily disclosed in a prospectus for equity transactions. It is questionable whether automatically providing potential investors in equity with an outstanding historic profit forecast is necessarily beneficial as many such forecasts may have ceased to be material.

Instead, AFME's view is that, only if an issuer considers that a previously published forecast is information which is material to making an investment decision in the securities of the issuer, should the issuer disclose the profit forecast in its prospectus. In AFME's view, an example where materiality may be presumed is where a forecast has been produced specifically in connection with an IPO. Conversely, if the issuer considers that such previously disclosed forecast or estimate is not material, or is no longer relevant, consideration should be given to including an explanation in the prospectus.

Where an issuer considers that a previously published forecast would be material to satisfy the necessary information test under Article 6, it should have the option of doing so by including the forecast or through other prospectus disclosure (e.g. qualitative disclosure).

In response to the costs element of ESMA's question, AFME considers the removal of the requirement for an auditor's report on a profit forecast to be a commercial issue. If an auditor's report is commercially agreed and appropriate fees are paid, then an auditor's report will be prepared. However, this should be matter for commercial negotiation between the parties and depend on the specific circumstances of the particular transaction and the nature of the profit forecast rather than a matter of law.

Related to this, and for the same reasons, AFME's view is that requiring a company which has shares admitted to a regulated market to explain the invalidity of a profit forecast or estimate is unnecessary.

In addition, AFME considers that it would be helpful for ESMA to provide detailed guidance on what is and is not a "profit forecast" to assist issuer's and their advisers in applying the relevant disclosure standards, particularly the proposed disclosures concerning previous "profit forecasts".

<ESMA\_QUESTION\_FAC\_14>

**15. : Do you agree with the proposal to explain any 'emphasis of matter' identified in the audit report?**

<ESMA\_QUESTION\_FAC\_15>

AFME's view is that, to avoid duplication, there is no need for a specific disclosure requirement on this topic, as the issuer would be required to provide this item of information (if relevant) to satisfy the necessary information test under Article 6.

<ESMA\_QUESTION\_FAC\_15>

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



<ESMA\_QUESTION\_FAC\_16>

With respect to ESMA's proposal, AFME suggests that the requirements to disclose interests in the issuer's capital or voting rights, which are notifiable under national law, could be made clearer and easier to apply if it is clarified they are aligned with the notification requirements under Articles 9, 10 and 13 of the TD and its associated terminology, and are not intended to capture interests which are notifiable under other regimes.

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

<ESMA\_QUESTION\_FAC\_17>

AFME's view is that, to avoid duplication, there is no need for a specific disclosure requirement on this topic, as the issuer would be required to provide this item of information (if relevant) to satisfy the necessary information test under Article 6. In addition, national governments or quasi-regulatory bodies set governance standards by country so there is no EEA wide norm of governance to gauge disclosure.

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

<ESMA\_QUESTION\_FAC\_18>

Yes. As the draft amendments to the rules, in respect of the historical financial information, would make it clear that, where changes have been made to an IFRS requirement, this does not require an issuer to restate its last two financial statements, even though the next financial statements may be presented differently on account of the change. This is a helpful clarification to a requirement that has potentially caused confusion in the past.

As to the requirement to restate the last audited financial statements (including comparative information for the previous year) in case of change in the accounting standards framework, AFME suggests also to clarify that the audited restated financial statements for the financial year prior to the adoption of the new accounting framework should be made publicly available at the time of change of the accounting framework or at the latest at the time of publication of the audited annual financial statements drafted under the new accounting framework.

<ESMA\_QUESTION\_FAC\_18>

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

<ESMA\_QUESTION\_FAC\_19>

AFME supports the proposal that the disclosure of the issuer's memorandum and articles of association should be streamlined and that a hyperlink to the constitutional documents should be included in the prospectus, subject to a requirement that: (a) the hyperlink must be to the up-to-date versions of these documents; and (b) the summaries must refer to such up-to-date versions. These changes will not, in AFME's view, have a material impact on investor protection.

<ESMA\_QUESTION\_FAC\_19>



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

<ESMA\_QUESTION\_FAC\_20>

### **Major Shareholders**

As to the inclusion of a reference date for major shareholders information, AFME suggests an alternative formulation such as "other most recent practicable date", to account for information derived from significant shareholding notification requirements under applicable law, whose reference date depends on the holding reaching, crossing or exceeding shareholding disclosure thresholds.

### **OFR – non-financial key performance indicators**

The requirement to include, where appropriate, non-financial key performance indicators (“KPIs”), raises potential additional risks for investors in that, by their nature, non-financial KPIs are derived – in whole or in part - from operational data which is not subject to an audit or review by accountants in the same way as financial information, heightening the risk of errors in such data. It is also not prepared according to universally applicable financial reporting standards, heightening the risk of such data being misleading due to the application of management discretion and subjectivity and/ or a different presentation or compilation as to compared to peer companies.

AFME recommends that ESMA address these potential additional risks, either in the Level 2 legislation, or by way of Level 3 guidance, as it has done for Alternative Performance Measures.

### **Business Overview – Strategy and Objectives – Financial Objectives**

The new strategy and objectives item 6.4 requires issuers to include an issuer’s financial and non-financial objectives. As ESMA will be aware, a recent trend is for issuers to include forward looking financial targets and objectives in an IPO prospectus (typically known as ‘guidance’), among other things to ensure that there is equality of information between analysts and investors. Such guidance is often presented qualitatively or, where quantitative, in the form of ranges, as ‘medium term’ objectives rather than for any particular period, and with various other caveats, qualifications and disclaimers, to reflect the inherent fragility and uncertainty of such information. AFME considers that this approach is well understood by the market and investors, and that the new requirement to include financial objectives should in practice be satisfied by the inclusion of "guidance" in such form rather than more detailed precise forward looking information.

<ESMA\_QUESTION\_FAC\_20>

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

<ESMA\_QUESTION\_FAC\_21>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_21>

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



<ESMA\_QUESTION\_FAC\_22>

AFME's view is that, provided national competent authorities and the relevant banking regulators (if different) have a common understanding of capital targets, then there is no need to alter the existing language.

<ESMA\_QUESTION\_FAC\_22>

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

<ESMA\_QUESTION\_FAC\_23>

AFME's view is that, if the draft amendments to the rules proposed by ESMA in respect of the capitalisation and indebtedness statement make it clear that the statement may be made within the 90 day period prior to the date of the prospectus and that a narrative update for the stub period is sufficient, these changes would clarify the existing disclosure requirement that has historically caused some confusion. This means the wording should state "after the 90 day period prior to the date of the document" in order to achieve the meaning intended by the amendment.

<ESMA\_QUESTION\_FAC\_23>

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

<ESMA\_QUESTION\_FAC\_24>

Yes. The change would mean that the disclosure of the impact of dilution on existing holders is described in terms of a comparison of the participation in share capital and voting rights before and after the capital increase and a comparison of the net asset value per share at the latest balance sheet before the public offer and the offer price per share. AFME's view is that this change to the dilution disclosure requirement will make it more meaningful to investors.

<ESMA\_QUESTION\_FAC\_24>

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

<ESMA\_QUESTION\_FAC\_25>

AFME's view is that, to avoid duplication, there is no need for a specific disclosure requirement on this topic, as the issuer would be required to provide this item of information (if relevant) to satisfy the necessary information test under Article 6.

<ESMA\_QUESTION\_FAC\_25>

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

<ESMA\_QUESTION\_FAC\_26>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_26>





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

<ESMA\_QUESTION\_FAC\_27>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_27>

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

<ESMA\_QUESTION\_FAC\_28>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_28>

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

<ESMA\_QUESTION\_FAC\_29>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_29>

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

<ESMA\_QUESTION\_FAC\_30>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_30>

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

<ESMA\_QUESTION\_FAC\_31>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_31>

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

<ESMA\_QUESTION\_FAC\_32>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_32>

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

<ESMA\_QUESTION\_FAC\_33>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_33>

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

<ESMA\_QUESTION\_FAC\_34>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_34>

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

<ESMA\_QUESTION\_FAC\_35>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_35>

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

<ESMA\_QUESTION\_FAC\_36>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_36>

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

<ESMA\_QUESTION\_FAC\_37>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_37>

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

<ESMA\_QUESTION\_FAC\_38>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_38>

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

<ESMA\_QUESTION\_FAC\_39>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_39>

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

<ESMA\_QUESTION\_FAC\_40>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_40>

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

<ESMA\_QUESTION\_FAC\_41>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_41>

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

<ESMA\_QUESTION\_FAC\_42>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_42>

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

<ESMA\_QUESTION\_FAC\_43>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_43>

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

<ESMA\_QUESTION\_FAC\_44>

**Item 2.1 of Annex 6:** AFME would like to reiterate that complying with the new requirements relating to risk factors, including the requirement that they are to be disclosed in a “limited number of categories” and



the requirement that they must be "corroborated by the content of the securities note" presents a number of serious practical challenges from an asset-backed securities perspective. AFME is very concerned that any guidance issued should take account of these challenges and help to facilitate compliance. To that end, we stand ready to provide feedback from the asset-backed securities perspective on the new approach to the risk factor disclosure. AFME understands that ESMA's consultation on Level 3 guidelines on risk factor disclosure is the appropriate forum in which to provide this feedback and will do so in our response to that consultation. If we may be of any assistance in the interim, we would be pleased to engage constructively with ESMA accordingly.

**Item 4.2 of Annex 6 (and item 4.1 of Annex 5):** It should be noted that Securities Note ABS annex (i.e. Annex 11 (former Annex VIII)) is an additional building block that ABS issuers would need to use in combination with appropriate (i.e. either wholesale or retail) debt and derivative Securities Note annexes (i.e. Annex 6 (former Annex XIII) or Annex 5 (former Annex V) respectively). Given that ABS deals can be and are done as programmes, some of which can (and often do) involve issuances of multiple tranches/classes of notes, re-classifying disclosure about "the class of securities" as CAT A in paragraph 4.2 of Annex 6 and paragraph 4.1 of Annex 5 does not make practical sense, because at the time the base prospectus is prepared the issuer cannot possibly know of all the different tranches/classes of notes it may issue under its programme, so the issuers will struggle to provide meaningful CAT A style disclosure for this item in the base prospectus. No justification for this change having been provided, we are unclear why ESMA is proposing it and we can see no reason why this change should be made.

<ESMA\_QUESTION\_FAC\_44>

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

<ESMA\_QUESTION\_FAC\_45>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_45>

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

<ESMA\_QUESTION\_FAC\_46>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_46>

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

<ESMA\_QUESTION\_FAC\_47>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_47>

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

<ESMA\_QUESTION\_FAC\_48>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_48>

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

<ESMA\_QUESTION\_FAC\_49>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_49>

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

<ESMA\_QUESTION\_FAC\_50>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_50>

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

<ESMA\_QUESTION\_FAC\_51>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_51>

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

<ESMA\_QUESTION\_FAC\_52>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_52>

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

<ESMA\_QUESTION\_FAC\_53>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_53>

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

<ESMA\_QUESTION\_FAC\_54>  
TYPE YOUR TEXT HERE



<ESMA\_QUESTION\_FAC\_54>

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

<ESMA\_QUESTION\_FAC\_55>

**Item 3.1 of Annex 10:** AFME refers to our concerns noted above in relation to item 2.1 of Annex 6 (in response to Question 44), which are equally valid here. AFME further notes the different wording used in item 3.1 “Risk factors” (which refers to “shall receive the highest prominence” instead of “shall be mentioned first” as in other RD annexes). While presumably both formulations should be interpreted in the same manner, it is not clear why different wording needs to be used in the asset-backed securities registration document. We would strongly encourage ESMA to either make the wording uniform or explain the reason for the different formulations. Again, AFME would be pleased to comment from the asset-backed securities perspective on the new approach to risk factor disclosure, once ESMA’s draft Level 3 guidelines are published.

**Item 4.5 of Annex 10:** The drafting in item 4.5 of Annex 10 is slightly unclear and would benefit from small drafting improvements to aid interpretation. AFME suggests amending it slightly as follows:

"The domicile and legal form of the issuer, the legislation under which the issuer operates, its country of incorporation, ~~and~~ the address and telephone number of its registered office (or principal place of business if different from its registered office) and the website (on which information on the ABS is made available to investors), with a disclaimer that the information on the website does not form part of the prospectus."

<ESMA\_QUESTION\_FAC\_55>

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

<ESMA\_QUESTION\_FAC\_56>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_56>

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

<ESMA\_QUESTION\_FAC\_57>

- AFME welcomes the proposals to streamline certain overlapping disclosure requirements, in particular the removal in **item 2.2.11 of Annex 11** of the reference to “*an obligor accounting for a material portion of the assets*” and comment on the introduction of new express references to “guarantor” in item 2.2.11, which results in new overlapping requirements that should be streamlined/fine-tuned further to achieve more clarity on the significant obligor/significant asset guarantor disclosure requirements, AFME’s suggested amended item 2.2.11 on the latter point is set out below:

“Where the assets (i) comprise obligations of 5 or fewer obligors which are legal persons, or (ii) are guaranteed by 5 or fewer legal persons, or (iii) where an obligor or entity guaranteeing the obligations accounts for 20% of more of the assets, or (iv) where 20% or more of the assets are guaranteed by a single guarantor...”

- We note that **item 2.2.11(b) of Annex 11** has been amended to refer to the new concept of “*equivalent third country market*” instead of the concept of “equivalent market” and that the new concept of “equivalent third country market” is not defined in the operative provisions of the consultation paper that set out the draft technical advice and instead is separately listed as a defined term on page 7 in the Acronyms and Definitions section. No explanation for this approach is provided in the consultation paper, including no explanation for narrowing down considerably the scope of acceptable markets, which excludes any non-regulated market in the EEA. In particular, it excludes certain EEA MTFs which to date have been considered by the relevant NCAs as “equivalent markets”. To minimise cost and liability for the issuers and the relevant significant obligors or guarantors (and in the absence of any clear benefit from the investor perspective), it is important that the derogation under item 2.2.11(b) from the more detailed disclosure applies wherever appropriate public disclosure is available in relation to the relevant significant obligor or guarantor.

Therefore, AFME strongly encourages ESMA to amend the reference in item 2.2.11(b) as follows:

"if an obligor or guarantor has securities already admitted to trading on a regulated market, an MTF, or an equivalent third country market or SME Growth Market, its name..."

AFME also requests that ESMA confirms its intention in relation to the use of the phrase “equivalent third country market” for the purposes of the disclosure requirement in item 2.2.11(b), in particular: (i) whether the amendments are intended to restrict the equivalent markets to third country markets only, but giving the NCAs some scope for own determination of equivalence; or (ii) whether it is intended that the “equivalent third country market” is to be a defined term (with no scope for NCAs’ own determination), in which case, the relevant definition must be made part of the definition section in the Level 2 legislation and the equivalence decisions on the status of the relevant third country markets should then ideally be made in advance of application of Prospectus Regulation (EU) 2017/1129 in order to minimise additional costs.

AFME further notes that similar concerns arise (and, therefore, we request similar amendments and confirmation of ESMA’s intention) in connection with the “**new**” **item set out immediately after item 2.2.12 of Annex 11**, which provides for less onerous disclosure requirements where the underlying assets comprise obligations that are traded only on a regulated or equivalent third country market or SME Growth Market. By contrast, **items 2.2.14 and 2.2.15** (which deal with disclosure requirements where the underlying assets comprise equity securities) continue to refer to the concept of “equivalent market” only when distinguishing between less and more onerous disclosure requirements. The rationale for such inconsistency in approach is unclear and AFME requests that these be amended in line with the suggested wording above, with the requested confirmation of ESMA’s intention in relation to the use of the phrase “equivalent third country market” being also provided.

- **In item 4.1 (post issuance reporting) of Annex 11**, ESMA suggests changing the requirement from optional disclosure to mandatory (i.e. the wording has changed from an indication of “whether or not” the issuer intends to provide post-issuance reporting to an indication of “where” the issuer intends to provide post-issuance reporting). In a related comment (paragraph 168 of the CP) ESMA stated that “ESMA proposes to amend this requirement to clarify that post issuance reporting is no longer optional for securitisation”. If the suggested “clarification” is being proposed because of the forthcoming Securitisation Regulation, AFME would like to note that the transactions that will be

caught under the new reporting regime that will be introduced under the Securitisation Regulation are not defined by reference to the PD definition of “asset-backed securities” (ABS) and that the PD definition of ABS is rather different from the definition of “securitisation” used for the purposes of the Securitisation Regulation and, as such, would capture certain other deals, some of which will not be required to comply with Securitisation Regulation and may not commonly provide post-issuance reporting (e.g. repackaging transactions). AFME strongly urges ESMA to revert to the previous wording for this item.

- As ESMA is re-categorising various items in the disclosure annexes, AFME would invite ESMA to consider re-visiting the categorisation of the **swap counterparty disclosure in item 3.8(a) of Annex 11** and change it from CAT A to CAT C. As noted by AFME members during the PD2 consultation process, in the context of a number of ABS programmes, swap counterparties will only be appointed on a series-specific basis and, as such, it will not be possible to provide swap counterparty disclosure at the time the base prospectus is approved, meaning that individual series of notes that require swap counterparty identity disclosure need to be issued as a stand-alone/drawdown prospectus impacting on the costs and the timeline of the transaction.

<ESMA\_QUESTION\_FAC\_57>

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

<ESMA\_QUESTION\_FAC\_58>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_58>

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

<ESMA\_QUESTION\_FAC\_59>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_59>

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

<ESMA\_QUESTION\_FAC\_60>

AFME’s view is that, to avoid duplication, there is no need for a specific disclosure requirement on this topic, as the issuer would be required to provide this item of information (if relevant) to satisfy the necessary information test under Article 6.

<ESMA\_QUESTION\_FAC\_60>

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

<ESMA\_QUESTION\_FAC\_61>





TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_61>

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

<ESMA\_QUESTION\_FAC\_62>

**Working capital statement:** AFME's bank members will often, given the size and profile of the transaction and the associated risks, encourage an issuer voluntarily to include a working capital statement, even though, under the reduced disclosure requirements for a GDR (compared to a share), no such statement is currently required.

The market practice approach of including a working capital statement is also supported by the approach taken in Rule 144A GDR offerings, which are driven by the US requirement for disclosure of a working capital statement for IPOs that are marketed in the United States.

AFME supports ESMA's proposal for the inclusion of a working capital statement for these reasons.  
<ESMA\_QUESTION\_FAC\_62>

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

<ESMA\_QUESTION\_FAC\_63>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_63>

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

<ESMA\_QUESTION\_FAC\_64>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_64>

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

<ESMA\_QUESTION\_FAC\_65>

No. There is no need for greater convergence between the prospectus regime and the Alternative Investment Fund Managers Directive. Legislative measures to ensure investor protection, particularly for retail investors, could be effected more meaningfully by changes to the AIFMD, the Transparency Directive or the Market Abuse Regulation, rather than the prospectus regime.  
<ESMA\_QUESTION\_FAC\_65>



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

<ESMA\_QUESTION\_FAC\_66>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_66>

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

<ESMA\_QUESTION\_FAC\_67>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_67>

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

<ESMA\_QUESTION\_FAC\_68>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_68>

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

<ESMA\_QUESTION\_FAC\_69>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_69>

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

<ESMA\_QUESTION\_FAC\_70>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_70>

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

<ESMA\_QUESTION\_FAC\_71>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_71>

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

<ESMA\_QUESTION\_FAC\_72>



TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_72>

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

<ESMA\_QUESTION\_FAC\_73>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_73>

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

<ESMA\_QUESTION\_FAC\_74>

### **Importance of maintaining flexibility to disclose additional information**

It would be helpful if there were a clear statement in the Level 2 text that the general position is that specific prospectus contents requirements, including for simplified prospectuses under Article 14 of Level 1, represent a floor or minimum level of content rather than a maximum level of content. Issuers should be required to meet the minimum level of content (subject to derogations granted by NCAs) but have the unfettered right to insert additional content (subject to the requirement that the prospectus as a whole meets the “easily analysable, concise and comprehensible” requirement.

As ESMA notes, the Prospectus will have to meet the overall “necessary information” test set out in Article 6, and so the prescribed disclosure items should set out minimum disclosures which will apply to all companies, accepting that companies and their businesses will vary widely and there should be sufficient flexibility as to the information to include and not to include to allow them to produce comprehensible documents for investors to be able to understand their particular circumstances. Further, issuers should not be required to include non-material information that would not be used to form an investment decision.

### **Omission of important OFR and Capital Resources information**

AFME considers that the OFR section of a prospectus is one of the most important sections from the point of view of enabling an investor to understand an issuer and its business. It is by necessity a sober analysis of an issuer’s financial statements, in contrast to the sometimes more exuberant and aspirational strengths and strategy section and wider business description. AFME is therefore disappointed that ESMA is proposing not to require a simplified prospectus to include an OFR section at all, and instead require issuers to consult an issuer’s management report which will not, as noted above, typically be prepared to a prospectus standard nor offer the same legal recourse to the issuer if it contains misstatements or omissions.

Secondly, even if an issuer’s management report were prepared to a prospectus standard, a Prospectus Regulation OFR is required to include significant additional disclosure to a management report under items 9.2 (Operating Results) and 10 (Capital Resources). The significant factors affecting results disclosure (9.2.1)



is arguably one of the most important sections in a prospectus, drawing together the issuer’s historical results, future trends and risk factors into a concise summary of what drives its revenues and profits, and the capital resources section is generally highly relevant to an issuer that is seeking to raise additional capital. The omission of these sections from a prospectus could adversely affect an investor’s ability to understand an issuer’s financial position and results.

### **Summary of disclosures made under the Market Abuse Regulation**

Regarding the summary of disclosures made under the Market Abuse Regulation which is required to satisfy Article 14(3) of the Level 1 text, AFME would expect that in most cases, any information contained in MAR disclosures that is material to a particular offer would have already been disclosed in the main body of the prospectus (e.g. in the business section or current trends). Therefore, to ensure that this requirement does not lead to superfluous disclosure or a ‘check the box’ type exercise, AFME suggests that ESMA make the amendments set out below (in bold underlining) to proposed Level 2 requirement set out in paragraph 245 of the Consultation Paper:

“The summary of the relevant information disclosed under Regulation (EU) No 596/2014 featured in a simplified prospectus (the “MAR disclosure summary”) shall be presented in an easily analysable, concise and comprehensible form. It shall not replicate all information already published under Regulation (EU) No 596/2014 and shall be an intelligible summary of the last relevant information.

The MAR disclosure summary shall be presented in a limited number of categories depending on their topics.

The MAR disclosure summary shall provide a clear view of the evolutions and circumstances of facts and figures mentioned by the issuer. The summary shall not consist of simply a list of disclosures or links thereto and only MAR disclosures that are **(i) material and** relevant to a particular offer; **(ii) remain current and up to date; and (iii) relate to matters that have not been summarised elsewhere in the prospectus** shall be **required to be** summarised.”

### **Potential for confusion over status of MAR and TD disclosures**

As the Level 1 text provides that the alleviated disclosure regime should “take into account” MAR and TD disclosure, to ensure that investors are not confused by the requirement to include a ‘concise summary’ of MAR disclosures, we would recommend that ESMA:

- a. include a clear provision in Level 2 that, without prejudice to the concise summary of an issuer’s MAR and TD disclosures included in the prospectus, an issuer’s MAR and TD disclosures (whether or not summarised) do not form part of an issuer’s prospectus unless expressly incorporated by reference; and
- b. require an issuer to include specific wording in a prospectus stating that its MAR and TD disclosures do not form part of an issuer’s prospectus.

<ESMA\_QUESTION\_FAC\_74>

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

<ESMA\_QUESTION\_FAC\_75>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_75>



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

<ESMA\_QUESTION\_FAC\_76>

AFME's view is that, to avoid duplication, there is no need for a specific disclosure requirement on this topic, as the issuer would be required to provide this item of information (if relevant) to satisfy the necessary information test under Article 6.

<ESMA\_QUESTION\_FAC\_76>

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

<ESMA\_QUESTION\_FAC\_77>

AFME agrees with ESMA's suggestion that only previously undisclosed material contracts need to be included in a prospectus for secondary issuance.

<ESMA\_QUESTION\_FAC\_77>

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

<ESMA\_QUESTION\_FAC\_78>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_78>

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

<ESMA\_QUESTION\_FAC\_79>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_79>

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

<ESMA\_QUESTION\_FAC\_80>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_FAC\_80>

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



<ESMA\_QUESTION\_FAC\_81>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_FAC\_81>