To: European Commission (submitted via EC Better Regulation portal)

Feedback to the European Commission's draft Delegated Acts regarding the format and content of Prospectuses under the Prospectus Regulation (EU 1129/2017)

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. We advocate 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.

We welcome the opportunity to consider and comment on the Commission's draft regulation and its annexes. However, the amount of time and the fact that it is also a holiday period means that it has not been possible to provide as detailed feedback on the changes to the Commission proposals as our members would like. We would therefore be grateful for the opportunity to provide further input to the Commission, whether at a meeting or by email.

In light of these constraints we have focused our comments on four specific points and a series of comments on changes that have been made to the drafting of the Annexes.

1. **"Profit forecasts" and the requirement for an auditor's report**

We wrote to the Commission on 13 June 2018 setting out our views on the proposal by ESMA to delete the mandatory auditor's report requirement with respect to a profit forecast which is included in a prospectus.

As noted, in our view, the existence of an auditor's opinion on a profit forecast and the assumptions used as its basis ensures that a certain degree of rigour is followed in the process of compiling the forecast, which provides significant benefit to investors. Further, its removal as a regulatory requirement might result in auditors becoming reluctant to supply the comfort which an issuer or underwriters would ideally take into account 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 the Commission's approach in the draft regulation.

As an alternative, AFME has suggested that if a previously disclosed estimate or forecast is not material or is no longer relevant, (for example because the issuer's actual or expected results are in line with its previously made estimate or forecast), the issuer should be allowed to include qualitative disclosure (such as an explanation) in the prospectus, rather than to repeat the forecast itself. For the same reason, AFME considers that qualitative disclosure, rather than repetition, should be permitted in the case of very short-term forward-looking information, which is with respect to the unexpired remainder of a financial year. This would allow the issuer flexibility to form

a view as to whether a prior statement is material for disclosure, based on the prospectus disclosure standard in Article 6 of the Prospectus Regulation.

This approach would preserve the requirement for an auditor's report where a forecast is used in connection with the marketing of a particular issuance, such as a forecast prepared and disclosed in the context of an IPO (where the forecast assumes predominantly a marketing function given the lack of a public market for the company's equity) or a significant recapitalisation (where investors would be expected to focus on the management plans after the transaction and the expected financial performance that ensues).

A further alternative for consideration would be only to require a profit forecast report to be included for a profit estimate or profit forecast for the current or next financial year on the basis that investors will place more weight on such an estimate / forecast given the relatively short period being forecast and its proximity to the time at which the prospectus is published (i.e. the directors would be expected to be able to make the estimate / forecast with a reasonable degree of confidence), whereas forecasts for a medium or long term timescale are inherently more uncertain.

We would urge you to reconsider this issue.

2. Complex financial histories

Currently, if an issuer is considered to have a complex financial history or to have made a significant financial commitment, it may be required to make further financial disclosures in its prospectus (Article 4A PD Regulation). This may include financial information on acquired entities or pro-forma information. The nature of any additional financial disclosure will depend on the specific facts but will also be based on the historical financial information requirements generally applicable to issuers under Item 20 .1, Annex I PD Regulation, subject to modification in view of the factors set out in Article 4A (2).

The Commission's proposals would extend significantly the range of information concerning the target that may be required, beyond financial information, as if the target were the issuer. For example, it would require risk factors, a business description and other disclosures as if that acquired business was a stand-alone issuer. That could impose extensive additional costs on issuers, especially where the target business is non-public.

If the Commission wishes to confer the flexibility to include disclosure items other than financial disclosure, we consider the more appropriate test is the prospectus disclosure standard in Article 6 of the PR – for example in the case of an acquisition that, only just exceeds the 25% threshold, it is unlikely to be necessary to include full disclosures as if that acquired business were a stand-alone issuer.

In addition, there was inadequate consultation on this change – ESMA's commentary appeared to be describing the addition of a Recital at Level 2 - and we consider that an impactful change in an operative provision should be subject to full consultation so that market participants can consider its impact and provide feedback.

For these reasons, we urge the Commission to reinstate the status quo as set out in Commission Delegated Regulation 809/2004, which market participants are familiar with.

3. The Commission's draft Delegated Regulation

We support the objective of harmonising the scrutiny of the prospectus across national competent authorities (NCAs) while taking a proportionate approach. In this context, we understand that the elevated importance of the "comprehensibility" requirement and the new criteria which all NCAs must take into account when scrutinising prospectuses (such as whether the prospectus has a structure that helps investors understand its contents) are soft guidelines only and do not provide NCAs with a mechanism for imposing additional substantive content requirements. Even so, we should be grateful if the Commission would expressly confirm that the discretion conferred on NCAs by Article 40 (additional criteria for the scrutiny of the information in the prospectus) will be interpreted narrowly and solely within the content and format parameters set by the Annexes and will not be used to require the disclosure of additional information beyond their scope.

4. **ABS registration document – new text which refers to the SPV objects and purposes being primarily the issue of securities** (**Section 4 – item 4.1 of Annex 9)**

"*A statement whether issuer has been established as a special purpose vehicle, whose objects and purposes are primarily the issue of securities.*"

We understand that the reason for the Commission's above change in drafting is the removal of the definition of "special purpose vehicle" in Article 1. We agree that, given the limited use of this definition, it is sensible to delete it. However, the proposed hard-wiring of the aspects of that definition (in particular the reference to "objects") into the disclosure requirement of item 4.1 will bring its meaning into more focus and this may result in some SPV issuers not feeling comfortable about giving the required disclosure statement absent changes to the objects clauses in the articles of association or other relevant constitutional documents, which may present challenges in some SPV jurisdictions where under applicable corporate law the SPV "objects" are generally framed as unrestricted, although the purpose of such SPV will be otherwise limited to the relevant ABS transaction in accordance with the board minutes/similar records and corresponding contractual arrangements.

On this basis and in order to ensure that the proposed change does not lead to the unintended consequences, we therefore request that the new disclosure wording in item 4.1 of Annex 9 is deleted and replaced with the wording as per currently applicable item 4.1 of Annex VII, which reads as follows (emphasis added):

> "*A statement whether the issuer has been established as a special purpose vehicle or entity for the purpose of issuing asset backed securities*"

5. **Managing adaptive costs**

AFME has previously noted 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 market participants and NCAs adjust to them. These adaptive costs are likely to vary from issuer to issuer and may also differ from jurisdiction to jurisdiction, if NCAs take differing approaches to interpretation of new provisions. In light of this, AFME is concerned about the Commission's approach of revising some of ESMA's drafting as set out in the draft delegated regulation and annexes as ESMA had largely followed the language of the existing content and format regime under Delegated Regulation 809/2004 as amended, in its Final Report. AFME understands that there was no policy intention to change the substance of ESMA's language. However, as a matter of practice, the Commission drafting changes are likely to result in differences in meaning between the Commission's and ESMA's wording or in uncertainty. Regarding specific additions to disclosure requirements, if the issuer would be required to provide an item of information to satisfy the necessary information test under Article 6 of level 1, we do not consider that a specific requirement is

necessary. We would therefore encourage the Commission to restore the status quo by reverting to ESMA's drafting in the following Annexes for equity issuance:

- Annex I – item 4.3 (Information about the issuer): the language in ESMA's Final Report provided for disclosure of the "length of life" of the issuer, except where the length of life was indefinite. Our understanding of this requirement is that it is aimed at eliciting disclosure about the future life of the issuer where it has been incorporated with a fixed or otherwise limited period of existence (e.g. a Jersey limited duration company). The Commission proposes to change this language to require disclosure of the "length of time the issuer has been in existence, except where the period is indefinite." We urge the Commission to reinstate the status quo as set out in ESMA's Final Report as no issuer will have been in existence for an indefinite period of time. In addition, the period of time for which the company is in existence will already covered by the disclosure of the date of incorporation. This point also applies to item 2.1 of Annex 5.

- Annex 1 – item 1.1 and 1.2 (Responsibility statement): we note that the Commission has amended ESMA's wording as follows in Annex I Item 1.2 and Annex 19. The first deletion of "such is the case" results in the wording becoming incomprehensible.

  "A declaration by those responsible for the registration document that, having taken all reasonable care to ensure that ~~such is the case,~~ the information contained in the registration document is, to the best of their knowledge, in accordance with the facts and contains no omission likely to affect its import.

  ~~As the case may be,~~ Where applicable, a declaration by those responsible for certain parts of the [securities note/registration document] that having taken all reasonable care to ensure that ~~such is the case,~~ the information contained in the part of the registration document for which they are responsible is, to the best of their knowledge, in accordance with the facts and contains no omission likely to affect its import."

  We also suggest that the Commission remove the words "details of" at the start of Disclosure Item 1.1 and reinstate ESMA's wording. If the Commission intends that the substantive meaning of this provision to remain the same, as we understand is the case, it is clear that that only the name of the persons responsible needs disclosing.

- item 3.1 (Risk factors disclosure): AFME commented on ESMA's helpful and proportionate guidelines in relation to the content and presentation of risk factors in prospectuses under Article 16 of the Prospectus Regulation. It appears that the Commission's Level 2 provisions merely re-state concepts under Level 1. It would be helpful if the Commission would confirm that this is its intention.

- Annex 3 (secondary equity issues registration document) and 5 (depositary receipts) – Material contracts: it is unclear what is meant by "not previously disclosed elsewhere" in this item. Given this requirement for the simplified disclosure prospectus for equity is different from (and potentially more onerous than) the material contracts requirement in the primary equity disclosure annex, it would be helpful to clarify its meaning, for example in Level 3 guidance. For example, does it mean that the issuer is not required to disclose material contracts to the extent that they are disclosed somewhere in the public domain?

- Annex 12: item 18.7.1 (Significant change): it is unclear whether there is any practical difference between ESMA's form of no significant change statement and the Commission's version or why this form for the simplified secondary equity prospectus is different from the form for primary equity issuance. It would therefore be helpful if the Commission were to confirm that there is no practical difference between the ESMA and Commission wording and also explain the reason for the differences between the primary and secondary equity annexes.

- Finally, we would draw to the Commission's attention that that there are a number of typos in its draft annexes that need correcting. For example:
    - in Annex 3, typo in item 3.2 ("tem") and item 5.4.1 (placersin").
    - Annex 12, in item 7(c) "indicate" should be changed back to "indication".

21 December 2018