esma European Securities and Markets Authority

Response form for the Consultation Paper on draft RTS under the new Prospectus Regulation

15 December 2017

European Securities and Markets Authority

Date: 15 December 2017

Responding to this paper

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

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

ESMA will consider all responses received by 9 March 2018.

Instructions

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

- Insert your responses to the questions in the Consultation Paper in the present response form.
- Please do not remove tags of the type <ESMA_QUESTION_PR_1>. Your response to each question has to be framed by the two tags corresponding to the question.
- If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
- When you have drafted your response, name your response form according to the following convention: ESMA_PR_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_PR_ABCD_RESPONSEFORM.
- Upload the form containing your responses, **in Word format**, to ESMA's website (www.esma.europa.eu under the heading "Your input – Open consultations" → "Consultation on draft RTS under the new Prospectus Regulation").

Publication of responses

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

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading “Data protection”.

Who should read the Consultation Paper

The Consultation Paper may be of particular interest to investors, issuers, offerors or persons asking for admission to trading on a regulated market as well as to any market participant who is affected by the new Prospectus Regulation (Regulation (EU) 2017/1129).

General information about respondent

Name of the company / organisation	Association for Financial markets in Europe
Activity	Banking sector
Are you representing an association?	☒
Country/Region	Europe

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_ PR_1>
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 (ABS). We have therefore not provided responses to those questions which cover areas outside these products.

We would like to make the following general comments, by way of introduction.

A. **Key financial information in the prospectus summary**:

We urge ESMA to reconsider its prescriptive approach which would restrict issuers by imposing an arbitrary limit on disclosure. Issuers should be able to disclose the level of information they consider to be appropriate to meet the general disclosure test for the summary, subject to compliance with the seven page length limit. AFME's view therefore is that the limit on the number of additional line items or APMs, contemplated at paragraph 58 of ESMA's paper is removed.

This removal is important because:

- Issuers should be able to disclose the level of information they consider appropriate to ensure that the summary is accurate, fair and clear and not misleading and to achieve the standard contemplated at Level 1 (Article 7), subject to the compliance with the seven page length limit. To do so, there will be many occasions where issuers will want to include key information in the summary which is different to that required by ESMA's draft Annexes I to VI.

- It is overly prescriptive to impose an arbitrary limit on disclosure, of three line items or APMs, in addition to the relevant elements of RTS' Annexes. As a matter of current best practice for offerings inside and outside the EU, summaries will typically contain significantly more than the compulsory line items plus three others, therefore to impose a limit would likely result in poorer disclosure compared to the current requirements in the EU and elsewhere.

- Given the requirement for the financial information to be "key information" (which implies materiality), it is unnecessary, as a matter of law, to restrict disclosure by reference to a numerical limit.

- The proposed approach is likely to result in numerous requests for waivers for industries where the RTS minimum requirements are not appropriate for the purposes of satisfying the overriding Level 1 Article 7 test, or the exclusion of the line items most material to the relevant business, none of which are in the interests of efficient and well-functioning EU capital markets.

Subject to removal of the limit on the number of additional line items or APMs, AFME's view is that the approach to disclosure of key financial information which is being suggested for the prospectus summary, of setting out specific line items of financial information or APMs, will be generally workable for issuers.

The Commission and ESMA should also ensure that National Competent Authorities (NCAs) allow issuers to make use of the option to include additional disclosure, where appropriate, or permit derogations, where necessary, including pursuant to the disclosure requirements or practices (or ordering of information) in other markets. For example, in the context of permitted pro forma financial information, we note that, for Rule 144A equity transactions the US Regulation S-X standards will need to be taken into account in determining when pro formas are required and their presentation. The same principle applies to the presentation applicable to issuers with a complex financial history.

The application of Annexes I, III, IV and VI also requires clarification. It is unclear which of ESMA's templates in Annex I, III, IV or VI should be used by a complex financial institution where the financial statements might include line items that are in both the credit institution and insurance company templates. Given that the tables are prescriptive, the ability to include additional disclosure is also important.

We welcome that issuers of equity (and ABS) will have the ability voluntarily to include APMs which constitute key information without any requirement to include in the summary the full explanation otherwise required by ESMA's Guidelines, although further clarification of ESMA's expectation in relation to APM disclosure in the summary is required (see Question 5 below). ESMA should consider, for example, making APM disclosure an exception to the "no cross-referencing rule" at Level 1 (Article 7(11)), as this would allow issuers to insert a footnote indicating where the disclosure is in the body of the prospectus. An alternative would be to include a bespoke short-form APM "warning" when an APM is disclosed in a summary rather than a full explanation.

Our generic observations above and our responses to Questions 1 through 13 below reflect the views of AFME members, as the sell-side departments of banks active in the equity capital markets, regarding current best practice in the EU and other leading markets (and no more). We express no view on the prospectus disclosure appropriate to specific fact patterns, as this is each issuer's responsibility.

B. **Advertisements**

General

The definition of 'advertisement' in the Prospectus Regulation (PR) is as follows:

'advertisement' means a **communication** with both of the following characteristics:

(i) relating to a specific offer of securities to the public or to an admission to trading on a regulated market;

(ii) aiming to specifically promote the potential subscription or acquisition of securities.

We note that the definition of "advertisement" as used in the existing Prospectus Directive has been extended in the PR, from "an announcement....." to a "communication.....". As ESMA notes, it therefore appears on an initial analysis that a wider range of communications, oral as well as written, promoting a specific offer or admission, will potentially be an "advertisement", although we see this to some extent as a codification of the existing Level 2. However, it remains the case that Level 1 confers advertisement status only on those communications which both: (1) relate to a specific offer or admission; and (2) have a promotional element with respect to such an offer or admission.

Our view is that communications which are undertaken to begin to familiarise the wider investment community with an unlisted issuer or to help assess the viability of moving ahead with a future equity capital markets transaction are unlikely to relate to a specific offer or admission and therefore unlikely to be advertisements. The absence of an offer or admission may also exclude communications which are for the purpose of establishing whether there is likely to be support for a particular deal size or structure or to launch a deal at all, from the advertisements regime. This will be a factual assessment in each case.

After potential investors have been informed about a potential offer or admission of equity securities, and before the prospectus is approved, our view is that communications of an ordinary course nature, e.g. administrative or ministerial or which are only sent internally between the deal team (for example, among advisers and issuer/seller), would not be advertisements, as they do not aim to promote the subscription or acquisition of securities. In contrast, marketing documents, slides or materials relating to a specific offer or admission, after the launch of bookbuilding of the deal (i.e. start of the offer), and before the prospectus is approved, are more likely to be covered by the PR's advertisements regime. An example of such an advertisement might be marketing of shares to institutional investors based on a "pathfinder" (or near final draft) prospectus.

In addition to the requirements in Articles 7 and 22 (advertisements) of the PR, a significant element of protection for investors in equity securities will also be provided by the Market Abuse Regulation (EU 596/2014). It will regulate the provision of non-public information to investors. Such equity issuers will also be subject to substantial public disclosure requirements pursuant to EU and other continuing disclosure regimes (such as the Prospectus Regulation Article 22.5), which provide a further layer of investor protection, ensuring all investors receive the same information and prohibiting selective disclosure at the time the offer is made.

Finally, the MiFID investor protection rules and any applicable financial promotion regimes already mean that issuers are required to include all material information in the prospectus and ensure that information disclosed outside of the prospectus is consistent with it and is fair, clear and not misleading. It is unnecessary to use the advertisements regime to achieve the same effect as the above regulation. We would also emphasise that "consistency" as required under Articles 22.3 and 22.4 of the Prospectus Regulation does not mean that all and any information contained in an advertisement needs to be contained in the prospectus - only material information, in accordance with Article 22.5.

We also recommend that ESMA apply its requirements to non-exempt offers rather than to "retail investors", as the latter term is not used in the Prospectus Regulation and its usage could lead to inconsistent practices between National Competent Authorities and market participants.

Subject to the above, we welcome:

- ESMA's confirmation (para 141) that the format and length restrictions applicable to advertisements do not apply to pathfinder prospectuses (despite a pathfinder falling within the definition of "advertisement").

- ESMA's approach to the scope of advertisement provisions relating to offers to the public where a prospectus is not required. We also support the statement in paragraph 136 of the paper that Level 2 provisions should not be too prescriptive.

Treatment of research

We believe that it is critical that ESMA reconfirms - either in the RTS Regulation itself or by way of a FAQ – the view expressed by CESR (in CESR 03/400, at paragraph 73 (here)) that analyst research reports distributed in connection with exempt offers to investment professionals prior to launch of an IPO ("pre-deal research") will not constitute 'advertisements' under the new Prospectus Regulation. This is because if pre-deal research were to constitute an advertisement, it would make it impossible for banks to continue to produce and distribute pre-deal research ahead of IPOs in the EEA. We explain this issue in further detail below.

Background

Pre deal research has been a feature of IPOs in the EEA for many years, and we believe that investors value the independent views that such research and analyst investor education provides on issuers and businesses proposing to list. It also ensures that the market has the benefit of research reports around the time IPO company shares are offered and a company is listed rather than having to wait for 40 days post listing before the banks involved in the offering and any unconnected research analysts that publish before or at IPO time are able to publish research reports.

We would also note that while the nature of pre-deal research is such that it can only be distributed to institutional investors, the independent analysts who prepare pre-deal research receive the same information as all other investors, since all material information provided to analysts must be included in the prospectus. Analysts are not, therefore, getting an inside track on the issuer, or otherwise being given information that will not be generally available.

In addition, we note that the production and distribution of research reports is already subject to a separate regulatory regime under MiFID II and further regulation is unnecessary.

Why pre-deal research does not fall within the definition of 'advertisement'

Although we acknowledge that pre deal research is a communication, whereas it is clearly not an announcement, we do not consider that pre deal research satisfies either of the two limbs of the definition for the following reasons:

- **Pre deal research does not relate to a specific offer or admission.** Pre deal research is prepared by banks' research departments (that are wholly independent of the IPO company and the bank's division that provides underwriting and placing services) to provides banks' investment professional clients with an independent view of the issuer and its business ahead of an anticipated offer and admission, but not in relation to that offer and admission. Banks impose a clear 'blackout period' between distribution of pre deal research and the launch of an offer of securities (i.e. issue of an approved price range prospectus or pathfinder/ offering circular and the start of the public offering and/or institutional bookbuilding process) to underline this separation, and the publication of pre deal research does not mean that an offering or admission will definitely follow. Any references to

the anticipated offer or admission that are in pre deal research are included only to ensure that they provide a fair and complete picture of the issuer[1].

- **Pre deal research does not aim to specifically promote the subscription or acquisition of securities.** Pre deal research is an independent, non-biased view of the issuer and its business. It is not a marketing document that seeks to highlight only the positive attributes of the issuer, or a selling or offering document that seeks to solicit investors to subscribe shares, and the credibility of the research analyst and the bank's research department depends on this independence. For example, pre deal research will usually include the analyst's projections for the issuer's future financial performance, and these will almost certainly differ from - and are not infrequently less favourable than - any forward looking information (e.g. targets or projections) made by the issuer itself in its prospectus. Similarly, the analyst's view of the key strengths (and weaknesses) of a business will rightly differ from the issuer's own assessment in the investment highlights/strengths section of the prospectus. And the research analyst's other views, focuses and conclusions will in all likelihood be different, and should be expected to be different, to those expressed by the issuer in its prospectus.

  In fact, unlike the IPO marketing materials prepared by the issuer with the assistance of the underwriting divisions of the syndicate banks, which should be consistent with the prospectus, the express purpose and value of pre-deal research is that it is not consistent with the prospectus as pre deal research is prepared independently of issuers.

  Moreover, pre-deal research does not include any details of the relevant offering or admission[2], including the expected timetable, details of the prospectus/ registration statement or the identity of the banks through which any orders must be placed. It cannot therefore be said to promote an offering as it provides no information concerning the means of participating in an offering.

Impact of pre deal research being an advertisement

If pre-deal research were to constitute an advertisement, it would make it impossible for banks to continue to publish pre-deal research for the following reasons:

- As noted above, it would not be possible to comply with the requirement for an advertisement to be consistent with the prospectus as pre deal research is prepared independently of issuers and issuers have no ability to require an analyst to amend a report to ensure consistency[3]. And nor should an issuer or legislation have the effect of requiring pre-deal research to mirror the issuer's words in its prospectus. For example, it would not be possible for an issuer to require an analyst to amend his or her financial projections to make them the same as those in the prospectus, or to amend the analyst's views and conclusions on what the strengths and weaknesses of an issuer are to align with the issuer's stance on these.

- This applies *a fortiori* with respect to unconnected analyst pre-deal research[4], which is a long standing feature of IPOs in France and is hoped to become more prevalent elsewhere in the EEA to increase the availability of independent research on companies seeking to IPO, and following the

[1] For example, if an issuer is planning to raise €500m in primary proceeds, it would be misleading to issue pre deal research that did not take that into account.
[2] Other than based on information publicly disseminated by the issuer regarding the size of any capital raise to ensure that they provide a fair and complete picture of the issuer.
[3] For completeness, we note that it is customary for the issuer and its legal advisers to carry out a check of factual matters in pre deal research and ask analysts to amend these where necessary in the interests of ensuring that the reports do not contain factual misstatements, but this does not extend to statements of opinion and other non-factual matters.
[4] That is, pre deal research prepared by the research departments of banks that are not underwriters on the IPO.

recent decision by the UK's FCA to modify the UK IPO regime to facilitate the publication unconnected research on IPOs.

- It would not be possible to include a statement in pre deal research that it is an advertisement or where the prospectus for the offering is available as this would clearly link pre deal research to an offering and risk it attracting liability as an offering document, and suggest a lack of independence of it from the prospectus and issuer. Banks would not be willing to accept this risk given that the content of pre deal research is primarily opinion based so could not be addressed through due diligence and verification in the same way as a prospectus and other offering materials. (As noted above, we would also note that the content of research reports is separately regulated under MiFID II).

C. **Data and machine readability**

AFME welcomes that the draft RTS imposes obligations on NCAs rather than market participants. However, AFME disagrees with the proposal to include an obligation for issuers to submit the necessary data where required by the NCA. However, we think the drafting of the proposed new requirement in paragraph 108 of ESMA's paper needs to be clarified.

In terms of the information to be provided:

- We consider that requirements 26 (Price offered), 27 (Consideration offered) and 29 (Type of offer/admission) need clarification, as issuers may otherwise interpret these requirements differently across the EU, in particular with respect to secondary equity capital raising.

- We assume that "N/A" will be an acceptable answer to certain fields. Please would ESMA confirm this.

D. **Supplements**

We consider the approach suggested by ESMA on this topic to be generally helpful.

We welcome the proposed approach of re-stating the current Delegated Regulation provisions (which is in line with previous AFME recommendations). This means that the key scenarios which trigger the requirement for a supplementary prospectus under the existing regime will be retained, with amendments to reflect ESMA's RTS on the format and content of the prospectus. For example:

1. insufficiency of working capital will still trigger the need for a supplementary prospectus; the working capital trigger will be extended to apply in the context of GDRs and convertible debt issuances, in addition to the current trigger in the equity capital raising context.

2. the publication of a profit forecast or estimate after the approval of the prospectus, but before the admission to trading or close of the offer to the public will still trigger the need for a supplementary prospectus.

The definition of "offer of securities to the public"

As noted in AFME's response to ESMA's consultation on the RTS applicable to the format and content of the prospectus, AFME:

1. 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".

2. considers that withdrawal rights should not apply in the context of admission-only prospectus supplements. We believe 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.

It would also be helpful if ESMA would clarify that investor withdrawal rights would not apply where the prospectus is prepared solely for admission to trading i.e. the rights would only apply where there is a non-exempt offer to the public.

Note: AFME flagged the issue in its paper dated 20 June 2017, which was sent to ESMA.

E. **Publication**

We welcome the general approach of using the relevant sections of the Second Commission Delegated Regulation.

F. **ESMA Q&A on Prospectuses**

The extensive ESMA Q&A issued under the existing Prospectus Directive regime contains 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. An example of a specific area where AFME would suggest that ESMA retains its FAQ guidance is FAQ no. 99 (dissemination of amended advertisements). AFME would be pleased to work with ESMA to recommend aspects of the existing guidance which could be carried forward.

G. **ICMA response**: AFME has seen and broadly supports the ICMA response in relation to debt securities.

AFME's response follows the order of ESMA's Prospectus RTS consultation paper:

1. Key financial information for the prospectus summary

2. Data and machine readability

3. Advertisements

4. Supplements

5. Publication

Note: We have followed ESMA's numbering in Annex II, and note that it differs from that used for the list of questions set out in the body of ESMA's paper.
<ESMA_COMMENT_ PR_1>

Key financial information in the summary

Q1: Do you agree that the KFI extracted from the issuer's historical financial information should be sign-posted?

<ESMA_QUESTION_PR_1>
Yes. ESMA's suggestion for sign-posting information extracted from historical financial information (so that investors can differentiate audited information from APMs) is consistent with current equity capital markets best practice in the EU where information that is extracted from the historical financial information is marked as such. AFME agrees with the proposal.
<ESMA_QUESTION_PR_1>

Q2: Would you suggest the inclusion of specific templates for other types of issuer? Please specify and explain your reasoning.

<ESMA_QUESTION_PR_2>
No, we would not suggest additional templates. Adding further templates would over-complicate the rules and it is unlikely that they would work for all types of issuers in any event. They would also require frequent updates to ensure that they covered new industries - for example, e-commerce and peer-to-peer lending which did not exist 20 years ago. The approach (described by ESMA in paragraph 25 of the paper) where issuers are selecting an appropriate alternative line item and the mandated line item does not appear in their financial statements is more flexible and therefore preferable. It would also be useful for ESMA to provide some guidance for more complex financial institutions that also have insurance operations. At the moment it is not clear if the lines from both Annexes III and IV would become mandatory for inclusion in the summary.
<ESMA_QUESTION_PR_2>

Q3: Do you agree that cash flow from operations is the most useful measure of cash flow for non-financial entities issuing equity and that cash flow from financing activities and cash flow from investing activities are not so relevant for investors in equity securities?

<ESMA_QUESTION_PR_3>
We disagree with ESMA's proposition that cash flow from operations is the most useful measure. Investing and financing net cash flow figures will also be relevant for equity in the majority of cases. This issue would be resolved if the cap on the number of additional line items is lifted.
<ESMA_QUESTION_PR_3>

Q4: Given the page limit for the summary please provide your views on which items of historical financial information would be most useful for retail investors.

<ESMA_QUESTION_PR_4>

Given the broad diversity of issuers and their businesses, it would be impossible to establish measures relevant for all types of businesses that may wish to prepare a summary in order to issue equity or debt securities to retail investors.

If an issuer considers there to be several line items from its financial information that are key for an investor and disclosure of all of the those line items is needed for it to meet its obligation under Prospectus Regulation Article 7.1, it should not be restricted from disclosing all those line items by virtue of a prescriptive Level 2 regime. We would also note that, as a matter of current best practice in the EU and in other leading markets, summaries will typically include more line items than the metrics envisaged by Level 2 ESMA in the draft RTS annexes plus three others.

In addition, it seems inconsistent with the approach to IFRS for ESMA to be mandating a restrictive approach to disclosing key financial information in the summary at a time when IFRS is requiring companies to include increasing levels of disclosure in their financial statements. We have also received feedback from a leading audit firm that certain of the line items required by ESMA are not mandated by IFRS (e.g. operating profit or loss in Annex I).

In addition, adding mandatory measures raises a question with respect to the ability of issuers to update their prospectuses, when they issue trading updates on the basis of summary financial information and not on final or interim financial statements. If the issuer were to proceed to supplement its prospectus to reflect those trading updates, it would need to be allowed to update the key financial information in the summary to the extent the financial updates do not include all mandatory measures.

We also note that mandating a set of measures for all issuers with the same type of business could create challenges for issuers which do not publish exactly the same line items, for example because of differences in accounting standards applied or because issuers may only publish financial information, such as a Q4 trading update, that does not amount to interim or full financial statements. An alternative might be to legislate for (i) a reference to the type of measure that should be included in the summary and the reason for including such measure, accompanied by examples of measures that would satisfy the requirement and its objectives and (ii) giving issuers the flexibility to include in their summaries measure(s) that satisfy the same disclosure objectives.

For example, some issuers have adopted the revised IFRS 9 standard from 1 January 2018. As a result, impairment to financial assets will be a less meaningful measure than it used to be. Please would ESMA clarify the objective of the required disclosure, so that issuers may assess whether impairment of financial assets could still be the right measure to include, or if it should be replaced by expected credit losses, for example.

From the perspective of ABS SPV issuers, ESMA should recognise that the definition of "ABS" captures a wide range of deals, meaning that a "one size fits all" approach with a prescribed mandatory financial information disclosure with no flexibility for derogation or omission, as proposed in Annex V of the draft RTS, does not sit well with the diverse nature of ABS transactions and the ABS SPV issuer entities involved in such transactions. To illustrate this point, it should be noted that under the ABS Registration Document annex (ie paragraph 8.1 of Annex VII of the PD Regulation under the current regime; and paragraph 8.1 of Annex 10 of the ESMA consultation on draft technical advice on format and content of the prospectus (ESMA31-62-532 of 6 July 2017)), an ABS issuer that has not commenced operations since the date of its incorporation and has not prepared financial statements, has the benefit of a derogation from financial disclosure (this is relevant on debut stand-alone retail ABS transactions and the establishment of retail programmes by ABS SPV issuers).

The proposed summary requirements, however, do not take this into account. It should also be noted that ABS SPV issuers established in certain jurisdictions (e.g. the Cayman Islands) may be not required under their national laws to prepare audited statutory accounts. In such cases, the relevant NCAs will consider and decide on a case-by-case basis the availability of derogations from certain financial disclosures (focusing on the nature of the ABS transaction in question and the issuer's confirmation and supporting disclosure (as required under the ABS Additional Building Block) that "*the securitised assets backing the issue have characteristics that demonstrate capacity to produce funds to service any payments due and payable on the securities*"). Again, the proposed summary requirements do not take this type of scenario into consideration. In AFME's view, the most pragmatic approach to fixing the disconnect between the proposed summary requirements for ABS and the ABS Registration Document annex requirements and the reality of ABS transactions would be to mark every line item in Annex V of the draft RTS with # (hash) denoting the flexibility to only include such disclosure if it appears elsewhere in the prospectus, as opposed to having such disclosure (as currently proposed) marked with * (asterisk), which denotes mandatory nature of the required disclosure with no flexibility for derogation or omission. This change in approach will also be in line with the empowerment in PR Article 7(13) requiring the key financial information in the summary to be "concise and understandable" and coherent with the rest of the prospectus disclosure.
<ESMA_QUESTION_PR_4>

Q5: Do you agree with the proposal to allow the use of footnotes to describe APMs or could this result in lengthy footnotes and complicated explanations?

<ESMA_QUESTION_PR_5>
Voluntary inclusion of APMs which constitute key financial information (in accordance with the Article 2 summary requirements) with no requirement for the lengthy associated disclosure to be set out would be a sensible approach. ESMA might wish to consider making this an exception to be "no cross-referencing rule" and a footnote could indicate where the disclosure is in the body of the prospectus. An alternative would be to include a bespoke short-form APM "warning" when an APM is disclosed in a summary rather than a full explanation.

However, we would caution against being overly prescriptive. Some APMs are very clear in their description and so the suggestion of using footnotes would work in such cases. However it does depend on the specific measure. For some APMs, it could result in potentially very lengthy disclosure, which (if it is contemplated to be disclosed via the use of footnotes), could lead to certain information being included in a footnote when such important disclosure should be elevated to the body of the summary. It should also be noted that the use of footnotes is not expressly provided for in the draft RTS. Therefore, ESMA is requested to confirm whether it is contemplated to be addressed via amendments to ESMA's APM Guidelines, the updated ESMA Q&As on the prospectus or APM disclosures or by some other means.

Furthermore, ESMA comments in paragraphs 21 and 41 of the consultation paper, which refer (emphasis added) to "***where it is necessary*** *to provide some explanation on the APMs in the summary…by the insertion of footnotes*" and "*it is also* ***possible that an explanation*** *of APMs in the summary would be* ***necessary****…by way of footnotes*", seem to suggest that it may also be possible not to provide any APM-related explanation at all and that where such explanation is necessary to be provided it should be done using the footnotes. We would be grateful if ESMA would clarify these.

In conclusion, AFME would suggest that ESMA considers adopting a different approach to the APM-related disclosure in the summary, whereby, whilst preserving the flexibility for issuers to voluntarily disclose APMs and related explanations, provide that the summary is to include a general warning that it contains references to APMs and then only to require, where an APM is first referred to in the summary, to have such

reference accompanied by a corresponding footnote, confirming that the measure is an APM and directing investors to the relevant part(s) in the prospectus where further disclosure can be found. AFME believes that this approach will be in line with ESMA's Q&As on APMs and ESMA guidance on the concept of "prominence" (Q&A 9), i.e. it would better support the policy behind the APM regime and ensure that APMs are not given more prominence and the prospectus summary disclosure does not add unnecessarily to the length of the analysis provided on APMs. More generally, please would ESMA clarify its expectation as to the level of detail and nature of the APM-related disclosure that is expects to be provided in the summary in order to avoid confusion in practice and divergence in approaches amongst the market participants and the NCAs.
<ESMA_QUESTION_PR_5>

Q6: Do you agree that issuers should be given flexibility to present pro forma financial information as additional columns to the relevant tables or as a separate table? If not, should a format be mandated, bearing in mind the page limit for the summary as well as the requirement for the summary to be comprehensible?

<ESMA_QUESTION_PR_6>
It is not clear how pro forma information could be set out and explained appropriately in an additional column in practice. AFME believes that the rules should be flexible on this point. Currently the practice is to reproduce the entire pro forma in the summary as issuers may be unable to isolate those items from the package of information in the pro formas, which are most useful to investors. We therefore recommend allowing the existing practice to continue.

It should also be noted that pro forma accounts often include APMs, but such APMs are exempt from the scope of the APM Guidelines when disclosed in compliance with PD Regulation Annex II. However, APMs extracted from pro forma accounts into the summary could result in bringing such APM disclosure within the scope of the APM Guidelines, thereby giving rise to the relevant additional disclosure considerations. ESMA is therefore requested to provide clarification on this point.
<ESMA_QUESTION_PR_6>

Q7: Do you agree that complex financial information in the summary should be presented according to its presentation in the prospectus? If not, please specify and provide alternative ways of presentation.

<ESMA_QUESTION_PR_7>
This question is relevant in equity issuance where there have been significant acquisitions and disposals during the track record period, requiring a patchwork of financial data and disclosure set out in the prospectus to be combined to create the financial "track record" (assuming premium listing), given that accounts will be required for each relevant entity for the relevant period. It is difficult to see how a complex financial history can be included, or meaningfully summarised in, the summary, in the manner proposed, without exceeding the seven page summary length limit. We therefore recommend that the issuer should have flexibility to choose how it wishes to present the complex financial history in the summary.
<ESMA_QUESTION_PR_7>

Q8: Which financial measures are most useful for retail investors to determine the health of a credit institution? Do you consider that the CET1 is comprehensible for retail investors? Please specify.

<ESMA_QUESTION_PR_8>
CET1 is generally a key metric that is disclosed by credit institutions in their prospectus summaries. To that extent, the proposed approach of requiring disclosure of CET1 in the summary if that disclosure appears elsewhere in the prospectus, is logical, subject to the issuer having the flexibility to select alternative and additional measures if they provide meaningful disclosure and provided the * (mandatory) and # (mandatory if included elsewhere in the prospectus), are retained in the RTS.

AFME expresses no opinion on whether CET 1 is comprehensible for retail investors.
<ESMA_QUESTION_PR_8>

Q9: Do you agree that it should be mandatory for credit institutions to disclose SREP information in relation to Common Tier One Equity, the minimum prudential capital requirements, the Total Capital Ratio and the Leverage Ratio in the summary?

<ESMA_QUESTION_PR_9>
We agree with the approach suggested by ESMA of requiring these metrics to be disclosed in the summary if it is included elsewhere in the prospectus, subject to the issuer having the flexibility to select alternative or additional measures if they provide meaningful disclosure.

Following the approach of allowing flexibility to adapt the requirement to each issuer's reality, it would be appropriate to make explicit that there is no obligation to include a measure considered mandatory when it is not applicable to the issuer and there is no comparable information.
<ESMA_QUESTION_PR_9>

Q10 : Do you agree with the choice of measures for insurance companies?

<ESMA_QUESTION_PR_10>
AFME expresses no opinion on these proposed measures, other than our general comments above about the approach in the proposed draft RTS to key financial information being overly prescriptive.
<ESMA_QUESTION_PR_10>

Q11 : Do you think it would be useful for retail investors to include a measure of historical performance for closed end funds in the summary?

<ESMA_QUESTION_PR_11>
AFME expresses no opinion on whether these proposed measures would be useful for retail investors, other than our general comments above about the approach in the proposed draft RTS to key financial information being overly prescriptive.
<ESMA_QUESTION_PR_11>

Q12 : Do you think that investment companies which are subject to capital requirements should be required to include regulated capital ratios in their summary?

<ESMA_QUESTION_PR_12>
AFME expresses no opinion on these proposed measures, other than our general comments above about the approach in the proposed draft RTS to key financial information being overly prescriptive.
<ESMA_QUESTION_PR_12>

Q13 : Would the issuer, offeror or person asking for admission to trading incur costs if the proposed provisions are adopted? If so, please specify the nature of such costs, including quantifying them.

<ESMA_QUESTION_PR_13>
There are unlikely to be additional reporting accountant costs associated with these requirements. Increased costs may arise in any consideration of whether the mandatory requirements meet the Level 1 obligation to disclose "key" financial information, for example if ESMA expected the reporting accountants to be involved and form a view on which three optional items are the most useful to investors.

We note that lifting the cap on the number of additional line items/APMs would help address this concern.

Finally, as noted in comments to Question 4 above, from the ABS SPV perspective, the mandatory requirement for the provision of financial information in compliance with the proposed Annex V will lead (with no apparent benefit for investors) to additional costs being incurred by ABS SPV issuers, because the proposed summary requirements do not take into consideration the availability of a derogation from historical financial information disclosure under the Asset-Backed Securities Registration Document annex, where the ABS SPV issuer has not commenced operations since the date of its incorporation (which will be relevant in the context of a debut retail stand-alone ABS transaction and the programme establishments for a retail ABS issuer) and certain other considerations that AFME discusses in more details in its response to Question 4 above.
<ESMA_QUESTION_PR_13>

Data and machine readability

Q14 : Do you believe that the data related to the amount raised should be made mandatory? Please explain your reasons.

<ESMA_QUESTION_PR_14>
The data required should be kept to a minimum to ensure investors do not place undue importance on the data in the ESMA storage mechanism, without reference to the underlying prospectus.
<ESMA_QUESTION_PR_14>

Q15 : Do you agree with the data items that have been identified as necessary for the purpose of classification as well as to allow for the compilation of the annual report under Article 47 of the Prospectus Regulation? Would you like to propose any additional items or suggest items that should in your view be deleted? Please explain your reasons.

<ESMA_QUESTION_PR_15>
ESMA appears to require the submission of data for two reasons:

(1) to allow ESMA to compile its report on prospectuses in accordance with Prospectus Regulation Article 47, to facilitate regulatory oversight of prospectuses and issuance within the scope of the PR; and

(2) to allow investors to search for prospectuses published under the PR (Article 21(6)).

The data that ESMA requires should be kept to a minimum to avoid any unnecessary cost and administrative burdens on NCAs and market participants. We suggest removing the following items from the list:

- Language;
- Issuer, Offeror and Guarantor registration country;
- Maturity Date;
- Volume offered; and
- Market identifier of the trading venue.

None of these items is essential to allowing ESMA to comply with its obligations under the PR. In relation to the optional information suggested in the consultation paper (consideration raised and document date), we do not believe this information should be requested by ESMA.
<ESMA_QUESTION_PR_15>

Q16 : Do you agree with the ESMA proposal to maintain the current system in place whereby NCAs submit data to ESMA in XML format as the practical arrangement to ensure that such data is machine readable? Do you agree that, by keeping the data submission system unchanged, adaptation costs are minimised for the market at large?

<ESMA_QUESTION_PR_16>
Yes. We agree with the proposal to maintain the current systems in XML formal to minimise the disruption for the market.
<ESMA_QUESTION_PR_16>

Q17 : Do you agree that the proposed amendment to the technical advice on prospectus approval could contribute to provide clarity on the way data referred to in Annex VII are collected by NCAs?

<ESMA_QUESTION_PR_17>

The suggestion will result in a doubling up of compliance costs and administrative burden, with the issuer providing the information to the NCA and the NCA then needing to check the information provided to it by the issuer in order to ensure it is providing correct information to ESMA. This proposal should not be taken forward. However, if ESMA chooses to proceed with the proposed Article C(2a) of its technical advice on prospectus approval, it may be worth considering whether guidance might be given on how issuers shall submit data to the relevant NCA, as this is not clear in the proposed Article C(2a).
<ESMA_QUESTION_PR_17>

Q18 : Do you have suggestions in relation to how the efficiency, accuracy and timeliness of the data compilation and submission process can be further improved? In your experience, is there any specific reporting format or standard that you would deem most appropriate in this context?

<ESMA_QUESTION_PR_18>
Please see our responses above.
<ESMA_QUESTION_PR_18>

Advertisements

Q19 : Do you consider that an advertisement should contain at least a hyperlink to the website where it is published and where available and technically feasible additional information that would facilitate tracing the prospectus? Please provide examples of the additional information that you think would be helpful to include in the advertisement.

<ESMA_QUESTION_PR_19>
Yes, subject to our comments in Section B of the Introduction (on page 5) regarding the scope of the potentially wide new Level 1 definition of "advertisement".
<ESMA_QUESTION_PR_19>

Q20 : Do you consider that the definition for complex securities set out in para 140 provides clarity to issuers and would be helpful in deciding when the comprehension alert referred to in Article 8(3)(b) of the PRIIPs Regulation should be included in an advertisement?

<ESMA_QUESTION_PR_20>
We express no opinion on this question.
<ESMA_QUESTION_PR_20>

Q21 : Do you agree with the requirements suggested for Article 11 of the RTS? If not, please provide your reasoning.

<ESMA_QUESTION_PR_21>
Please see our comments in Section B of the Introduction (on page 5) regarding the scope of the potentially wide new Level 1 definition of "advertisement".

In addition, our previous concerns regarding the requirement to disseminate amended advertisements are briefly restated below.

- Requirement to disseminate amended advertisements in Article 13 and materiality – The requirement to disseminate amended advertisements following the publication of a supplement to the prospectus may be problematic. Partly, this stems from the fact that the definition of advertisement includes a larger number of different types of advertisement, so one regime is unlikely to be capable of being effectively applied in practice to all types of advertisement. In addition, the draft RTS should be clarified so that the obligation to disseminate an amended advertisement will only apply if the new factor, material mistake or inaccuracy detailed in the supplement has rendered the contents of the advertisement materially inaccurate or misleading rather than (as is the case under ESMA's draft) simply technically and insignificantly inaccurate or misleading. Hence we propose that the draft RTS should be clarified in this respect.

- Roadshow presentations - we recommend that ESMA's FAQ 99, which confirms there is no need to reschedule the roadshow presentation, if there is a requirement to disseminate an amended advertisement through the same means as the original advertisement, is retained. This is important as a roadshow presentation would typically be a live slide presentation either uploaded to an interactive web-based conference system or presented in person. In order to communicate an amendment to the presentation through the same means as the original advertisement (as required by Article 11.3), it would otherwise seem that an issuer might need to re-schedule the roadshow presentation(s) with the original investor(s).

<ESMA_QUESTION_PR_21>

Q22 : In particular, do you agree with the requirement to include warnings in advertisements? Do you consider that the suggested warnings are fit for purpose in terms of investor protection?

<ESMA_QUESTION_PR_22>
We suggest that the requirements be linked to advertisements relating to non-exempt offers as the term "retail investor" (as used by ESMA) is generally not used in the operative provisions of the PR.

It may be impracticable for the requirements relating to warnings in advertisements to apply to oral advertisements. We recommend that Article 12.2 of the RTS should be amended so that it applies to written advertisements only.

We do not agree that the proposed warnings should be a requirement for advertisements. It should be sufficient that the advertisement contains a reference that clarifies that such document is an advertisement, as stipulated by Article 12(3). That alone should be sufficient to make it clear to investors, before they make an investment decision, that there is a difference between an advertisement and a prospectus.

At the most the proposed warning 2 b) ("potential investors should read the prospectus before making an investment decision") could be included in advertisements, since it will refer to the prospectus, which contains all necessary information (especially all risk factors) for investors. The standard rubric for inclusion on a written advertisement would then read:

"This document does not constitute an offer to sell or the solicitation of an offer to buy any securities of the issuer. It is an advertisement and does not comprise a prospectus for the purposes of the Prospectus Regulation. Investors should only subscribe for any securities referred to herein on the basis of the information in the [final] prospectus. Investors should read the [final] prospectus before making an investment decision. When available, the [final] prospectus will be made public in accordance with the Prospectus Regulation and investors may obtain a copy of such final prospectus from [*website*]."

Moreover it seems questionable whether investors will consider the proposed warnings in a sufficient way, especially if the usage of such warnings will unnecessarily lengthen the advertisement and would make it more onerous to read. If the additional warnings are included, they should be kept as short as possible to maximise their effect. In addition, most proposed warnings will already be part of the summary of the prospectus. Therefore it seems not necessary to incorporate these warnings also into advertisements.

To address this concern, if ESMA chooses to retain the requirement for the full warnings proposed, it could permit issuers to make reference to a website where such warnings are posted rather than include them in the body of the actual advertisement. In a similar context, Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) No 596/2014 (MAR), the RTS for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest provides in its Art. 3 (2) that where the required disclosure of conflicts of interest information is disproportionate in relation to the length or form of an investment recommendation, including in the case of a non-written recommendation that is made using "modalities", such as meetings, road shows, audio or video conferences, as well as radio, television or website interviews, the producer of the recommendations should state in it where the required information can be directly and easily accessed by recipients, free of charge. The same approach might be adopted for the warnings required in an advertisement.

We would also note that the product governance requirements of Article 9 of the Commission Delegated Directive (EU) 2017/593 are intended to ensure that investors will be sufficiently protected as a general matter. In addition, the requirements of MiFID 2 (Art. 24 (3)) and the Delegated Regulation (EU) 2017/565 in Art. 44 do not foresee that advertisements have to contain special warnings (only that the information addressed is fair, clear and not misleading). We would therefore encourage ESMA to keep the additional Level 2 advertisement requirements as simple as possible to avoid potential confusion and additional expense arising for the need to take into account and comply with multiple pieces of EU legislation.

We express no view with respect to the "comprehension Agent" concept as it is only relevant where the summary includes a PRIIPS KID (and shares are out of scope for PRIIPs).
<ESMA_QUESTION_PR_22>

Q23 : Would the issuer, offeror or person asking for admission to trading incur costs if the aforementioned provisions are adopted? If so, please specify the nature of such costs, including whether they are one-off or ongoing and, quantify them.

<ESMA_QUESTION_PR_23>
A core objective of the Prospectus Regulation is to facilitate pan-European offerings of securities and move towards a single rulebook. This requires one NCA to approve the prospectus, and similarly one NCA to have the power to exercise control over the compliance of advertisements under the Prospectus Regulation.

Fragmenting control over advertising activity to various NCAs will represent a retrograde step. It is also not clear how it would work in practice in respect of online advertising activity.
<ESMA_QUESTION_PR_23>

Supplements

Q24 : Do you agree that Article 2 of the First Commission Delegated Regulation should be carried over, in its entirety, to Level 2 under the new regime?

<ESMA_QUESTION_PR_24>
Yes, we would retain the approach to specifying circumstances in which a supplement for equity securities must be published as shown in the existing Prospectus Directive level 2 measures (i.e. the PD Regulation (EU) no 382/2014).
<ESMA_QUESTION_PR_24>

Q25 : Do you agree that the additional requirements identified from ESMA's draft technical advice should also be included.

<ESMA_QUESTION_PR_25>
Yes, we agree that it is consistent with the draft technical advice to include the additional requirement relating to profit estimates and forecasts. We reiterate, however, that we do not believe that the inclusion of profit estimates and forecasts should become mandatory for non-equity prospectuses.
<ESMA_QUESTION_PR_25>

Q26 : Do you agree that the publication of audited financial statements by an issuer of retail debt or retail derivative securities should not trigger the requirement to publish a supplementary prospectus?

<ESMA_QUESTION_PR_26>
In principle, we consider that it should be for issuers to decide whether a specific situation triggers the publication of a supplement, under Level 2 of the existing Prospectus Directive regime.
Otherwise, we express no opinion on this subject.
<ESMA_QUESTION_PR_26>

Q27 : Would the issuer, offeror or person asking for admission to trading incur costs if the aforementioned provisions are adopted? If so, please specify the nature of such costs, including quantifying them.

<ESMA_QUESTION_PR_27>
Increased costs may arise in any consideration of whether the mandatory requirements meet the Level 1 obligation (under Article 23).

We note in particular the points of uncertainty repeated above about the definition of "offer of securities to the public" and the application of withdrawal rights. Clarification regarding these points would help manage associated costs.
<ESMA_QUESTION_PR_27>

Publication

Q28 : Do you agree that only Article 6(1)(c) and 6(3) of the Second Commission Delegated Regulation need to be carried over to Level 2 under the new regime?

<ESMA_QUESTION_PR_28>
Yes.
<ESMA_QUESTION_PR_28>

Q29 : Do you agree that no other publication provisions of the new Prospectus Regulation need to be specified by way of RTS? If not, please identify the provisions which should be specified.

<ESMA_QUESTION_PR_29>
Yes.
<ESMA_QUESTION_PR_29>

Q30 : Do you believe that the proposed publication provisions will impose additional costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the type and nature of such costs, including whether they are one-off or on-going, and quantify them.

<ESMA_QUESTION_PR_30>
The proposals are unlikely to impose significant costs on issuers.
<ESMA_QUESTION_PR_30>