

European Securities and Markets Authority
103 Rue de Grenelle
75007 Paris
France

(Submitted online at www.esma.europa.eu under the heading "Your input> Consultations")

6 January 2012

Dear Sirs,

ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU – Further consultation

The International Capital Market Association (ICMA) is responding to the above.

ICMA is a self regulatory organisation and an influential voice for the global capital market. It represents a broad range of capital market interests including global investment banks and smaller regional banks, as well as asset managers, exchanges, central banks, law firms and other professional advisers. ICMA's market conventions and standards have been the pillars of the international debt market for over 40 years. See: www.icmagroup.org.

ICMA is responding in relation to its primary market constituency that lead-manages syndicated debt securities issues throughout Europe. This constituency deliberates principally through ICMA's Primary Market Practices Sub-committee¹, which gathers the heads and senior members of the syndicate desks of 27 ICMA member banks, and ICMA's Legal and Documentation Sub-committee², which gathers the heads and senior members of the legal transaction management teams of 19 ICMA member banks, in each case active in lead-managing syndicated debt securities issues in Europe. ICMA has also sought feedback from its structured product constituency.

We set out our response in the annexes to this letter and would be pleased to discuss it with you at your convenience.

Yours faithfully,

A handwritten signature in black ink, appearing to read "R. Ewing", with a large, sweeping flourish at the end.

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¹ <http://www.icmagroup.org/About-ICMA/ICMAs-Committees/Primary-Market-Practices-Sub-committee.aspx>.

² <http://www.icmagroup.org/About-ICMA/ICMAs-Committees/Legal-and-Documentation-Sub-committee.aspx>.

Preliminary remarks

Retail cascades – concept and availability of data

It seems from the consultation that ESMA considers ‘retail cascade’ offers to mean, effectively, indirect offers by issuers via distributors they have ‘appointed’ in some way. This is not so. Retail cascades have generally involved independent offers beyond issuers’ control and knowledge (though generally expected and often hoped for). Issuers have recently become involved to an extent in cascade offers because the Prospectus Directive (**PD**) regime compelled them to do so (in terms of supplementing and passporting their prospectuses). This preceded establishment of the Markets in Financial Instruments Directive (**MiFID**) regime, which now governs intermediary conduct of business. Intermediary-level disclosure (such as individual intermediaries’ standard terms of business that can run into dozens of pages each) should be regulated via MiFID and not via the PD. These aspects are further discussed below, notably in response to Q.2 distinguishing further between:

- single indirect ‘harmonised’ retail offerings (indirect offerings organised by issuers);
- ‘pure’ retail cascade offers (offerings wholly independent of issuers); and
- PD ‘restricted’ retail cascade offers (offerings generally independent of issuers, but covered by their PD-approved prospectuses).

ICMA is only aware of some anecdotal feedback on current practice regarding retail cascades. This is because of the relatively low level of issuance made available to retail investors in the EU (though this may change to an extent with the current turbulence in the institutional markets) and the ‘national’ nature of most such issuance (both partly as a result of the PD regime). The ‘national’ nature of most such issuance in turn complicates matters, because of national market commercial traditions/preferences and some national differences in PD regime interpretation. Responses to ESMA’s questions therefore have to be on a qualitative rather than a quantitative basis.

Purpose of a prospectus

A prospectus has several overlapping purposes – namely:

- (a) to help an issuer market its debt securities issue, by conveniently disclosing (i) the terms of such securities once issued and (ii) the issuer’s financial and business prospects (and so its likelihood of being able to abide by such terms); some very limited indication of how the securities can be acquired might also be separately given, depending on how the securities are to be marketed;
- (b) in so doing, to eliminate any information asymmetry between the issuer and prospective investors in relation to their investment decision, by requiring the prospectus to include all material information known by the issuer (with liability for loss caused by error or omission); and
- (c) to serve as a point of reference for logistical information during the subsequent life of the debt securities.

Supplement mechanics

Under the PD, supplements can, and usually do, operate differently in relation to a standalone prospectus and a base prospectus.

A ‘standalone’ prospectus is approved and published in relation to a specific offer (or series of offers) and/or application for a specific admission to trading on an EU regulated market. Any supplement will therefore necessarily be published in relation to offers/applications that are already under way and for which offer acceptance withdrawal rights are therefore likely to be relevant. This will indeed be required further to a “significant new factor, material mistake or inaccuracy relating to the information included in the prospectus” under the PD. It is an undesired, and so hopefully minority, scenario.

The same may equally apply in the context of an offer/application pursuant to a base prospectus, generally once the relevant final terms have been filed with the home (and any relevant host) competent authorities – this being a similarly minority scenario. However, base prospectuses are also supplemented, during their 12 month validity period, ahead of launching any specific offers/applications, so as to bring them to the same ‘starting point’ as a standalone prospectus on its approval – this being a planned and frequent scenario. In this case, withdrawal rights are generally irrelevant as such supplements will be hopefully timed such that there are no pending offers. An ability to publish issue-specific supplements is crucial in this respect.

The PD requires “significant” new information to be mentioned in a supplement. It does not, however, prohibit other information from being mentioned in a supplement. As issuers face liability if significant information is not mentioned in a supplement, then they have to be allowed full discretion to decide what information is to be mentioned in a supplement.

Grandfathering

Whatever approach to the substance of the consultation topics is ultimately advised by ESMA (and then potentially followed in the legislative process), sufficient advance notice will be needed as to what any new provisions shall be and when they will start applying to new issuance of securities – be it in the standalone or base prospectus contexts.

The consent to use a prospectus in a retail cascade

Q1: In practice, for what types of securities are retail cascades used? In ESMA FAQ No. 56 it was assumed that retail cascades are only used for distribution of debt securities. However, the regulation introduced by the Amending Directive in Article 3.2 Prospectus Directive does not differentiate between equity securities and debt securities in this regard but applies to all kind of securities.

Retail cascades are certainly relevant to the distribution of newly issued debt securities. No response is made to this question otherwise, given the debt-focused nature of ICMA’s work. Other constituencies are likely to respond in this respect.

Q2: Please describe situations in which a retail cascade is normally used, how a retail cascade may be structured and the modalities of such retail cascade. What different models of retail cascades are used in practice?

ICMA published in 2007 a guidance note³ on retail cascades (the **2007 ICMA Guidance**). This explained a ‘retail cascade’ as involving the issuer selling the securities to investment banks underwriting the issue who, in turn, sell them to retail distributors, thereby creating a distribution chain. Over a period of time ranging from several days to several months, which frequently extends beyond the issue date of the securities (and also the date of any admission to trading), the retail distributors then sell the securities to their clients at prices that may vary from sale to sale, generally reflecting market conditions at the time of sale.

More generally, distribution chains might be ‘integrated’ to various degrees, where the ‘downstream’ intermediary has arrangements with, or is at least known to, the immediate upstream intermediary and sometimes further up (potentially, but not always, all the way to the issuer). Chains might otherwise be ‘fragmented’, where the upstream intermediaries and/or issuer have limited knowledge of an immediate downstream intermediary and no knowledge of any subsequent downstream intermediary. This is similar in some respects to someone buying computers wholesale from the producer at its factory – the buyer may be consuming the computers internally (e.g. for a large corporate network) or selling them on (either wholesale or retail). The intermediaries involved can operate on a ‘principal’ basis (with the relevant securities being actually acquired at their own risk for onward distribution) or on an ‘agency’ or ‘referral’ basis (where investor orders are effectively transmitted back up the chain, individually or on an aggregated basis). A distribution chain can be institutional and/or retail in terms of the actual initial investors.

³ <http://www.icmagroup.org/ICMAGroup/files/8e/8e46706d-13dd-476f-855d-432653a7bad1.pdf>.

An individual distribution chain could include any or all of the above (in varying combinations). Ultimately this will depend, regarding aspects within its control, on the issuer's choice based on applicable law (such as the PD) as well as considerations such as targeted investor bases, likely demand, logistical cost/benefit analyses, commercial reputations, national/cultural traditions, etc. Some re-selling will always remain, to an extent, beyond even the most controlling issuer's reach and will depend on applicable law (again), background market logistics and other dynamics.

Intermediaries in such distribution chains may be 'acting in association' with the issuer, but rarely so (and any arrangement may not necessarily amount to a formal bilateral contract). At one end of the spectrum, a distribution chain effectively amounts to a **single indirect but 'harmonised' offering** (all of which is practically able to be disclosed in the issuer's prospectus). At the other, 'cascade', end of the spectrum, the issuer has no knowledge of the subsequent offerors or their offers and is unable to make any disclosure in this respect (beyond of course stating its lack of knowledge). These cascade offerings are arguably the more efficient form of distribution from an economic subsidiarity viewpoint (i.e. that persons closest to something are best able to deal with it), in contrast to other more 'centralised' forms of offering.

Retail cascade offering was consistent with the regulatory regime preceding the PD, which envisaged prospectus disclosure on the initial public offer of any securities (with subsequent disclosure arising under stock exchange ongoing transparency rules). The PD provides that any (not just the initial) public offer within its scope must either be exempt or be subject to an approved prospectus (despite ongoing disclosure after admission to trading being also mandated under the Market Abuse and Transparency Directives). With this, issuers have been effectively forced to abandon the **'pure' form of retail cascade**, since intermediaries have neither the ability nor the resources to authoritatively publish their own approved prospectuses (only having at their disposal past regulatory filings by issuers and/or press reports, which may well be stale or even initially erroneous). Retail cascades have therefore been (i) somewhat restricted as below, (ii) replaced with more direct forms of distribution, and residually (iii) succeeded by a reduction in European retail issuance. The **'restricted' retail cascade** model is consistent with the current iteration of the PD (subject to any national implementation variations), in that it operates on the basis that (i) the issuer's prospectus omits information on the cascade offers on the basis of PD Regulation Art.23.4 (as ESMA has historically considered and as described further in the 2007 ICMA Guidance) and (ii) the issuer otherwise (notably regarding the terms of the securities themselves and the description of the issuer) keeps its prospectus up to date for the duration of the cascade offers (with the consent debate arising in this context).

An example distribution process used by one financial issuer to distribute retail structured products in one particular EU Member State is set out in Annex 2.

ICMA is unaware of any data on the relative prevalence in practice of the different distribution models (including their combinations), from the single indirect 'harmonised' offering, via the PD 'restricted' retail cascade, to the 'pure' retail cascade.

Q3: Do you agree with ESMA's understanding of retail cascades and in particular that the terms and conditions of the offer by the intermediaries may not differ from the terms and conditions in the prospectus or final terms? If not, please specify which terms and conditions may differ from those stated in the prospectus or final terms and who would be responsible and liable for such information.

ESMA's proposed understanding set out in the consultation is incorrect. The position set out in ESMA FAQ No.56 is correct. The response to Q.1 above includes some initial information on how specific cascade 'offer' terms will vary from the terms and conditions in the prospectus or final terms. Annex 3 (extracted from the Annex to the 2007 ICMA Guidance) sets out in detail how the information items in section 5 of PD Regulation Annex V (and so also in section 5 of PD Regulation Annex XII) would be addressed. It indicates that the only information certain to be able to be included, and not omitted on the basis of PD Regulation Art.23.4, would be that relating to the duration (because of the obligation to supplement) and location (because of the obligation to passport) of the offers covered by the (base) prospectus. Other information should be disclosed by intermediaries directly to their investor clients under MiFID.

Cascade pricing will usually follow 'market' conditions. However, some structured securities distributed on a more integrated basis involving detailed formal distribution arrangements may well

provide an alternative specific pricing mechanism, notably regarding valuation methods/models, etc. Some (but not all) cascade offer pricing information could consequently be made compatible with the issuer's prospectus / final terms – if the 'market conditions' pricing disclosure is allowed to be appropriately drafted. The issuer's prospectus / final terms will however generally distinctly disclose the pricing of the issuer's own initial offer.

The treatment of other (non-pricing) cascade offer information is more difficult under the PD, as intermediaries generally sell on the basis of their own specific standard terms. The pure form of cascade is effectively unworkable under the current PD – hence reliance on the 'restricted' retail cascade and Art.23.4 omission as noted above and in the ICMA 2007 guidance note. The more an issuer mandates and controls the detail (either by arrangement or through narrowing the coverage afforded by its prospectus), and accordingly further restricts the adaptive flexibility of cascade offers, the more likely it is that the related disclosure can be included in the issuer's prospectus. However, mandating such an approach would also result in some further reduction in the choice of offerings available to retail investors in Europe and a concomitant reduction in funding opportunities for European enterprises. Such other (non-pricing) cascade offer information should be covered under MiFID.

Q4: Can you provide examples of scenarios whereby the price would differ from that set out in the prospectus? Would you deem this to be a change of the terms and conditions?

The issuer's initial offer documented in the prospectus / final terms is set at a fixed price. It is difficult to envisage scenarios whereby cascade offer prices would not differ from the original price. Different prices do not relate to the 'terms and conditions' of the securities themselves, but to the terms of each offer of such securities.

Q5: What information required according to the Prospectus Regulation cannot be provided in a prospectus or base prospectus/final terms in case of retail cascades but is only provided by the intermediary at the time of the sub-offer? How and when is such information communicated to the investor? Please specify and explain

As noted above, Annex 3 (extracted from the Annex to the 2007 ICMA Guidance) sets out in detail how the information items in section 5 of PD Regulation Annex V (and so also in section 5 of PD Regulation Annex XII) might be addressed. Annex 3 indicates that the only information certain to be included and not omitted on the basis of PD Regulation Art.23.4 would be that relating to the duration and location of the offers covered by the (base) prospectus. This can be ascertained further from the detailed examples set out in the response to Q. 2 above and Q.9 below. In particular, downstream distributors may simply be unknown. If appointed (and so known), they may be in huge numbers (several thousand, each with their own individual and detailed terms of business running to several pages) that may change continuously and irrespective of any specific offers under a base prospectus (i.e. the issuer will have consented to its base prospectus being used by such intermediaries but will not know in advance which ones will choose to actually participate in any specific securities issuance).

Other information should be communicated to investors by the relevant intermediaries under MiFID.

The PD definition of 'public offer' (a communication presenting sufficient information so as to enable an investor to decide) is much wider than a public offer in the general commercial sense (a contractual offer to the general public with an accompanying logistical machinery). However, many of the information items in section 5 of PD Regulation Annex V specifically require disclosure, and so the existence, of logistical machinery for a full public offer in the commercial sense. An individual intermediary in a retail cascade might not be running a formal application process (with e.g. newspaper application forms for submission by a specific deadline), but simply advising it has specified securities in stock for sale. Investors would then contact the intermediary to indicate interest, check the current price and available volume and then, if satisfied, execute a purchase. Explanation of the intermediary's applicable terms of sale should be required in that context under MiFID.

Q6: Do you consider it necessary to clarify in the prospectus who is responsible for information that is provided by the intermediary to the investor? ~~Validity of a prospectus and responsibility of the issuer or the person responsible for the prospectus. Duration of consent~~⁴

No. The prospectus clearly sets out the information that the issuer is taking responsibility for. Other information should be provided by the relevant intermediary under MiFID (which has its own distinct responsibility regime), as well as for logistical reasons (if only so that the investor knows how much to pay and where).

Q7: Do you agree that the period for which consent to use a prospectus may be granted cannot extend beyond the validity of the prospectus and the period in which a supplement is possible according to Article 16 Prospectus Directive? If not, please specify how in particular a standalone prospectus can be kept valid once the period according to which a supplement is possible has lapsed.

Agreed, but only to an extent. There is a distinction in this respect between prospectus approval for admission to trading on an EEA regulated market and approval for non-exempt offers within the EEA. An out of date prospectus (either because new 'significant' information has arisen and not resulted in publication of a supplement or because the 12 month maximum validity period has elapsed) does not validly satisfy the PD requirement regarding non-exempt public offers. Consequently explicit consent purported to be given by an issuer to an intermediary to rely on the issuer's out of date prospectus would result in any related public offers being made in breach of the PD.

Under Article 16 of the PD, significant information is subject to a supplement if it "arises or is noted [before] 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". An issuer generally chooses to limit the duration of the offering period covered by its prospectus in order to avoid an open-ended (or at least 12 month) obligation to supplement the prospectus. The issuer is therefore always able to supplement the prospectus until the end of the offering period (which it has specified in the prospectus), so reference to a limiting nature of "the period in which a supplement is possible according to Article 16 Prospectus Directive" in this question seems incorrect.

Distinctly regarding withdrawal rights in the context of prospectus approvals for non-exempt offers within the EEA, these apply to "investors who have already agreed to purchase [...] before the supplement is published [...], provided that the [significant information] arose before the final closing of the offer to the public and the delivery of the securities." That is to say investors with orders pending prior to publication of the supplement are able to withdraw those orders. In a cascade context, the securities may well have already been delivered by an intermediary to some investors before closing of the offering period covered by the issuer's prospectus, so that the investors concerned do not have pending offers to withdraw. Incidentally, the issuer may well make its consent conditional on some form of early termination mechanics (see the "Early termination notice methods" column in the merely illustrative and hypothetical table in Annex 4) – this would enable the issuer to prevent any further orders being placed that would subsequently be subject to the withdrawal right relating to the supplement. The supplement, in turn, would disclose the resumption of the consent.

Regarding liability, consent granted by the issuer to use its prospectus should cause any liability for incorrect prospectus disclosure for the related offers to be redirected to the issuer. Cascade intermediaries generally have no contact with the issuer, let alone authoritative knowledge – otherwise they would be able to produce their own prospectus and not, in this respect, need consent to use the issuer's prospectus. Of course, liability for cascade offers from other angles (notably MiFID) should attach directly to the intermediaries concerned.

Q8: In relation to a standalone prospectus, do you agree that once the offer which is the subject matter of the initial prospectus has been closed, financial intermediaries subsequently offering the securities in a retail cascade should prepare a new prospectus which could incorporate by reference the issuer's initial prospectus?

Once the offering period which is covered by the initial prospectus has ended, financial intermediaries subsequently making non-exempt offers should indeed prepare a new prospectus. However, as noted above, they may well have no ability to do so – hence the 'restricted' retail

⁴ The struck-through language was only included in the question as set out in Annex I to the consultation and is therefore assumed to be a typographical error.

cascade model compatible with the current PD that involves the issuer's prospectus being valid for a defined cascade offering period.

Furthermore, any new prospectus as mentioned above should not incorporate the issuer's initial prospectus by reference. Issuers accept responsibility for incorrect prospectus disclosure relating to their own offer and cascade offers for which they have consented that their prospectus be used. An issuer should not be made liable for losses, regarding incorrect information in its prospectus, that arise because such incorrect information is perpetuated, without the issuer's consent, by other intermediaries through their own prospectuses.

Q9: Is it the case that the identities of the financial intermediaries, the conditions attaching to the consent and the duration of the consent are generally known at the time of the approval of the prospectus or at the time of filing the final terms? At which stage do you generally determine the precise way of distribution including the decision of which financial intermediaries to use for a specific offer?

Intermediary identities and consent duration and other conditions are not known at the time of the approval of a base prospectus as most, if any, offers to be made under it have not been envisaged at that time. This information (except for consent duration and geographical location) may well still not be known at the time of approval of a standalone prospectus or of filing of final terms. In some cases, appointed (and so known) intermediaries may be in huge numbers (several thousand, each with their own individual and detailed terms of business) that may change continuously and irrespective of any specific offers under a base prospectus (i.e. the issuer will have consented to its base prospectus being used by such intermediaries but will not know in advance which intermediaries will elect to actually participate in any specific securities issuance).

For example, a European car manufacturer will target raising a specified volume of funds in a set year at a specified weighted average cost (including the cost of any prospectus compliance) – this may well be revised during the year further to its own business developments (e.g. unexpectedly curtailed factory expansion plans) or further to market dynamics (e.g. much cheaper than expected funding because of macro-economic developments). It will then seek to issue securities (or otherwise raise funds) in various markets at various times in order to meet this funding goal.

For example, it may be informed by some intermediaries that:

- it would likely be able through their efforts to issue €200m to retail investors in a particular EU Member State over a three week period (so including two weekends' worth of media reporting that retail investors in that jurisdiction tend to react best to); but
- up to an extra €100m in demand might arise via other intermediaries during this period once news of the issuance spreads.

Seeking to individually secure all potential distributors in advance would be (i) not cost effective for the issuer, (ii) incompatible with the issuers' funding timeline and/or (iii) simply impossible (intermediaries may refuse to commit resource to transactions until they have reached certain levels of personal confidence, which may in some cases involve observing market developments as the offer period unfolds). The issuer could limit itself to offering just via the initially named distributors, but at the cost of foregoing up to about €100m that could compensate for any unexpected shortfall in the main targeted €200m and that it would residually have to seek elsewhere (quite possibly away from EU retail investors). Investors in the main targeted €200m would also lose out in terms of proportionally reduced secondary liquidity. Some of this could be compensated by a hard underwriting commitment from some of the intermediaries involved – but again at a cost that might well impact the issuer's targeted average cost of funding (and such commitments may be getting more difficult to secure in any case with shrinking bank balance sheets).

A similar situation is faced when the issuer is advised that:

- it would be able to raise €800m in one morning from 400 or so professional accounts; but
- this might increase to €1bn if a prospectus is kept valid for a period of four weeks for non-exempt offers within two EU Member States.

This is because some of the mass of professional accounts are anticipated to either on-sell to retail directly or to intermediaries who will do so. Identifying which in advance would again be (i) not cost effective for the issuer, (ii) incompatible with the issuers' funding timeline and/or (iii) simply impossible

as above. Even after the issuance has occurred, and, say, €1bn has been raised, the issuer may not know, and may never know, what (if any) of that issuance was actually placed with retail investors. If the issuer is unable to facilitate the extra €200m, it may decide to keep the transaction at €800m on a PD-exempt basis (so avoiding EU retail investors) or even decide to seek €1bn in a different market altogether.

As previously noted, an example distribution process used by one financial issuer to distribute retail structured products in one particular EU Member State is set out in Annex 2.

In some cases, the issuer may agree, on a generic basis, to its prospectus being used. In this case, intermediary identities and other specific information will always be unknown and so not able to be disclosed in the prospectus or final terms. Example generic disclosure language relating to such consent is set out at Annex 4. Incidentally, the hypothetical table set out in the Annex is intended to be merely illustrative of the variety of approaches that might be taken.

To summarise, whilst some intermediary identities, consent duration/location and other conditions could be identified at the time of the approval of the prospectus or at the time of filing the final terms, mandating disclosure on this basis would be at a substantial cost to European business seeking funding and to European investors seeking saving opportunities. Regarding the 'restricted' retail cascade model compatible with the current PD, and as previously noted, the only information certain to be included and not omitted on the basis of PD Regulation Art.23.4 would be that relating to the duration and location of the offers covered by the (base) prospectus.

Q10: Is it common practice for agreements with financial intermediaries to be finalized following the approval of the prospectus or the filing of final terms? Can you estimate how often this would happen?

Finalisation of agreements with intermediaries depends on the substance of such agreements. For example, where active participation in essential and complex marketing campaigns is necessary, then it is likely that such agreements will be detailed and entered into in advance of the relevant offering period. However, in some case intermediaries may enter, on a continuous basis, into a general arrangement with issuers relating to any securities issued under their base prospectus – any formal agreements in this case might be finalised at any time. At the other end of the scale, some distribution chains can operate without any such agreements being entered into at all. As noted above, ICMA is unaware of any specific data in this respect.

Q11: Given the fact that in a retail cascade the responsibility of the issuer for the content of the prospectus is subject to its consent to use the prospectus such consent is crucial for the whole prospectus responsibility regime. Therefore ESMA believes that the consent to use the prospectus needs to be public, and furthermore, that it should be stated in the prospectus as is also the case for the general responsibility statement. Do you agree with ESMA's approach to include such consent in the prospectus or base prospectus/final terms?

The proposed approach to compel inclusion of such consent in the prospectus or base prospectus/final terms is incorrect. Ultimately, it is for the intermediary making the public offer to obtain written evidence that it has obtained the issuer's consent if using its prospectus. Investors will in any case have recourse in respect of any loss suffered following publication of a misleading prospectus which relates to the relevant securities: as against the issuer if such evidence of consent is then produced or as against the intermediary (and its MiFID-related insurance / compensation fund arrangements) if not. Prospectuses should be allowed, but not required, to set out a consent principle or some form of generic consent (see Annex 4), to satisfy the requirement for written consent for an intermediary and so eliminate the need for additional consent documentation.

Similarly, an intermediary challenged by a regulator should be able to provide written evidence of the consent it has received.

Mandating publication of the information (i.e. prohibiting offers via intermediaries that are not so published) would therefore bring no material benefit. It would however, with individual issuance likely to be either reduced in size or cancelled altogether as noted under Q.9 above, constrain to an extent the ability of European business to obtain funding and of European investors to seek saving opportunities. Given the practical impossibilities in publishing such information in a retail cascade context, some issuers might commit the additional resources to establishing much more integrated distribution chains for their offerings (so avoiding retail cascades as such) and accept the additional increase in their weighted average cost of funding – but they are likely to be the minority given the

alternatives available to the EU retail markets (though this may to an extent change temporarily given the current extraordinary dislocations in the institutional debt securities markets). Mandating such publication would not therefore seem to be a proportionate requirement. Incidentally, if inclusion of such information in prospectuses is not required, then the application of the PD language regime ceases to be a concern.

Q12: If the above elements are known at the time of approval of the prospectus or the time of filing the final terms, what are the disadvantages (if any) for including this information within the prospectus or final terms?

As noted above, such elements are generally not known. The disadvantages may be limited in merely including, within the prospectus or final terms, limited information that is anyway known by the issuer at the time of prospectus approval or final terms filing. These would probably involve some extra drafting and verification costs, though even such costs should be justified. However, where such information is substantial (thousands of intermediary names), the prospectus would be swamped with information which, as noted in relation to Q.11 above, is of no benefit to investors and could well become stale prior to the end of the offering period covered by the prospectus.

Q13: ESMA believes that the means of publication to be used in relation to the existence of a consent and any conditions attached to it should allow investors and competent authorities to clearly determine the responsibilities of the persons involved. Instead of including the above elements within the prospectus do you believe that there are any other methods of publication for this information that would also provide sufficient transparency and legal certainty? If yes, please specify.

Alternative means of publication are conceivable, notably publication via any of the means allowed under article 14.2 of the amended PD (this is considered to confer sufficient transparency and legal certainty regarding prospectus publication). However as noted under Q.11 above, regarding consent, publication would provide no more transparency or legal certainty than currently – just extra cost.

Q14: Do you consider a supplement necessary in relation to information on retail cascades? Please explain and justify your position, also taking into account different typical situations of retail cascades and any effect such retail cascade related information may have on the assessment of the securities.

On the basis discussed above that no investor or regulator purpose is addressed in mandating inclusion in the prospectus of detailed information on individual consents, then such information is not 'significant' and so should not be subject to a supplement obligation. In this respect, there is no difference between a base prospectus and a standalone prospectus context.

As noted under Q.9 above, no consent information is known at the time of the approval of a base prospectus as most, if any, offers to be made under it have not been envisaged at that time (and different intermediaries are likely to be involved from offer to offer). Consequently, aside from any consideration discussed in this response of rationale for requiring prospectus or other publication of consent, an 'A' classification of the issuer's intent in respect of consent is not mechanically workable – at least unless the 'A' classification encompasses optionality that can be exercised in the relevant final terms.

Q15: In case of standalone-prospectuses:

Q15a) If a supplement is not required, how should the consent to use the prospectus be published?

As noted under Q.11 above, consent to use of the prospectus does not need to be published. If some other need is confirmed, then, depending on the nature of such need, publication, via any of the means allowed under article 14.2 of the amended PD, could be considered.

Q15b) If a supplement is not required, how can it be safeguarded that the investor and the competent authority in the home member state but also the competent authorities in any host member states learn of the new information? Please explain and justify your position, also taking into account issues as e.g. language requirements, filing of such information with the relevant competent authorities and responsibility issues that may arise in respect of such disclosures outside of a prospectus.

This has been addressed in the response to Q.11 above.

Q15c) Without prejudice to the requirement of a supplement, when information on a retail cascade is not known at the time of approval of a prospectus, do you consider it necessary to indicate in a prospectus how such information on retail cascades will be published? Should there be any specific regulation or guidance detailing by what means such information should be published (e.g. requiring publication in accordance with Article 14.2. Prospectus Directive)?

As noted under Q.11 above, consent to use of the prospectus does not need to be published. If some other need is confirmed and some publication method mandated, then disclosing such method in the prospectus should not be logistically challenging.

Review of the provisions of the Prospectus Regulation

Information on Taxes withheld at source

As a preliminary point, the position set out in ESMA FAQ 45 is correct.

Q1: Under the circumstances where taxes on the income of the securities have been withheld at source in a country where the issuer is not acting nor has appointed a paying agent, was such information on withholding tax indeed not disclosed in the prospectus? If necessary to correctly understand the context, please provide additional legal explanations on the withholding tax mechanism.

Where taxes on the income of the securities have been withheld in a country where the issuer is not acting nor has appointed a paying agent, then such withholding is by definition ‘downstream’ and not “at source” and so not able, nor required by the PD, to be disclosed (see further below).

Q2: Are there⁵ cases where a tax on the income of the securities would be withheld at source, which however would not be required to be disclosed in the prospectus in accordance with the current wording of the Prospectus Regulation on tax information? If yes, please provide specific examples.

No.

Q3: Are there cases where the Prospectus Regulation currently requires information on taxes on the income of the securities withheld at source, which will not be levied in practice in that specific case? If so, please provide specific examples and identify any difficulties.

Generally the international debt securities markets operate and are taxed on the basis of no withholding at source. This is because it has been considered that foreign investors (who are therefore not liable to taxation in the issuer’s country) should not be subject to the administrative procedures and accompanying lengthy delays in having to recover, under applicable bilateral double tax treaties, withheld interest. Such withheld interest may even not be recoverable at all if no bilateral double tax treaty has been negotiated between the issuer’s country and the foreign investor’s country. Prospectus disclosure therefore focuses (i) on the residual risk of an (unplanned) withholding at source materialising (and related mitigating provisions) and (ii) putting investors on notice that withholding, other than at source, may apply to them depending on the combination of their personal status and the status of the chain of custody they choose to hold through.

Q4: What information on withholding tax should be required by the Prospectus Regulation in order to ensure that the prospectus provides investors with sufficient information to know the “net” amount that they will receive in accordance with the terms of the securities?

PD article 5.1 requires the prospectus to contain all information which, “according to the particular nature of the issuer and of the securities”, is necessary to enable investors to make an informed assessment of the economic position of the issuer and of “the rights attaching to such securities”. It does not require information on individual investors’ tax positions.

This is because it is impossible to know, much less disclose, what the ‘net’ amount investors receive will be. In terms of any withholding for tax, this will depend on thousands of individual combinations of investor personal status, double tax treaties and the status of the chain of custody investors choose to hold through (which will vary several times per annum as government tax policies are constantly changing). In any case, an investor’s net payment will be subject to other deductions, not least the

⁵ The struck-through language was only included in the question as set out in Annex I to the consultation and is therefore assumed to be a typographical error.

fees of its own custodian. Such information should be disclosed by the relevant intermediary under MiFID. Ultimately any securities of the same type (regardless of individual issuer) acquired by an investor should be subject to the same 'downstream' tax withholding (if any), so it is only withholding at source that an investor might expect to be apprised of in the prospectus. Imposing in the PD any such requirement would therefore be disproportionately burdensome.

Q5: In cases where tax treaties mitigate or prevent applicable double taxation, do you consider it useful for investors to be informed of this fact?

As noted above imposing any such requirement would therefore be disproportionately burdensome.

Index Composed by the Issuer

Set out below are a few preliminary general points regarding proprietary indices.

- Proprietary indices are used as an efficient way to measure the performance of a range of underlying reference assets in a transparent and comprehensible way which investors can readily understand.
- As noted in the consultation, there are a number of "major market indices which are generally known by the large public". These major market indices are sufficiently well understood so that investors do not need to refer to specific index methodology for these and the specific market index being used will simply be specified in the applicable final terms. It is correct that this practice should continue.
- While the existence of major market indices makes the concept of proprietary indices more accessible for investors, it is important that the index description for proprietary indices is made available for investors as this is the key component of any product linked to a proprietary index. The proprietary index description sets out specific index rules for the calculation of the index level so that investors can readily understand what the index is doing. Indices are typically standalone creatures which can be used for a wide range of products. In addition provisions for issues of securities linked to proprietary indices would often be included in the base prospectus – for example, securities features such as adjustments related to a proprietary index.
- Currently a number of issuers include in the final terms the index description or an indication of where information on the index can be found (e.g. the issuer's website). This approach works well currently and there are good arguments that this should be allowed to continue, which can be discussed further should ESMA so wish.

In the consultation, it is proposed that the index description should be part of the prospectus and subject to review in the same way as other prospectus information. Arguments can be made for doing this, but there are practical difficulties with this approach in the programme context. In particular:

- the form for a particular index will not necessarily be known at the time a base prospectus is prepared (but, as noted above, the base prospectus is likely to contemplate index-linked issues);
- it is the case that a number of issuers issue securities linked to indices of other issuers; in these cases the index of that third party issuer might have already been approved within a prospectus but not in the issuer's own prospectus;
- if ESMA takes the view that index descriptions should be subject to regulatory review, in order to ensure that the proprietary index is approved, an issuer could wish to issue a new prospectus, a drawdown prospectus or supplement an existing prospectus; however, a number of competent authorities have recently been unwilling to approve a supplement to a base prospectus other than in limited circumstances where new information on the issuer (rather than the securities) needs to be supplemented; if this practice continues then issuers will be very limited in the way that they could ask any regulator to review a new index for an issue under a programme; the use of supplements generally is, incidentally, a wider issue in the context of amending the PD regime;
- a number of issuers make their index descriptions available on a website and investors can easily refer to these.

Taking these points into account, it would seem that there is a good argument for a procedure whereby index descriptions might be separately approved by PD competent authorities. Relevant approved indices might then be referred to in final terms as regulated information. This is a complex area and one which it is very important to get right in order to allow the market to function efficiently and in the best interests of investors.

Q6: Do you agree with ESMA's observation that it is not a common market practice to issue, under prospectuses prepared for the purpose of the Prospectus Directive, derivative securities linked to an index composed by another issuer? If not, please provide specific examples.

There are, as set out above, a number of issuers/indices which follow this route. The S&P GSCI Index (formerly the Goldman Sachs Commodity Index) is one example.

Q7: Do you agree to keep the current requirement of the Prospectus Regulation to disclose the description of an index composed by the issuer in the prospectus? If yes, please feel free to provide additional arguments. If not, please provide the reasoning behind your position.

For the reasons set out above it would seem that this route may unnecessarily limit the market and impose practical difficulties on issuers which interfere with the object of providing a competitive and efficient regime in the best interests of investors.

As set out above, there are good arguments to be made for issuers to continue to be able to refer to standalone indices. If indices are to be subject to regulatory review, it should be open to issuers to issue a supplement providing the index description.

As an alternative and if the supplement approach is not acceptable, index descriptions could be approved under a separate index review process whereby competent authorities could review an index description on a standalone basis and approve it for the purposes of a particular programme or for wider PD use

Q8: Do you agree that Item 4.2.2. of Annex XII needs to be revised to the extent that an index description should also be required for an index composed by any entity belonging to the same group as the issuer, or by an entity acting in association with, or on behalf of, the issuer? If not, please provide your reasons.

As noted above, the same procedures should be available to all entities (and not simply the issuer) to have indices specifically approved for PD purposes.

Profit Forecast and Estimate

Q9: Do you agree with ESMA's view to keep the current requirement of the Prospectus Regulation to produce a report for profit forecasts and profit estimates? If yes, please feel free to provide additional arguments. If not, please provide the reasoning behind your position.

Issuers should be able to share with investors, not just formal figures, but also the benefit of the expert views of its senior management. In this respect it may indeed make sense that profit forecasts and estimates involving actual figures be subject to some kind of auditor review. However, other statements in general terms (along the lines of "this coming year is unlikely to be as good as last year") are too vague for auditors to agree to undertake any form of meaningful review but still arguably represent valuable information for investors where such statement represents the considered and honest view of senior management experts. Consequently either (i) the current requirement should be relaxed for profit forecasts and estimates that do not involve actual figures or (ii) profit forecasts and estimates should be defined to only include specific figures.

In this respect, international regulatory convergence should also be a relevant consideration. In the context of US transactions under the jurisdiction of the US Securities and Exchange Commission, offering documents generally include a disclosure statement regarding forward-looking statements – an anonymised example from a recent SEC filing is set out at Annex 5. The disclosure is intended to identify both the nature of the forward-looking statements and important factors that could cause actual results to differ materially from the forward-looking statements. The statement comes under a safe harbour adopted, as part of the US Private Securities Litigation Reform Act of 1995, to encourage meaningful disclosure while protecting against private litigation.

The operative provisions of the safe harbour are contained in Section 27A(c) of the US Securities Act of 1933 and Section 21E(c) of the US Securities Exchange Act of 1934, in virtually identical form. The key requirement for use of the safe harbour for a forward-looking statement is that such statement is "[i]dentified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." The definitions of "Forward-Looking Statement" are set out in Section 27A(i)(1) of the Securities Act, Section 21E(i)(1) of the Securities Exchange Act and in Rule 175 under the Securities Act.

Q10: Do you agree with ESMA's approach to exclude "preliminary statements" from the scope of Article 2.11. relating to "profit estimate" and to provide a definition of "preliminary statements" in the Prospectus Regulation? If not, please indicate your reasons.

It is unclear what ESMA's rationale for proposing to exclude "preliminary statements" from the definition of profit forecasts is. It may well stem from the fact that, if an issuer has made a past statement (by way of a regulatory announcement) which could constitute a profit forecast if included in a prospectus and that statement is still outstanding at the time of publication of the prospectus, then (in the turbulent market conditions of the financial crisis) the issuer must include/update such forecast in the prospectus and also include specified additional information.

Notably, under paragraph 9.2 of Annex IV of the PD Regulation, it is required that profit forecasts or profit estimates included in a prospectus be accompanied by an accountants' report stating that, in their opinion, the forecast or estimate has been properly compiled on the basis stated and that the basis of accounting used for the profit forecast or estimate is consistent with the accounting policies of the issuer. However, accountancy firms have advised that they may not deliver such reports because the market announcements are issued in advance of the related financial results being finalised. The net result of this is that issuers are not able to issue retail debt securities until the final results are published. This can cause serious problems for very frequent issuers, such as banks, that issue off their debt securities programmes on an almost daily basis. The burden of such a requirement seems excessive in the context of debt securities.

If the proposal is intended to address the above, then it is welcome, subject to the response to Q.11 and also the following:

- the term "preliminary statement" might not be a term generally understood across all national accounting/auditing environments – this should be confirmed and if necessary addressed;
- even final audited accounts are subject to assumptions.

Q11: Do you agree with the list of criteria that have been defined for "preliminary statements"? If not, please indicate your reasons.

It is not clear how criteria 3, 4 and 5 of the proposed definition of "preliminary statements" are intended to work in practice.

Concerning criteria 3 (no basing on assumptions): As noted above even final audited accounts are subject to assumptions, so this criteria seems inconsistent with the apparent goal articulated in response to Q.10 above.

Concerning criteria 4 (approval by persons responsible and publication as soon as practicable thereafter): Such statements will always be approved by the issuer before publication. It is however unclear whether ESMA is suggesting there now be a requirement to include a statement in prospectuses to this effect or a form of responsibility statement.

Concerning criteria 5 (agreement by auditors): If ESMA's goal as above is to address the inability of accountants to deliver a report on such preliminary statements, it is unlikely to succeed since auditors are no more likely to alternatively grant their formal agreement to such statements – clarification of what is intended by "agreement" may be relevant in this respect. Again, it is also unclear whether ESMA is suggesting there now be a requirement to include a statement in prospectuses to this effect or a form of responsibility statement.

Generally, a principle for such specific criteria should that they be able to be satisfied in the prospectus rather than in the preliminary statements themselves – otherwise it may be too late to achieve the goal articulated above.

Audited Historical Financial Information

Q12: Do you agree to keep the current requirement of the Prospectus Regulation to produce audited financial information covering the latest three financial years? If yes, please feel free to provide additional arguments. If not, please provide the reasoning behind your position.

No response is made to this question as it relates to depositary receipts over shares and not to the issuance of debt securities.

Annex 2
Non-exhaustive example distribution process
used by one issuer for retail structured products in one particular EU Member State

The distribution process for retail structured products that one financial issuer adopts in a particular EU Member State may be summarised as below.

- The issuer has a regular cycle of public offers occurring every 6 to 8 weeks with a portfolio of different products being issued each time. The cycles are overlapping so that there is effectively no time at which there are not ongoing public offer periods.
- The issuer's main distribution channel is through financial advisers and other authorised financial intermediaries. In order to distribute its retail structured products, an intermediary must generally sign up to the issuer's terms and conditions and have its application accepted by the issuer.
- The signing up of new intermediaries is a continuous process. Once signed up, intermediaries may elect to receive details of all further launches of products, although not all may necessarily participate in any particular product launch.
- Accordingly, new entities may become authorised distributors of the issuer's retail structured products at any time during any of the ongoing public offers.
- There are several thousand distributors who have signed up to the issuer's terms and conditions and have been accepted by the issuer.
- Intermediaries do not themselves purchase the securities; rather they pass on their clients' applications to sign up to investment plans. Accordingly, once the offer period has closed, there should be no need for financial intermediaries to continue to offer the securities as they should not have any unsold allotments and it is not possible to sign up to an investment plan once the public offer period has ended.
- In addition, the issuer sells its structured products to nationally-based 'aggregators'. These are distributors with which the issuer has distribution agreements and which collect in orders from financial advisers and other authorised persons and then place a single block order for securities. In this case, the issuer will not know the identities of the financial advisers that have placed orders through the aggregator and it does not enter into any written agreements with them.

Annex 3
'Restricted' retail cascade model - Application of PD Regulation Annex V, section 5

The table below sets out how the information items in section 5 of PD Regulation Annex V would be addressed in the context of a 'Restricted' retail cascade. For convenience, the example given assumes a base prospectus context with the use of the ICMA model form of final terms.

Relevant provisions of Annex V of PD Regulation	Reference to where items are required to be disclosed in the ICMA standard form Final Terms and, where appropriate, suggested wording for use in completing the Final Terms (<i>in italics</i>)
<p>5.1 <i>Conditions, offer statistics, expected timetable and action required to apply for the offer</i></p> <p>5.1.1 Conditions to which the offer is subject.</p>	<p>ICMA Final Terms, Part B, section 10, item 2 <i>“Offers of the Notes are conditional upon their issue.”</i></p>
<p>5.1.2 Total amount of the issue/offer; [if the amount is not fixed, description of the arrangements and time for announcing to the public the definitive amount of the offer.]</p>	<p>ICMA Final Terms, Part A, section 4 references the total amount of the issue. The wording contained in square brackets is N/A unless a full application process is being undertaken in relation to the issue.</p>

Relevant provisions of Annex V of PD Regulation	Reference to where items are required to be disclosed in the ICMA standard form Final Terms and, where appropriate, suggested wording for use in completing the Final Terms (<i>in italics</i>)
<p>5.1.3 The time period, including any possible amendments, during which the offer will be open and description of the application process.</p>	<p>ICMA Final Terms, Part A, section 37 (offer period) The offer period should be the period between two specified dates. <i>“An offer of the Notes may be made by the Managers [and [specify other distributors, if known and if applicable]] other than pursuant to Article 3(2) of the Prospectus Directive in [specify relevant Member State(s) - which must be jurisdictions where the Prospectus and any supplements have been passported] (Public Offer Jurisdictions) during the period from [specify date] until [specify date] (Offer Period).”</i> ICMA Final Terms, Part B, section 10, item 3 (application process) References to application process are N/A unless a full application process is being undertaken in relation to the issue.</p> <p>Note – This has been adopted by one law firm in a way that expands further on how other distributors may be disclosed: << Non exempt Offer: [Not Applicable] [An offer of the Notes may be made by the Managers [and [specify names of other financial intermediaries/placers making non-exempt offers, to the extent known OR consider a generic description of other parties involved in non-exempt offers (e.g. "other parties authorised by the Managers") or (if relevant) note that other parties may make non-exempt offers in the Public Offer Jurisdictions during the Offer Period, if not known]] (together with the Managers, the Financial Intermediaries) other than pursuant to Article 3(2) of the Prospectus Directive in [specify relevant Member State(s) - which must be jurisdictions where the Offering Circular and any supplements have been passported (in addition to the jurisdiction where approved and published)] (Public Offer Jurisdictions) during the period from [specify date] until [specify date or a formula such as "the Issue Date" or "the date which falls [●] Business Days thereafter"] (Offer Period). See further Paragraph 10 of Part B below. >></p>
<p>5.1.4 A description of the possibility to reduce subscriptions and the manner for refunding excess amount paid by applicants</p>	<p>ICMA Final Terms, Part B section 10, item 4 This reference is N/A unless a full application process is being undertaken in relation to the issue.</p>

Relevant provisions of Annex V of PD Regulation	Reference to where items are required to be disclosed in the ICMA standard form Final Terms and, where appropriate, suggested wording for use in completing the Final Terms (<i>in italics</i>)
<p>5.1.5 Details of the minimum and/or maximum amount of application, (whether in number of securities or aggregate amount to invest).</p>	<p>ICMA Final Terms, Part B section 10, item 5 This reference is N/A unless a full application process is being undertaken in relation to the issue.</p>
<p>5.1.6 Method and time limits for paying up the securities and for delivery of the securities.</p>	<p>ICMA Final Terms, Part B section 10, item 6 <i>“The Notes will be issued on the Issue Date against payment to the Issuer of the net subscription moneys.”</i></p>
<p>5.1.7 A full description of the manner and date in which results of the offer are to be made public.</p>	<p>ICMA Final Terms, Part B section 10, item 7 This reference will be N/A unless an “up to” issue is being undertaken.</p>
<p>5.1.8 The procedure for the exercise of any right of pre-emption, the negotiability of subscription rights and the treatment of subscription rights not exercised.</p>	<p>ICMA Final Terms, Part B section 10, item 8 This reference will be N/A unless a full application process is being undertaken in relation to the issue.</p>
<p>5.2 <i>Plan of distribution and allotment</i> 5.2.1 The various categories of potential investors to which the securities are offered. If the offer is being made simultaneously in the markets of two or more countries and if a tranche has been or is being reserved for certain of these, indicate any such tranche.</p> <p>5.2.2 Process for notification to applicants of the amount allotted and indication whether dealing may begin before notification is made.</p>	<p>ICMA Final Terms, Part B section 10, item 9 <i>“Offers may be made by Offerors authorised to do so by the Issuer in [insert jurisdiction where the Prospectus has been approved and published and jurisdictions into which it has been passported] to any person [insert suitability criteria, if any are deemed appropriate, pursuant to any applicable conduct of business rules]. In other EEA countries, offers will only be made pursuant to an exemption from the obligation under the Prospectus Directive as implemented in such countries to publish a prospectus.”</i></p> <p>ICMA Final Terms, Part B section 10, item 10 This reference will be N/A.</p>
<p>5.3 <i>Pricing</i> 5.3.1 An indication of the expected price at which the securities will be offered or the method of determining the price and the process for its disclosure. Indicate the amount of any expenses and taxes specifically charged to the subscriber or purchaser.</p>	<p>ICMA Final Terms, Part B section 10, item 1 (Offer Price) ICMA Final Terms, Part B section 10, item 11 (expenses and taxes)</p> <p>These two references will be N/A, in reliance on Article 23.4 of the PD Regulation. (Note that the “Issue Price is already disclosed in the ICMA Final Terms, Part A, section 5)</p>

Relevant provisions of Annex V of PD Regulation	Reference to where items are required to be disclosed in the ICMA standard form Final Terms and, where appropriate, suggested wording for use in completing the Final Terms (<i>in italics</i>)
<p>5.4 <i>Placing and Underwriting</i></p> <p>5.4.1 Name and address of the coordinator(s) of the global offer and of single parts of the offer and, to the extent known to the issuer or to the offeror, of the placers in the various countries where the offer takes place.</p>	<p>ICMA Final Terms, Part A, section 33 (Distribution) references details of Managers/Dealers and underwriting commitments.</p> <p>ICMA Final Terms, Part B section 10, item 12 (details of placers).</p> <p>Insert details of relevant retail distributors known to the issuer at the date of the final terms. If none are known as at that date, the reference will be N/A, in reliance on Article 23.4 of the PD Regulation.</p>
<p>5.4.2 Name and address of any paying agents and depository agents in each country.</p>	<p>ICMA Final Terms, Part B section 9 (Operational Information)</p>
<p>5.4.3 Name and address of the entities agreeing to underwrite the issue on a firm commitment basis, and name and address of the entities agreeing to place the issue without a firm commitment or under “best efforts” arrangements. Indication of the material features of the agreements, including the quotas. Where not all of the issue is underwritten, a statement of the portion not covered. Indication of the overall amount of the underwriting commission and of the placing commission.</p>	<p>ICMA Final Terms, Part A, section 33 (Distribution)</p>
<p>5.4.4 When the underwriting agreement has been or will be reached.</p>	<p>ICMA Final Terms, Part A, section 33 (Distribution)</p>

Annex 4
Non-exhaustive hypothetical examples of possible PD forms of consent wording

Stand-alone issue prospectus format

ICMA model form of offering document legend

This [Offering Circular/Prospectus] has been prepared on the basis that any offer of Notes in any Member State of the European Economic Area which has implemented the Prospectus Directive (each, a **Relevant Member State**) other than offers (the **Permitted Public Offers**) which are made prior to [], and which are contemplated in the [Offering Circular/Prospectus] in *[name(s) of Member State(s) where prospectus will be approved or passported for the purposes of a non-exempt offer]* once the [Offering Circular/Prospectus] has been approved by the competent authority in *[name of Member State where the prospectus will be approved]* and published [and notified to the relevant competent authorit(y)(ies)] in accordance with the Prospectus Directive, and in respect of which the Issuer has consented in writing to the use of the [Offering Circular] / [Prospectus], will be made pursuant to an exemption under the Prospectus Directive from the requirement to publish a prospectus for offers of Notes. Accordingly any person making or intending to make an offer in that Relevant Member State of Notes which are the subject of the [offering/placement] contemplated in this [Offering Circular/Prospectus], other than the Permitted Public Offers, may only do so in circumstances in which no obligation arises for the [Issuer] or any of the Managers to publish a prospectus pursuant to Article 3 of the Prospectus Directive or supplement a prospectus pursuant to Article 16 of the Prospectus Directive, in each case, in relation to such offer. Neither the [Issuer] nor the Managers have authorised, nor do they authorise, the making of any offer (other than Permitted Public Offers) of Notes in circumstances in which an obligation arises for the [Issuer] or the Managers to publish or supplement a prospectus for such offer. The expression **Prospectus Directive** means Directive 2003/71/EC (and amendments thereto, including the 2010 PD Amending Directive, to the extent implemented in the Relevant Member State), and includes any relevant implementing measure in the Relevant Member State and the expression **2010 PD Amending Directive** means Directive 2010/73/EU.

Example consent statement

[The Issuer] has consented to [this Prospectus] being used for the purpose of Permitted Public Offers, being offers of securities to the public under [Directive 2003/71/EC (the Prospectus Directive or PD)] (a) by the persons, (b) in the jurisdictions, (c) from the dates and (d) until the earlier of (i) the dates and (ii) any early termination of such consent notified by or on behalf of [the Issuer] by any of the methods, all as respectively specified in the table below and only to the extent such persons have and continue to have any necessary authorisations and licences and at all times in compliance with *[cross refer to any selling restrictions]*).

[The Issuer] may choose to separately extend consent to the use of [this Prospectus] by other persons from time to time [and in relation to the same or different tranches of securities].

Any person (an **Investor**) intending to acquire or acquiring any securities from any person (an **Offeror**) should be aware that, in the context of an offer to the public as defined in *[relevant national law provisions]*, [the Issuer] may be responsible to the Investor for [this Prospectus] under *[relevant national law provisions]*, only if [the Issuer] has authorised that Offeror to make the offer to the Investor. Each Investor should therefore enquire whether the Offeror is so authorised by [the Issuer].

<i>Person to whom consent granted</i>	<i>Jurisdiction where prospectus has been approved or passported and for which consent granted</i>	<i>Date consent valid from</i>	<i>Date consent valid to (absent early termination)</i>	<i>Early termination notice methods</i>
All entities holding and continuing to hold a valid relevant authorisation from [the relevant competent authority]	United Kingdom	[<i>Prospectus publication date where UK FSA is home competent authority</i>]	[<i>Date three weeks after Prospectus approval date</i>]	- RNS announcement - Financial Times advertisement
Landesbank Tiegarten	Germany	Date [this Prospectus] has been notified to the relevant national competent authority under the PD and such notification has become effective	[10 th calendar day following such notification becoming effective]	- e-mail to [address] - fax to [number] - posting letter to current registered office
Banque XYZ S.A. [address, etc if relevant] Crédit Imaginaire S.A.	France	Date [this Prospectus] has been notified to the relevant national competent authority under the PD and such notification has become effective [(expected to be [date two weeks after Prospectus approval date])]	[<i>Date four weeks after Prospectus approval date</i>]	- e-mail to [address] - fax to [number] - posting letter to current registered office

Base prospectus format

Base prospectus – ICMA model form of legend

This [Offering Circular/Prospectus] has been prepared on the basis that, except to the extent subparagraph (ii) below may apply, any offer of Notes in any Member State of the European Economic Area which has implemented the Prospectus Directive (each, a **Relevant Member State**) will be made pursuant to an exemption under the Prospectus Directive, as implemented in that Relevant Member State, from the requirement to publish a prospectus for offers of Notes. Accordingly any person making or intending to make an offer in that Relevant Member State of Notes which are the

subject of an [offering/placement] contemplated in this [Offering Circular/Prospectus] as completed by final terms in relation to the offer of those Notes may only do so (i) in circumstances in which no obligation arises for the [Issuer] or any Dealer to publish a prospectus pursuant to Article 3 of the Prospectus Directive or supplement a prospectus pursuant to Article 16 of the Prospectus Directive, in each case, in relation to such offer, or (ii) if a prospectus for such offer has been approved by the competent authority in that Relevant Member State or, where appropriate, approved in another Relevant Member State and notified to the competent authority in that Relevant Member State and (in either case) published, all in accordance with the Prospectus Directive, provided that any such prospectus has subsequently been completed by final terms which specify that offers may be made other than pursuant to Article 3(2) of the Prospectus Directive in that Relevant Member State, such offer is made in the period beginning and ending on the dates specified for such purpose in such prospectus or final terms, as applicable, and the Issuer has consented in writing to its use for the purpose of such offer. Except to the extent sub-paragraph (ii) above may apply, neither the [Issuer] nor any Dealer have authorised, nor do they authorise, the making of any offer of Notes in circumstances in which an obligation arises for the [Issuer] or any Dealer to publish or supplement a prospectus for such offer. The expression **Prospectus Directive** means Directive 2003/71/EC (and amendments thereto, including the 2010 PD Amending Directive, to the extent implemented in the Relevant Member State), and includes any relevant implementing measure in the Relevant Member State and the expression **2010 PD Amending Directive** means Directive 2010/73/EU.

Final terms – extract from ICMA model form

[Part A]

37. Non-exempt Offer: [Not Applicable] [An offer of the Notes may be made by the Managers [and [specify, if applicable]] other than pursuant to Article 3(2) of the Prospectus Directive in [specify relevant Member State(s) – which must be jurisdictions where the Prospectus and any supplements have been passported] (**Public Offer Jurisdictions**) during the period from [specify date] until [specify date] (**Offer Period**). See further Paragraph 10 of Part B below.

[Part B]

10. TERMS AND CONDITIONS OF THE OFFER²¹

Offer Price:	[Issue Price][specify]
Conditions to which the offer is subject:	[Not Applicable/give details]
Description of the application process:	[Not Applicable/give details]
Description of possibility to reduce subscriptions and manner for refunding excess amount paid by applicants. ²⁵	[Not Applicable/give detail]
Details of the minimum and/or maximum amount of application:	[Not Applicable/give details]
Details of the method and time limits for paying up and delivering the Notes:	[Not Applicable/give details]
Manner in and date on which results of the offer are to be made public:	[Not Applicable/give details]
Procedure for exercise of any right of pre-emption, negotiability of subscription rights and treatment of subscription rights not exercised:	[Not Applicable/give details]

Categories of potential investors to which the Notes are offered and whether tranche(s) have been reserved for certain countries:	[Not Applicable/give details]
Process for notification to applicants of the amount allotted and the indication whether dealing may begin before notification is made:	[Not Applicable/give details]
Amount of any expenses and taxes specifically charged to the subscriber or purchaser:	[Not Applicable/give details]
Name(s) and address(es), to the extent known to the Issuer, of the placers in the various countries where the offer takes place.	[None/give details]

Private letter

Dear [xxxx] – We, as [Issuer] of the [specify securities], consent to [the Prospectus] being used for the purpose of offers of [specify securities] to the public pursuant to and in accordance with [Directive 2003/71/EC (the Prospectus Directive or PD)] in [jurisdiction(s)] by [entity] from [date] until the earlier of (i) [date] and (ii) any early termination notified to you by us by [method].

Offers of [specify securities] to the public may not be made in [jurisdiction(s)] until [the Issuer] has confirmed to you in relation to a particular jurisdiction that (i) the [Prospectus] has been approved by [relevant competent authority] and notified to the relevant competent authority in [jurisdiction(s)], (ii) such notification has become effective in accordance with Article 18 of the PD and any relevant national implementing laws in that jurisdiction, (iii) in relation to [jurisdiction(s)] only, the final terms relating to the [specify securities] have been filed with the relevant competent authorit[y][ies] and (iv) no further administrative steps need be taken by any party in relation to the [Prospectus] prior to such an offer to the public being made by you in that jurisdiction.

Offers may also be made to ‘qualified investors’ (as defined in the PD) in compliance with Article 3(2)(c) and (e) of the PD [or, subject to written prior approval of [specify name of lead manager], Article 3(2)(b) of the Prospectus Directive].

No action has been taken by [the Issuer] or by any other person that would, or is intended to, permit or facilitate a non-exempt offer to the public in the European Economic Area (the “EEA”) (or any part thereof) or an offer to the public by you (or any person on your behalf) of the Notes in any jurisdiction other than [jurisdictions] at any time. For the avoidance of doubt, the fact that [the Issuer] has or may from time to time apply for a certificate of approval attesting that the [Prospectus] has been drawn up in accordance with the PD to be provided by the [relevant competent authority] to a relevant competent authority in other EEA member states for the purposes of permitting offers to the public to be made in such jurisdictions pursuant to the [Prospectus] shall not be implied as giving authority to you to make any such offer (public or otherwise) outside of [jurisdictions].

ICMA model screen announcement

[PD non-exempt: Offers to the public permitted in [each of] [specify EEA jurisdictions] from and including [the date of [publication / filing] of the [prospectus / final terms] / specify date] through to [and including / but excluding] [the settlement date / specify date] [by [authorised persons / specify] only].]

[Offers of [specify securities] to the public may not be made in [jurisdiction(s)] until passporting has become effective and has been notified by the [Issuer].]

[Elsewhere in the EEA, offers / PD-exempt: Offers] may only be made to qualified investors (as defined in the Prospectus Directive) or otherwise in compliance with [either] Article 3(2)(c) and (e) of the Prospectus Directive [or, subject to *[the terms and conditions of any]* written prior approval of *[specify name of lead manager]*, Article 3(2)(b) of the Prospectus Directive].

See the [prospectus / base prospectus and the final terms] for further details.

Explanatory notes to the form of screen announcement / notice
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- Single underlined text is only applicable to an issue where some PD non-exempt distribution is anticipated.
- Wavy underlined text is only applicable to an issue intended to be entirely distributed on a PD-exempt basis.
- Dashed underlined text may be applicable depending on whether and how the issuer intends to allow use of the 100/150 person exemption. As drafted, this language is assumed to be paired with an issuer statement in the stand-alone prospectus or drawdown final terms limiting reliance on the prospectus in this respect.

N.B. The *italicised underlined* text does not form part of the ICMA model but may be appropriate, if relevant.

Annex 5
Anonymised example of recent forward-looking disclosure statement

FORWARD-LOOKING STATEMENTS

This document contains “forward-looking statements” – that is, statements related to future, not past, events. In this context, forward-looking statements often address our expected future business and financial performance and financial condition, and often contain words such as “expect,” “anticipate,” “intend,” “plan,” “believe,” “seek,” “see,” or “will.” Forward-looking statements by their nature address matters that are, to different degrees, uncertain. For us, particular uncertainties that could cause our actual results to be materially different than those expressed in our forward-looking statements include: *[includes list identifying important factors that could cause actual results to differ materially from those in the forward-looking statements (e.g. current economic and financial conditions, including volatility in interest and exchange rates, commodity and equity prices and the value of financial assets; potential market disruptions or other impacts arising in the United States or Europe from developments in the European sovereign debt situation; the impact of conditions in the financial and credit markets on the availability and cost of funding, etc)].* These uncertainties may cause our actual future results to be materially different than those expressed in our forward-looking statements. We do not undertake to update our forward-looking statements.