



DRAFT GUIDELINES ON THE DISCLOSURE REQUIREMENTS UNDER THE PROSPECTUS REGULATIONS

Issued 4 October 2019

ICAEW welcomes the opportunity to comment on the *Draft guidelines on the disclosure requirements under the Prospectus Regulations* published by ESMA on 12 July 2019, a copy of which is available from this [link](#).

ICAEW is listed in the EU Transparency Register (ID number: 7719382720-34).

ESMA's proposal to update the CESR recommendations is welcome given the repeal of the Prospectus Directive and its replacement with the Prospectus Regulation. The CESR recommendations, and ESMA's previous updates, are influential and relied upon by market participants. Market participants also comply with the ESMA Prospectus Regulation Q&A (Q&A). An opportunity seemingly has been missed, as part of this substantial exercise, to integrate the Q&A within draft new guidelines, and to produce an improved, streamlined body of guidance. While the CESR recommendations are being converted to guidelines, there is no mention of the impact on the future status of the Q&A and clarification will be welcome.

Our review of specific draft guidelines finds that the general approach of carrying over CESR recommendations - with some changes - has, in some cases, resulted in draft guidelines that do not relate to the Prospectus Regulation requirements or that are contradictory. This reduces their value to those responsible for a prospectus. We have explained apparent contradictions in our response together with how they should be interpreted.

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KEY POINTS

1. ESMA's proposal to update the CESR recommendations is welcome given the repeal of the Prospectus Directive and its replacement with the Prospectus Regulation. The CESR recommendations, and ESMA's previous updates, are influential and relied upon by market participants. Market participants also comply with the ESMA Prospectus Regulation Q&A (Q&A). An opportunity seemingly has been missed, as part of this substantial exercise, to integrate the Q&A within draft new guidelines, and to produce an improved, streamlined body of guidance. While the CESR recommendations are being converted to guidelines, there is no mention of the impact on the future status of the Q&A and clarification will be welcome.
2. Our review of specific draft guidelines finds that the general approach of carrying over CESR recommendations - with some changes - has, in some cases, resulted in draft guidelines that do not relate to the Prospectus Regulation requirements or that are contradictory. This reduces their value to those responsible for a prospectus. We have explained apparent contradictions in our response below.

ANSWERS TO SPECIFIC QUESTIONS

PROFIT FORECASTS AND ESTIMATES

Question 7: Do you agree with the choice to largely carry over the CESR recommendation on profit forecasts and estimates? If not, could you please indicate what further guidance should be provided and the legal basis for such?

3. The guidance from the CESR recommendations largely supported the required report from an accountant that the profit forecast had been 'properly compiled'. However, since that reporting requirement has been removed the relevance of that guidance is less obvious.
4. Annex 1, Item 11.2(b) requires that the assumptions are 'reasonable' but no explanation is given of what this means in the context of an assumption relevant to a profit forecast.
5. Annex 1, Item 11.2 also requires that consideration is given as to whether a previously issued forecast is still valid. However, guideline 9, paragraph 44 (and guideline 12) refers to it remaining 'valid and correct' which is a concept from regulation 809/2004 and no explanation of the difference between 'valid' and 'correct' is given.
6. Guideline 10. Paragraph 48 requires that a forecast is comparable with historical results and this is supported by Item 11.3 of Annex 1 and also paragraph 49 of the guidance. However, it is more important that the forecast is capable of being compared with the actual results for the period to which it relates. Pro forma financial information, suggested in paragraph 49, will not provide a suitable comparison as it describes a hypothetical situation.
7. Guideline 11. The guidance in paragraph 54 potentially creates confusion because it suggests that it is possible that the forecast may not be comparable with historical financial information and that therefore this should be explained, despite Item 11.2 of Annex 1 appearing to require an unmodified statement. Paragraph 55 also says that the statement should not be qualified with any 'caveats or softening of the message'.
8. Guidelines 10 and 11 both deal with comparability but do so in a different way. While paragraph 50 suggests presenting additional adjusted financial information, paragraph 54 suggests dealing with the same point through additional explanation.

Question 8: Do you believe the application of draft guidelines 9, 10, 11 and 12 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and - on a best-effort basis – quantify them.

9. Additional costs will arise if, as mentioned above, it is necessary to restate historical financial information and, if it were to be required, for the restated information to be reviewed or audited.

HISTORICAL FINANCIAL INFORMATION

Question 9: In relation to draft guideline 14, do you consider that it is beneficial to clarify the application of the bridge approach for prospectuses that include less than three years of financial information? If not, please elaborate on your reasoning and suggest an alternative approach.

10. We do not understand why it is considered necessary to clarify the application of the bridge approach, as the requirement for restatement of financial information for the last two years is clear, so the bridge approach is not relevant.

Question 10: Do you agree with the guidance set out in draft guidelines 13, 14, 15, 16 and 17? If not, please explain your reasons and provide alternative suggestions.

11. The guidance on comparability is potentially confusing. While guideline 13 seeks to enable comparison of restated financial information with financial statements prepared under the previous accounting framework, it is silent on the means of comparison. Guideline 14 then stipulates the bridge approach. Guideline 15, however, deals with comparability of format of presentation of information.
12. Additionally, paragraph 62 applies in circumstances where it is only required to include two years historical financial information, for example item 8.2.3 of Annex 9, so it is incorrect to say that the first year of financial information is not required to be restated.

Question 11: Do you consider that additional guidance is necessary as regards the restatement of historical financial information in the case of prospectuses that include less than three years of financial information? If so, please explain your view.

13. Please refer to our response to question 9.

PRO FORMA FINANCIAL INFORMATION

Question 13: Should draft guideline 18 include any other standard indicators of size? Have you ever used other indicators because the three indicators included in draft guideline 18 would produce anomalous results?

14. We do not believe there is a need to include other indicators of size in guideline 18.

Question 14: In draft guideline 18, do you agree that when an issuer is involved in several transactions which individually do not, but which collectively do, constitute a 25% variation to the issuer's size, pro forma information should be required unless it is disproportionately burdensome to produce it?

Question 15: In draft guideline 18, do you agree that when an issuer is involved in several transactions of which only one constitutes a 25% variation to the issuer's size, pro forma

information should be required for all the transactions unless it is disproportionately burdensome to produce it?

15. We believe that the 'disproportionately burdensome' caveat is too vague to be helpful for preparers in either of the situations described in questions 14 and 15. If no single transaction exceeds the 25% threshold it should be the issuer's decision whether or not to prepare pro forma information on a voluntary basis, based upon their assessment of information that investors need to understand the financial position of the issuer. Similarly, the decision whether to include small unconnected transactions in required pro forma financial information should be at the issuer's discretion, taking account of the same assessment and ensuring that the pro forma financial information is not misleading.

Question 16: In draft guideline 25, do you agree that the accountant / auditor report should not be permitted to include an emphasis of matter?

16. We agree that there should not be an emphasis of matter in the accountant/auditor report on the pro forma information.
17. The drafting in paragraph 113 could imply that the person responsible for the pro forma financial information in the prospectus will be responsible for ensuring that the accountant's opinion is not modified. The guideline would be more useful if it made clear that the accountant's opinion cannot be modified and therefore if the issuer is not able to present to the pro forma information in such a way that an unmodified opinion can be issued the matter would have to be discussed with the appropriate competent authority.

Question 17: In relation to draft guidelines 19, 20, 21, 22, 23, 24 and 26 which largely carry over existing material, do you agree that this material should be carried over? If you do not, please specify which material is no longer relevant and explain why.

18. Guideline 19 currently omits the situation where pro forma information is prepared for both the last completed financial period and the most recent interim period. For completeness, the guidance should refer to this situation and the appropriate approach being to present the pro forma profit and loss accounts for both periods as if the transaction had been undertaken on the first day of the earliest period presented.
19. Guideline 21. Paragraph 96 prescribes the time period covered by pro forma information but is potentially confusing or superfluous given the commentary in paragraph 99.
20. Guideline 24. We do not agree with some of the drafting in paragraph 109. The use of 'generally' is not correct in '...pro forma information should generally not include adjustments which are dependent on actions to be taken once the transaction has been completed...'. Similarly, the commentary on deferred or contingent consideration that is not attributable to the transaction is incorrect (ie that such consideration 'should as a rule' not be included). The application of the issuer's accounting policies will determine how such items are dealt with in the pro forma information.
21. Guideline 24. Paragraph 111 could imply that if an acquisition is not conditional on the capital increase then the capital increase should not be reflected in the pro forma information. This is incorrect as there may not be any conditionality but it may be appropriate to reflect both the acquisition and associated financing.

Question 18: Do you believe the application of any of the draft guidelines 18, 19, 20, 21, 22, 23, 24, 25 and 26 will impose additional costs on the persons responsible for the

prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

22. On balance, we do not think that additional costs would be material.

INTERIM FINANCIAL INFORMATION

Question 19: Do you agree with the proposal to carry over only part of the CESR recommendations on interim financial information since some of the contents appear to be obsolete under the current legislative framework? If not, could you please indicate which CESR recommendations should have been retained and the legal basis for including them in these draft guidelines.

23. It may be useful for the guidance to mention that the reference in the regulation to the inclusion of the audit or review reports on previously published quarterly or half year financial information refers to audit or review reports published with that quarterly or half yearly financial information.

Question 20: Do you believe the application of draft guidelines 27 and 28 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

24. We do not consider that additional costs will be likely.

WORKING CAPITAL STATEMENTS

Question 21: Do you agree with the rules for calculation of working capital in draft guideline 31? If you do not agree, please explain why and propose an alternative approach.

25. We do not think that guideline 31, as drafted, recognises that underwriting of an offering is invariably subject to conditions which may include that the underwritten price and therefore the amount of proceeds that will be underwritten may be determined on pricing. Can ESMA extend the guidance to reflect how such matters should be considered?

Question 22: Do you agree with the rules for calculation of present requirements in draft guideline 32? If you do not agree, please explain why and propose an alternative approach.

26. We believe that the calculation of present requirements would more accurately include 'amounts falling due for payment within a minimum of 12 months from the date of approval of the prospectus' rather than, as in the drafting, liabilities for a minimum of 12 months from that date.

Question 23: Do you agree that it is useful to require credit institutions to take their liquidity risk into account when they determine their working capital? Do you agree with the requirements of draft guideline 34?

Question 24: Do you agree that it is useful to require (re)insurance undertakings to take their liquidity metrics and their regulatory capital requirements into account when they determine their working capital? Do you agree with the requirements of draft guideline 35?

27. The guidance in paragraphs 134 and 138 seems incomplete - a credit institution or an insurance or reinsurance undertaking should draw up a working capital statement on a basis that reflects the specificities of their business model by relying on the relevant prudential

requirements 'unless where relying on such requirements would render working capital statement misleading'. The guidance does not describe what /how this should be disclosed.

28. It is not clear why guideline 34 does not require credit institutions to take regulatory capital requirements into account.

Question 25: In relation to draft guidelines 29, 30, 33, 36 and 37, which largely carry over existing material, do you agree that this material should be carried over? If you do not, please specify which material is no longer relevant and explain why.

29. Guideline 29. We believe that the current principle, that an issuer should ensure there is very little risk that the basis of the working capital statement is subsequently called into question, is a clearer threshold for constructing a downside case than '...based on robust procedures to limit the risk that statement is called into question', and should be retained.
30. Paragraph 122(iv) refers to both 'a reasonable worst case' and 'reasonable alternative scenarios' but does not explain either of them nor how they relate to each other. As an understanding of these terms is key to an understanding of a working capital statement it would be helpful if these terms were clearly explained.

Question 26: Do you believe the application of any of the draft guidelines 29, 30, 31, 32, 33, 34, 35, 36, and 37 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

31. Additional costs may arise depending on what work over and above that performed to ascertain a 'reasonable worst case' will be required to construct 'reasonable alternative scenarios'.

CAPITALISATION AND INDEBTEDNESS STATEMENTS

Question 27: Would you like more specific guidance on what to disclose concerning the type of guarantee according to draft guideline 38? If so, please explain which type of further guidance would be helpful.

32. We do not believe that more guidance is necessary.

Question 28: Would you like more specific guidance on how credit institutions and (re)insurance undertakings should adapt the capitalisation statement according to draft guideline 38? If so, please explain which type of further guidance would be helpful.

33. ESMA should consult with credit institution and (re)insurance sector experts on the need for specific guidance.

Question 29: Do you agree that trade receivables and trade payables should be included in the indebtedness statement, as proposed in draft guideline 39?

34. We do not agree the inclusion of trade receivables and payables. We observe that the changes proposed in order that the indebtedness statement provides a full picture of the issuer's indebtedness result in information that, excluding reserves balances, resembles interim financial information which may result in confusion and so the value to investors could be undermined.

35. Moreover, the reason for the inclusion of trade receivables and payables and not other receivables and payable is unclear, and will also require the preparation of underlying accounting information that might not otherwise be prepared.

Question 30: In the indebtedness statement, do you agree that financial liabilities from leases should be included under financial debt and described further in a paragraph after the statement of indebtedness?

36. We agree.

Question 31: Do you consider that any line items in either the capitalisation or the indebtedness statement are not useful to investors? Please explain your answer.

Question 32: Do you have any other comments on draft guidelines 38 and 39?

37. We draw attention to the amount of detail expected to be included under the heading capitalisation and indebtedness. As an overarching comment, we suggest that the opportunity might be taken to realign the guidance with the regulation. The regulation does not, for example, require 'net indebtedness'. What is described as 'capitalisation' in guideline 38 is, in fact, what the regulation expects to be covered by capitalisation and indebtedness, as it already includes total current debt and total non-current debt. There may be a case to do away with the re-analysis of indebtedness in guideline 39 to arrive at a net figure.
38. In relation to specific comments on guidelines 38 and 39, we observe that guideline 38 does not provide for issuers who do not include lease liabilities on balance sheet, and also refer to our response to question 29.

Question 33: Do you believe the application of draft guidelines 38 and 39 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

39. The changes to the wording in the indebtedness statement will require more time spent on extraction by issuers of additional data.

STATEMENTS BY EXPERTS

Question 47: Do you agree with the guidance set out in draft guideline 46 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

40. It would be helpful to clarify whether an accountant or auditor issuing a report for inclusion in a prospectus on pro forma financial information is considered an 'expert' as we understand that practice differs across Member States.
41. Also, is the person who is considered an 'expert' assumed to be an individual or a firm/organisation? Clarification of this would be helpful for the purpose of determining what is relevant compensation in paragraph 190 and any additional costs in extracting this.