International
Capital
Market
Association

ICMA

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

(Submission online via www.esma.europa.eu)

28 June 2013

Dear Sirs,

Consultation on Draft Regulatory Technical Standards on specific situations that require the publication of a supplement to the prospectus – March 2013

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

Setting standards internationally, ICMA is a unique 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-committee[1], which gathers the heads and senior members of the syndicate desks of 30 ICMA member banks, and ICMA's Legal and Documentation Sub-committee[2], 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.

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

Yours faithfully,

Ruari Ewing
Senior Director - Primary Markets
ruari.ewing@icmagroup.org
+44 20 7213 0316

[1] http://www.icmagroup.org/About-ICMA/icma-councils-and-committees/Primary-Market-Practices-Sub-committee/.
[2] http://www.icmagroup.org/About-ICMA/icma-councils-and-committees/Legal-and-Documentation-Sub-committee/.

Annex 1
General Remarks

Uncertainty related to supplements

1. We welcome the opportunity to engage with ESMA in relation to supplements (and are particularly grateful for the extended consultation period that facilitates richer feedback). There is current uncertainty on a number of matters relating to supplements as a result of the different ways that different competent authorities interpret and apply relevant legislation. The UKLA published a consultation paper on 22 February 2013 that included a technical note setting out the UKLA's approach to supplements. Matters raised in that technical note[3] and the ICMA response to it[4] relate to matters covered in this response.

2. Current uncertainty related to supplements includes principally: (i) the extent to which securities note information may be updated by means of a supplement and (ii) whether or not withdrawal rights apply to supplements relating to prospectuses describing exempt offers. These issues are discussed in Annex 3.

3. There is currently a debate on what constitutes "information to be disclosed on taxes withheld at source" concerning countries where the offer is made or admission is sought. This debate relates to prospectuses for non-exempt offers made in a number of member states and (as outlined in paragraph 75 of the consultation) supplements to those prospectuses. This debate is discussed in Annex 3.

Specified situations

4. The specific situations described in the draft RTS are situations where there is currently no legal uncertainty or lack of a harmonised approach in practice. It is already clear when the occurrence of one of these situations would be a "*significant new factor… capable of affecting the assessment of the securities*" and issuers are aware of their obligation to publish supplements in these situations if the Article 16 trigger is met. There is no evidence that issuers are not currently publishing supplements in cases where the Article 16 trigger is met (the evidence provided by ESMA relates only to costs of publishing supplements, not to lack of harmonised practice). Even where there might be some divergence in practice, there is no evidence that this is detrimental to the integrity of markets or reduces investor protection. As a matter of public policy, legislation should not be created where it is not required.

5. Currently, the decision as to whether an event constitutes a "*significant new factor… capable of affecting the assessment of the securities*" is for the issuer to make. This is the correct position because an issuer is best placed to understand how the event will affect the securities. Moreover, an issuer takes responsibility for a prospectus and is liable as to its contents and should therefore have maximum discretion over its contents. In this respect:

   - the "without prejudice" reference in paragraph 28 presumably only refers to a competent authority being able to suggest the need for a supplement where it is aware of a particular significant development in relation to an issuer, and not to second-guess an issuer's own determination that a supplement is required; and
   - the points made by ESMA in paragraphs 22-24 of the consultation that tie the test for supplement disclosure to the test for prospectus disclosure (Prospectus Directive Article 5.1)[5], are helpful and should be included within ESMA's *Questions and Answers on Prospectuses* to give them greater prominence and permanence.

   The consultation notes that a new prospectus, rather than a supplement, could be required by a competent authority due to lack of consistency, completeness or comprehensibility. Whilst a competent authority is indeed entitled to withhold its approval from a supplement that it considers

[3] http://www.fsa.gov.uk/pubs/ukla/ukla_supplementary_prospectuses.pdf
[4] http://www.icmagroup.org/assets/documents/Regulatory/Primary-Markets/UKLA-PMB5-consultation-ICMA-response-final-8-April-2013.pdf
[5] Prospectus Directive Article 7 on minimum information (and the related Prospectus Regulation annexes) being inapplicable in this respect.

would result in the information available to investors not being presented in an easily analysable and comprehensible form, this does not follow per se from a supplement's length.

6. Investors in equity assess securities on the basis of the issuer's profitability whereas investors in debt assess securities on the basis of the issuer's solvency. Incidentally, the Prospectus Regulation reflects this distinction in relation to the required standard of disclosure generally. For example, in item 4 of Annex IV to the Prospectus Regulation, the requirement to disclose a risk factor is triggered by affecting an issuer's "ability to fulfil its obligations", whereas in item 4 of Annex I to the Prospectus Regulation the requirement to disclose a risk factor is triggered by being "specific to the issuer or its industry".

7. The vast majority of corporate debt issues by number occur under programme base prospectuses rather under 'standalone' prospectuses for individual issues, which should be borne in mind when considering PD supplement mechanics. In particular, PD supplements to 'standalone' prospectuses inherently arise during non-exempt offer periods and/or in relation to particular regulated market admission applications. In contrast, supplements to base prospectuses may occur when an offer or application is on-going, or in anticipation of an issue under the programme or at times when no offers or applications are current – in the latter two cases to effectively bring a base prospectus to the same 'starting gate' as a hypothetical 'standalone' prospectus being approved at that time. There is no obligation on programme issuers to keep their disclosure current during the life of the programme and they are therefore not required to publish a supplement (even if an event occurs that otherwise meets the Article 16 trigger) if no offer or application is contemplated. Furthermore, it is explicitly prescribed that issues under programmes disclose specified information (including core aspects such as issue prices, issue dates, etc.) through final terms – such information is not subject to supplement disclosure.

8. The problem with creating specified situations that require supplements is that it will not be possible to capture comprehensively every situation in which a supplement should be produced and it may make some issuers less likely to publish a supplement in the case that an unspecified situation occurs that nonetheless still meets the Article 16 trigger. It may also encourage issuers to be formulaic and procedural in their approach to supplements, rather than giving them due attention.

Costs

9. The direct costs to an issuer of producing a supplement can include publication fees, legal fees, listing agent fees, stock exchange fees, translation fees, competent authority approval fees and (at least for profit forecasts or estimates) auditor/accountant report fees. The indirect costs to an issuer of a regime that requires an issuer to publish a prospectus when an event occurs that does not meet the Article 16 trigger are harder to quantify and include a reduced ability of an issuer to access the markets.

10. Depending on the nature of the information being documented in a supplement, the aggregate direct costs may range from below EUR 5,000 for the simplest supplements processed internally by some financial issuers, via EUR 5,000-15,000 for most straightforward supplements processed with external support, to EUR 100,000-150,000 (and more) for supplements concerning the more complex emerging market issuers.

The form of regulation

11. For the reasons set out above, rather than enacting regulation to require issuers to publish supplements in specified situations, it would be preferable for ESMA to publish guidance within ESMA's *Questions and Answers on Prospectuses* setting out specified situations where an issuer should consider whether or not it should publish a supplement.

12. The way that the RTS, when published as a delegated regulation in the Official Journal, will fit with the Prospectus Directive and the Prospectus Regulation is unclear. The draft delegated regulation purports to "supplement" the Prospectus Directive and it is unclear what this means. (The Prospectus Regulation uses a different term, "implement", which is preferable.) It would make more sense if the RTS Regulation amended the Prospectus Regulation rather than existing as a

separate regulation. This would enable market participants to continue to focus primarily on the Prospectus Directive and the Prospectus Regulation, rather than a plethora of other legislative items.

Annex 2
Responses to consultation questions

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

Supplements include information meeting the Article 16 trigger – that is (for the reasons set out in paragraph 5 of Annex 1) information which is considered necessary when applying the test under Prospectus Directive Article 5.1. Such information might or might not be covered by the specific items in the Prospectus Regulation annexes. Furthermore, as noted below, and for the reasons set out in Annex 1, there should be no systematic supplement obligation applicable to specified situations. Consequently supplements should not have to address specified disclosure requirements based on the Prospectus Regulation annexes. ESMA might however refer to individual items from the Prospectus Regulation annexes if drafting any guidance within ESMA's *Questions and Answers on Prospectuses*, as noted in paragraph 11 of Annex 1.

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

The practice of publishing a supplement after the publication of audited annual financial statements is already widespread. However, for the reasons set out in Annex 1, this obligation should not be systematic and issuers of debt securities should decide on a case-by-case basis if this scenario meets the Article 16 trigger.

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

As noted above, issuers of debt securities, including SPV issuers of asset-backed securities, should not be subject to an automatic obligation to produce supplements in connection with annual accounts. Instead such vehicles, like other issuers, should assess the need to produce a supplement on a case-by-case basis. Issuers of asset-backed securities may find case-by-case that their annual accounts require a supplement less often than is the case for some other issuers.

Incidentally, the proposed asset-backed carve-out set out in paragraph 40 of the consultation paper is not tracked through in the text of draft RTS. It also fails to include certain substantially similar SPV entities that are used in certain substantially similar limited recourse asset-backed structures (e.g. SPV funding entities in UK master trust securitisations).

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

Issuers who are intra-group finance companies (even if there is not an underlying asset-backed or depositary receipt structure) may find case-by-case that their annual accounts require a supplement less often than is the case for some other issuers. However, as noted above, the obligation should not be systematic for any issuers of debt securities.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger.

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

See paragraphs 9 and 10 in Annex 1 for a discussion of costs.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger.

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

See paragraphs 9 and 10 in Annex 1 for a discussion of costs.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger.

Incidentally, Prospectus Regulation Annex IV item 9 and Annex IX item 8 do not require issuers of debt securities to include a profit estimate in their prospectuses as a matter of course, instead they set out the content requirements for a profit estimate if an issuer chooses to include it. Also, Prospectus Regulation Annex IV item 9 requires issuers to obtain a report or confirmation from accountants or auditors relating to such statements and Prospectus Regulation Annex IX item 8 requires statements which are likely to require input from auditors or accountants. As such report, confirmation or statement may take some time to obtain, there would likely be a conflict with publishing a supplement in a timely manner or in a specific offer period.

Issuers of debt securities may find case-by-case that profit estimates require a supplement less often than is the case for some other issuers.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger. See further the additional aspects noted in the response to Question 10.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger. See further the additional aspects noted in the response to Question 10.

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

See paragraphs 9 and 10 in Annex 1 for a discussion of costs.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger.

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

See paragraphs 9 and 10 in Annex 1 for a discussion of costs.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger.

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

See paragraphs 9 and 10 in Annex 1 for a discussion of costs.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger.

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

See paragraphs 9 and 10 in Annex 1 for a discussion of costs.

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

There should be no systematic requirement to publish a supplement where an issuer is seeking admission to trading on an additional EU regulated market or making an offer to the public in an additional EU Member State for the reasons set out in Annex I. It should be for the issuer to decide on a case-by-case basis if this scenario meets the Article 16 trigger. For example, the decision to seek admission to trading on an additional market or make an offer in an additional EU Member State might not affect the assessment of the securities.

Incidentally, the relevant Prospectus Regulation securities note annexes do not require different disclosure depending on the EU member state where there is an admission to trading or where there is a non-exempt public offer. Requiring different disclosure for an admission to trading or a public offer depending on the relevant EU member state(s) would discourage cross-border offers or multiple trading. This issue is discussed further in Annex 3 in relation to information to be disclosed on taxes withheld at source.

In the context of a base prospectus, an indication of the specific market where the securities are to be admitted to trading (as required by Annex V item 6.1 and Annex XII item 5.1) is specified in Annex XX as a Category B item and may therefore be disclosed within the relevant final terms[6]. It may also be disclosed within the relevant final terms as it is specified as an additional item in Annex XXI. To require that this information is also disclosed in a supplement would be duplicative and contrary to the Prospectus Regulation.

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

See paragraphs 9 and 10 in Annex 1 for a discussion of costs.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger.

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

See paragraphs 9 and 10 in Annex 1 for a discussion of costs.

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

There should be no systematic requirement to publish a supplement after a judgment or concluding event of governmental, legal or arbitration proceedings already disclosed in the

[6] Provided only the base prospectus has disclosed the general principle that the securities may be the object of an application for admission to trading.

prospectus for the reasons set out in Annex I. It should be for the issuer to decide on a case-by-case basis if this scenario meets the Article 16 trigger. For example, it might be the case that the litigation concerned is minor (e.g. a dispute over office stationary supplies), the judgment is merely procedural (e.g. a ruling that certain evidence must be presented within specified period) and/or the judgment is consistent with expectations disclosed in the prospectus – and so is not significant and does not affect the assessment of the securities.

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

The triggering elements set out are potentially extremely onerous. Different jurisdictions have very different civil and criminal procedures and it may not always be clear if a judicial decision is a judgment or concluding event. Complex cases in some jurisdictions may involve many judicial decisions that could potentially be a trigger element, many of which may be relatively insignificant.

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

There should be no systematic requirement to prepare a supplement for judgments or concluding events in the case of issuers of debt securities. As discussed in the answer to question 10, investors in debt and investors in equity assess the securities on a different basis. It may be the case that a particular judgment is capable of affecting the assessment of equity securities but not debt securities, meeting the Article 16 trigger in relation to equity but not debt.

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

See paragraphs 9 and 10 in Annex 1 for a discussion of costs.

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

For the reasons set out in Annex 1, this obligation should not be systematic for issuers of debt securities who should decide on a case-by-case basis if this scenario meets the Article 16 trigger. A systematic requirement to publish a supplement in this scenario will not increase investor protection. Incidentally there is already a practice of publishing a supplement in case of an increase in the aggregate nominal amount of the programme.

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

See paragraphs 9 and 10 in Annex 1 for a discussion of costs.

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

For the reasons set out in Annex 1, there should be no systematic obligations for issuers of debt securities to publish supplements and such issuers should decide on a case-by-case basis if a scenario meets the Article 16 trigger.

Annex 3
Other uncertainties and issues with the supplement regime

Investor walkaway rights and exempt offers

1. There is currently an uncertainty over the extent to which investor walkaway rights still apply to exempt offers (such as offers of debt securities denominated in at least EUR 100,000) after a supplement has been published and before the closing of the offer.

2. The existence of walkaway rights in relation to supplements to prospectuses which describe exempt offers has always been problematic. These prospectuses are required if the securities are being admitted to trading on an EU regulated market, not because of the offer. It is illogical that investors should have walkaway rights after the publication of a supplement when no prospectus is required purely in relation to the offer.

3. The PD Amending Directive amended Article 16(2) of the Prospectus Directive to include new wording "*where the prospectus relates to an offer of securities to the public*". It is assumed that the intention of this new wording was to change the effect of Article 16(2) and limit the application of withdrawal rights to supplements relating to non-exempt offers.

4. Unfortunately, the new wording leaves room for different interpretations because the definition of "*offer of securities to the public*" includes both exempt offers and non-exempt offers. A purposive construction of the new wording might be that a supplement to an exempt offer prospectus is no longer caught by this provision because an exempt offer prospectus is only prepared in connection with an admission to trading. Differently, a literal construction of the new wording might be that a supplement to an exempt offer prospectus is still caught by this provision because a prospectus relating to an exempt offer does describe an offer of securities to the public, it just so happens that the offer itself is an exempt offer. Different member states have incorporated this provision into their domestic legislation in different ways.

5. The UKLA has confirmed formally and certain other competent authorities have confirmed informally that they will not require supplements related to prospectuses describing exempt offers to include a walkaway rights legend. These confirmations are helpful, but do not remove the legislative uncertainty, particularly in the case of cross-border offers where the laws of a number of jurisdictions and the policies of a number of competent authorities may be relevant.

6. It would be helpful if ESMA were to clarify within its *Questions and Answers on Prospectuses* that it considers that walkaway rights no longer apply across EU to supplements related to prospectuses describing exempt offers and accordingly no walkaway legends are required.

Supplements for securities note information

7. There is currently an uncertainty over the extent to which 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). The competent authorities do not share a common position on this point, though only the UKLA has published its position formally[7]. Article 16 of the Prospectus Directive is not, on the face of it, limited to registration statement disclosure and does not appear to prohibit amendments relating to securities note information (e.g. the change of control provisions / new index-linked notes noted above). It does not appear that there was any legislative intent to limit the use of supplements in this way. Indeed, Recital 24 to the Prospectus Directive specifically notes the need for flexibility in relation to the content for a base prospectus.

8. If an issuer is unable to amend its base prospectus to include a new change of control provision or new index-linked notes using a supplement, its options are either to update the whole base prospectus or to publish a drawdown prospectus. These options are more time-consuming and

[7] The UKLA takes the position that "*It is not appropriate to change the terms and conditions through [a supplementary prospectus]. The original prospectus will have been drafted for a specific offer (or offer(s) for base prospectuses) and/or admission event(s) (and should contain all necessary information).*" – See example 2 in http://www.fsa.gov.uk/static/pubs/ukla/ukla_supplementary_prospectuses.pdf.

more costly than the publication of a supplement and may therefore reduce the ability of an issuer to access the markets. From the perspective of an investor, it does not matter if the relevant disclosure is contained within a supplement or a drawdown prospectus or an updated base prospectus. In fact, a supplement may be the easiest for an investor to understand. As a matter of public policy therefore, it does not make sense to prohibit the use of supplements in these circumstances.

9. The need to amend securities note information in the context of a standalone prospectus will only infrequently arise and will generally be limited to amendments to the offer period or the offer amount. There is no uncertainty on this point and the competent authorities allow this.

10. It would be helpful if ESMA were to clarify within its *Questions and Answers on Prospectuses* that it considers that an issuer may use a supplement 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.

Information to be disclosed on taxes withheld at source

11. The Prospectus Regulation Annex V disclosure items include:

    "4.14. In respect of the country of registered office of the issuer and the country(ies) where the offer being made or admission to trading is being sought:

    - information on taxes on the income from the securities withheld at source;

    - indication as to whether the issuer assumes responsibility for the withholding of taxes at source."

    (The same disclosure requirement is incidentally included in Annex XIII.)

12. Interpretation of the underlined wording is addressed by ESMA's *Questions and Answers on Prospectuses* at Q45 (dated June 2012), which states:

    "ESMA considers the term 'where the offer is being made or admission to trading is being sought' refers to the countries where the prospectus has been approved and to which the prospectus is going to be notified. ESMA believes that it is appropriate to require withholding tax information in respect of such country(ies) as the issuers are legally entitled to apply for a public offer or an admission to trading in those country(ies).

    As this item is not intended to require a full disclosure of the tax regime in each country where the offer takes place or admission to trading is being sought, a statement in the tax section of the prospectus inviting investors to seek appropriate advice on their specific situation is strongly recommended."

13. ESMA's above interpretation conflicts with the Prospectus Regulation, which requires disclosure of information just on withholding tax "at source" (i.e. 'in the hands of the issuer' – on payments by the issuer or its legally-appointed agent) and not on all withholding taxes that may occur 'downstream' in subsequent on-payments made by third parties. In this respect, the country/ies of payments at source will not necessarily be the same countries as "where the offer being made or admission to trading is being sought". In fact, today payments at source are usually made in just one country (the issuer's home country of operations) where a single aggregate payment is made to a depositary acting for the relevant clearing system(s).

14. ESMA's interpretation is also superfluous. Individual investors tend to be familiar with withholding rates applicable to them. Such rates will likely be the same for similar investment propositions and so be irrelevant in making the related investment decisions. Such rates will be more likely affected by the specific holding wrappers selected by the investor concerned and so vary from individual to individual within EEA states. Finally, with the implementation of the EU's Savings Tax Directive, withholding tax is becoming less important in the EU as it has been largely replaced with an information exchange mechanism.

15. ESMA's interpretation would force issuers to take on disclosure liability. In limiting withholding tax disclosure to withholding tax "at source", issuers are not making any statement about downstream withholding that an investor could be misled by. However making any disclosure of the tax regime in each country where the offer takes place or admission to trading is being sought creates the

potential for investors to be misled – particularly where such information is not "full". In effect issuers will have to diligence, at great expense (given legal/tax advice fees), the domestic tax regimes of every such country every time an offer is made or admission sought (since tax regimes are being continuously modified by governments) even if only to be able to justify short-form disclosure wording. This will be so regardless of any prospectus statement "inviting investors to seek appropriate advice on their specific situation."

16. Ultimately ESMA's interpretation threatens the existence of a pan-EEA securities market. Imposing requirements that are effectively both superfluous and extremely onerous to comply with will simply accelerate issuers moving away from EEA retail and regulated markets, reducing choice and quality for European investors. ICMA's November 2007 submission to CESR[8] on CESR's September 2007 *Frequently asked questions regarding Prospectuses* already noted that "it is widely recognised that the need to include in the prospectus information specific to the host Member States, in particular on local taxation, was one of the factors that prevented the pan-EEA securities market developing before the Prospectus Directive."

17. By way of further historical reference, ICMA's 6 January 2012 response to ESMA[9] on ESMA's further consultation on technical advice under the amended PD noted:

    "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).

    [...]

    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.

    [...]

    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 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."

    It would be helpful if ESMA were to clarify within its *Questions and Answers on Prospectuses* that it considers that information to be disclosed on taxes withheld at source does not necessarily extend to the country(ies) in which the issuers are legally entitled to apply for a public offer or an admission to trading.

[8] http://www.icmagroup.org/assets/documents/ICMA%20Letter%20to%20CESR%20re%20PD%20QAs.pdf.
[9] http://www.icmagroup.org/assets/documents/Maket-Practice/Regulatory-Policy/EU-Prospectus-Directive/ESMA%20PD%20L2%20CPII%202011-12%20-%20ICMA%20response%20v4%20final%206Jan2012.pdf