



European Securities and
Markets Authority

ICMA SUBMISSION: 8 March 2018

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



Responding to this paper

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

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

ESMA will consider all responses received by 9 March 2018.

Instructions

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

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

Publication of responses

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



Data protection

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

Who should read the Consultation Paper

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



General information about respondent

Name of the company / organisation	International Capital Market Association (ICMA)
Activity	Other Financial service providers
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	International

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_PR_1>

Introduction to ICMA

ICMA is a membership association, committed to serving the needs of its wide range of members representing both the buy side and sell side of the industry. Its membership includes issuers, intermediaries, investors and capital market infrastructure providers. ICMA currently has more than 530 members located in over 60 countries worldwide. See: www.icmagroup.org.

This response is given by the ICMA primary market constituency comprised of borrowers and banks that lead-manage syndicated debt securities issues throughout Europe. This constituency deliberates principally through:

- the ICMA Corporate Issuer Forum¹, which gathers senior representatives of 27 major corporate issuers;
- the ICMA Financial Institution Forum², which gathers the heads or senior members of the capital raising, funding and treasury departments of 35 ICMA member banks active in capital markets issuance in Europe;
- the ICMA Primary Market Practices Committee³, which gathers the heads and senior members of the syndicate desks of 50 ICMA member banks active in lead-managing syndicated debt securities issues in Europe; and
- the ICMA Legal and Documentation Committee⁴, which gathers the heads and senior members of the legal transaction management teams of 21 ICMA member banks active in lead-managing syndicated debt securities issues in Europe.

We set out responses to the questions posed by ESMA below and some general comments in this section.

¹ <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-committees/icma-corporate-issuer-forum/>

² <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-committees/icma-financial-institution-issuer-forum/>

³ <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-committees/icma-primary-market-practices-committee/>

⁴ <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-committees/icma-legal-and-documentation-committee/>

General remarks

Disincentives to retail issuance: ESMA's approach of using existing Level 2 measures under the Prospectus Directive (PD) as a starting point for the draft RTS, where applicable, is helpful because the current regime is generally well understood by market participants and so avoiding changes to it will minimise disruption, and the costs associated with disruption, for issuers. However, the new provisions relating to key financial information for the summary and advertisements disseminated to retail investors are likely to be viewed as a further disincentive to direct retail issuance of bonds. This is unfortunate, because it may result in a further decline in the availability of bonds that can be bought directly by retail investors (who may need access to fixed income securities e.g. during their retirement) and those retail investors may therefore face increased costs associated with investing via funds.

Key financial information for the summary: The approach to the proposed draft RTS for key financial information in the summary seems relatively prescriptive. Generally speaking, prescriptive requirements can give rise to unexpected results in practice when they are applied to the wide range of prospectuses prepared under the EU prospectus regime. This introduces increased costs for issuers, who need to spend time understanding how best to comply with prescriptive requirements that don't necessarily fit with their business. An example of the unexpected results of prescriptive rules has been seen outside the prospectus regime in the requirements for KIDs under the PRIIPs Regulation, where concerns have been raised that KIDs may be misleading for investors (prompting the FCA in the UK to issue a [statement](#) on this point). Within the prospectus regime, the prescriptive requirements for the current PD summary format are generally acknowledged to have resulted in unclear and unhelpful disclosure for investors in practice. Whilst these have (helpfully) not been replicated under the new Prospectus Regulation, the approach in the proposed draft RTS for key financial information in the summary is still relatively prescriptive.

If the annexes to the proposed draft RTS are to be retained in their current form, **it is very important that the proposed cap on the number of additional line items or APMs that can be included in the summary is removed.** See further our response to Q12 below.

APMs: Further clarification of ESMA's expectations in relation to APM disclosure and explanation in the summary is needed. See further our response to Q5 below.

Data and machine readability: From an investor protection perspective, it is important that the draft RTS on data and machine readability is calibrated to ensure that the ESMA Prospectus Register does not develop into a tool that allows or encourages investors to compare products without reference to the underlying prospectuses. The more data that is available on the ESMA Prospectus Register, the more likely it is that this could happen. See further our response to Q15 below.

Separately, we disagree with the suggestion that NCAs may require issuers to submit the data required by Annex VII to the draft RTS to them, because it seems likely to result in a doubling up of compliance costs. See further our response to Q17 below.

Advertisements: Many of our concerns with the proposed draft RTS on advertisements stem from the wide definition of "advertisement". As noted by ESMA in the consultation paper, the use of the word "communication" rather than "announcement" in the Prospectus Regulation would appear to broaden the scope of the advertisements regime. This is likely to mean that specific obligations relating to advertisements may be problematic when they are applied to the very wide range of "communications" to which they relate. For this reason, certain of the requirements in the draft RTS should be restricted to written



advertisements in order to ensure that the draft RTS are workable in practice. See further our responses to Q19 – Q22 below.

In addition, we continue to have concerns with the new approach of the host NCA exercising control over the compliance of advertising activity with the Prospectus Regulation regime. We appreciate this is set at Level 1 and so Level 2 measures cannot change the position on this, but take the opportunity to note again that this appears to be a step away from the concept of Capital Markets Union.

Supplements: The approach that ESMA has taken is generally helpful. We set out some thoughts, particularly in relation to the importance of a profit forecast not being mandatory for any prospectus relating to non-equity securities, as well as some other areas of continuing uncertainty in relation to supplements, in our responses to the relevant questions below.

Publication: The approach that ESMA has taken is generally helpful.

Other points

ESMA Q&A on Prospectuses: As mentioned in the [ICMA response to the ESMA consultation paper on format and content of the prospectus](#) of September 2017, it would be helpful if ESMA were to review its Q&A on Prospectuses and carry across any guidance which might continue to be helpful under the Prospectus Regulation. In particular, Q&A 99 in relation to the application of the requirement to disseminate an amended advertisement in the context of roadshows should be carried across. ICMA would be happy to work with ESMA, on an informal basis, to assess which of the Q&A should be retained.

Timing: We assume that the intention is for the RTS to take effect at the same time as the majority of provisions of the Prospectus Regulation apply (i.e. 21 July 2019). A confirmation from ESMA on this point would be useful, so that market participants know what to expect in terms of the implementation of the Prospectus Regulation. We also assume that the final delegated regulation will include a sentence regarding its application date in Article 18 (i.e. “It shall apply from [date]”).

AFME response: ICMA has seen and broadly supports the AFME response in relation to equity securities and securitisation. |

<ESMA_COMMENT_PR_1>

Key financial information in the summary

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

<ESMA_QUESTION_PR_1>

Yes. The suggestion that information extracted from historical financial information should be flagged as such in order to differentiate for investors the audited financial information from APMs is sensible and, in our view, uncontroversial.

More generally, it is helpful that issuers can include APMs in the summary. However, there are some questions around how such APMs should be explained in the summary. See further our response to Q5 below.

<ESMA_QUESTION_PR_1>

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

<ESMA_QUESTION_PR_2>

No. Additional templates are not required (but note the need to clarify the application of existing templates to complex financial institutions discussed below).

As noted in our general remarks above, prescriptive requirements such as those envisaged in the draft RTS for key financial information in the summary can have unexpected results in practice when they are applied to the wide range of prospectuses prepared under the EU prospectus regime. A more flexible approach, allowing issuers to disclose the financial information that they consider to be key for the purposes of the summary and in the context of their own business would be preferable.

If the approach envisaged by the draft RTS is to be taken forward, it is not necessary to add further templates for specific types of issuer. Such templates are unlikely to work for all issuers within any given category and could further add to the possibility of confusion in relation to which template applies in which circumstance (see below). Rather, ESMA's approach (described in paragraph 25 of the consultation paper and envisaged in draft RTS Article 2.3) in which the issuer or guarantor substitutes items from the tables with a corresponding item from its financial statements is preferable.

We understand from discussions with one leading audit firm that the selection of such "corresponding item" from the issuer's or guarantor's statements should be relatively straightforward in most instances. However, we anticipate that there may still be occasional circumstances where that is not the case. In those cases, it is hoped that NCAs will take a pragmatic approach in their interpretation of the proposed draft RTS annexes.

The possible difficulties that issuers could encounter when applying the proposed prescriptive approach are illustrated when considering how a complex financial institution should approach its disclosure under the draft RTS. For example, where a complex financial institution has both credit and insurance operations, it may not be clear which annex to the RTS should be used and, if one annex to the RTS is used, there may be line items from another annex that will be relevant to the issuer. If a prescriptive approach is to be



retained in the final RTS, this concern could be ameliorated by the removal of the cap on the additional line items and APMs that can be included in the summary (see further our response to Q12 below). Guidance from ESMA on the particular annex that should be used by complex financial institutions with both credit and insurance operations would also be helpful.

We also note that there are a range of ABS deals issued by a variety of different types of SPV, and certain SPVs will not be able to provide all the mandatory information which ESMA has proposed in Annex V of the draft RTS. This would be the case, for example, in relation to Retail Charity Bonds PLC, which is an SPV established for the purpose of issuing ABS with a view to making it easier for UK charities to raise money from investors in the capital markets. It is important that an SPV issuer has the flexibility to include line items that are relevant to that particular SPV and which align with the disclosure it will be including in its prospectus to demonstrate that its assets (whatever they may be, and in the case of Retail Charity Bonds PLC, loans to charities) have capacity to produce funds to service payments due on the securities. In recognition of this, **ESMA is strongly encouraged to replace each * (asterisk) in Annex V of the draft RTS with a # (hash)** such that an SPV only needs to provide the information if it appears elsewhere in the prospectus. This would also assist debut SPV issuers who have not commenced operations and not drawn up financial statements (as envisaged in current ABS registration document requirements and as carried forward in proposed Annex 10, item 8.1 of ESMA's consultation paper on format and content of the prospectus). It will also be important (as mentioned elsewhere in this response) that the proposed cap on the number of additional line items or APMs that can be included in the summary is removed, so that an SPV issuer can provide the information that, in the light of its particular circumstances, is the key information for investors.

In addition, Article 2.7 of the draft RTS and the titles to the tables in the annexes to the draft RTS are slightly confusing at the moment. We think this is due to the title to Annex II not including a reference to "non-financial entities". We suggest that the titles to the annexes to the draft RTS are amended to match the list set out in paragraph 22 of the consultation paper. It might also be worth considering whether it might be appropriate for issuers that are not covered by the annexes to the draft RTS to use a combination of the different annexes, depending on what is most appropriate for their business (Article 21.1 of the current PD Regulation could provide some inspiration for this).

Separately, the title to Annex IV includes a "0" instead of a ")" and there is a reference to "KFI" instead of "key financial information" in Article 9. |

<ESMA_QUESTION_PR_2>

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

<ESMA_QUESTION_PR_3>

|ICMA does not express a view on this question as it relates to equity securities, although see our general remarks above in relation to our broad support for AFME's response to this consultation paper. |

<ESMA_QUESTION_PR_3>

Q4 : Do you think that investment companies which are subject to capital requirements should be required to include regulated capital ratios in their summary?

<ESMA_QUESTION_PR_4>

It is not entirely clear what is meant by “investment companies” in this question. To the extent this question relates to closed end funds, ICMA does not express a view as this is not our area of focus. To the extent this question relates to credit institutions, please see our responses to Q8 – Q9 below. |

<ESMA_QUESTION_PR_4>

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

<ESMA_QUESTION_PR_5>

ESMA’s proposal to allow issuers and guarantors to disclose APMs in the summary on a voluntary basis is helpful, because such disclosure may be necessary for the issuer to ensure it provides the key information required by Prospectus Regulation Article 7.1 in the summary. It is very important that the cap on the number of APMs that can be included in the summary is lifted (see our response to Q12 below).

In relation to the explanation of APMs in the summary, the use of footnotes generally is a pragmatic approach to balance the possible need to explain APMs with the restrictions on the length of the summary (noting that Prospectus Regulation Article 7.1.1 states that the summary shall not contain cross-references to other parts of the prospectus or incorporate information by reference). However, depending on the particular APM included in the summary and the relevant explanation, the proposed approach might result in quite lengthy footnotes and this might affect the clarity of the presentation of the summary.

An alternative approach might be for issuers to include a prominent warning that the summary contains APMs and that investors should read the summary together with the rest of the prospectus (which will contain the relevant explanations in line with the ESMA Guidelines on APMs).

More generally, we note that the draft RTS itself does not include any reference to APMs being explained in footnotes. Perhaps this is because ESMA envisages that guidance on how APMs should be explained in the context of a summary would be better contained in the ESMA Guidelines on APMs than in the draft RTS. We note that paragraph 21 of the consultation paper states that footnotes “should” be used “where it is necessary to provide some explanation on the APMs in the summary” and paragraph 41 of the consultation paper notes that “it is also possible that an explanation of the APMs in the summary would be necessary...” and that this “could be accommodated by the insertion of footnotes” (emphasis added). It would be helpful if the precise approach that ESMA is envisaging in relation to APM explanation were to be clarified, given the inconsistency between “should” and “could” in the previously mentioned paragraphs. For example, can some explanation be given in footnotes and some explanation in the body of the summary? |

ESMA_QUESTION_PR_5>

Q6 : Do you agree that issuers should be given flexibility to present pro forma financial information as additional columns to the relevant tables or as a separate table? If

not, should a format be mandated, bearing in mind the page limit for the summary as well as the requirement for the summary to be comprehensible?

<ESMA_QUESTION_PR_6>

We agree that issuers and guarantors should be given flexibility to present pro forma financial information as additional columns to the relevant tables or as a separate table. Feedback from one leading audit firm suggests that, in practice, it might be difficult for issuers to present pro forma financial information as additional columns, but that flexibility in the rules to allow for different approaches would be useful.

Currently, issuers of non-equity securities tend to reproduce any pro forma financial information in full in the summary, as it will often be considered key financial information for investors.

Separately, we also note that pro forma financial information provided in compliance with current PD requirements often includes APM items. Such APM disclosure is outside the scope of the ESMA Guidelines on APMs. However, there is a question as to whether selective disclosure of APMs that are extracted from the pro forma accounts section of the prospectus and disclosed in the summary could possibly bring such APM disclosure within the scope of the ESMA Guidelines on APMs, thereby giving rise to additional disclosure considerations. Clarification from ESMA on this point would be welcome.

<ESMA_QUESTION_PR_6>

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

<ESMA_QUESTION_PR_7>

Disclosure of complex financial information is typically more relevant for equity issues than non-equity issues. Please see our general remarks above in relation to our broad support for AFME's response to this consultation paper.

<ESMA_QUESTION_PR_7>

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

<ESMA_QUESTION_PR_8>

In respect of non-equity securities, total equity is regularly disclosed by credit institutions in their prospectus summaries currently, but inclusion of CRR metrics is much less common. We understand that market practice may differ in relation to equity securities.

We do not support disclosure of the CET1 ratio in the summary being mandatory if it is disclosed elsewhere in the prospectus (per the proposed draft RTS). Credit institutions need flexibility to decide how best to meet the general requirement for summary disclosure in Prospectus Regulation Article 7.1 and disclose their key financial information in a way that is accurate, fair and clear and not misleading in accordance

with Prospectus Regulation Article 7.2. This will require careful thought by credit institutions, as retail investors may not fully understand regulated capital ratios and how they interact with relevant bail-in tools or, indeed, with the risk profile of the institution. Some investors might, for example derive false comfort from a high ratio and assume that it makes the institution “safe”.

It is therefore important that issuers have flexibility to determine the most appropriate way to disclose summary key financial information in the context of their own businesses and the particular securities they are issuing. This might involve disclosure of ratios such as CET1 in the summary, but it might not, depending on the issuer’s business and how it expects its CET1 ratio to appear to retail investors in the relevant securities that are being issued. |

<ESMA_QUESTION_PR_8>

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

<ESMA_QUESTION_PR_9>

No. See our response to Q8 above. Issuers should have flexibility to determine the most appropriate way to disclose summary key financial information in the context of their own businesses and the securities they are issuing. This might involve disclosure of regulatory capital ratios and associated SREP information in the summary, but it might not, depending on the issuer’s particular business and how it expects that information to appear to retail investors in the securities it is issuing. Some issuers might be concerned, for example, that investors could derive false comfort from, or generally misunderstand, disclosure of their relevant capital ratios and associated SREP information. Other issuers might consider SREP information to be useful for retail investors, but the rules should allow issuers to decide what disclosure is most appropriate and helpful for investors in the context of their own business and the type of securities that it is issuing. |

<ESMA_QUESTION_PR_9>

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

<ESMA_QUESTION_PR_10>

Aside from our concerns in relation to the prescriptive approach adopted in the draft RTS generally (see general remarks above and response to Q12), feedback from one leading audit firm suggests that the measures chosen for insurance companies seem sensible, as long as the * and # categorisations remain in the final RTS.

However, see response to Q2 above in relation to concerns for complex financial institutions that have both credit and insurance operations. See also our response to Q8 above in relation to the proposed prescriptive approach having unexpected results in practice and it generally being preferable to afford issuers the flexibility to disclose the measures that they consider to be key financial information in the context of their own business. |

<ESMA_QUESTION_PR_10>

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

<ESMA_QUESTION_PR_11>

ICMA does not express a view on whether it would be useful for retail investors to include a measure of historical performance for closed end funds in the summary as this is not our area of focus.

<ESMA_QUESTION_PR_11>

Q12: Given the page limit for the summary please provide your views on which items of historical financial information would be most useful for retail investors.

<ESMA_QUESTION_PR_12>

As noted in our general remarks above, prescriptive requirements such as those envisaged in the draft RTS for key financial information in the summary can have unexpected results in practice when they are applied to the wide range of prospectuses prepared under the EU prospectus regime.

It is very difficult (if not impossible) to predict and cater for all types of businesses that may wish to prepare a summary in order to issue non-equity securities with a low denomination.

If an issuer considers there to be several line items from its financial information that are key for an investor and disclosure of all of those line items is needed for it to meet its obligation under Prospectus Regulation Article 7, it should not be restricted from disclosing all those line items by virtue of a strictly delineated Level 2 regime.

Summaries at the moment will typically include more line items than the ones envisaged by ESMA in the draft RTS annexes and three others. Flexibility is particularly important in the context of issuance of non-equity securities targeted at investors in and outside of Europe as there may be occasions where issuers need to include additional information or reflect practices in other markets in their prospectus summary.

Similarly, if an issuer considers that the mandatory line items in the Annexes are not “key” financial information, they will have used valuable space in the summary on disclosing information that is not key for investors. This may be particularly relevant in relation to the disclosure of regulatory capital ratios.

In addition, it seems slightly contradictory for ESMA to be mandating a restrictive approach to disclosing key financial information in the summary at a time when IFRS is requiring companies to include increasing levels of disclosure in their financial statements. On the other hand, we note that certain of the line items mandated by ESMA are not required by IFRS (e.g. operating profit/loss in Annexes I and II), although feedback from one leading audit firm suggests that most companies do include this line item or a similar measure in their financial statements.

Another example of the difficulties that can arise when a prescriptive approach is adopted is the question of how complex businesses should approach their disclosure. For example, a complex financial institution may have both credit and insurance operations, which will be reflected in its financial statements. It may

therefore not be clear which annex to the RTS should be used and, even where it is clear, there may be line items from another annex that will be relevant to the issuer. See also our response to Q2 above.

More generally, the restrictions envisaged in the draft RTS may further disincentivise retail bond issuance because issuers will face increased costs in seeking to comply with specific requirements that may not align with their particular disclosure needs (see further our response to Q13 below).

A more flexible approach, allowing issuers to disclose the financial information that they consider to be key for the purposes of the summary and in the context of their own business, would be preferable. This might involve an indication from ESMA of the range of line items that might be expected (but not mandated).

However, if the proposed annexes to the draft RTS are to be retained, **it is very important that the proposed cap on the number of additional line items or APMs that can be included in the summary is removed.** This would:

- address the main concern with the current prescriptive approach – namely that an issuer might be prevented from disclosing all key financial information in the summary;
- ameliorate concerns in relation to securities offerings targeted both inside and outside Europe;
- help to address the concerns of large financial institutions that include both credit and insurance entities and therefore would be unduly restricted by following either Annex III or IV of the draft RTS;
- also help to address concerns in relation to ABS issued by SPVs (see our response to Q2 above);
- address concerns in relation to disclosure of APMs that are considered to be key financial information but which are themselves comprised of other APMs that also need to be referenced in order to ensure that the summary disclosure is fair, clear and not misleading; and
- help to reduce costs of compliance with the new regime (see our response to Q13 below).

Given the length of the summary is limited to seven pages and there are a significant number of other disclosure requirements besides key financial information, the issuer is already restricted from disclosing lengthy key financial information in the summary and so there is no need for an additional arbitrary cap on the number of additional line items or APMs that can be included in the summary.

The removal of the cap on the number of additional line items or APMs that can be included in the summary is therefore critical.

<ESMA_QUESTION_PR_12>

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

<ESMA_QUESTION_PR_13>

Issuers will incur additional legal costs in adjusting to the new, prescriptive regime for disclosure of key financial information in the summary, because issuers and their legal advisors will need to consider how best to meet the general obligation to provide key information in the summary pursuant to Prospectus Regulation Article 7 in line with the prescriptive requirements.

These additional costs would be reduced if the cap on the number of additional line items or APMs were to be removed, because issuers would have more flexibility and therefore be able to meet their disclosure requirements without being so restricted by prescriptive Level 2 measures. To the extent a cap is retained, this could result in increased costs from both a legal and reporting accountant perspective, as both sets of advisors may be involved in forming a view on which three additional items are the most useful to investors. These costs will vary, depending on the complexity of the issuer's and any guarantors' businesses.

Separately, the proposals could contribute to increased costs for retail investors. This is because the prescriptive approach taken in the proposed draft RTS could be viewed as a further disincentive to issuance of bonds directly to retail investors, which could result in a further decline in the availability of bonds that can be bought directly by retail investors (who may need access to fixed income securities e.g. during their retirement). Those retail investors may therefore face increased costs associated with investing via funds. <ESMA_QUESTION_PR_13>

Data and machine readability

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

<ESMA_QUESTION_PR_14>

No. See our general comments on the proposals relating to data and machine readability in our response to Q15 below. Briefly, the data required should be kept to a minimum to reduce administrative burdens and ensure the ESMA storage mechanism does not develop into a tool that allows investors to compare and assess securities without reference to the underlying prospectus. <ESMA_QUESTION_PR_14>

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

<ESMA_QUESTION_PR_15>

Generally, the data items listed in Annex VII seem relatively numerous.

In considering the information to be provided to ESMA, it is important to note the purpose for which such information will be used. It appears that the submission of data to ESMA has two purposes: (1) to allow ESMA to compile its report on prospectuses in accordance with Prospectus Regulation Article 47 which seems to be intended to facilitate regulatory oversight of prospectuses and issuance within the scope of the Prospectus Regulation; and (2) to allow investors to search for prospectuses published under the Prospectus Regulation.

Purpose (1) is unobjectionable, but the data that ESMA requires should be kept to a minimum to avoid any unnecessary cost and administrative burdens on NCAs and market participants.

Purpose (2) is envisaged in Prospectus Regulation Article 21(6) and recital 63, and the general principle of facilitating investor access to documents published under the Prospectus Regulation is understandable. However it is not clear that investors have actually requested or intend to make use of any search function on the updated Prospectus Register and without such requests from investors, it is important to keep the data items required by the RTS to a minimum in order to avoid unnecessary costs and administrative burdens for NCAs and market participants.

Separately, from an investor protection perspective, it is very important that the updated Prospectus Register does not develop into more than a simple tool allowing investors to search and access documents published under the Prospectus Regulation, for example by giving information on securities outside of the published documents and/or allowing investors to compare different securities without looking at the relevant prospectuses. This pitfall should be avoided through both the design of the updated Prospectus Register and also by minimising the information that is available to the public in the database.

For these reasons, we suggest removing the following items from the list of information to be provided to ESMA:

- Approval or filing date;
- Language;
- Issuer, Offeror and Guarantor registration country;
- FISN Code;
- CFI Code;
- Maturity Date;
- Volume offered;
- Price offered; and
- Market identifier of the trading venue.

None of these items appear to be essential to allow ESMA to comply with its obligations under Prospectus Regulation Article 21(6) or Article 47.

Separately, we note that the precise breakdown of information that is to be supplied may need some clarification. For example:

- *Item 6, Annex VII to the proposed draft RTS (Structure type):* Should base prospectus be listed as an option under “Structure type”, or would a base prospectus be a “single document prospectus”?
- *Item 27, Annex VII to the proposed draft RTS (Consideration offered):* The “Consideration offered” point in Table 7 of the Consultation Paper (page 44) is broken down in to three different pieces of information: number of securities, price per unit and overall consideration offered. We understand that this could be problematic in the context of certain types of offers which take place over a period of time. We note, however, that this breakdown does not appear to be reflected in item 27 of Annex VII to the proposed draft RTS.
- *Item 28, Annex VII to the proposed draft RTS (Type of security):* The options for derivative securities all reference a denomination. However, not all derivative securities have a denomination.

In relation to the optional information suggested in the consultation paper (consideration raised and document date), we do not believe this information should be requested by ESMA. This information does not



appear to be essential to allow ESMA to comply with its obligations under Prospectus Regulation Article 21(6) or Article 47 and, for the reasons given above, the information required by ESMA and included in the updated Prospectus Register should be kept to a minimum.

Finally, we query the proposal in paragraph 75 of the consultation paper that information in respect of registration documents and URDs will be submitted to ESMA at the time of approval of the related securities note and summary (if applicable). As registration documents and URDs are approved in their own right, it might make more sense for those documents and the related data to be submitted to ESMA at the time they are approved. This would allow investors to access registration documents and URDs before a securities note is available (which they may wish to do) and avoid uncertainty in relation to a situation where several related securities notes are approved (as it is not clear whether the registration document or URD and related data would need to be submitted to ESMA in respect of each approved securities note).

<ESMA_QUESTION_PR_15>

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

<ESMA_QUESTION_PR_16>

Yes, we agree with the ESMA proposal to maintain the current system in order to minimise adaptation costs for the market at large.

<ESMA_QUESTION_PR_16>

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

<ESMA_QUESTION_PR_17>

We disagree with the suggestion that NCAs may require issuers to submit the data required by Annex VII to the draft RTS to them.

The suggestion will result in a doubling up of compliance costs and administrative burden, with the issuer providing the information to the NCA and the NCA then needing to check the information provided to it by the issuer in order to ensure it is providing correct information to ESMA.

Also, given the information required is relatively straightforward and, in many cases, better known by the NCA than the issuer, it is unclear why issuers should be required to provide this information to NCAs. For example, NCAs will know the content to be reported in respect of the national identifier, related national identifier, sending member state and receiving member state more easily than the issuer and its advisers.



Furthermore, we understand that some of the information that would be required by the proposed draft RTS is already required to be reported to ESMA by the ICSDs and market operators pursuant to other supervisory reporting requirements (e.g. under MAR). As a result of those requirements, the ICSDs and market operators are already requiring issuers to report information to them, so that they can pass it on to NCAs and ESMA. The European Commission is currently undertaking a Fitness Check on Supervisory Reporting in relation to reporting requirements in force at the end of December 2016. The background to this is concerns raised by market participants in relation to overlaps and inconsistencies between reporting requirements and an excessive number of reporting requirements. So there is already an acknowledgment by the official sector that overlaps in reporting requirements need to be addressed.

We therefore strongly encourage ESMA to re-consider the proposal to require issuers to report information to NCAs and not to proceed with draft Article C(2a). Rather, ESMA should consider whether it can obtain the necessary information it needs via other reporting frameworks that are already in place. If there is any outstanding information that ESMA would not already have under those other reporting frameworks, NCAs should report to ESMA in accordance with the draft RTS without placing additional burdens on issuers.

<ESMA_QUESTION_PR_17>

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

<ESMA_QUESTION_PR_18>

We have nothing to add to the points raised in our responses to Q14 – 17 above.]

<ESMA_QUESTION_PR_18>

Advertisements

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

<ESMA_QUESTION_PR_19>

As noted in our general remarks above, the wide definition of “advertisement” is likely to mean that any specific obligations relating to advertisements could be problematic when they are applied in practice to the very wide range of “communications” to which they relate. An example might be conversations that an experienced retail investor has with their broker on a frequent basis. Some parts of those conversations may at times fulfil the definition of “advertisement” under the Prospectus Regulation. In that context, it

might not be realistic, or indeed necessary from an investor protection perspective, to expect the part of the conversation that is an “advertisement” to comply with the RTS as proposed (for example, by clearly identifying the website where the prospectus is published or will be published).

It is for this reason that ICMA previously suggested that the term “communication” in the Level 1 text be interpreted to mean a communication that is of general import or is widely disseminated, and not a bilateral communication. We note that ESMA provides some examples of the types of communication that it considers to be captured by the new definition of advertisement in paragraph 131 of the consultation paper. These examples appear to be helpful and generally in line with the concept of a communication that is widely disseminated (regardless of whether each individual communication is bilateral or not), rather than a bespoke or specific bilateral communication that might happen on a one-off basis, such as the example given above.

However, concerns still remain in relation to how certain elements of the proposed draft RTS will apply in practice.

In relation to proposed draft RTS Article 12.1, which sets out requirements relating to the identification of the prospectus in an advertisement, we encourage ESMA to consider the following points.

1. Issuers of non-equity securities, who typically publish their prospectuses on the website of the relevant regulated market, are unlikely to have control over the direct link to the prospectus. A link to a webpage where the prospectus is or is likely to be published would be more practical for those issuers, and it is unlikely to be significantly more burdensome for investors to find the prospectus if a hyperlink to a specific webpage is given. Therefore it would be helpful if sub-paragraph (b) were to be amended to allow flexibility to link directly to the prospectus or a specific page of the website where the prospectus is published or will be published.
2. Sub-paragraph (b) currently applies to advertisements disseminated by “electronic means”. We believe ESMA intends to capture only advertisements disseminated by **written** electronic means, rather than Skype calls, for example, but it would be helpful if sub-paragraph (b) were to be clarified on that point.
3. The circumstances in which sub-paragraph (c) applies are currently unclear. The current drafting of the proposed draft RTS appears to suggest that this requirement (i.e. for the advertisement to contain information to identify the prospectus and offer or admission to trading) applies to all advertisements relating to a public offer or admission to trading on a regulated market. However, paragraph 136 of the consultation paper suggests that this requirement only applies to advertisements disseminated by written electronic means, which seems to be a more sensible approach. The drafting of sub-paragraph (c) should be amended so that it is clear that it applies only to advertisements disseminated by written electronic means. |

<ESMA_QUESTION_PR_19>

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



<ESMA_QUESTION_PR_20>

PRIIPs Delegated Regulation 2017/653 provides that a comprehension alert should be included in a KID when the PRIIP does “not meet the requirements laid down in points (i) - (vi) of Article 25(4)(a) of [MiFID II]”.

Proposed draft Article 12.2(c) therefore appears to be a refinement of this requirement in respect of advertisements and so seems unobjectionable, **but only to the extent that Article 12.2 is amended so that it applies to written advertisements only.**

This is because it is unlikely to be feasible for market participants to determine whether the PRIIPs comprehension alert is required in all oral communications that could possibly come within the definition of “advertisement”. For example (as mentioned in our response to Q19 above), a conversation between a retail investor and their financial adviser regarding possible changes to their investment portfolio might include elements that could be classed as an “advertisement”. While ESMA’s statements in paragraph 131 are helpful in indicating that such conversations might not be caught by the definition of advertisement (see response to Q19 above), if such elements were to be viewed as within the advertisements regime, it is unlikely to be practicable for the financial adviser to decide during the course of the conversation with the retail investor whether the PRIIPs comprehension alert is required on the basis of the test in Article 12.2(c).

Furthermore, the PRIIPs comprehension alert (“You are about to purchase a product that is not simple and may be difficult to understand”) was drafted for the PRIIPs KID and is therefore inherently more appropriate for a written communication.

More generally, ESMA may wish to consider whether re-purposing the PRIIPs comprehension alert for the purposes of advertisements under the Prospectus Regulation could be confusing for retail investors, and cut across the warning that is proposed by draft RTS Article 12.2(b), which quite correctly states that potential investors should read the prospectus before making an investment decision. In other words, a retail investor should not be told they are “about to purchase” the product when they read or hear an advertisement. Rather, they should be directed to the prospectus before making an investment decision, in line with the warning that is required pursuant to Article 12.2(b).

Separately, it would be helpful to know whether ESMA views the criteria in draft RTS Article 12.2(c) as conjunctive or not. In other words, is the comprehension alert only required where the summary includes or will include a PRIIPs KID and the product is also complex under MiFID II, or is the comprehension alert required in three scenarios – (1) where the summary includes or will include a PRIIPs KID (and therefore a comprehension alert), (2) where the product is complex under MiFID II, and (3) the summary includes or will include a PRIIPs KID **and** the product is complex under MiFID II? |

<ESMA_QUESTION_PR_20>

Q21: Do you agree with the requirements suggested for Article 12 of the RTS? If not, please provide your reasoning.

<ESMA_QUESTION_PR_21>

We appreciate the general intention behind the provisions in Article 12. However, there are some concerns in relation to how the proposals will work in practice, particularly where they apply to oral advertisements.

Article 12.1: Please see our response to Q19 above for suggestions in relation to Article 12.1.

Article 12.2:

1. As noted in our response to Q20 above, the requirements in Article 12.2 are unlikely to be practical in the context of oral advertisements, particularly given the wide definition of the term “advertisement”. As such, **it is important that Article 12.2 is amended so that it applies to written advertisements only.**
2. The term “retail investor” is not used in the Prospectus Regulation and is not defined in the proposed draft RTS. It would be helpful if the RTS were to define this term, for example by reference to MiFID II.

Article 12.3: Article 12.3 should also be **restricted to written advertisements only** (i.e. the second sentence should be deleted and the word “written” should be included in the first sentence). This is because the requirement in the second sentence that the purpose of the oral communication be clearly identified at the beginning of the message is unlikely to be workable in practice. For example, conversations between investors and their financial advisors or brokers may be frequent and contain elements that fall under the definition of “advertisement” and elements that do not. Those conversations may also be initiated by the investor, rather than the financial advisor or broker. In those circumstances, it is not clear how the financial intermediary could practically ensure compliance with proposed draft Article 12.3. Furthermore, the requirement in relation to oral advertisements seems particularly unnecessary in relation to financial intermediaries dealing with professional clients or ECPs, who do not need to be told what the purpose of the communication is, because they are professionals and it will be obvious from the context.

Article 12.4: The purpose of Article 12.4 appears to be to ensure that written advertisements are recognisable as such so that retail investors do not confuse an advertisement with the prospectus. However, this requirement is already contained in the Prospectus Regulation at Article 22.3 (“*Advertisements shall be clearly recognisable as such*”). In addition, proposed draft RTS Article 12.2 and 12.3 will impose requirements for various warnings and the word “Advertisement” to be included in a prominent place on written advertisements. Article 12.4 therefore seems redundant. It could also potentially cause confusion in practice by imposing an unclear and subjective requirement on issuers. As such, **Article 12.4 should be deleted.**

As a more general comment, it is not clear how the advertisement provisions will apply to a securities note that might be circulated without the relevant registration document or URD and *vice versa*. From the wide definition of “advertisement”, there is a risk that there are scenarios in which those documents might be interpreted to be “advertisements”. This serves to illustrate the concerns in relation to the very wide definition of the term “advertisement”, and it would be likely to be confusing for investors if those documents complied with the RTS (e.g. by having the word “Advertisement” in a prominent place). However, ICMA assumes that, where documents are component parts of a prospectus and are subject to the prospectus requirements, they are **not** subject to the advertisements regime and do not need to comply with the draft RTS.

<ESMA_QUESTION_PR_21>

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

<ESMA_QUESTION_PR_22>

As noted in our response to Q21 above, it may be impractical for the requirements relating to warnings in advertisements to apply to oral advertisements. **Proposed draft RTS Article 12.2 should therefore be amended so that it applies to written advertisements only.**

<ESMA_QUESTION_PR_22>

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

<ESMA_QUESTION_PR_23>

To the extent the comments above are not addressed, there are likely to be relatively significant costs for issuers and financial intermediaries (which are likely to be passed on to issuers or investors through financial intermediaries' fees) in training staff and monitoring compliance on an ongoing basis with the requirements related to oral advertisements. Those costs are likely to vary across firms, depending on the nature of their business.

In addition, the proposals could contribute to increased costs for retail investors. This is because the requirements relating to advertisements disseminated to retail investors could be viewed as a further disincentive to issuance of bonds directly to retail investors, which could result in a further decline in the availability of bonds that can be bought directly by retail investors (who may need access to fixed income securities e.g. during their retirement). Those retail investors may therefore face increased costs associated with investing via funds.

In addition to the points raised above, we also note that the proposed requirement in draft RTS Article 13 to disseminate amended advertisements following the publication of a supplement to the prospectus is problematic from a number of perspectives. This was originally discussed in [ICMA's response](#) to the ESMA consultation on this provision in the context of the PD II regime. Those concerns are likely to be increased in practice by the newly expanded definition of "advertisement".

- A key concern is that the obligation to disseminate an amended advertisement applies regardless of whether the new factor, material mistake or material inaccuracy detailed in the supplement has rendered the contents of the advertisements materially inaccurate or misleading or simply technically and insignificantly inaccurate and misleading. Indeed, investors who see an amended advertisement specifying immaterial or insignificant changes could be misled into thinking that the corrected information is more important than it really is. **This concern could be addressed by adding the word "materially" before the words "inaccurate or misleading" at the end of draft RTS Article 13.1.**
- The requirement to disseminate an amended advertisement through the same means as the original advertisement has always been problematic in the context of certain types of advertisements

such as leaflets that are available at retail bank branches (how can one know that the retail investors who picked up the original leaflet will also pick up the amended leaflet?). Questions around the practicality of this requirement may increase in the context of the new regime, which captures a wider range of advertisements.

- ESMA Prospectus Q&A 99 in relation to the interpretation of the requirement to disseminate an amended advertisement in the context of roadshow presentations is helpful and is an example of the type of Q&A that should be carried forward, to the extent draft RTS Article 13 is adopted. |

<ESMA_QUESTION_PR_23>

Supplements

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

<ESMA_QUESTION_PR_24>

Yes, we agree with the proposed approach.

While our general view remains per the [ICMA 2013 response to the PD II consultation on supplements](#) (i.e. it should be for issuers to decide whether a specific situation meets the test for publishing a supplement and it is not necessary for legislation to prescribe specific instances of when a supplement is required), market participants are now familiar with these requirements and we do not believe there is any need to change them. Any changes will result in increased costs for issuers as they will need to spend time analysing and understanding the new provisions with their legal advisers.

Please also see our general remarks relating to supplements in the Introduction above and responses to other questions on supplements below. |

<ESMA_QUESTION_PR_24>

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

<ESMA_QUESTION_PR_25>

Profit forecasts: As noted in ICMA's [response to the consultation on the format and content of the prospectus](#) dated 28 September 2017, our very strong view is that a profit forecast should **not** become mandatory for prospectuses for non-equity securities, on the basis that there would be no benefit for investors unless the profit forecast is so extreme that it will impact an issuer's ability to make payments under the bonds (in which case, it will already need to be disclosed under the general disclosure test in Prospectus Regulation Article 6).



We are hopeful that this view will be reflected in the final RTS on format and content of the prospectus. If that is the case, it would mean that the new trigger for a supplement in Article 16.1(b) would not be relevant for non-equity prospectuses (unless the issuer chooses to include a profit forecast in the prospectus, which is likely to be rare).

Working capital statement for depositary receipts: We do not express a view as this is not an area of focus for ICMA.

<ESMA_QUESTION_PR_25>

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

<ESMA_QUESTION_PR_26>

Yes. Our general view remains per the [ICMA 2013 response to the PD II consultation on supplements](#) i.e. it should be for issuers to decide whether a specific situation meets the test for publishing a supplement and it is not necessary for legislation to prescribe specific instances of when a supplement is required. We therefore support the approach of carrying forward existing PD II Level 2 provisions on the basis that market participants are now familiar with the provisions, and do not believe additional triggers need to be included.

<ESMA_QUESTION_PR_26>

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

<ESMA_QUESTION_PR_27>

Assuming the comments noted above related to profit forecasts are taken on board, there should be limited costs for market participants as a result of these provisions being adopted.

However, we take the opportunity to note some continuing points of uncertainty related to supplements. These are not new points, but are repeated here because clarification on these points would help to manage costs for market participants associated with the uncertainty surrounding them.

- **Grandfathering:** As noted on page 8 of [ICMA's 2017 response to ESMA's CP on format and content of the prospectus](#), it would be helpful for ESMA to confirm, for the avoidance of doubt, that a supplement after 21 July 2019 to an existing prospectus approved in the months prior to 21 July 2019 will not trigger a requirement to prepare that supplement (or, indeed, a completely new prospectus) in compliance with the new Prospectus Regulation.
- **Withdrawal rights:** As noted on page 8 of [ICMA's 2017 response to ESMA's CP on format and content of the prospectus](#), clarification that the investor withdrawal right will not be triggered where a wholesale prospectus is supplemented would also be welcome. This would reflect what we understand to

be the intention that investor withdrawal rights should only apply where the prospectus relates to an offer of securities to the public that is not exempt from the obligation to publish a prospectus. A simple clarification would avoid lengthy debates and the risk that there might be differing interpretations in different jurisdictions, as occurred in the case of the PD II amendments.

- **Notification of a supplement to investors:** Also as noted on page 8 of [ICMA's 2017 response to ESMA's CP on format and content of the prospectus](#), the obligation on financial intermediaries to inform investors of the possibility of a supplement being published and contacting investors on the day when the supplement is published may be challenging for underwriters, who may not be aware that a supplement is going to be published by the issuer.
- **Updating securities note information by means of a supplement:** As noted on pages 10 - 11 [ICMA's 2013 response to the PD II consultation on supplements](#), clarity on whether supplements may be used to amend securities note information in a base prospectus (e.g. to add a change of control provision or provisions related to index-linked notes to a base prospectus that did not previously include these provisions) would also be welcome. |

<ESMA_QUESTION_PR_27>

Publication

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

<ESMA_QUESTION_PR_28>

Yes. The other provisions of Article 6 of the Second Commission Delegated Regulation are covered by PR Article 19(2) and Article 21. |

<ESMA_QUESTION_PR_28>

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

<ESMA_QUESTION_PR_29>

Yes, we agree that no other publication provisions of the new Prospectus Regulation need to be specified by way of RTS. |

<ESMA_QUESTION_PR_29>

Q30: Do you believe that the proposed publication provisions will impose additional costs on issuers, offerors or persons asking for admission to trading? If yes, please



specify the type and nature of such costs, including whether they are one-off or on-going, and quantify them.

<ESMA_QUESTION_PR_30>

The proposals are unlikely to impose significant additional costs on issuers. |

<ESMA_QUESTION_PR_30>