



European Securities and
Markets Authority

Final Report

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

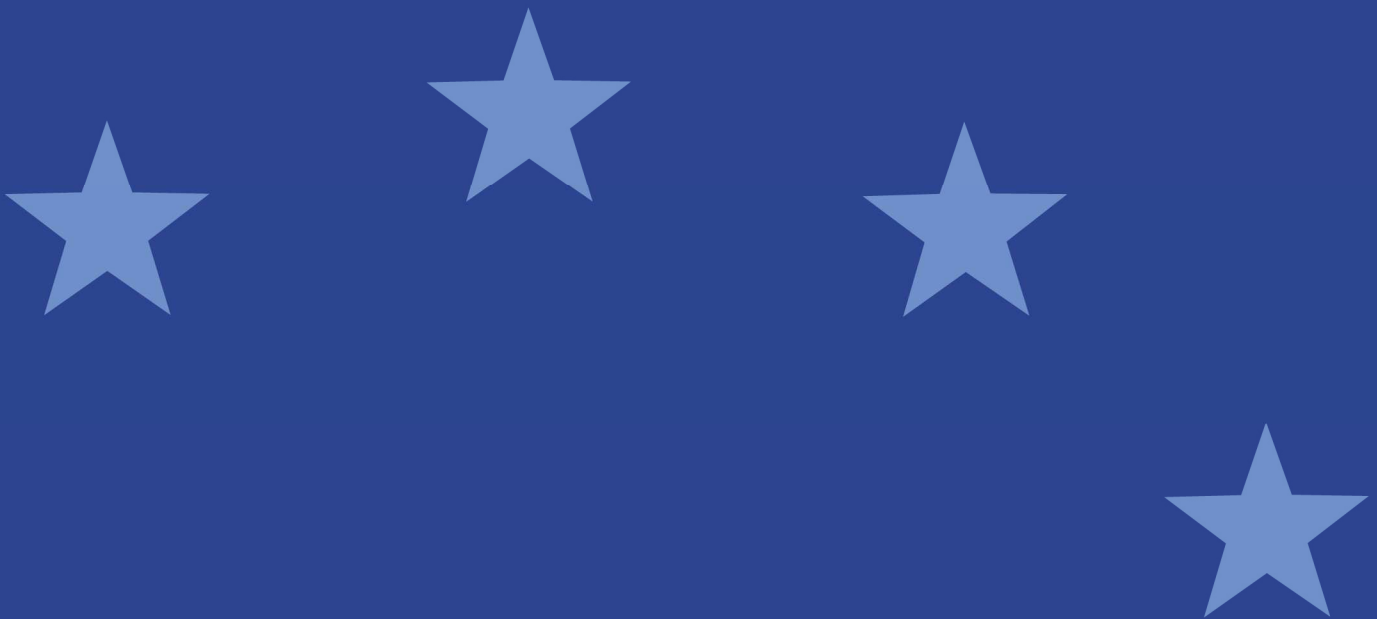


Table of Contents

I.	Executive Summary	5
II.	Background	6
III.	Summary of the feedback and amendments to the draft RTS	7
III.I.	General comments and comments on the scope of the RTS	7
III.II.	Comments on the test to be performed in Article 16 (1) of the Prospectus Directive.....	9
III.III.	Comments on specific situations which require a supplement to the prospectus	10
III.III.i.	Question on disclosure requirements for supplements.....	11
III.III.ii.	Publication of new annual audited financial statements	12
III.III.iii.	Change in profit forecast for certain equity securities and depository receipts	18
III.III.iv.	Change in profit estimate for an annual financial period.....	19
III.III.v.	Change in control of the issuer for equity securities and depository receipts.....	22
III.III.vi.	Public takeover bids for equity securities and depository receipts.....	24
III.III.vii.	Working Capital Statements for certain equity securities.....	25
III.III.viii.	Admission to trading or offer to the public in an additional Member State	27
III.III.ix.	New significant financial commitment for equity securities.....	28
III.III.x.	Any judgment or concluding event of governmental, legal or arbitration proceedings already disclosed in the prospectus.....	29
III.III.xi.	Increase in aggregate nominal amount of the programme	32
III.III.xii.	Other situations	33
III.IV.	Comments on supplements which do not relate to the draft RTS	34
	ANNEX I – SUMMARY OF QUESTIONS	35
	ANNEX II – LEGISLATIVE MANDATE TO DEVELOP TECHNICAL STANDARDS.....	38
	ANNEX III – COST-BENEFIT ANALYSIS.....	39
	ANNEX IV – SMSG OPINION	56
	ANNEX V – DRAFT REGULATORY TECHNICAL STANDARD.....	57
	ANNEX VI – LEGAL REFERENCES.....	62
	ANNEX VII – REFERENCES TO PARAGRAPHS IN THE CP	68



Acronyms and definitions used

Commission Delegated Regulation No 486	Commission Delegated Regulation (EU) No 486/2012 of 30 March 2012 amending Regulation (EC) No 809/2004
Commission Delegated Regulation No 862	Commission Delegated Regulation (EU) No 862/2012 of 4 June 2012 amending Regulation (EC) No 809/2004
CP	Consultation Paper on Draft Regulatory Technical Standards on specific situations that require the publication of a supplement to the prospectus (ESMA/2013/316)
ESMA	European Securities and Markets Authority
ESMA's Recommendations	ESMA update of the CESR recommendations - The consistent implementation of Commission Regulation (EC) No 809/2004 implementing the Prospectus Directive, Ref. ESMA/2013/319
ESMA Regulation	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC
EU	The European Union
NCA	National Competent Authority
Q&A	Questions and Answers – Prospectuses - 20th updated version – October 2013, Ref. ESMA/2013/1537
RTS	Regulatory Technical Standard
SMEs	Small and Medium Enterprises
TFEU	Treaty on the Functioning of the European Union
The Commission/EC	The European Commission
The Omnibus Directive	Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC
The PD/Prospectus Directive	Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC as amended by the Directive 2010/78/EU and the Directive 2010/73/EU



The PR/Prospectus Regulation Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements as amended by the Commission Delegated Regulation No 486/2012, the Commission Delegated Regulation No 862/2012 and Commission Delegated Regulation No 759/2013

I. Executive Summary

Reasons for publication

Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending among others Directive 2003/71/EC requires ESMA to develop draft regulatory technical standards (RTS) to specify situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published.

While developing the draft RTS, ESMA consulted stakeholders by way of a Consultation Paper.

Contents

This final report includes a summary of the feedback from the public consultation and the proposed changes made by ESMA. To a large extent it follows the structure of the Consultation Paper with the first part dealing with general comments, issues unrelated to the subject at hand, matters concerning scope and the test to be performed in Article 16 (1) of the Prospectus Directive; and second part dealing with the list of specific situations which require a supplement to the prospectus.

The annexes of the final report consist of a revised cost-benefit analysis (Annex III), the revised draft RTS (Annex V) and legal references used in the final report (Annex VI).

Next steps

This final report will be submitted to the Commission by 20 December 2013. The Commission has three months to decide whether to endorse ESMA's draft RTS.

II. Background

1. With the aim to ensure that any new matter liable to influence the assessment of the investment, arising after the approval of a prospectus but before the closing of the offer or the start of trading on a regulated market, could be properly evaluated by investors, a supplement procedure was established in Article 16 of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (hereinafter the “Prospectus Directive” or “PD”).
2. Article 5 (7) of the Omnibus Directive¹ inserted a new paragraph 3 into Article 16 of the Prospectus Directive which reads as follows: “In order to ensure consistent harmonisation, to specify the requirements laid down in this Article and to take account of technical developments on financial markets, ESMA shall develop draft regulatory technical standards to specify situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published. ESMA shall submit those draft regulatory technical standards to the Commission by 1 January 2014”.
3. Regulation (EU) No 1095/2010 establishing the European Securities and Markets Authority (hereinafter the “ESMA Regulation”) empowers ESMA to develop draft RTS where the European Parliament and the Council delegate power to the Commission to adopt regulatory standards by means of delegated acts under Article 290 TFEU.
4. Besides the draft RTS included in this final report, ESMA may issue guidelines or recommendations in accordance with Article 16 of the ESMA Regulation or apply convergence tools in accordance with Article 29 of the ESMA Regulation such as Opinions or Questions and Answers to address issues related to the Prospectus Directive. However, with regard to identifying specific situations where a supplement would be mandatory ESMA is obliged by the Omnibus Directive to use the tool of an RTS.
5. For the purpose of discharging its mandate, ESMA published on 15 March 2013 a Consultation Paper on Draft Regulatory Technical Standards on specific situations that require the publication of a supplement to the prospectus (ESMA/2013/316) (hereinafter “the Consultation Paper” or “CP”). The CP included a draft RTS as well as an initial cost-benefit analysis. The consultation period was open until 28 June 2013. ESMA received responses from 16 market participants mainly representing issuers.
6. In addition to this ESMA sought the views of the Securities and Markets Stakeholder Group (SMSG), the Corporate Finance Standing Committee Consultative Working Group as well as the competent authorities of Member States to draw on their experiences in this field. While advice on the CP was not received from the SMSG, the views of both the CWG and national competent authorities have been taken into account in the compilation of this final report.
7. An essential element for the drafting of the technical standard is the analysis of the costs and benefits that the proposed measures might entail. This final report includes a cost-benefit analysis in

¹ 2010/78/EU.

Annex III. The limited amount of information available and collected on the basis of the responses to the CP did not allow ESMA to perform an in-depth quantitative cost-benefit analysis. Notwithstanding this, the cost-benefit analysis included contains some quantitative elements where possible and otherwise focuses on qualitative descriptions.

8. The final report does not constitute an exhaustive account of every comment made by market participants but addresses the main comments received to the consultation. Certain comments do not relate directly to the issues referred to in the CP nor the subject matter at hand. Therefore, comments received on other prospectus related issues such as incorporation by reference, rights issues, agreement by the auditor required by e.g. Annex I, item 13 (2) subparagraph 2, definitions for the terms “primary market”, “secondary market” and “public offer” etc. have not been considered in this final report.
9. In addition to a summary of responses to the CP received by ESMA, the final report contains the rationale for keeping or changing the standards following the consultation process.

III. Summary of the feedback and amendments to the draft RTS

III.I. General comments and comments on the scope of the RTS

Discussion of Article 16 (3) of the PD

10. A significant number of respondents generally welcomed that the RTS referred to in Article 16 (3) of the PD will aim to bring more legal certainty to the process of determining whether a particular new factor, mistake or inaccuracy requires the publication of a supplement to the prospectus in accordance with Article 16 (1) of the PD. It was further noted that the objective of harmonisation can only be achieved if it is sufficiently clear which cases will require a supplement.
11. However, some respondents questioned the need for an RTS. These respondents were of the view that there is currently no legal uncertainty or lack of a harmonised practice for the specific situations described in the draft RTS and while there might be some divergence in practices, there is no evidence that this is detrimental to the integrity of markets or reduces investor protection.
12. Respondents opposed to the development of an RTS considered that decisions on requirements to publish a supplement should always be based on a case-by-case analysis. Furthermore, such respondents considered that the requirements under Article 16 of the PD cannot generally be determined in order to capture comprehensively every situation in which a supplement should be produced nor should the assessment of a situation by the issuer, offeror or person asking for admission to trading be replaced. The end result could be that some issuers would be less likely to publish a supplement in case a situation occurs that is not contained in the list, despite such situation meeting the trigger in Article 16 of the PD.
13. Several respondents expressed concern that the RTS would result in investors being confronted with many more supplements which would to some extent be of a more “formal” than significant nature.

ESMA's response:

14. The Impact Assessment conducted by the Commission accompanying the proposal for the revised PD (hereinafter the "EC IA") stated that there is a regulatory failure in this area which could result in a non-harmonised application of the legislation². The manner set out to address this is the development of technical standards with the aim of providing market participants with more legal certainty to determine whether a particular new factor qualifies as a triggering event for producing a supplement to the prospectus in accordance with the first paragraph in Article 16 of the PD. Therefore, the RTS should focus on specific situations which systematically require the publication of a supplement to the prospectus which is in line with the wording of Article 16 of the PD.
15. As explained in paragraph 13 of the CP (see Annex VII of this final report), for the identification of such specific situations ESMA has focused its work on the concept of "significant new factor". Difficulties in determining whether or not a particular mistake or inaccuracy triggers the obligation to publish a supplement are encountered less frequently³.
16. ESMA agrees that for most new factors, mistakes or inaccuracies the materiality or significance cannot be generally determined. That is why the draft RTS contains a quite short list of situations, i.e. only those situations whose materiality is such that they always require the publication of a supplement have been included in the list. ESMA does not agree that a list would result in issuers not publishing supplements for situations not on the list as they have to apply the general rule in Article 16 of the PD for determining the need of a supplement (i.e. case-by-case analysis) for all other situations.
17. ESMA does not expect a significant increase in the number of supplements for the situations in the list as such situations, to a large extent, codify existing market practice.
18. Considering the above, ESMA confirms that the RTS pursuant to Article 16 (3) of the PD should identify a list of specific situations which should be considered as a significant new factor or a material mistake or inaccuracy and, therefore, systematically require the publication of a supplement. ESMA reminds readers that despite a situation being included in the list, a new prospectus could be required by the competent authority due to lack of consistency, completeness or comprehensibility of the full prospectus.

Positive/negative changes

19. A quarter of the respondents disagreed with ESMA's interpretation of the need for a supplement even in case of material positive changes and generally considered that positive changes cannot be the purpose of the RTS and must therefore be rejected or reinterpreted to ensure fulfilment of the protective purpose of the provision. The main argument was that it is imbalanced and unjustified to grant investors a right of withdrawal in cases which are clearly positive for investors and that such a right would lead to undesirable results.
20. It was also suggested that if ESMA maintains the proposal that a supplement must be published no matter whether a negative or positive change occurs, it should be stated that the investor's withdrawal right does not apply to positive changes to the prospectus. The reason is that positive

² Confer EC IA page 10, section 3.1.3.

³ The concept of a "significant new factor" was the main area of legal uncertainty identified by the EC in the EC IA page 10, section 3.1.3.

changes would only be of relevance for those investors that have not agreed to subscribe or purchase the securities, if at all.

ESMA's response:

21. ESMA understands that there might be cases of positive news where it could be seen as unbalanced to grant investors a right of withdrawal. However, Article 16 of the PD does not distinguish between positive and negative new factors nor is there an indication that such a distinction was contemplated by the legislator. Therefore, there is no flexibility to make such an interpretation.
22. Furthermore, what constitutes a negative, positive or neutral change will always be a matter of individual investor perception.

III.II. Comments on the test to be performed in Article 16 (1) of the Prospectus Directive

23. ESMA received comments from five market participants with regards to the test to be performed in Article 16 (1) of the PD. While one of these respondents considered that the interpretation made by ESMA in paragraphs 21-24 of the CP (see Annex VII of this final report) is helpful, other respondents did not agree with such interpretation that ties the test for supplement disclosure to the test for prospectus disclosure.
24. Respondents against the proposal mentioned that there is a relevant difference between the “informed assessment” that Article 5 (1) of the PD aims at and materiality and significance triggering a supplement. The terms “material” and “significant”, but also their connection to “which is capable of affecting the assessment” outline very clearly that the level of interpretation of what triggers a supplement is higher than the notion of “necessary for an informed assessment”. If this were not the case, the PD would have used the same wording in Article 5 (1) and Article 16 (1).
25. Some respondents pointed out that as a consequence of ESMA's interpretation, the number of supplements needing to be published would increase substantially as any factual change to the original information in the prospectus would trigger the requirement to produce a supplement. This would mean that any mistake or inaccuracy would be considered as material.

ESMA's response:

26. ESMA acknowledges that there is a difference in timing and, initially, in content when applying Article 5 (1) and 16 (1), respectively, which would indicate that the test to be performed is not an identical test. However, ESMA maintains that there is a strong correlation between the articles and that they cannot be viewed as being independent of each other and that Article 16 (1) is rather a subset of Article 5 (1). The requirement of “information...necessary to enable investors to make an informed assessment...” in Article 5 (1) is the overarching principle indicating why certain information (as set out in the Annexes of Commission Regulation (EC) No 809/2004 (the “Prospectus Regulation” or “PR”) is to be included in a prospectus. From this principle one derives that should information included in the prospectus prove to be erroneous or inaccurate or should a new factor arise, any of which is capable of affecting an investors assessment, then such information is material or significant and as such is also necessary to include in the prospectus even at this later point in time. The method for this is by way of publishing a supplement.

27. When considering the materiality of a mistake/inaccuracy or the significance of a new factor, one must assess the triggering element and its impact on the investment decision. This is seen by the wording “assessment of the securities” in Article 16 (1) and the “informed assessment of...the rights attaching to such securities” in Article 5 (1) of the PD. The assessment of the securities also implies an assessment of the issuer itself. Information resulting in a changed assessment of the issuer would usually also mean a changed assessment of the securities at hand. If the triggering element is not capable of affecting a decision, then it is not material or significant nor is it necessary information to enable an investor to make an informed assessment.
28. As a result ESMA is of the opinion that the test to be performed when considering the necessity of a supplement pursuant to Article 16 (1) of the PD is similar in nature to the test of including information in the prospectus with the more principle based approach in Article 5 (1) of the PD and that the two provisions are complementary. Consequentially, this would not lead to a situation where all mistakes or inaccuracies would be considered as material.

III.III. Comments on specific situations which require a supplement to the prospectus

29. Before addressing the responses to the questions regarding each situation included in the list of specific situations which systematically require the publication of a supplement, this final report addresses some other relevant comments made regarding the explanations included in paragraphs 25-36 of the CP.
30. One market participant inquired about any research conducted to identify which events in practice lead to supplements.
31. Two market participants understood that situations in the list come on top of those which still have to be tested on a case-by-case basis against Article 16 of the PD and thus, the general rule would still apply, also in these foreseen situations.
32. It was also mentioned that the “without prejudice” reference in paragraph 28 of the CP⁴ presumably only referred to a competent authority being able to suggest the need for a supplement where it is aware of a particular significant development in relation to an issuer, and not to second-guess an issuer’s own determination that a supplement is required.

ESMA’s response:

33. ESMA wishes to clarify that the list includes those situations which are always material in the opinion of the Competent Authorities and is based on their experience. In general, respondents have confirmed that there is already a market practice for many of these situations to publish a supplement which confirms ESMA’s views on the importance for the investment decision of a supplement for such events.

⁴ “For all other situations which are not included in the list below, it is up to the issuer, the offeror or the person asking for admission to trading on a regulated market to assess their significance or materiality, without prejudice to the powers of the competent authority of the home Member State.”

34. The list includes situations which systematically require the publication of a supplement. Thus, for the situations included in the list it is not necessary to test on a case-by-case basis their significance/materiality as a supplement is always mandatory.
35. ESMA recognises that the assessment of whether a supplement is necessary or not initially resides with the issuer, offeror or person asking for the admission to trading. Notwithstanding this fact, even where the issuer considers that a particular situation is not material or significant, the competent authority can nevertheless require a supplement where it considers that such situation is material or significant in accordance with Article 17 (2) of the PD.
36. **For the avoidance of any doubt, ESMA reiterates that for all other situations which are not included in the list below, the onus is on the issuer, the offeror or the person asking for admission to trading on a regulated market to assess their significance or materiality without prejudice to the powers of the competent authority of the home Member State.**
37. The following sections summarise and address the principal responses received from stakeholders to the specific questions included in the CP.

III.III.i. Question on disclosure requirements for supplements

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

38. Ten market participants responded to this question. Four respondents were clearly against the proposal while other comments were very diverse in nature.
39. One respondent was of the opinion that supplements should include information meeting the Article 16 requirement and that such information might or might not be covered by the specific items in the annexes of the PR. Consequently, supplements should not have to address specific disclosure requirements based on the PR annexes.
40. Two respondents disagreed with the disclosure in supplements of any other objective consequences deriving from the triggering event which are capable of affecting the assessment of the relevant securities. They considered that issuers should only be obliged to disclose what is required under the PR. An obligation to set out any objective consequences would create an additional and unnecessary layer of complexity for issuers
41. It was also mentioned that ESMA fails to distinguish between supplement and prospectus data. It is unclear why following a triggering event (e.g. an annual report), all figures derived from the previous year's annual report need to be corrected after publication of the new annual report. Supplementing additional notes to the new report should suffice.
42. One market participant said that timing issues would be appeased if ESMA did not raise legal uncertainty about the minimum content of supplements and respected the wording "significant" and "material" in Article 16 (1) of the PD.
43. Other comments or suggestions on the proposal were the following:

- One respondent asked whether the supplement has to give explanations or interpretation to investors. This respondent also explained that the PD requires the supplement to include the relevant information when read together with the prospectus and the supplement need not contain all relevant information on its own.
- Regarding paragraphs 22, 23 and 24 in the CP (see Annex VII of this final report), two respondents believed that, if taken literally, these could mean that the supplement itself must comply in full with all the disclosure requirements of the PR. This could be understood as a requirement to provide continuously updated information on the disclosure elements from the PR.
- It was also suggested that the issuer's obligation be limited to providing all information actually known and all objective consequences reasonably identifiable from such information as the issuer may not be in a position to ensure compliance with an obligation to disclose all objective consequences.

ESMA's response:

44. Regarding the criticisms of the requirement to disclose “any other objective consequences deriving from” the triggering event, ESMA clarifies that the content of the supplement should be that which is necessary to supplement all information that is affected in the prospectus by the situation which triggered the supplement and which is reasonably identifiable at the time of drafting of the supplement.
45. ESMA has considered the added value of indicating the legal sources regarding the content of the supplement where these sources are already determined by the initial insertion of the relevant information in the prospectus in accordance with the PR. ESMA also notes that the indication of some points of the PR Annexes might be misleading in the proper application of Article 16 of the PD since the situation triggering the publication of the supplement may impact information covered by points of Annexes not mentioned in the draft RTS which was included in the CP.
46. Furthermore, the proposed wording of letter (b) of Article 3 of the draft RTS could be misconstrued as to the type of information required, since "material consequences deriving directly from the situations" triggering the obligation to publish a supplement could be seen to refer to the consequences of the situation vis-à-vis the investment made by the investor through that security, rather than the consequences of such situation on the information compiled in the prospectus.
47. **Considering the above, and to clarify any ambiguity, ESMA has deleted Recital 14, Article 3 (b) and Annex 1 of the draft RTS and included a new Recital 3 in order to indicate the content of any supplement to a prospectus. For guidance purposes the Final Report sets out the items of annexes that refer directly to information in the situations in the list which ESMA expects would constitute the minimum information in a supplement.**

III.III.ii. Publication of new annual audited financial statements

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

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

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

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

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

General comments

48. Generally speaking, respondents confirmed that
- i. the practice of publishing a supplement after the publication of audited annual financial statements is already widespread; and
 - ii. annual audited financial statements are without any doubt an important source of information for investors. They highlighted that it is crucial for potential investors to be aware of the most up to date financial information prior to making any final investment decision.
49. However, ESMA's proposal to systematically require a supplement for the publication of audited annual financial statements was criticised by a significant number of respondents, with at least half of them clearly against.
50. Some respondents considered that a systematic requirement to publish a supplement regarding annual audited financial statements is not appropriate as financial statements which do not differ a lot from earlier financial statements will not affect the assessment of the securities. If financial statements do differ from earlier financial statements, issuers would give investors the necessary disclosure on the progress of the economic and financial situation in compliance with other legislative provisions (e.g. the Transparency Directive⁵).
51. In the particular case of structured products, one market participant considered that a systematic supplement requirement at the time the publication of new financial statements would be giving a put option to the investor and would mean that the risk of the investor relating to the performance of the underlying which is inherent in structured products would be transferred unduly to the issuer. A systematic supplement requirement at the time of the publication of new financial statements would even give the investor a possibility to speculate against an issuer because investors know when financial statements of a company are published. Knowing that they would be allowed to return securities bought shortly before the publication of the financial statements if the securities performed badly for reasons totally unrelated to the financial statements would encour-

⁵ Directive 2004/109/EC of the European Parliament and the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p.38).

age them to speculate against the issuer. The EU would provide a tool which, if "weaponised" by hedge funds, would harm issuers massively.

ESMA's response:

52. The confirmation from several market participants that there is a widespread practice among issuers to provide a supplement after the publication of annual financial statements together with the view that most changes in financial statements are of no relevance seem to be a contradiction.
53. A systematic requirement to supplement for the annual audited financial statements provides investors who have already subscribed for the securities and also those who can do so in the future with the most updated financial information.
54. While it is possible that investors withdraw for reasons unrelated to the triggering event, ESMA does not believe this outweighs the investor's right to updated information. The withdrawal right is an integral part of Article 16 of the PD. The issue of "weaponisation" is further dealt with below.
55. In spite of the number of respondents against the proposal, ESMA considers that arguments provided in paragraphs 37-39 of the CP (see Annex VII of this final report) were not refuted.

Carve-outs

56. There were no objections to the carve-outs in Article 2 (2) of the draft RTS included in the CP. However, some respondents provided other suggestions for situations where a supplement should not always be required for the publication of annual audited financial statements arguing that in such cases, financial statements do not affect the assessment of the securities. The most relevant situations mentioned were the following:
 - Where there are no new negative financial statement details (e.g. losses), especially where the registration document is about to expire.
 - In case of debt securities where most changes in financial statements are of no relevance.
 - In case of structured products as the value of the securities is primarily dependent on the value of the underlying and not on the issuer of such securities or its creditworthiness as long as it remains solvent.
 - Certain substantially similar limited recourse asset-backed structures (e.g. SPV funding entities in UK master trust securitisations).
 - In case of financial statements of a financing subsidiary (intra-group finance companies) whose bonds are guaranteed by the parent or holding company. The rating of these bonds depends on the credit rating of the guarantor.
 - When audited financial statements confirm profit estimates or information related to the fourth quarter which must include information on year-end basis which have already been included in a prospectus or in a supplement. In the opinion of these respondents the annual audited financial information would materially match or overlap the information previously incorporated in the prospectus.

ESMA's response

57. ESMA considers that there is no legal basis in the PD to interpret that the need for a supplement depends on the validity period of a registration document. In other words, a significant new factor affecting the information disclosed in the registration document requires the publication of a supplement if it meets the conditions under Article 16 (2) of the PD, irrespective of whether it happens at the beginning of the validity period of the registration document or when it is about to expire.
58. Annual audited financial statements are without any doubt an important source of information for investors and are therefore absolutely necessary information that has to be part of a prospectus according to Article 5 of the PD. However, Article 16 only requires the publication of a supplement for factors that can influence the assessment of the securities by being 'significant' or 'material'.
59. As noted by respondents to the consultation, investors in equity and depository receipts assess securities on the basis of the issuer's profitability whereas investors in debt assess securities on the basis of the issuer's solvency. This distinction is reflected in the Prospectus Regulation which specifies different standards of disclosure for equity and debt generally. In particular, one respondent referred to the fact that in item 4 of Annex I to the Prospectus Regulation the requirement to disclose a risk factor is triggered by being "specific to the issuer or its industry" whereas in item 4 of Annex IV to the Prospectus Regulation, the requirement to disclose a risk factor is triggered by affecting an issuer's "ability to fulfil its obligations".
60. The proposal outlined in the CP had the potential to affect each and every base prospectus several times during its lifetime – even though the conditions of Article 16 of the PD in many cases would not be fulfilled. The impact of the proposal on equity offerings would be significantly less as these, due to their duration, can be timed in a way so that they do not fall into a period in which new financial statements are published.
61. While acknowledging that information contained in annual financial statements could always be considered material or significant in the context of equity securities and depository receipts, ESMA is of the view that this is not always the case in the context of non-equity securities including structured products. Furthermore, ESMA accepts that while the credit risk of an issuer of structured products is not necessarily lower than in the case of plain vanilla bonds, in case of structured products the value of the securities is primarily dependent on the value of the underlying.
62. Rather than increasing the number and nature of the carve-outs included in its original proposal, ESMA has amended the draft RTS to take into account the different considerations of investors when investing in equity securities and depository receipts and non-equities. In making this amendment, ESMA has considered the extent to which the annual audited financial statements could always be considered significant in the context of the assessment of the securities. By limiting the systematic requirement for a supplement to equity securities and depository receipts, ESMA considers that concerns of respondents regarding certain asset-backed structures' and intra group financing arrangements can be addressed.
63. However, as to the suggestion from a respondent to grant an exemption for the systematic obligation where the issuer already published a supplement for a profit estimate in relation to the annual financial period, this issue was already commented on in paragraph 43 of the CP (see Annex VII of this final report). ESMA did not propose a carve-out for this situation, because the annual au-

dited financial statements contain additional information to that contained in a profit estimate which is significant for the investment decision. For the same reason, ESMA does not consider it appropriate to exempt issuers from the obligation to publish a supplement for the publication of annual audited financial statements where financial information related to the fourth quarter which includes information on year-end basis has been previously included in the prospectus.

64. ESMA clarifies that the limitation of the systematic obligation to produce a supplement for audited annual financial statements to equity securities and depository receipts does not mean that supplements will never be necessary for other securities. The significance of annual financial statements in the context of other securities should still be assessed on a case-by-case basis by the issuer, offeror or person asking for the admission to trading. Particular attention should be paid to such significance in the context of securities which are offered to retail investors.
65. ESMA included an exemption for issuers of depository receipts from the systematic requirement to publish a supplement for their annual audited financial statements in Article 2 (2) (a) of the draft RTS in the CP. This was intended to clarify that the financial statements of issuers of depository receipts are not required to be included in the prospectus in accordance with the disclosure requirements in the PR, rather the financial statements of the issuer of the underlying shares are required to be disclosed. However, following comments received and further consideration, such a reference would result in the need for a case-by-case analysis of the materiality of such information which would be contrary to the PR because such a disclosure requirement does not exist. Therefore, no carve-out is required.

Interims

66. All respondents except one were of the opinion that there should not be a systematic requirement to prepare a supplement following the publication of interim financial information. Respondents against a systematic requirement of a supplement for interim financial information considered that interim financial statements generally are not significant within the meaning of Article 16 of the PD. There were also references to high costs for this type of supplement (it might be four times the costs for the publication of systematic supplements for annual financial statements in the opinion of one respondent) and possible abolition of the requirement to produce interim management statements or quarterly reports.
67. The respondent in favour of the requirement for supplements in case of interims argued that while this information is less comprehensive than the annual audited financial statements, interim financial information provides an important opportunity for investors to assess the business performance against their individual expectations.

ESMA's response

68. The revised Transparency Directive⁶ provides for the publication of periodic financial information other than on an annual or half yearly basis subject to certain conditions, mainly whether such a requirement would be proportionate to what contributes to investment decisions and is not unduly burdensome on issuers in the specific markets⁷. In line with the legislative concerns on possible relevance of such information being subject to a number of considerations linked to individual

⁶ 2013/50/EU.

⁷ Confer with Recital 5 and inserted Article 1 (a) in the revised Transparency Directive.

markets, ESMA is of the view that setting up a systematic requirement to supplement quarterly interim financial information could be a disproportionate burden to a person responsible for the drawing up of a prospectus. The decision to supplement when quarterly interim financial information is published should therefore continue to be taken on a case-by-case basis.

69. With regard to half yearly financial information the PR does not distinguish between quarterly or half yearly information in its disclosure requirements. Furthermore, ESMA is of the view at this point in time that no such distinction should be introduced.
70. Considering the above and that almost all respondents were against an extension of this obligation to interim financial information, ESMA has not incorporated any situation related to interim financial information in the final draft RTS and thus its materiality should be assessed on a case-by-case basis.
71. **Considering all the above, ESMA has decided to keep the systematic requirement for supplements in relation to annual audited financial statements as proposed in the CP but only in the case of equity securities and depository receipts. Therefore, a supplement should be submitted to the competent authority by the issuer, offeror or person asking for admission to trading of such securities as soon as practicable after the publication of the annual audited financial statements of:**
- **the issuer; or**
 - **the issuer of the underlying shares in case of depository receipts; or**
 - **the issuer of the underlying shares or other transferable securities equivalent to shares in case of equity securities covered by Article 17 (2) of the PR.**
72. **Such a supplement should contain:**
- i. **Where any of the persons mentioned in the bullets in paragraph 71 above published both unconsolidated and consolidated annual audited financial statements, at least the annual consolidated financial statements and the audit report in accordance with item 20.1 of Annex I, item 20.1 and item 20.1 (a) of Annex X and item 15.1 of Annex XXIII.**
 - ii. **Where any of the persons mentioned in the bullets in paragraph 71 above published only unconsolidated annual audited financial statements, at least the audit report and the financial information as required by the relevant registration document schedule for issuers that prepare the audited financial information in accordance with item 20.1 of Annex I, item 20.1 and item 20.1 (a) of Annex X, and item 15.1 of Annex XXIII.**
 - iii. **Where any of the persons mentioned in the bullets in paragraph 71 above published annual audited financial statements and the registration document was drawn up in accordance with any of the proportionate disclosure regime registration document schedules for SMEs and companies with reduced market capitalisation, at least the audit report and the required statement in accordance with item 20.1 of Annex XXV and item 20.1 of Annex XXVIII.**

III.III.iii. Change in profit forecast for certain equity securities and depository receipts

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

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

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

73. Nine market participants commented on this situation, five of them being clearly against the proposal for a systematic obligation to produce a supplement for profit forecasts for an annual financial period.
74. Those against the proposal were of the opinion that a case-by-case analysis is absolutely necessary for this situation. The main argument was that profit forecasts may only be of significance for the assessment of the securities if they deviate from information previously included in the prospectus, i.e. a profit forecast that meets the expectations has no additional informational value for investors.
75. Most respondents confirmed that the assessment for equity securities and non-equity securities is different and considered that debt securities should be excluded.
76. Some respondents pointed out that the draft RTS should not establish a mandatory disclosure for profit estimates in supplements as the disclosure of profit estimates in prospectuses is voluntary according to the PR. ESMA assumes that such comments also apply to profit forecasts as the provisions for profit forecasts and profit estimates are identical.

ESMA's response

77. Although ESMA's proposal in the CP only referred to profit forecasts for equity securities and depository receipts, it seems that at least one respondent misunderstood the reference to Annex V of the PR. The intention was not to create a systematic requirement for debt securities. The reference in the CP and the draft RTS to Annex V was necessary to make clear that the situation would apply to all equity securities covered by Article 4 (2) (1) and Article 17 (2) of the PR.⁸
78. ESMA acknowledges the element of choice in the provisions of the PR relating to profit forecasts and profit estimates and therefore is of the opinion that it is not possible to systematically require inclusion of a published profit forecast in a prospectus⁹. Consequently if an issuer publishes a profit forecast following the approval of the prospectus, ESMA considers that it is not possible to

⁸ ESMA considers Article 17 (2) to be broader than Article 4 (2) (2) given the reference to shares already issued or to be issued by an entity belonging to the group of the issuer.

⁹ This is in line with the presumption in paragraph 44 of ESMA update of the CESR recommendations - The consistent implementation of Commission Regulation (EC) No 809/2004 implementing the Prospectus Directive, Ref. ESMA/2013/319 (ESMA's Recommendations).

systematically require the inclusion of such in a supplement as it would not relate to information already disclosed in the prospectus. Any inclusion would require a case-by-case analysis.

79. However, if the issuer has included a profit forecast in the prospectus, ESMA considers that the issuer has to produce a supplement in case of an amendment of that forecast. By including such profit forecast in the prospectus, the issuer has assessed that this information was important to the investor in order to make an informed decision in accordance with Article 5 (1) of the PD. Any modification of an outstanding forecast would therefore be material and lead to the conclusion that a supplement is necessary. ESMA has accordingly amended its proposal for profit forecasts included in the CP.
80. Market participants should be aware that ESMA considers that the arguments in paragraphs 44-48 in the CP are still valid and confirm what is already set out in paragraph 44 of ESMA's Recommendations, i.e. the publication of a profit forecast would constitute material information for share issues. This means that there is a presumption that forecasts published during the offering period are material and should therefore be included in a supplement for equity securities and depository receipts.
81. If a profit forecast is made for a period not previously included in the prospectus, this is considered a new forecast and is subject to a case-by-case analysis. However, if it encompasses a period or part of a period which was already the subject of the forecast in the prospectus, it is considered a modification and subject to a systematic requirement to supplement.
82. As proposed in the CP and supported by several respondents, ESMA continues to believe that the systematic obligation should not apply to securities other than equity securities and depository receipts. This is also consistent with the fact that the annexes of the PR for equity securities and depository receipts require a statement setting out whether or not an outstanding forecast is still correct while it is not required for other securities (see for example PR, Annex I, Item 13.4).
83. **Considering the above, ESMA has amended its proposal included in the CP. The publication of any modification of a profit forecast already included in the prospectus shall trigger the obligation to publish a supplement where the prospectus is drawn up in accordance with the following annexes of the PR:**
- **a share registration document schedule (Annex I, Annex XXIII or Annex XXV) and a share securities note schedule (Annex III or Annex XXIV); or**
 - **a share registration document schedule (Annex I, Annex XXIII or Annex XXV) and a debt securities note schedule (Annex V or Annex XIII) and the additional information building block on underlying shares for some equity securities (Annex XIV); or**
 - **a depository receipt schedule (Annex X or Annex XXVIII).**
84. **Such a supplement should comply, as the case may be, with item 13 of Annexes I, X, XXV and XXVIII or item 8 of Annex XXIII of the PR.**

III.III.iv. Change in profit estimate for an annual financial period

Q10: Do you agree that there should be a systematic requirement to prepare a sup-

plement for a profit estimate in relation to the annual financial period? If not, please state your reasons.

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

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

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

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

85. Six out of 11 respondents clearly expressed their disagreement with ESMA's proposal regarding profit estimates for an annual financial period.
86. Arguments in relation to a systematic disclosure in supplements of information which can be included in a prospectus on a voluntary basis according to the PR have already been referred to in the previous section regarding profit forecasts.
87. One respondent proposed that where the draft annual financial statements submitted by the issuer's Board of Directors and pending approval by the ordinary shareholders' meeting is regarded as a profit forecast pursuant to Article 2 (11) of the PR, the disclosure of such draft financial statements during the offering period should not necessarily imply the need to prepare a prospectus supplement¹⁰.
88. The majority of respondents disagreed with the extension of this situation to debt and derivative securities. The most significant comments made in this regard were:
 - Profit estimates can be relevant for investors in case of equity securities but a generalised view is not possible for other securities.
 - The analysis should be similar to that in relation to profit forecasts.
89. One of these respondents argued that offers of equity securities can be timed in a way so that they do not fall into a period in which profit estimates are made since equity offerings only last for a few weeks. Thus, if ESMA's proposal in the CP were implemented for equity securities only, the impact would be less than if it were applied also to debt securities and structured products.

¹⁰ ESMA understands this to be a reference to profit estimates, not profit forecasts.

90. There were nine responses to the question on supplements for interim profit estimates with only one in favour of extending the situation to interim profit estimates. This respondent argued that any available interim financial information is likely to be an important consideration for potential investors. The main arguments against the extension were that:
- the threshold for being “significant” or “material” might be set even higher in case of interim profit estimates; and
 - as a concept, interim profit estimates are subject to considerable reserve.

ESMA’s response:

91. Following the same reasoning as in case of profit forecasts, ESMA has maintained a systematic obligation to produce a supplement for profit estimates but only where those responsible for the prospectus have already included a profit estimate in the prospectus. In such a case, any modification of such outstanding profit estimate would require the publication of a supplement.
92. As suggested by most respondents, ESMA considers that there should not be a systematic requirement for a supplement in case of debt and derivative securities. This would align this requirement with that regarding profit forecasts which only refers to equity securities covered by Article 4 (2) (1) and Article 17 (2) of the PR and depository receipts.
93. Responses received indicate that it does not change the analysis whether an auditor’s report or an agreement by the auditor is required. Therefore, as proposed in the CP, ESMA does not make any distinction between profit estimates covered by e.g. Annex I, item 13.2 subparagraph 1 (referring to profit estimates for which a report of an auditor is required) and financial information relating to the previous financial year covered by e.g. Annex I, item 13.2 subparagraph 2 (referring to profit estimates for which no report of an auditor is required).
94. As most respondents confirmed ESMA’s view that interim profit estimates should not act as a triggering event for the systematic obligation to publish a supplement, ESMA will proceed as proposed in the CP, i.e. the requirement only applies to profit estimates for an annual financial period.
95. **Considering the above, ESMA has amended its proposal included in the CP. The publication of any modification of a profit estimate for an annual period already included in the prospectus shall trigger the obligation to publish a supplement where the prospectus is drawn up in accordance with the following annexes of the PR:**
- **a share registration document schedule (Annex I, Annex XXIII or Annex XXV) and a share securities note schedule (Annex III or Annex XXIV); or**
 - **a share registration document schedule (Annex I, Annex XXIII or Annex XXV) and the debt securities note schedule (Annex V or Annex XIII) and the additional information building block on underlying share for some equity securities (Annex XIV); or**
 - **a depository receipt schedule (Annex X or Annex XXVIII).**
96. **Such a supplement should comply, as the case may be, with item 13 of Annexes I, X, XXV and XXVIII or item 8 of Annex XXIII of the PR.**

III.III.v. Change in control of the issuer for equity securities and depository receipts

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

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

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

97. There were few respondents against the proposal for a systematic obligation to produce a supplement in case of change in control of the issuer for equity securities. They questioned the significance of a change in control of the issuer in certain circumstances and provided the following examples of situations where, in their opinion, a change in control of the issuer is not material:
- Where the new controlling shareholder already held a significant stake.
 - Where the change in control is of a temporary and/or technical nature.
 - Where the forthcoming change in control is already mentioned in the prospectus and therefore in line with investors' expectations.
 - In case of depository securities.
98. Other respondents suggested some amendments to the proposal such as:
- In light of the difficulties of an issuer being able to definitively identify the ultimate controller of securities as a result of holdings being in depository systems and the complexity of indirect investment structures, the requirement to publish a supplement for this situation should only apply where the issuer becomes actually aware of the change of control.
 - The information to be included in a supplement for this situation should only extend to providing the information disclosed to the issuer under the Transparency Directive.
 - ESMA should provide further clarity on what is meant by a "change of control", so that all issuers across Member States and non-EU issuers can apply the correct test. The respondent argued that the definition of change in control in statute might differ across a number of statutes governing different areas of regulation.
 - The systematic obligation should be extended to any change in the shareholder structure of the issuer prior to the listing of securities, even if there is no actual change of control.
99. Most respondents mentioned that a change in control does not necessarily change the assessment of debt securities (e.g. in case of change of control of an SPV issuing ABS, in case debt securities are secured by a guarantor etc.).

ESMA's response:

100. Regarding the examples provided by some market participants explaining that a change in control does not necessarily change the assessment of the securities, ESMA considers that:

- A change in control is always material even in those cases where the new controlling shareholder already held a significant stake.
- Even if the possibility of a change in control is already mentioned in the prospectus, where it finally occurs, the arrangements in relation to such change in control are material information for the investment decision.
- As to situations where the change in control is permanent or of a temporary/technical nature, only where such a case is regarded as a change in control under the applicable national legislation should it be mandatory to publish a supplement.
- In absence of arguments for a carve-out in case of depository receipts and taking into consideration that there are several situations in the draft RTS which refer to both equity securities and depository securities and no other criticisms in this regard, such a carve-out does not seem necessary.

101. As to the above mentioned suggestions for amending the proposal, ESMA is of the opinion that:

- As happens with any other new factor, inaccuracy or mistake, a supplement for this situation is required only where the issuer becomes aware of it.
- The minimum disclosure requirement in the PR in relation to a change in control of the issuer does not make reference to the Transparency Directive but to any material arrangements known to the issuer in relation to such change in control. It does not seem appropriate to require a different disclosure for a supplement.
- As mentioned in the CP, the change in control of the issuer is a non-harmonised concept across the EU and is not specific to the prospectus regime. Therefore, ESMA cannot provide further guidance in this report with regards to this concept and the situations referred to by market participants. The different definitions within a jurisdiction and issues concerning third country issuers should also be assessed in accordance with the applicable law.
- As to the suggestion to extend this situation to a change in the shareholder structure of the issuer prior to the listing of securities, see section III.III.xii Other Situations.

102. ESMA confirms that the systematic obligation for a supplement in case of change in control of the issuer should only apply to equity securities and depository receipts as, in general, they are more price sensitive to this situation. For other securities a case-by-case analysis is most appropriate.

103. Therefore, ESMA will proceed as proposed in the CP, i.e. a change in control of the issuer or of the issuer of the underlying shares in case of depository receipts or of the issuer of the underlying shares or other transferable securities equivalent to shares in case of equity securities covered by Article 17 (2) of the PR triggers the obligation to produce a supplement where a prospectus is drawn up in accordance with:

- **a share registration document schedule (Annex I, Annex XXIII or Annex XXV) and a share securities note schedule (Annex III or Annex XXIV); or**

- a share registration document schedule (Annex I, Annex XXIII or Annex XXV) and a debt securities note schedule (Annex V or Annex XIII) and the additional information building block on underlying share for some equity securities (Annex XIV); or
- a depository receipt schedule (Annex X or Annex XXVIII).

104. Such a supplement should include the description of any arrangements known to the issuer in relation to such change in control.

III.III.vi. Public takeover bids for equity securities and depository receipts

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

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

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

105. Two respondents were clearly against the proposal, their main argument being that EU takeover law already provides specific disclosure requirements concerning takeovers and thus investors already have the possibility to inform themselves.
106. Another respondent considered that regulators have to pay attention to possible overlap or contradictions between information published according to the Takeover Bids Directive¹¹ and the PR.
107. It was also mentioned by a respondent that it is not clear when the requirement to produce a supplement would be triggered. The respondent suggested that the requirement to produce a supplement should apply when a takeover bid is announced and when the offer becomes, or is declared, wholly unconditional in accordance with the laws governing the terms and conditions of the bid.

ESMA's response:

108. As to those comments regarding possible regulatory overlaps between information published according to the Takeover Bids Directive and the PR, the prospectus regime does not allow issuers to omit any information in the prospectus which has already been disclosed in accordance with other EU legislation. The relevant information should be in the prospectus and any supplements thereto, and the issuer, offeror or person asking for the admission to trading of the securities assumes responsibility for it.

¹¹ 2004/25/EC.

109. Furthermore, withdrawal rights have particular importance in this situation as investors may have subscribed for equity securities at a higher price than the one that is being proposed under the terms of the public takeover bid.
110. The draft RTS requires the publication of a supplement in case of
- i. a new public takeover bid by third parties; and
 - ii. the outcome of any public takeover.

Such triggering events are consistent with the existing disclosure requirements in the PR for takeover bids. Therefore, ESMA prefers not to replace such triggering events by the moment “when the offer becomes, or is declared, wholly unconditional in accordance with the laws governing the terms and conditions of the bid”.

111. ESMA continues to believe that the general rule (e.g. case-by-case analysis) is most appropriate for debt and derivative securities in case of a new public takeover bid.
112. **ESMA does not consider it necessary to make any amendments to the proposal for this situation included in the CP and therefore:**
- i. **any new public takeover bid by third parties, as defined in Article 2 (1) (a) of the Takeover Bids Directive in respect of the issuer’s equity or the equity of the issuer of the underlying shares in case of depository receipts or the equity of the issuer of the underlying shares or other transferable securities equivalent to shares in case of equity securities covered by Article 17 (2) of the PR; and**
 - ii. **the outcome of any public takeover bid**

shall be considered as significant and thus a triggering event to produce a supplement where the prospectus is drawn up in accordance with the annexes listed in paragraph 103.

113. **Such supplement should comply, as the case may be, with the information required by:**
- **item 4.10¹² in Annex III, item 27.13 in Annex X and Annex XXVIII or item 1.10 in Annex XIV; and**
 - **item 18.4 of Annex I where either the registration document is drawn up in accordance with such annex or where item 2 in Annex XIV applies.**

III.III.vii. Working Capital Statements for certain equity securities

Q21: Do you agree that there should be a systematic requirement to draw up a supplement in case of a positive and a negative change to the issuer’s

¹² An indication of public takeover bids by third parties in respect of the issuer’s equity, which have occurred during the last financial year and the current financial year. The price or exchange terms attaching to such offers and the outcome thereof must be stated.

working capital statement? If not, please indicate your reasons.

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

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

114. Four respondents mentioned that this situation should rather be left to a case-by-case analysis. One market participant warned that this obligation would create time and cost constraint issues as time will need to be allowed for due diligence work. ESMA was requested to clarify whether this trigger situation obliges issuers to continuously update the underlying forecast and projections or only at the time a key event took place or the existence of a mistake/inaccuracy was uncovered.
115. Only one respondent disagreed with the distinction made between equity securities and debt securities but no arguments were provided to justify the extension of the systematic obligation to publish a supplement for this situation to debt securities.

ESMA's response:

116. ESMA acknowledges that the working capital is in principle in a state of permanent change. Notwithstanding this, it does not mean that situations where the working capital statement proves not to be valid any more frequently happen (i.e. i) a change of a qualified working capital¹³ statement into a clean working capital statement (except for a change resulting from the proceeds of the offering as disclosed in the prospectus); and ii) a change of a clean working capital statement into a qualified working capital statement). In fact, such a situation only occurs on rare occasions. Other situations such as a deterioration of a qualified working capital statement will require a case-by-case analysis.
117. The arguments against a systematic obligation to produce a supplement where a qualified working capital statement becomes clean raise the issue of positive changes which has already been mentioned in section [III.I] of this final report. Additionally, ESMA understands that, in this particular case, investors are also interested in situations where a qualified working capital statement becomes clean as it may induce new investors to subscribe for the securities or existing investors to increase their orders as it implies that the issuer's financial position is improving.
118. ESMA considers that this requirement does not oblige issuers to continuously update the working capital statement but only where the main assumptions used significantly change.
119. As proposed in the CP and in line with almost all respondents, ESMA has not extended the systematic obligation to publish a supplement for this situation to debt and derivative securities.
120. **Therefore, the final draft RTS states that where in an approved prospectus which relates to shares and other transferable securities equivalent to shares in accordance with Article 4 (2) (1) and convertible/exchangeable debt securities which are equity securities covered by Article 17 (2) of the PR the working capital statement**

¹³ Negative working capital statement.

proves not to be valid anymore, a supplement should be published. ESMA has amended the draft RTS to clarify the two situations in which changes to the working capital statement systematically require the publication of a supplement.

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

III.III.viii. Admission to trading or offer to the public in an additional Member State

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

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

122. Several respondents expressed their disagreement with the proposal, the main argument being that information regarding admission to trading on an additional regulated market or an additional public offer is not of significance for assessing the securities. However, one market participant mentioned that a dual listing creates trading possibilities that may have an effect on the position and interest of initial investors.
123. It was also mentioned that in the context of a base prospectus an indication of the specific market where the securities are to be admitted to trading is specified in Annex XX of Delegated Regulation 486/2012 as a Category B item and may therefore be disclosed within the relevant final terms. It may also be disclosed within the relevant final terms as it is specified as an additional item in Annex XXI of Delegated Regulation 486/2012. To require that this information is also disclosed in a supplement would be duplicative and contrary to the PR.
124. Regarding the disclosure of information on taxes, the same respondent expressed its disagreement with the interpretation provided by ESMA in Q&A 45 and suggested that ESMA should amend such Q&A in order to clarify that information to be disclosed on taxes withheld at source does not necessarily extend to the country(ies) in which the issuers are legally entitled to apply for a public offer or an admission to trading.
125. One respondent suggested that an announcement by the issuer of its intention and the “passporting” of the prospectus should suffice for the purposes of disclosure to the markets.
126. It was also suggested that clarity is introduced confirming that no supplement would be required where the admission to trading/offer to the public in an additional Member State falls within an exemption so that no prospectus is required to be published in that Member State.

ESMA’s response:

127. Respondents against the proposal did not explain how the notification in accordance with Article 18 of the PD can be performed without all the relevant information in relation to those jurisdictions as required by the relevant securities note schedule.

128. ESMA is not of the opinion that this requirement would be duplicative and contrary to the PR as the information to be disclosed in the supplements can also be included in the final terms in accordance with Annexes XX and XXI of Delegated Regulation 486/2012. ESMA clarifies that, as explained in paragraph 76 of the CP (see annex VII of this final report), this obligation would not apply where the missing information can be included in the final terms, i.e. where i) the application for admission to trading on an additional EU regulated market than the one(s) foreseen in the prospectus is referred to in the final terms; and ii) the base prospectus already contains the required information on taxes with respect to the country where the additional EU regulated market is located.
129. ESMA considers that its interpretation on the disclosure requirement for information on taxes on income from the securities withheld at source in Q&A 45 is correct and thus believes that the base prospectus should contain the withholding tax information in respect of the countries where the prospectus has been approved and to which the prospectus is going to be notified as issuers are legally entitled to apply for a public offer or an admission to trading in such countries.
130. In line with the explanation in paragraph 171 of this final report, neither a prospectus nor a supplement is required where the admission to trading/offer to the public in an additional Member States falls within an exemption.
131. ESMA believes that it is doubtful that this requirement poses a disproportionate burden as costs are not different from the costs of including such information in the original prospectus.
132. **Therefore, ESMA has decided to keep in the final draft RTS the requirement to publish a supplement where:**
- i. an issuer is seeking admission to trading on (an) additional EU regulated market(s) in an additional Member State other than the one(s) foreseen in the prospectus; or**
 - ii. an issuer is intending to make an offer to the public in (an) additional Member State(s) other than the one(s) foreseen in the prospectus.**
133. **Such a supplement should contain the information required by the PR with respect to the application for admission to trading on a regulated market and/or the offer to the public in such Member State which was not included in the prospectus or base prospectus.**

III.III.ix. New significant financial commitment for equity securities

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

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

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

134. There were only two responses clearly against the proposal. Unfortunately, no arguments were provided to explain why a significant financial commitment is not material pursuant to Article 16 of the PD.
135. Nobody proposed to extend this requirement to securities other than those covered by Article 4 (2) (1) and Article 17 (2) of the PR.

ESMA's response:

136. In absence of arguments against the proposal, ESMA continues to believe that a new significant financial commitment which is likely to give rise to a significant gross change for securities covered by Article 4 (2) (1) and Article 17 (2) of the PR is always material for the investment decision and thus a supplement illustrating the changes to the issuer's financial position in such a situation is necessary so that investors have all necessary information for their investment decision.
137. **Accordingly, ESMA has maintained in the final draft RTS the systematic obligation to publish a supplement where the issuer of securities covered by Article 4 (2) (1) or the issuer of the underlying shares or other transferable securities equivalent to shares in case of equity securities covered by Article 17 (2) of the PR makes a new significant financial commitment which is likely to give rise to a significant gross change, pursuant to paragraph 6 of Article 4a of the PR.**
138. **As proposed in the CP, such a supplement should comply with Article 4a of the PR and may therefore require pro forma information prepared in accordance with Annex II of the PR.**

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

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

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

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

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

139. All respondents disagreed with the proposal for a systematic obligation to publish a supplement for any judgment or concluding event of governmental, legal or arbitration proceedings already disclosed in the prospectus.
140. The following examples of situations where a judgment or concluding event of governmental, legal or arbitration proceedings would not always be material were provided by market participants:

- Where the judgment is consistent with expectations disclosed in the prospectus.
- Where the issuer sets up reserves in its financial statements for litigation if it may result in a high payment obligation of the issuer.
- In case of debt and derivative securities, especially in case of structured products where the value of the securities is primarily dependent on the value of the underlying and not on a single judgment against or in favour of the issuer.
- Where the judgment is merely procedural (e.g. a ruling that certain evidence must be presented within a specified period or the decision to accept further material into evidence during a court proceeding).

141. Apart from the lack of materiality, there were other arguments such as:

- In order to avoid prospectus liability, issuers tend to include litigation if they are not certain whether it is material or not. However, each and every change to such a single litigation will certainly not be significant within the meaning of Article 16 of the PD.
- Where annual financial statements contain certain proceedings and such financial statements are incorporated by reference to the prospectus as a whole, it does not mean that issuers or persons responsible consider such proceedings to be of relevance for an informed assessment of the securities. Furthermore, updating information on such basis would not be of relevance for the assessment of securities.
- Since according to Article 16 of the PD, any supplement triggers a right of the investor to return its securities to the issuer (i.e. gives it a put option), regardless of whether the new factor set forth in the supplement is positive or negative, any request for mandatory or systematic supplements has to be made with utmost care.
- If adopted, the proposal would generate a huge number of supplements which would confuse rather than assist investors.

142. Regarding the triggering events, all respondents expressed their disagreement with the proposal, the most significant comments being:

- “Any judgement or concluding event” is too broad and vague and could include any event that occurs during the procedure and within the scope of a specific level of justice.
- The different stages of the proceedings etc. may “provide insights”, but they may still have no effect on the assessment of the securities.
- ESMA’s approach is even stricter than accepted market practice of ad hoc disclosure under the Market Abuse Directive¹⁴.
- Different jurisdictions have very different civil and criminal procedures and it may not always be clear if a judicial decision is a judgment or a concluding event. Complex cases in some jurisdictions may involve many judicial decisions that could potentially be a trigger element, many of which may be relatively insignificant.

¹⁴ 2003/6/EC.

143. Most respondents were of the opinion that this situation is more significant for equity securities than for debt and derivative securities as it may be the case that a particular judgment only affects the assessment of equity securities but not debt securities – this will depend on the nature and subject of the proceedings.

ESMA's response:

144. ESMA has carefully reconsidered this element in light of the clear rejection of the proposal by market participants.
145. After having considered all the responses, ESMA came to the conclusion that not all interim decisions in governmental, legal or arbitration proceedings are material for the investment decision.
146. Therefore, ESMA considered whether it was possible to keep the final decision of governmental, legal or arbitration proceedings as a situation which systematically requires the publication of a supplement.
147. ESMA has concerns on the excessive disclosure on governmental, legal and arbitration proceedings in the prospectus without distinguishing them according to their materiality (see CBA in Annex III of this final report). Some respondents have confirmed this practice. A requirement to systematically produce a supplement for any judgment or concluding event in governmental, legal or arbitration proceedings would have effectively limited such non-material disclosure in the prospectus.
148. In this regard, ESMA is still of the opinion that an investor needs to know the results of the material proceedings in order to assess their impact on the issuer. However, it is doubtful whether it is technically possible to introduce a requirement referring exclusively to the “final decision” on such material proceedings due to the fact that EU jurisdictions have different types of proceedings where the understanding of terms such as the “decision”, “final decision” or “outcome” may vary. Furthermore, it is not always clear whether a particular judgment or event is the final outcome as it might sometimes depend on the parties involved, especially where it is subject to appeal.
149. In light of the above, ESMA considers that a systematic requirement for this situation would result in investors facing excessive amounts of information which may be non-material for their investment decision.
150. **As a result, ESMA has decided to exclude any situation regarding governmental, legal or arbitration proceedings from the draft RTS.**
151. As such a requirement will not finally appear in the final draft RTS, ESMA would like to remind that the PR only refers to the disclosure of any governmental, legal or arbitration proceedings which may have or have in a recent past had significant effects on the issuer and/or the group's financial position or profitability.
152. As a case-by-case analysis of materiality applies to both new governmental, legal or arbitration proceedings and governmental, legal or arbitration proceedings already disclosed in the prospectus, one would expect that a higher disclosure of proceedings in a prospectus would mean a higher probability for supplements related to both new significant proceedings and material events on those proceedings already disclosed in the prospectus.

III.III.xi. Increase in aggregate nominal amount of the programme

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

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

153. There were different views as to the importance of the aggregate nominal amount for the investment decision. While some respondents considered that it is not always material (e.g. in case of negligible increases) or questioned the arguments provided by ESMA in the CP (e.g. some respondents mentioned that an increase in the aggregate amount of the programme does not necessarily imply a change in funding needs and is not an indication of the actual indebtedness of an issuer or their credit standing and liquidity), other respondents supported that it is an important element in the assessment of an issuer's funding needs.
154. There were several respondents, even some of those respondents against the proposal, who confirmed that there is a widespread practice of supplements in case of increase in aggregate nominal amount of the programme.
155. A respondent commented that if this situation is included in the RTS, issuers may omit this kind of information, thereby avoiding the obligation to draft a supplement if there is an increase to the ceiling amount.
156. It was also pointed out by a market participant that the disclosure of the aggregate nominal amount in the prospectus should continue to be optional.

ESMA's response:

157. ESMA recognises that there might be cases where an increase in the aggregate amount of the programme does not imply a modification of the issuer's funding needs. However, this was not the only possible explanation on the materiality of this situation given in the CP. ESMA also noted in the CP that there could be other reasons such as a great interest in the programme or the opportunity to finance further investments. A further situation was brought to ESMA's attention, namely the case where as a consequence of the increase in the aggregate amount of the programme, the dealership agreement changes and with it all contracts that are linked to this agreement.
158. Regarding other arguments provided by market participants, ESMA believes that:
- small increases in the aggregate amount of the programme rarely (if ever) occur; and
 - responses indicate that it is market practice to disclose the aggregate amount of the programme in the base prospectus on a voluntary basis and publish a supplement in case of an increase in the aggregate amount of the programme which confirms that issuers consider that this information is important for the investor in order to make an informed decision in accordance with Article 5 (1) of the PD.
159. For these reasons, ESMA does not expect that as a consequence of keeping this situation in the RTS, issuers will decide to omit the aggregate amount of the programme in their base prospectus, thereby avoiding the obligation to draft a supplement if there is an increase to such aggregate amount.

160. The draft RTS does not refer to disclosure requirements for prospectuses but only establishes some situations in which a supplement to the prospectus is always required and thus it does not oblige issuers to disclose the aggregate amount of the programme in the base prospectus.
161. **Therefore, ESMA considers it appropriate to keep in the final draft RTS the requirement to systematically produce a supplement where the issuer increases the aggregate nominal amount of the programme.**

III.III.xii. Other situations

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

162. Market participants had the following suggestions for other situations where the significance is such that they should also be incorporated in the list of situations which systematically require the publication of a supplement:
- General changes to the terms and conditions of the notes.
 - A rating downgrade either of the issuer or, if the issuer is a financing subsidiary whose bonds are guaranteed by the parent or holding company, the downgrade of the guarantor.
 - In the context of an application for admission to trading where the amount of shares held by the initial shareholder changes between the publication of the prospectus and the admission to trading. This is because the change in the shareholder structure can make a huge difference in the possibility for new shareholders to vote on important governance issues. This has an impact on the investment decision if investors also want to execute their shareholder rights.
 - Reverse listing of new activities. If listed companies sell all assets and thereby end up as 'empty stock', followed by a reverse listing of new activities, there is no regulation of the information to be provided to investors. A supplement to the original prospectus and an information memorandum are two minimum requirements for the listed company to inform their shareholders and other investors about the material change in the company's structure and business view.

ESMA's response:

163. As to the proposal regarding changes to the terms and conditions of the notes, see paragraph 172 where ESMA explains why this issue has not been addressed in the draft RTS.
164. As to the proposal regarding rating downgrades, ESMA thoroughly discussed the convenience of including this situation in the RTS before publishing the CP. In line with G20 commitments, Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies established new rules in order to reduce reliance on external ratings. For instance, this regulation obliges European Supervisory Authorities to avoid references to credit ratings in their rules and guidelines where they have the potential to create mechanistic effects. In light of this new regulation, ESMA decided not to propose to systematically require a supplement in case of rating downgrades.

165. In relation to the proposal for a systematic supplement in case of change in the shareholder structure, ESMA is of the opinion that there might be changes in the shareholder structure that do not affect the assessment of the investment and thus it is not appropriate to include this situation in the list.
166. Regarding the proposal on reverse listings of new activities, this seems to be outside the scope of this draft RTS.
167. **Therefore, ESMA considers that no additional elements should be added to the list of elements which systematically require the publication of a supplement.**

III.IV. Comments on supplements which do not relate to the draft RTS

168. ESMA received a number of comments on additional issues which do not relate to the draft RTS. Such comments included requests for clarification as to the extent to which securities note information may be updated by means of a supplement and whether or not withdrawal rights apply to supplements relating to prospectuses describing exempt offers.

ESMA's response:

169. All comments received are welcome as they might be useful for any possible future work on supplements. However, ESMA considers that the above mentioned issues are clearly outside the scope of this draft RTS but would like to express its opinion on each particular topic.
170. ESMA acknowledged in paragraph 16 of the CP that there might be other outstanding issues on supplements, e.g. whether new information on terms and conditions of the securities and/or the offer should be allowed by means of a supplement. However, ESMA has not addressed this issue in the draft RTS as it raises the question whether a supplement is sufficient or a new prospectus needs to be prepared.
171. As to the second issue mentioned above (i.e. whether or not withdrawal rights apply to supplements relating to prospectuses describing exempt offers), ESMA considers that Article 16 applies where an approved prospectus exists. Therefore, in case of an exempted offer where a PD compliant prospectus has not been approved by the competent authority, the PD does not apply, a supplement is not required and there are no withdrawal rights.
172. If needed, ESMA will deal with any other issue on supplements which is out of the scope of Article 16 (3) of the PD by means of Recommendations/Guidelines or Questions & Answers at a later stage or following any further mandate from the Commission.

ANNEX I – SUMMARY OF QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



ANNEX II – LEGISLATIVE MANDATE TO DEVELOP TECHNICAL STANDARDS

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

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

ANNEX III – COST-BENEFIT ANALYSIS

Introduction

1. The Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) (hereafter Omnibus Directive) requires ESMA to develop draft regulatory technical standards (RTS) and implementing technical standards (ITS) in relation to several provisions of the Prospectus Directive, Directive 2003/71/EC as amended.
2. This Cost-Benefit Analysis (CBA) has been developed in order to assist in the drafting of the RTS to specify situations where a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus requires a supplement to the prospectus to be published, cf. Article 5 (7) of the Omnibus Directive.
3. Before submission of the final CBA in this final report, ESMA has consulted with stakeholders and with established working groups within the parameters of the Regulation (EU) No 1095/2010 establishing the European Supervisory and Markets Authority in the following ways:
 - a) public consultation by publishing a Consultation Paper (ref. ESMA/2013/316) (hereafter “CP”) on 15 March 2013 with a consultation period open until 28 June 2013. ESMA received 16 responses from market participants representing issuers, banks, lawyers, auditors, investors and a stock exchange. Responses received included generic descriptions or large ranges of cost estimates on some but not all situations presented in the list of situations. Feedback was mostly of a qualitative nature.
 - b) request for an opinion from the Securities and Markets Stakeholder Group (SMSG) on 3 April 2013. The SMSG chose not to provide advice on this issue due to the technical nature of the request.
 - c) consultation on an informal basis with the Corporate Finance Standing Committee Consultative Working Group which provided oral feedback at a meeting on 30 November 2012. The feedback was of a qualitative nature, some relating to the scope of the mandate in the Omnibus Directive and whether a list of situations was recommendable at all. The views expressed were taken into account when discussing policy options and drafting the CP.
4. ESMA has developed the CBA internally with contributions from the National Competent Authorities (NCAs) in order to benefit from their experience in the field. Particularly the NCAs provided quantitative data relating to costs of submitting a supplement for approval by an NCA.

Problem identification

5. The main reason for the provision in Article 5 (7) of the Omnibus Directive is regulatory failure and a wish to counter lack of legal clarity on the issue of when supplements are required, thereby assisting issuers, offerors and persons asking for admission to trading on a regulated market on interpreting the provision. This was identified as a key problem in the Impact As-

assessment published by the European Commission¹⁵ (hereafter “EC IA”). The belief is that by furthering legal certainty on this issue it is possible to fulfil the overall objectives of transparency and enhancing the level of investor protection envisaged by the PD¹⁶.

6. The EC IA states that the existing Article 16 of the PD is subject to divergent application and much discussion due to the wording as the terms applied leave room for interpretation, specifically the term “significant new factor”¹⁷. As such, divergent market behaviour is expected to continue without a technical standard setting out specific situations where a supplement is a mandatory requirement. Essential limitations to the list’s potential to increase legal certainty and thereby minimising divergent behaviour is, however, the exact scope of the mandate provided in Article 16 as well as considerations of proportionality as it may be preferable to maintain an assessment on a case-by-case basis in certain situations.

Nature of CBA

7. The CBA is mostly qualitative in nature. In order to support ESMA’s policy choices with precise cost assessments it was essential to receive such information from the market participants responding to the public consultation as this information is not readily available through the NCAs. The information received was of a generic nature setting out either a high maximum cost or a wide cost range without further clarification as to the reasons why costs could/would vary to such a large degree, e.g. due to the specific nature of the situations or high administrative and/or legal costs connected to a particular situation. As such, this information has been taken on board as a more high level consideration.
8. It is appropriate to add that aside from the limitations to the data on costs mentioned above, a majority of the fact finding exercises and information available through other sources such as the EC IA and documents referred to in its section 2 were produced prior to the entry into force and transposition of the amended PD¹⁸ as well as Commission delegated acts that have entered into force across the last one and a half years. The actual effects of all such amendments to the prospectus regime are only emerging now and as the deadline for submission of the draft RTS to the Commission is 1 January 2014, there has not been sufficient time to take them into account to any large degree during this work.

Structure of the CBA

9. In each of the proposals except for the first there is the option of not including the situation on the list requiring mandatory supplements. In effect such a solution would imply the reversal of the mentioned pros and cons and is therefore not specifically set out for each of the situations.
10. The item “Costs to regulator“ is included primarily in the first table concerning the overarching issues relating to supplements as this element in principle does not vary dependent on the specific content of the supplement but rather the number of supplements submitted for approval.
11. The item “Quality of products offered “is in this CBA a reference to both the prospectus offered and the individual securities type.

1. Systematic requirement for a supplement	<i>This item addresses the overarching issues relating to all supplements when considering a systematic supplement requirement in certain situations. The following information is based on information from page 48 of the EC IA, NCAs’ experience and feedback from the public consultation.</i>
---	--

¹⁵ Page 10, section 3.1.3 of the European Commission’s Impact Assessment, SEC(2009) 1223/COM(2009)491 final accompanying the proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

¹⁶ Page 7 of the EC IA overall problem definition.

¹⁷ Page 10, section 3.1.3 of the EC IA.

¹⁸ The transposition deadline of the amended PD was 1 July 2012.

	Qualitative description	Quantitative description	Monetary value
Relative to the baseline, what are the benefits and costs of the option under consideration?			
<i>Costs to regulator:</i> - <i>One-off</i>	The NCAs incur the costs of manpower in order to perform the scrutiny of a supplement that has been submitted for approval. The time spent on the scrutiny will depend on the nature and length of the content and is difficult to estimate.	<i>Not available.</i>	<i>Not available.</i>
<i>Compliance costs:</i> - <i>One-off</i>	<p>In particular, depending on the nature of the information being documented in a supplement, the direct costs may range from below 5,000 EUR for the simplest supplements processed internally by issuers, via EUR 5,000-15,000 EUR for the most straightforward supplements processed with external support, to EUR 150,000 (and more) for supplements concerning the more complex emerging market issuers.</p> <p>In case of purely positive changes (e.g. qualified working capital statement turning into a clean statement), issuers could experience a negative effect through the possibility of investors' withdrawal right as such could be performed due to other reasons than the material new event for which the supplement has been drawn up. It is not possible to estimate how many</p>	<p>Issuers must bear the direct costs of drafting the supplement themselves (including legal fees, translation fees, competent authority fees, public relations fees and secretarial assistance¹⁹) which can amount to up to 19,000 EUR.</p> <p>The approval fee for submitting a supplement for approval by a competent authority ranges from 0 to 1,500 EUR. This information was collected through a fact finding exercise among the NCAs.</p> <p>The estimated costs for a standard straightforward supplement (applicable for all types of the mentioned supplements) connected to external legal counsel is €2,500-€4,000 and listing agent fees of €1,000-€2,000 per jurisdiction.</p>	

¹⁹ Range received from respondents to the public consultation.

	<p>withdrawals would be due to other reasons than the triggering specific event.</p> <p>Costs for issuers with multiple base prospectuses are higher as they would always have to produce supplements to each base prospectus in case a situation listed in the RTS occurs. This could therefore be considered more as an ongoing cost depending on the triggering event.</p>		
<i>Quantity of products offered</i>	<p>In general the NCAs do not foresee substantial growth in submission or publication of supplements to prospectuses based on the situations covered by the draft RTS. This is to a vast extent due to the market participants already submitting supplements for the situations covered for approval and publishing. However, a systematic requirement would lead to a more harmonised approach across the EU.</p>	<i>Not available.</i>	Not available.
<i>Quality of products offered</i>	<p>A systematic requirement to produce a supplement provides for a harmonised approach across the EU and legal certainty as to when a supplement is required.</p> <p>A supplement ensures that potential investors have access to up-to-date information which is subject to the same liability regime as the prospectus prior to making their (final) investment decision.</p> <p>Investors that have already subscribed for the securities before the supplement is published have the right to withdraw their acceptances</p>	<i>Not available.</i>	<i>Not available.</i>

	<p>when presented with significant new information contained in the supplement, provided that the new factor arose before the final closing of the offer and the delivery of the securities.</p> <p>A supplement combines all necessary information concerning the issuer and the securities in one place, namely the prospectus, thereby providing a full set of information irrespective of whether certain information is already publicly available outside the prospectus regime.</p> <p>The competent authority checks that the information contained in the supplement is complete, comprehensible and consistent when read in conjunction with the prospectus.</p>		
--	--	--	--

2. Publication of new annual audited financial statements	<i>This option concerns the requirement of the systematic publication of a supplement in situation of publication of new annual audited financial statements. Information is based on NCA's experience and feedback from the public consultation.</i>		
	Qualitative description	Quantitative description	Monetary value
Relative to the baseline, what are the benefits and costs of the option under consideration?			
<i>Compliance costs:</i> - <i>One-off</i>	<p>The proposed RTS would not require preparing annual audited financial statements as they are already published as required by other national or EU legislation.</p> <p>On the other hand, there may be some additional costs incurred in order to ensure compliance with the relevant items</p>		According to some market participants, a standard update can amount to 10,000-20,000 EUR.

	<p>in the PR annexes (such as the Operating and Financial Review). However, no quantitative data was provided by the respondents.</p> <p>Based on current market practice there should not, in general, be an increase in the number of the supplements required from issuers.</p>		
<p><i>Quality of products offered</i></p>	<p>Supplementing a prospectus with the most recent annual audited financial statements keeps a number of items required by the different registration document schedules up to date.</p> <p>The requirement to always supplement the prospectus with the most recent annual audited financial statements guarantees, that audited financial statements relating to the previous one to three financial years are included in the prospectus at all times. This is not only needed for investors who have already subscribed for the securities but also for those who would do so in the future.</p> <p>The far-reaching harmonised scope of this information and the audit report provided by an independent entity guarantee a high level of investor protection.</p> <p>Supplementing a prospectus with annual audited financial statements increases the transparency of the issuer's situation and prevents an information asymmetry between the issuer and investors.</p>	<p><i>Not available.</i></p>	<p><i>Not available.</i></p>

	<p>Issuers of non-equity securities will not be subject to a systematic requirement to publish a supplement with regard to their audited financial statements and so will be alleviated of the associated costs. Instead, they will have to consider, on a case-by-case basis, whether a supplement is needed.</p> <p>Investors would have the possibility to compare the annual audited financial statements with previous profit forecasts or estimates of the issuer (if any) or with annual audited financial statements of similar type issuers.</p>		
--	---	--	--

3. Change in profit forecast for equity securities and depository receipts	<i>This option concerns the requirement of systematic publication of a supplement in case of publication of a profit forecast. It is based on NCAs' experience, ESMA public documents and feedback from the public consultation.</i>		
	Qualitative description	Quantitative description	Monetary value
Relative to the baseline, what are the benefits and costs of the option under consideration?			
Compliance costs: - <i>One-off</i>	<p>Following ESMA's Recommendations for shares, there is a presumption that the issuer will have to produce a supplement for equity securities²⁰ and therefore it is unlikely that there will be any additional significant costs to issuers.</p> <p>According to some market participants, the majority of the work</p>	<i>Not available.</i>	<i>Not available.</i>

²⁰ Confer with paragraph 43 of ESMA's Recommendations of March 2011, ref. ESMA 2012/607 (initially introduced by CESR guidance of February 2005) and ESMA Q&A no 20 (approved by CESR in 2007) stating that the profit forecast constitutes material information, ref. ESMA/2013/594.

	<p>required by the issuer to derive the statement to be made would have already been completed. However, there will be additional costs associated with the due diligence and public reporting required of the reporting accountant or the auditor. The extent of these costs will be highly dependent on the circumstances of the individual issue and the actual statement made.</p>		
<p><i>Quality of products offered</i></p>	<p>The publication of a modified profit forecast is the responsibility of the issuer and persons responsible for the prospectus where due care and diligence must be taken to ensure that profit forecasts are not misleading to investors. The auditor's report and further information on underlying assumptions provides further assurance/credibility to the forecast.</p> <p>Provided that the issuer has included a profit forecast in the prospectus, a modified profit forecasts is always significant, especially for retail investors as they set out the future situation of the issuer as assessed by the issuer.</p> <p>Investors would have the possibility to compare the modified profit forecasts for which the supplement is drawn up with previous profit forecasts of the issuer (if any) or other forecasts drawn up according to the same rules and disclosure requirements.</p>	<p><i>Not available.</i></p>	<p><i>Not available.</i></p>

4. Change in prof-	<i>This option concerns the requirement for the systematic publication of a sup-</i>
---------------------------	--

it estimate for an annual financial period for equity securities and depository receipts	<i>plement in the situation of modification of a profit estimate.</i>		
	Qualitative description	Quantitative description	Monetary value
Relative to the baseline, what are the benefits and costs of the option under consideration?			
<i>Compliance costs:</i> - <i>One-off</i> - <i>Ongoing</i>	<p>According to some market participants the majority of the work required by the issuer to derive the statement to be made would have already been completed, however, there will be additional costs associated with the auditor's or the accountant's report. The extent of these costs will be highly dependent on the circumstances of the individual issue and the actual statement made.</p> <p>However, following the coming into force of Commission Delegated Regulation (EU) No 862/2012, Annex I, item 13.2, the second paragraph of the Prospectus Regulation now provides a new disclosure regime for profit estimates in certain circumstances. Costs on compliance with this new regime are not considered relevant in this context.</p>	<i>Not available.</i>	<i>Not available.</i>
<i>Quality of products offered</i>	The annual profit estimates constitute the most up-to-date annual information of the issuer, guarantor or obligor providing the preliminary annual results of the issuer. Provided that the issuer has included a profit estimate in the prospectus, a modifica-	<i>Not available.</i>	<i>Not available.</i>

	<p>tion of such estimate therefore constitutes material information for investors.</p> <p>Involvement of auditors, where required by the Prospectus Regulation, provides further credibility to such modified estimates.</p> <p>Investors would have the possibility to compare the modified profit estimates for which the supplement is drawn up with previous profit forecasts of the issuer or with estimates of other issuers.</p>		
--	---	--	--

5. Change in control of the issuer for equity securities and depository receipts	<i>This option concerns a situation of change in control of the issuer in case of equity securities or in case of depository receipts. The option is evidenced by oral contributions by NCAs based on their experience.</i>		
	Qualitative description	Quantitative description	Monetary value
Relative to the baseline, what are the benefits and costs of the option under consideration?			
<i>Compliance costs:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>Ongoing</i> 	Currently, providing this information through a supplement is a market practice. Furthermore, the situation would occur rarely and therefore the proposal does not imply additional costs for issuers.	<i>Not available.</i>	<i>Not available.</i>
<i>Quality of products offered</i>	Knowledge of who controls the issuer benefits investors because such control may affect the business, the financial strategy performed and may also have an impact on the dividend policy.	<i>Not available.</i>	<i>Not available.</i>
6. Public takeover bids for equity securities and depository receipts	<i>This option concerns a systematic requirement to supplement when there is an announcement of public takeover bids and their final outcome, in case of equity securities or in case of depository receipts.</i>		
	Qualitative description	Quantitative description	Monetary value

Relative to the baseline, what are the benefits and costs of the option under consideration?			
<i>Costs to regulator:</i> - <i>One-off</i>	Should this situation arise there would be additional costs for the regulator in connection with approval of the documents concerning the relevant takeover bid. However, this is not seen as a cost to be included in this equation as approval of such documents would be necessary regardless of the existence and validity of an approved and published prospectus.	<i>Not available.</i>	<i>Not available.</i>
<i>Compliance costs:</i> - <i>One-off</i>	The information to be included in the supplement is already available in documents that must be developed according to the Takeover Bids Directive. Further costs would relate to incorporating it into the supplement format. Similar to the costs to the regulator, such a situation would incur additional costs for the issuer with regard to the development and approval of the takeover documents. However, such costs are not considered as material elements of the assessment in connection with approval of a supplement.	<i>Not available.</i>	<i>Not available.</i>
<i>Quantity of products offered</i>	Should such a situation arise, the product (either the prospectus or the securities covered by such prospectus) will undergo a change as there will be a new offer in the market, i.e. the takeover bid. Should pre-emptive rights holders have opted or contemplated subscribing to the offer in progress,	<i>Not available.</i>	<i>Not available.</i>

	a takeover bid may offer terms more agreeable to such persons.		
<i>Quality of products offered</i>	<p>Where a takeover bid is launched over the shares of the issuer (or over the underlying shares of the issuer in case of depository receipts), the potential investors need to know who is launching such an offer and its price.</p> <p>Ownership structure of a company is an important factor when assessing the current and future position of a company.</p> <p>Notwithstanding that withdrawal rights are not the core subject matter of this draft RTS, such rights have particular importance in this situation as investors may have subscribed for equity securities at a higher price than the one that is being proposed under the terms of the public takeover bid.</p>	<i>Not available.</i>	<i>Not available.</i>

7. Working capital statements for certain equity securities	<i>This option concerns a systematic requirement to produce a supplement for a change in the working capital statement.</i>		
	Qualitative description	Quantitative description	Monetary value
Relative to the baseline, what are the benefits and costs of the option under consideration?			
<i>Compliance costs:</i> - <i>One-off</i>	<p>According to some market participants there is likely to be additional due diligence costs associated with a supplement that details either a positive or negative change to the working capital statement.</p> <p>ESMA acknowledges that</p>	<i>Not available.</i>	<i>Not available.</i>

	time constraints may arise (i) in case of a clean working capital statement particularly as it is expected that the issuer would have to undertake adequate procedures to support such statement; and (ii) in case of a qualified working capital statement as it would also be expected that the issuer provides a detailed action plan on how it intends to rectify the shortfall in the working capital statement.		
<i>Quality of products offered</i>	<p>Any change in a clean working capital statement would immediately question the issuer's ability to access cash and other available liquid resources in order to meet its liabilities as they fall due. Therefore, investors should be informed of such a development and how additional working capital will be provided as soon as practicable after the occurrence of such a change.</p> <p>Furthermore, investors are also interested in situations where a qualified working capital statement becomes clean, as such a development may induce new investors to subscribe for the securities or existing investors to increase their orders.</p>	<i>Not available.</i>	<i>Not available.</i>

8. Admission to trading or offer to the public in an additional Member State	<i>This option proposes to introduce a systematic requirement to produce a supplement for admission to trading in (an) additional Member State(s) or offer to the public in (an) additional Member State(s). Without such information, a notification in accordance with Article 18 of the PD cannot be performed. Further guidance on the issue is in the Commission Delegated Regulation No 862 and ESMA Q&A no 45 regarding withholding tax.</i>		
	Qualitative description	Quantitative description	Monetary value
Relative to the baseline, what are the benefits and costs of the option under consideration?			

<p><i>Compliance costs:</i> - <i>One-off</i></p>	<p>There are costs for expanding an offer/seeking admission to trading in further jurisdictions than originally envisaged, e.g. the provision of including further tax information. Such costs do not differ from the costs of including such information in the prospectus as originally approved. Application of admission to trading on an additional regulated market in (an) additional Member State(s) or launching a public offer in (an) additional Member State(s) is completely at the discretion of the issuer. Therefore, he must endure such costs.</p>	<p><i>Not available.</i></p>	<p>According to some market participants a standard update can easily amount to 10,000-40,000 EUR, as it might be necessary to seek external counsel (e.g. lawyers, auditors (€€2,500-€4,000 per jurisdiction), listing agents) before the supplement is ready to be approved by the authorities.</p>
<p><i>Quality of products offered</i></p>	<p>Information on the additional jurisdictions is a requirement for the notification of the prospectus in accordance with Article 18 of the PD. The issuance of a supplement is the least expensive manner of complying with such a requirement compared to submitting a new prospectus for approval.</p> <p>Investors who have already subscribed to the relevant securities will become aware that the potential investor base has been expanded.</p> <p>Investors of all Member States where the public offer and/or admission to trading occurs will have access to the same information by including such in the prospectus and its related supplement(s) and ensuring equal access to information for all potential investors.</p>	<p><i>Not available.</i></p>	<p><i>Not available.</i></p>

<p>9. New significant financial commitment for equi-</p>	<p><i>This option concerns the systematic requirement to produce a supplement for new significant financial commitments for equity securities. The information is evidenced by Article 4a of the Prospectus Regulation, experience from NCAs</i></p>
---	--

ty securities	<i>and feedback received.</i>		
	Qualitative description	Quantitative description	Monetary value
Relative to the baseline, what are the benefits and costs of the option under consideration?			
Compliance costs: <ul style="list-style-type: none"> - <i>One-off</i> - <i>Ongoing</i> 	Involvement of auditors with regard to pro forma information will result in costs for issuers. However, ESMA does not expect a substantial increase in the number of supplements due to the time constraints for preparing the supplement in correlation with the complexity of the issue and the length of an average offer period of equity securities.	<i>Not available.</i>	<i>Not available.</i>
<i>Quality of products offered</i>	Investors will be able to assess how the financial situation of the issuer would have been affected by the commitment and get an insight of the full picture of the issuer after the transaction is performed.	<i>Not available.</i>	<i>Not available.</i>

10. Any judgment or concluding event in governmental, legal or arbitration proceedings already disclosed in the prospectus	<i>This option concerns the requirement for the systematic requirement of a supplement in the situation of any judgment or concluding event in governmental, legal or arbitration proceedings already disclosed in the prospectus. It is based on NCAs' experience and feedback from the public consultation. This situation has not been included in the final draft RTS.</i>		
	Qualitative description	Quantitative description	Monetary value
Relative to the baseline, what are the benefits and costs of the option under consideration?			
Compliance costs: <ul style="list-style-type: none"> - One-off 	This proposal may result in a possible increase of the total costs of these supplements due to an increase in their number. However, the drafting cost of each particular supplement is expected to remain the same.	<i>Not available.</i>	<i>Not available.</i>

	With regard to the extent of the increase in the number of supplements, according to some market participants, this requirement would have the biggest impact, especially as regards base prospectuses.		
<i>Quality of products offered</i>	Where governmental, legal or arbitration proceedings which may have or have in a recent past had significant effects on the issuer, and/or the group's financial position or profitability has already been disclosed in the prospectus, ESMA expects that investors are interested in the result of such proceedings. Sometimes issuers provide excessive disclosure on their governmental, legal and arbitration proceedings in the prospectus without distinguishing them according to their materiality. Therefore, the requirement to systematically produce a supplement for any judgment or concluding event in governmental, legal or arbitration proceedings may effectively limit such non-material disclosure in the prospectus.	<i>Not available.</i>	<i>Not available.</i>

11. Increase in the aggregate amount of the programme	<i>This option concerns the possibility to have a systematic requirement to produce a supplement for an increase in the aggregate amount of the programme when such has already been included in the prospectus at the time of approval. Evidence has been gathered oral discussion with the NCAs based on their experience and feedback to the public consultation.</i>		
	Qualitative description	Quantitative description	Monetary value
Relative to the baseline, what are the benefits and costs of the option under consideration?			
<i>Compliance costs:</i> - <i>One-off</i>	Very limited costs are expected due to the nature of the information required for these supplements. Currently, the vast majority of competent authorities require a supplement for	<i>Not available.</i>	<i>Not available.</i>

	<p>an increase of the aggregate maximum amount of the programme. Therefore, ESMA does not expect a substantial increase in the number of supplements</p>		
<p><i>Quality of products offered</i></p>	<p>Investors should be informed of an increase of the aggregate amount of the programme as this can be an indicator of:</p> <ul style="list-style-type: none"> - the necessity to finance the issuer's principal future investments to which the issuer's management body has already made full commitments (the Prospectus Regulation also requires information regarding the anticipated sources of funds to fulfil those commitments); - a potential need for funding due to the occurrence of negative developments in the issuer's business and/or market situation since the time of approval of the base prospectus; - a successful placement of offers under the base prospectus. <p>Some issuers may choose not to include the aggregate amount in the base prospectus, thereby avoiding the obligation to draft a supplement if there is an increase in such amount. However, a majority of the respondents to the public consultation confirmed that it is to a large extent already market practice to produce this information.</p>	<p><i>Not available</i></p>	<p><i>Not available</i></p>



ANNEX IV – SMSG OPINION

The SMSG has chosen not to provide advice on this issue.

ANNEX V – DRAFT REGULATORY TECHNICAL STANDARD

Draft

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

of [...]

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

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC²¹, and in particular Article 16(3) thereof,

Whereas:

- (1) Directive 2003/71/EC harmonises requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State.
- (2) Directive 2003/71/EC also requires publication of supplements to the prospectus mentioning every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs later.
- (3) The provision of full information concerning the securities and the issuers of securities promotes the protection of investors. A supplement should therefore include all material information relating to the specific situations that triggered the supplement and that must be included in the prospectus in accordance with Directive 2003/71/EC.
- (4) In order to ensure consistent harmonisation, to specify the requirements laid down in Directive 2003/71/EC and to take account of technical developments on financial markets, it is necessary to specify situations where publication of supplements to the prospectus is required.
- (5) It is not possible to identify all the situations in which a supplement to the prospectus is required as this may depend on the issuer and securities involved. Therefore, it is necessary to specify the minimum situations where a supplement is required.
- (6) Annual audited financial statements play a crucial role for investors when making investment decisions. In order to ensure that investors base their investment decisions on the most recent financial information, new annual audited financial statements of issuers of shares, certain issuers of underlying shares in the case of convertible securities and issuers of underlying shares in the case of depository receipts published after the approval of the prospectus should be incorporated in a supplement to the prospectus.

²¹ OJ L 345, 31.12.2003, p. 64.

- (7) In order to take account of the ability of profit forecasts and profit estimates to influence an investment decision, issuers of shares or issuers of the underlying shares in case of depository receipts should ensure that any amendments to implicit or explicit figures constituting profit forecasts or profit estimates already included in the prospectus are also included in a supplement to the prospectus.
- (8) Information concerning the identity of the main shareholder(s) or any controlling entity of the issuer is vital for an informed assessment of the issuer, in case of any type of security. However, a situation of a change of control of the issuer is particularly significant where the offer refers to equity securities and depository receipts as these types of securities are, in general, more price sensitive to this situation. Therefore, a supplement should be published where there is a change of control of an issuer of equity securities or an issuer of underlying shares in the case of depository receipts.
- (9) It is essential that potential investors assessing an outstanding offer of equity securities or depository receipts are in a position to compare the terms and conditions of such an offer with the price or exchange terms attached to any public takeover bid announced during the offer period. Moreover, the result of a public takeover bid is also significant for the investment decision as investors should know whether it implies or not a change in control of the issuer.
- (10) Where the working capital statement is not valid anymore investors are unable to make a fully informed investment decision about the issuer's financial situation in the immediate future. Investors should be in a position to reassess their investment decisions in light of the new information on the issuer's ability to access cash and other available liquid resources to meet its liabilities.
- (11) There are situations where, after the approval of a prospectus, an issuer or offeror decides to offer the securities in Member States other than those referred to in the prospectus, or to apply for admission to trading of the securities on regulated markets in additional Member States other than those provided for in the prospectus. Information about these offers in other Member State(s) or admission to trading on regulated market(s) therein is important for the investor's assessment of certain aspects of the issuer's securities. Information regarding the offers in additional Member State(s) or admission to trading on regulated market(s) therein should be included in a supplement to the prospectus.
- (12) The financial position or the business of the entity is likely to be affected by a significant financial commitment. Therefore, investors should be entitled to receive additional information on the consequences thereof.
- (13) An increase of the aggregate nominal amount of an offering programme provides insights to an issuer's necessity for financing or an increase in demands for the issuer's securities. Therefore, where the aggregate nominal amount of an offering programme is included in the prospectus, an increase thereof should be included in a supplement to the prospectus.
- (14) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (15) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and the Council²².

²² Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010 p. 84).

HAS ADOPTED THIS REGULATION:

Article 1

Subject matter

This Regulation establishes regulatory technical standards specifying situations in which the publication of a supplement to the prospectus is mandatory.

Article 2

Obligation to publish a supplement

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

(a) where new annual audited financial statements are published by any of the following:

(i) an issuer where a prospectus relates to shares and other transferable securities equivalent to shares in accordance with Article 4(2)(1) of Regulation (EC) No 809/2004²³;

(ii) an issuer of the underlying shares or other transferable securities equivalent to shares in case of equity securities referred to in Article 17(2) of Regulation (EC) No 809/2004;

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

(b) where an amendment to a profit forecast or a profit estimate already included in the prospectus is published by any of the following:

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

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

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

(c) where there is a change in control in respect of any of the following:

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

²³ Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (OJ L 149, 30.4.2004, p.1).

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

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

(d) where there is any new public takeover bid by third parties, as defined in Article 2(1) a) of Directive 2004/25/EC of the European Parliament and the Council²⁴ and the outcome of any public takeover bid in respect of any of the following:

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

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

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

(e) where in relation to shares and other transferable securities equivalent to shares in accordance with Article 4(2)(1) of Regulation (EC) No 809/2004 and convertible or exchangeable debt securities which are equity securities referred to in Article 17(2) of that Regulation there is a change in the working capital statement included in a prospectus when the working capital becomes sufficient or insufficient for the issuer's present requirements

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

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

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

Article 3

Entry into force

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

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

²⁴ Directive 2004/25/EC of the European Parliament and of the Council on 21 April 2004 on takeover bids (OJ L 142 30.4.2004 p. 12).



Done at Brussels,

*For the Commission
The President*

*[For the Commission
On behalf of the President*

[Position]

ANNEX VI – LEGAL REFERENCES

Level 1

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

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

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

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

Article 5(1) - The prospectus

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

Article 12 - Prospectuses consisting of separate documents

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

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

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

Article 16 - Supplements to the prospectus

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

2. Where the prospectus relates to an offer of securities to the public, investors who have already

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

Article 21 – Powers

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

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

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

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

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

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

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

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

(d) suspend a public offer or admission to trading for a maximum of 10 consecutive working days

on any single occasion if it has reasonable grounds for suspecting that the provisions of this Directive have been infringed;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 2(1) a) – Definitions

1. For the purposes of this Directive:

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

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

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

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

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

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

In Article 16, the following paragraph is added:

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

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

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

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

Level 2

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

dissemination of advertisements

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

Article 4(2) – Share registration document schedule

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

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

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

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

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

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

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

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

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

- (a) information relating to each obligor as if it were an issuer drafting a Registration Document for debt and derivative securities with an individual denomination of at least EUR 100 000;
- (b) if an obligor or guarantor has securities already admitted to trading on a regulated or equivalent market or the obligations are guaranteed by an entity admitted to trading on a regulated or equivalent market, the name, address, country of incorporation, nature of business and name of the market in which its securities are admitted.

Level 3

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

<http://www.esma.europa.eu/system/files/2013-319.pdf>

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

Questions and Answers Prospectuses - 20th updated version – October 2013

http://www.esma.europa.eu/system/files/2013-1537_qa_prospectuses_-_20th_updated_version_o.pdf

20. Supplement to prospectuses: profit forecast

Date last updated: February 2007

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

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

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

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

ANNEX VII – REFERENCES TO PARAGRAPHS IN THE CP

Paragraph 13

13. However ESMA is aware that the origin of many concerns in relation to the supplement procedure is the lack of certainty with regard to the first prerequisite in Article 16(1) of the Prospectus Directive, i.e. the significance of the new factor or materiality of the mistake or inaccuracy capable of affecting the assessment of the securities. Specifically, market practice has shown that it is not always clear whether the occurrence of a new factor triggers the obligation to publish a supplement. On the other hand, such difficulties are encountered less frequently for mistakes and inaccuracies.

Paragraphs 21-24

21. ESMA believes that it is not possible to refer to materiality thresholds in the draft RTS (e.g. 10% of representative profits and losses) for supplements because:
- the Prospectus Regime does not include materiality thresholds for prospectuses (except that referred to in paragraph 6 of Article 4a of Commission Regulation (EC) No 809/2004 of 29 April 2004 (hereinafter the “Prospectus Regulation” or “PR”) introduced by the Commission Regulation (EC) No 211/2007 of 27 February 2007²⁵); and
 - it would be virtually impossible to determine (i) a unique threshold which is applicable to all the different items of the annexes of the PR or (ii) different thresholds for each of the items of the annexes in the Prospectus Regulation, as amended.
22. In the absence of definitions for the terms “material” and “significant” in Article 16(1) of the Prospectus Directive, ESMA believes that the test whether a new factor, mistake or inaccuracy qualifies as a triggering event for producing a supplement is the same test as whether information should be included in the prospectus. As a consequence, significance or materiality should be assessed according to the same qualitative and/or quantitative criteria used when drafting the prospectus.
23. In other terms, ESMA is of the opinion that the aforementioned Article 16(1) must be read in conjunction with Article 5(1) of the Prospectus Directive, stating that “the prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities”.
24. Accordingly, ESMA considers that any mistake or inaccuracy should be considered as “material” and any new factor should be considered as “significant” pursuant to Article 16(1) of the Prospectus Directive when the omission of such information prevents investors from making an informed assessment according to article 5(1) of the Prospectus Directive.

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

¹ Article 4a(6) in the Prospectus Regulation: *For the purposes of paragraph 5 of this Article, and of item 20.2 of Annex I, a significant gross change means a variation of more than 25%, relative to one or more indicators of the size of the issuer's business, in the situation of an issuer.*

Paragraphs 37-40

37. ESMA considers that incorporating the last annual audited financial statements in accordance with Article 12(2) or Article 16 of the Prospectus Directive, as a way of updating the information on the assets and liabilities, financial position, profits and losses and prospects of the issuer and of any guarantor, is a well-established market practice which ensures to some extent that investors do not base their investment decisions on outdated financial information.
38. Such a practice does not only guarantee that the prospectus contains, at any time, the latest 1-3 annual audited financial statements, but also keeps up to date a number of items required by the different registration document schedules.
39. For example, where the registration document in a prospectus is drawn up in accordance with Annex I of the Prospectus Regulation, at least the following items relate to information which is included in the annual audited financial statements and the annual financial report:
- statutory auditors (item 2),
 - selected financial information (item 3)
 - description of the principal investments of the issuer (item 5.2.1),
 - description of the principal activities and markets of the issuer and a statement relating to any exceptional factors which have influenced those activities and markets (items 6.1.1. and 6.2. and 6.3.)
 - description of the financial condition of the issuer and information about operating results (items 9.1. and 9.2.),
 - description of research and development policies of the issuer (item 11)
 - disclosure of the number of employees of the issuer and if possible their main category of activity and geographical location (item 17.1.)
 - description of related party transactions (item 19)
 - the amount of dividend per share (item 20.7.1)
 - the history of the share capital of the issuer (item 21.1.7.).
40. However, ESMA considers that for the below situations there would not be an automatic obligation to produce a supplement where the issuer publishes annual financial statements and it would be up to the issuer, offeror or person asking for admission to trading on a regulated market to assess on a case by case basis their significance and/or materiality:
- in the case of an issuer of depository receipts as neither Annex X nor Annex XXVIII of the Prospectus Regulation requires financial information in relation to the issuer; and
 - in the case of an issuer of asset-backed securities where claims of the investors against the issuer are limited to the underlying assets and the issuer is a special purpose vehicle.

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

- the person responsible for drawing up the prospectus must always produce a supplement af-

ter the publication of the annual audited financial statements of the issuer of the underlying shares; and

- the obligation to draw up a supplement shall not apply to the publication of annual audited financial statements by an issuer of depository receipts as such financial statements are not required by the depository receipts schedule and this information is not capable of affecting investors' assessment of the securities as the investment is in the underlying shares.

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

Paragraph 43

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

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

Paragraph 76

76. In case of a base prospectus, this obligation shall not apply where the missing information can be included in the final terms. For instance, it would be the case of an application for admission to trading on an additional EU regulated market than the one(s) foreseen in the prospectus where i) the application for admission to trading on the regulated market is referred to in the final terms and ii) the base prospectus already contains the required information on taxes with respect to the country where the additional EU regulated market is located.