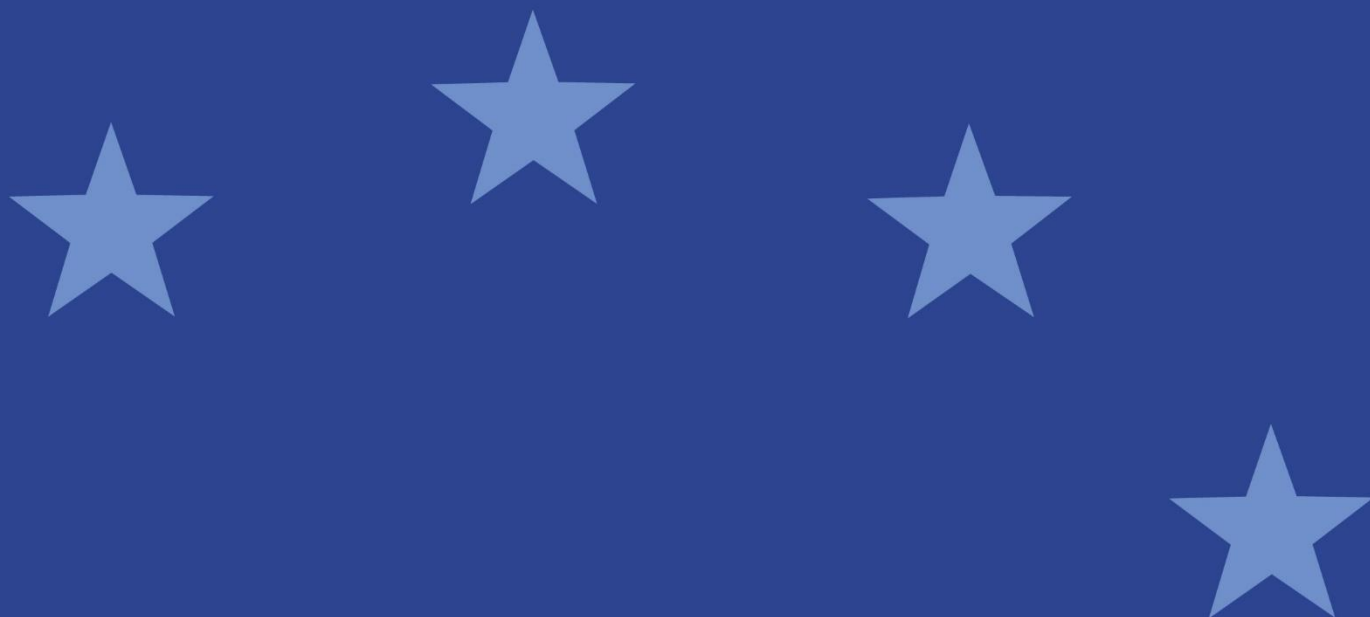


# Final Report

## ESMA Guidelines on disclosure requirements under the Prospectus Regulation



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## Legislative references and acronyms and terminology used

### Legislative references

Prospectus Regulation	Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC <sup>1</sup>
Prospectus Directive	Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC <sup>2</sup>
ESMA Regulation	Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC <sup>3</sup> , as amended by Regulation (EU) 2019/2175 <sup>4</sup>
Commission Delegated Regulation / Commission Delegated Regulation (EU) 2019/980	Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) 809/2004 <sup>5</sup>
Accounting Directive	Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC <sup>6</sup>
IFRS	International Financial Reporting Standards (IFRS) as adopted in the EU pursuant to Commission Regulation

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<sup>1</sup> OJ L 168, 30.06.2017, p. 12-82.

<sup>2</sup> OJ L 345, 31.12.2003, p.64-89.

<sup>3</sup> OJ L 331, 15.12.2010, p. 84-119.

<sup>4</sup> OJ L 334, 27.12.2019, p. 1–145.

<sup>5</sup> OJ L 166, 21.06.2019, p. 26-176.

<sup>6</sup> OJ L 182, 29.06.2013, p. 19-76.



	(EC) 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) 1606/2002 of the European Parliament and of the Council <sup>7</sup>
Commission Regulation (EC) 211/2007	Commission Regulation (EC) 211/2007 of 27 February 2007 amending Regulation (EC) 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards financial information in prospectuses where the issuer has a complex financial history or has made a significant financial commitment <sup>8</sup>
Regulation (EC) 809/2004	Commission Regulation (EC) 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements <sup>9</sup>
Transparency Directive	Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC <sup>10</sup>
Shareholder Rights Directive / SRD	Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies <sup>11</sup>
IAS Regulation	Regulation (EC) 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards <sup>12</sup>

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<sup>7</sup> OJ L 320, 29.11.2008, p. 1-481.

<sup>8</sup> OJ L 61, 28.02.2007, p. 24–27.

<sup>9</sup> OJ L 149, 30.4.2004, p. 1–126.

<sup>10</sup> OJ L 390, 31.12.2004, p. 38-57.

<sup>11</sup> OJ L 184, 14.07.2007, p. 17-24.

<sup>12</sup> OJ L 243, 11.09.2002, p. 1–4.



## Acronyms and terminology used

ESMA	European Securities and Markets Authority
ESFS	European System of Financial Supervision
Final Report	Refers to this document: ESMA(31-62-1426) dated [XX July 2020]
Consultation Paper	ESMA's Consultation Paper containing the Draft Guidelines on disclosure requirements under the Prospectus Regulation (ESMA31-62-1239) dated 12 July 2019 <sup>13</sup>
Guidelines	The Guidelines contained in Annex III of this Final Report
Draft Guidelines	The draft Guidelines contained in the Consultation Paper
CESR	Committee of European Securities Regulators
CESR recommendations / ESMA recommendations update of March 2013	ESMA update of the CESR recommendations for the consistent implementation of the Commission Regulation (EC) 809/2004 <sup>14</sup>
SMSG	ESMA's Securities and Markets Stakeholder Group
EU / Union	European Union
Persons responsible for the prospectus	The persons to whom responsibility for the information in a prospectus attaches, that is, as the case may be, the issuer or its administrative, management or supervisory bodies, the offeror, the persons asking for the admission to trading on a regulated market or the guarantor and any further persons responsible for the information given in the prospectus and identified as such in the prospectus
Annex(es) / Annex Item	Annexes (disclosure schedules) in Commission Delegated Regulation (EU) 2019/980

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<sup>13</sup> [ESMA31-62-1239](#) Consultation Paper - *Draft Guidelines on disclosure requirements under the Prospectus Regulation*, 12 July 2019

<sup>14</sup> [ESMA/2013/319](#) ESMA update of the CESR recommendations – *The consistent implementation of Commission Regulation (EC) No 809/2004 implementing the Prospectus Directive*, 20 March 2013



Profit forecast	As defined in Article 1(d) of Commission Delegated Regulation
ESMA's Prospectus Regulation Q&As	Questions and Answers on the Prospectus Regulation (ESMA31-62-1258) <sup>15</sup>
KPI	Key performance indicator
OFR	Operating and financial review
APM	Alternative performance measure as defined in ESMA's Guidelines on APMs (ESMA/2015/1415) <sup>16</sup>
Competent authority	An authority responsible for approving prospectuses under the Prospectus Regulation
ESG	Environmental, social and governance
Member State	Member State of the European Union
IAS	International Accounting Standards
Supplement or amendment	A supplement or amendment as referred to in the Prospectus Regulation
IPO	Initial public offer
Non-equity securities	As defined in Article 2(c) of the Prospectus Regulation
Profit estimate	As defined in Article 1(c) of Commission Delegated Regulation
Significant gross change	As defined in Article 1(e) of Commission Delegated Regulation
IFRS	International Financial Reporting Standards
Applicable accounting framework / Accounting framework	For the purpose of these Guidelines any of the following: (i) International Financial Reporting Standards (IFRS) as adopted in the EU pursuant to Regulation (EC) 1606/2002 on the application of international accounting standards <sup>17</sup> ; or (ii) National Generally Accepted Accounting Principles (GAAP), i.e. the accounting requirements stemming

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<sup>15</sup> [ESMA31-62-1258](#) Questions and Answers on the Prospectus Regulation. Please note that this document is updated and therefore the version may change. However, the reference number remains the same.

<sup>16</sup> [ESMA/2015/1415](#) Alternative performance measure as defined in ESMA's Guidelines on APMs.

<sup>17</sup> OJ L 243, 11.09.2002, p. 1-4.



from the transposition of the European Accounting Directives (into the legal system of the Member States of the European Union; or

(iii) GAAP laying down equivalent requirements in accordance with Commission Regulation (EC) 1569/2007<sup>18</sup> establishing a mechanism for the determination of equivalence of accounting standards applied by third country issuers of securities pursuant to Directive 2003/71/EC and 2004/109/EC of the European Parliament and of the Council for issuers that are exempted from the requirement of preparing IFRS as endorsed in the EU

European Accounting Directives	The Accounting Directives refer to Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, Council Directive 91/674/EEC on annual accounts and consolidated accounts of insurance undertakings as well as Council Directive 86/635/EEC on annual accounts and consolidated accounts of banks and other financial institutions
Level 2	Commission Delegated Regulation
Significant financial commitment	As referred to in Article 18(4) of Commission Delegated Regulation
CET 1	Common Equity Tier 1
Total capital ratio / TCR	As defined in Article 92(2)(c) of the Credit Requirements Regulation.
Minimum Capital Requirement	Minimum capital requirement as defined in Article 248 of Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Solvency II <sup>19</sup>
GAAP	Generally Accepted Accounting Principles
Equity securities	As defined in Article 2(b) of the Prospectus Regulation
Equivalent accounting framework / Equivalent third country accounting framework	See Commission Decision 2008/961/EC

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<sup>18</sup> OJ L 340, 22.12.2007, p. 66-68.

<sup>19</sup> OJ L 12, 17.01.2015, p. 1-797.



LEI

Legal entity identifier

Complex financial history

As referred to in Article 18(3) of Commission Delegated Regulation



# 1. Executive summary

## Reasons for publication

ESMA has updated the CESR recommendations in order to make them consistent with the contents of the Prospectus Regulation. Moreover, as a significant amount of time has passed since the CESR recommendations were drafted, ESMA took this opportunity to convert them into Guidelines so that the comply-or-explain mechanism would apply. On 12 July 2019, ESMA published a Consultation Paper on the draft Guidelines, which are intended to replace the CESR recommendations. This Final Report is the follow-up to the consultation and provides an overview of the feedback received from stakeholders during the public consultation of the draft Guidelines. ESMA's responses to the feedback have also been included. The final version of the Guidelines, which have been amended based on stakeholders' feedback, is in Annex III.

## Content

This Final Report is organised into three sections and contains a number of annexes. The first section is this executive summary. Section 2 provides background information and general remarks. Section 3 discusses stakeholders' feedback on the draft Guidelines and is split into three parts. The first part discusses stakeholders' general comments on the Guidelines, while the second part discusses stakeholders' comments on the Guidelines relating to financial disclosure and the third part discusses the comments on the Guidelines relating to non-financial disclosure. ESMA addresses to stakeholders' comments in each part of section 3.

Annex I provides a cost-benefit analysis, while Annex II sets out the advice provided by ESMA's Securities and Markets Stakeholder Group ('SMSG') and Annex III contains the Guidelines.

## Next steps

The final Guidelines in Annex III will be translated into the official EU languages and published on ESMA's website. They will become effective two months after their publication on ESMA's website in all the official languages.

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## 2. Introduction

### 2.1. Background

1. ESMA was set up with the objective of helping to foster investor protection through the establishment of common regulatory and supervisory standards and practices. ESMA achieves this aim by contributing to the construction of a single rule book for EU financial markets and ensuring its consistent application across the EU. One of ESMA's areas of responsibility is to promote the effective and consistent application of financial services legislation with the overall objective of ensuring that investors are provided with appropriate disclosure that enables them to make informed investment decisions.
2. The Guidelines included in this Final Report substantially update and replace the CESR recommendations, which were originally adopted in 2005 by ESMA's predecessor, CESR. While the CESR recommendations provide guidance to market participants and competent authorities about the various disclosure requirements in the Prospectus Directive and the legislation promulgated thereunder, the Guidelines provide guidance in relation to the Commission Delegated Regulation.
3. ESMA considers it appropriate to replace the CESR recommendations with the Guidelines, because the Prospectus Regulation entered into application on 21 July 2019 and a significant amount of time has passed since the CESR recommendations were last updated. Originally published in 2005, the CESR recommendations were grandfathered when ESMA was established in 2011, reissued by ESMA in 2011 and subject to a limited update in 2013. Furthermore, since the CESR recommendations were not adopted as Guidelines under Article 16 of the ESMA Regulation, the comply-or-explain mechanism does not apply to them.

### 2.2. Purpose and scope

4. As stated in Article 16(1) of the ESMA Regulation, ESMA “...shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities or financial market participants”.
5. The aim of the Guidelines included in Annex III of this report is to ensure that market participants have a uniform understanding of the relevant disclosure required in the various Annexes included in the Commission Delegated Regulation. More specifically, the persons responsible for a prospectus may have doubts about the extent of the information to be supplied under a certain disclosure Item of the Commission Delegated Regulation. The purpose of the Guidelines is to help the persons responsible for the prospectus assess which disclosure is required and to promote consistency across the Union in the way that the Annexes to the Commission Delegated Regulation are interpreted.

6. The Guidelines are also addressed to competent authorities to assist them when assessing the completeness, comprehensibility and consistency of information in prospectuses.

## 2.3. General remarks

### *Relationship with the CESR recommendations*

7. The content of the Guidelines generally carries over the content of the CESR recommendations, with some drafting changes to simplify the content and improve readability. The explanatory text (the text which follows the bold text within each Guideline) also broadly replicates the content of the CESR recommendations. Additional changes have been made to transform the text of the CESR recommendations into Guidelines and to reflect the repeal of the Prospectus Directive and its replacement with the Prospectus Regulation.
8. In a limited number of cases, ESMA included new Guidelines as well as added some new content in the explanatory text. These changes were either introduced in the Consultation Paper or were included based on respondents' reactions to the consultation. In particular, ESMA would draw readers' attention to the changes introduced in Guidelines 11 and 13 relating to profit forecasts, Guideline 18 relating to pro forma financial information, Guidelines 33, 36 and 37 relating to working capital statements and Guidelines 38 and 39 relating to capitalisation and indebtedness statements. The content of Q&As 14, 24, 50, 51, 52, 53, 54, 55, 61 and 97 from ESMA's Question and Answers on prospectuses<sup>20</sup> was also (in some cases, partially) included in the Guidelines.
9. A couple of sections of the CESR recommendations were not carried over. In particular, the CESR recommendations relating to selected financial information (paragraphs 20-26) were not converted into Guidelines, because selected financial information is not required under the Prospectus Regulation.
10. The CESR recommendations relating to specialist issuers<sup>21</sup> were also not carried over in the Guidelines. However, ESMA is currently considering how to approach the topic of specialist issuers and plans to address these recommendations in the future. In the meantime, ESMA will not rescind the CESR recommendations in this area which means that issuers and their advisors can continue to apply the recommendations relating to specialist issuers. Although the recommendations relating to specialist issuers were drafted for application under the Prospectus Directive, ESMA sees no issues with applying these recommendations after the entry into application of the Prospectus Regulation. This is in line with ESMA's Prospectus Regulation Q&A 2.1 concerning the

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<sup>20</sup> [ESMA31-62-780](#) Questions and Answers – Prospectuses, 30<sup>th</sup> updated version – April 2019, 8 April 2019

<sup>21</sup> The various types of specialist issuers are set out in Annex 29 of the Commission Delegated Regulation and consist of property companies, mineral companies, scientific research-based companies, start-up companies and shipping companies.



applicability of Level 3 guidance relating to the Prospectus Directive after the entry into application of the Prospectus Regulation.

#### *Application of the Guidelines*

11. When applying the Guidelines, ESMA expects that the persons responsible for the prospectus will not include information that is not material in the context of the issuer or the securities and will also refrain from duplicating information in the prospectus. As stated in Recital 27 of the Prospectus Regulation, a prospectus should not contain information that is not material or specific to the issuer and the securities concerned, as that could obscure the information relevant to the investment decision and undermine investor protection. This is also reflected in Article 6(1) of the Prospectus Regulation, which states that a prospectus shall contain the necessary information which is material to an investor for making an informed assessment of the information specified in that paragraph.
12. Instead of duplicating information, the prospectus may refer to where information can be found elsewhere in the prospectus, provided that this does not harm the comprehensibility of the prospectus. This should help avoid the duplication of information. For example, the prospectus may cross-refer to relevant information provided in the financial statements in order to provide information required by the Guidelines.

#### *Relationship with financial reporting*

13. The Guidelines relating to the disclosure of financial information have a close relationship with financial reporting. Issuers should involve financial reporting experts in order to ensure that the financial information in the prospectus satisfies the requirements set out in these Guidelines, as well as the general obligation in Article 6(1) of the Prospectus Regulation to ensure that the prospectus contains the information necessary for an investor to make an informed assessment of the assets and liabilities, profits and losses, financial position and prospects of the issuer and of any guarantor. Likewise, competent authorities should ensure that their supervisory staff is sufficiently familiar with the contents of the Guidelines and that expertise in financial reporting is available to deal with issues that arise when applying the Guidelines relating to the disclosure of financial information.

### 3. Feedback statement and amendments to the Guidelines

#### 3.1. General comments on the draft Guidelines

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
1	2	8	2

14. The general comments were mainly high-level in nature. The key message was that respondents were satisfied with the proposal to update the CESR recommendations. Respondents welcomed the fact that the comply-or-explain mechanism will apply to the Guidelines and they said this should help to achieve greater consistency in their application.
15. There were some technical comments concerning: capitalisation and indebtedness, profit forecasts and estimates, pro forma and working capital statements. However, ESMA has addressed those comments in the sections which deal specifically with the relevant subject.
16. One respondent (legal and accountancy) raised the following points which were not strictly linked to questions elsewhere in the Consultation Paper:
  - The respondent noted that the draft Guidelines did not touch upon paragraphs 173-176 of the ESMA recommendations update of March 2013. The respondent asked ESMA to clarify if those recommendations will be rescinded or converted into Guidelines in the future.
  - The respondent requested guidance on whether certain securities granted to employees, such as options and restricted share units (which theoretically may not qualify as securities under the Prospectus Regulation because they are not transferable), fall under the scope of the exemptions of Article 1(4)(i) and Article 1(5)(h) of the Prospectus Regulation. In certain cases, the respondent stated that competent authorities have argued that such options and similar instruments do not fall under the scope of the definition of 'securities' and therefore cannot benefit from the exemptions related to those instruments.
  - The respondent asked for the text of each Annex Item to be included in the Guidelines. Essentially, the respondent asked for the Guidelines to be presented as they were in the CESR recommendations.

- The respondent sought additional guidance on the net asset value per share requirements set out in Annex 11, Item 9.1 of the Commission Delegated Regulation. More specifically, the respondent questioned how this requirement should be satisfied when the share structure has changed after the latest balance sheet date.

#### *Input from the SMSG*

17. The SMSG welcomed the proposed Guidelines. In particular, the SMSG were supportive of the proposals in draft Guidelines 23, 24, 31, 34, 35 and 39.

#### *ESMA's response*

18. ESMA welcomes the support for the Guidelines. ESMA believes that their issuance will help to facilitate more convergence and to improve prospectus disclosure.
19. In relation to paragraphs 173-176 of the CESR recommendations, ESMA wishes to highlight that technical advice has already been published concerning securities issued or allotted in takeovers, mergers or divisions.<sup>22</sup> ESMA also wishes to highlight that the Guidelines relate to the disclosure requirements in the Commission Delegated Regulation and not to provisions of the Prospectus Regulation. As paragraphs 173-176 are more closely related to the Prospectus Regulation, they are not addressed in the Guidelines.
20. More generally, ESMA wishes to highlight its Q&A on the Status of Level 3 guidance<sup>23</sup> which deals with the transition from the Prospectus Directive to the Prospectus Regulation. The Q&A explains that persons responsible for the prospectus should consider previously issued guidance delivered under the Prospectus Directive to the extent that it does not conflict with the Prospectus Regulation as a whole<sup>24</sup> and to the extent no other guidance is available.
21. ESMA did not provide additional guidance regarding securities granted to employees. Again, the objective of the Guidelines is to clarify disclosure requirements set out in Commission Delegated Regulation, whereas that specific request concerns the Prospectus Regulation. Furthermore, the details provided by the respondent are very general in nature. Questions of that nature are more appropriately addressed on a case-by-case basis.
22. ESMA decided against amending the Guidelines to include the text of each Annex Item. Instead, ESMA maintained the approach of presenting the legal basis at the beginning of each Guideline. ESMA considers that it is unnecessary to repeat the content of each relevant Annex Item because the legal basis alone is sufficient. Additionally, if ESMA

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<sup>22</sup> See [ESMA31-62-1207](#) Final Report – *Technical advice on Minimum Information Content for Prospectus Exemption*, 29 March 2019.

<sup>23</sup> See Q&A 2.1 in [ESMA31-62-1258](#) Questions and Answers – *on the Prospectus Regulation*, 18 February 2020.

<sup>24</sup> Which includes the legislation promulgated thereunder such as Commission Delegated Regulation (EU) 2019/980.

were to carry over the text of each Annex Item it would make the Guidelines much longer and more complex.

23. Finally, ESMA did not provide additional guidance on the request concerning net asset value per share. ESMA does not see this topic as one which requires clarification via the Guidelines. If the net asset value per share details change, Article 23 of the Prospectus Regulation should be considered.

## 3.2. Financial information issues

### 3.2.1. Operating and financial review (OFR)

**Question 1: Do you agree with the choice to largely carry over the CESR recommendations on OFR? If not, could you please indicate what further guidance should be provided and the legal basis for such?**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	3	6	3

24. Four respondents (two banking, one legal and accountancy and one ‘other’) agreed with the draft Guidelines. The remaining ten respondents generally agreed, but some had further points to raise.
25. **Draft Guideline 2: (Comparability)** Three respondents (issuers and investment services) questioned whether information in the OFR should be compared with “...*similar information provided elsewhere...*” as per paragraph 21 of the Consultation Paper. The respondents suggested narrowing the language so that the principle of comparability concerns only information in the prospectus.
26. One respondent (legal and accountancy) asked for the inclusion of an example. The purpose of this example would be to illustrate the type of discussion that is expected, in the OFR, where an issuer makes changes in accounting principles.
27. **(Time frame)** One respondent (legal and accountancy) requested the following clarifications in the Guidelines:
- Guidance regarding how trends can be identified.
  - Guidance on how analysis should be made where only one period of historical financial information is presented.

- A requirement for the disclosure of significant known trends which have arisen since the end of the last period for which historical financial information is included in the prospectus.
  - A clarification that it is inappropriate to discuss the performance of an issuer in periods prior to those for which historical financial information is included in the prospectus.
28. **Draft Guideline 3:** Five respondents (four legal and accountancy, one issuers and investment services) asked what is meant by the term ‘recurring elements’ in paragraph 22 of the Consultation Paper. Two respondents (one legal and accountancy, one issuers and investments services) highlighted a need for consistency between the Guidelines and ESMA’s APM Guidelines in relation to terms ‘recurring and non-recurring elements’.
29. Two respondents (legal and accountancy) questioned the inclusion of the term ‘long-term objectives’ in paragraph 23 of the Consultation Paper. They submitted that Items 7.1.1 and 7.1.2 in Annex 1 of the Commission Delegated Regulation are already clear about the discussion on the performance of a company which is required in the OFR.
30. Three respondents (one legal and accountancy and two ‘other’) questioned the inclusion of the term ‘ESG’ in paragraph 26 of the Consultation Paper. The way in which it was included caused uncertainty for them. For instance, the respondents asked why the inclusion of any information on non-financial KPIs would automatically require information on all ESG matters to be disclosed in the OFR. The respondents also pointed out that ESG matters may be pertinent to financial as well as non-financial KPIs and they suggested that this should be made clearer in the Guidelines. The respondents submitted that non-financial KPIs will differ from company to company and that it should be up to each company to determine which ESG factors to include in a prospectus.
31. One respondent (legal and accountancy) argued that the materiality of a component (e.g. earnings, cash flows, assets and liabilities) should not only be assessed by its relative size but also on the basis of an entity’s financial and non-financial objectives and strategy. The respondent believed this should be acknowledged in the Guidelines.

*Input from the SMSG*

32. **Draft Guideline 2:** (Audience) The SMSG believed the reference to ‘qualified investors’ in paragraph 18 of the Consultation Paper is not necessary and may cause confusion if carried forward.
33. Similar to other respondents, the SMSG also questioned which information should be compared with the information in the OFR. The SMSG highlighted that paragraph 25 of the Consultation Paper refers to consistency of information “*in the prospectus*” and asked if the paragraphs should be aligned.
34. **Draft Guideline 3:** The SMSG had several comments concerning paragraph 26 of the Consultation Paper and stated that the paragraph generally required clarification. In



particular, the SMSG cautioned that the wording of paragraph 26 may allow issuers to argue that non-financial KPIs are not relevant to them. The SMSG indicated that if this argument is taken to its logical conclusion, ESG factors would also be considered irrelevant. The SMSG submitted that ESG disclosure is presumably always relevant in the context of the proposed Guideline and therefore implied that this message is made clearer.

#### *ESMA's response*

35. ESMA welcomes the general support for draft Guidelines 2 and 3. ESMA made certain adjustments based on the feedback received. The following paragraphs explain the most important adjustments, and also contain ESMA's general responses to the feedback.
36. **Draft Guideline 2: (Comparability)** Guideline 2 was amended to make it clear that comparability concerns information elsewhere in the prospectus.
37. In relation to changes in accounting policies, ESMA did not provide the example which was requested. The principles (i.e. comparability, audience, time-frame, reliability) are general in nature and the intention is to maintain them as such. A detailed example of disclosure relating to changes in accounting policies would not fit within the overall Guideline. While ESMA is not including an example, it is reasonable to expect that discussion on changes in accounting policies could include information on the known or reasonable impact that the application of a new accounting standard will have on the issuer's financial statements.
38. (Time frame) ESMA did not make any changes to the explanatory text concerning the time frame of the OFR. As explained above, the principles in Guideline 2 are of a general nature and it is not ESMA's intention to cover all of the situations that can arise when drawing up the OFR. However, ESMA suggests applying the principles of audience, time frame, reliability and comparability to ensure that the OFR contains the information necessary to make an informed investment decision in accordance with Article 6(1) of the Prospectus Regulation. In the event that an issuer has difficulty drawing up their OFR, this should be discussed with the competent authority responsible for the approval of the prospectus.
39. ESMA agrees with the SMSG's comment that the reference to 'qualified investors' should be removed. ESMA implemented this change.
40. **Draft Guideline 3:** To address the comments on the term 'recurring elements', ESMA included a footnote which refers to paragraph 25 of the APM Guidelines. Paragraph 25 of the APM Guidelines contains a negative definition of 'recurring elements'.<sup>25</sup> This negative definition should help market participants in the application of Guideline 3.

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<sup>25</sup> Paragraph 25 of the APM Guidelines states: "[..]. For example items that affected past periods and will affect future periods will rarely be considered as non-recurring, infrequent or unusual (such as restructuring costs or impairments losses)"



41. ESMA removed the reference to 'long-term objectives' from Guideline 3. The notion of 'long-term' is difficult to define and ESMA agrees that this does not need to be carried over from the CESR recommendations. The Guideline now only refers to 'objectives' which appears more aligned with the relevant Annex Items in the Commission Delegated Regulation.
42. Regarding the SMSG's comments on paragraph 26 of the Consultation Paper, ESMA recognises that market participants could use the original drafting to argue that ESG factors are always irrelevant to them. This was not ESMA's intention. ESMA's intention was to ensure that market participants always consider whether ESG disclosure is relevant in the context of the OFR. In the Guidelines, ESMA deleted the equivalent of paragraph 26 of the Consultation Paper and made adjustments. These adjustments are discussed in the next paragraph.
43. To compensate for the deletion of paragraph 26, ESMA introduced point (iv) into Guideline 3. The introduction of point (iv) allows ESMA to recycle the ESG elements of the former paragraph, and to incorporate them more appropriately than the manner in which they had been incorporated in the Consultation Paper. The reference to ESG in point (iv) now highlights that ESG factors are examples of what could influence sustainability. This should encourage issuers to consider ESG disclosures in the OFR without making ESG disclosure compulsory. The key point, of course, is that ESG factors should always be considered in the context of the OFR. Additionally, this amendment should help to remove the impression that ESG factors are only related to non-financial matters.

**Question 2: Do you agree with the introduction of draft guideline 4 in order to provide further guidance on the use of the management report? Do you believe the inclusion of any separate non-financial report (when applicable) could materially increase the length of equity prospectuses? If so, please provide your reasoning and an alternative proposal.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
3	3	6	3

44. Eleven respondents (four legal and accountancy, two issuers and investment services, two 'other' and three banking) agreed with the proposal. The remaining respondents sought certain clarifications but did not expressly disagree with the proposal.
45. Two respondents asked which non-financial report is the subject of the Guideline. One respondent said it is difficult to determine in which situations information should be provided from such non-financial reports.

46. Respondents also voiced concerns about keeping the information in the management report up to date. One respondent (legal and accountancy) asked if only material inconsistencies between the management report and the rest of the prospectus should be disclosed. Another respondent ('other') believed that additional language required to update the prospectus will need to be clearly segregated from the original management report, and believed that this should be made clear in the Guidelines.
47. Finally, three respondents believed that including the separate non-financial report will increase the length of prospectuses. One of these respondents stated this will also be the case where the non-financial report is incorporated by reference. One respondent (banking) appeared to disagree with the latter suggestion and stated that incorporation by reference does not necessarily imply an increase in length. The respondent went on to argue that non-financial information is material and should be disclosed in any case.

*ESMA's response*

48. ESMA carried the Guideline forward with some small adjustments.
49. The non-financial report to which the Guideline refers is the separate report with non-financial information, which some Member States have permitted when transposing Article 19a(4) / 29a(4) of the Accounting Directive. ESMA clarified this in the explanatory text of the Guideline. In addition, the Guideline was amended to clarify the extent to which information from the separate report should be included in the prospectus, i.e. to the extent it is material and necessary to comply with Article 6 of the Prospectus Regulation. The Guideline now refers to 'the entire management report' in the bold text and the explanatory text contains a reference to 'a separate report'.
50. Regarding updates of the original information contained in the management report, ESMA amended the explanatory text of the Guideline to make it clear that updates should only be included in the prospectus to the extent they are material. ESMA also agrees that any information used to update the prospectus should be clearly segregated from the original material in the management report. Consequently, ESMA also clarified this in the explanatory text of the Guideline.
51. As for the length of equity prospectuses, ESMA acknowledges that there is a risk of an increase in length, but the inclusion of a separate report containing non-financial information may be material in the context of Article 6(1) of the Prospectus Regulation.

**Question 3: Do you believe the application of draft guidelines 1, 2, 3 and 4 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
3	2	1	3

52. Three respondents (two banking, one legal and accountancy) believed that no additional costs will arise. One of those respondents added that certain organisations may even improve their processes as a result of the application of these four Guidelines. One respondent ('other') stated that the costs associated with the Guidelines are difficult to assess. Two respondents (both issuers and investment services) stated that there will be slight increases in costs due to the application of Guidelines 1 and 2. These respondents also believed that Guidelines 3 and 4 could increase consulting and auditing costs in the region of 10%.
53. Two respondents ('other') stated that there may be some potential for adaptive costs and suggested that variations in the application of the Guidelines by different competent authorities might have an impact on costs.

*ESMA's response*

54. ESMA notes that no major changes were introduced by Guideline 3 compared to the CESR recommendations. Consequently, ESMA does not expect significant additional costs to materialise as a result of the Guideline.
55. While ESMA appreciates that Guideline 4 may lead to an increase in costs, ESMA wishes to highlight that the Guideline was included because of a change introduced in Annex 1, Item 7.1.2 of the Commission Delegated Regulation. The change in the Commission Delegated Regulation allows for the substitution of the section on OFR with a management report. ESMA believes that divergent practices may develop without any guidance. As such, ESMA believes that the Guideline should help to reduce rather than increase costs, because it should help issuers to anticipate how competent authorities will approach the substitution of their management report for the OFR.

### 3.2.2. Capital resources

**Question 4: Do you agree with the choice to largely carry over the CESR recommendations on capital resources? If not, could you please indicate what further guidance should be provided and the legal basis for such?**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
3	1	5	3

56. Nine respondents (two banking, one issuer, five legal and accounting and one 'other') agreed with the choice to largely carry over the CESR recommendations on capital resources.
57. Furthermore, two respondents (both legal and accountancy) requested additional guidance for credit institutions and in relation to other measures such as ratios between capital resources and capital requirements, which are often used as APMs.
58. Two other respondents (both 'other') suggested that the Guidelines should be amended to reflect that covenants in debt financing documents are not the only types of restriction on the use of capital resources that could be relevant. These respondents provided the example of an issuer with secured funding from a government body that is subject to conditions or, more rarely, equity funding that has certain conditions attached.
59. Another two respondents (both 'other') requested an amendment to draft Guideline 7 which requires disclosure concerning any discussions between the issuer and lenders on the operations of any covenants. These respondents requested that this disclosure be limited to 'material' discussions between the issuer and lenders.
60. One respondent ('other') did not agree with the choice to largely carry over the CESR recommendations on capital resources. This respondent argued that the phrase in the CESR recommendation, "*and the impact such restrictions have had or are expected to have on the ability of the issuer to meet its cash obligations*", wrongly narrows the relevance of disclosures down to those that only affect the ability to meet its cash obligations. The respondent explained that investors are interested in what the total cash balance is after the issuer upstreams all the cash it practically can from its controlled subsidiaries (either by dividends or inter-company loans), taking into account all restrictions. This respondent also argued that the examples in draft Guideline 5 in the Consultation Paper should be expanded to include (bank) covenants and dividend leakage to non-controlling shareholders.

*ESMA's response*

61. ESMA welcomes respondents' support for its choice of largely carrying over the CESR recommendations relating to capital resources and takes note of respondents' other comments relating to draft Guideline 7.
62. In relation to respondents' request for further guidance for credit institutions, ESMA included additional explanatory text in Guideline 6. This text states that credit institutions and insurance and (re)insurance undertakings should discuss their funding and treasury policies in the context of their capital requirements. It also briefly discusses the possible inclusion of prudential metrics. ESMA notes that it consulted the relevant authorities in the process of preparing this text.
63. While two respondents commented that covenants are not the only restriction on the use of capital resources, ESMA notes that the explanatory text relating to draft Guideline 5 in the Consultation Paper does address other restrictions on the use of capital resources. However, it is possible that this explanatory text should be more prominent due to its importance. Therefore, ESMA changed this part of the explanatory text into Guideline 7 concerning any material legal and economic restrictions on the use of capital resources.
64. ESMA chose to retain a separate Guideline on covenants, since these types of restrictions on the use of capital resources have their own specificities. However, ESMA broadened the scope of Guideline 7 to apply to restrictions on the use of capital resources that are similar to covenants. ESMA also amended Guideline 8 so that only material discussions with lenders on the operation of covenants need to be disclosed, as requested by respondents.
65. With regard to the respondent who did not agree with ESMA's decision to largely carry over the CESR recommendations on capital resources, ESMA notes that those CESR recommendations have served their purpose for a significant amount of time. Furthermore, ESMA is not aware of any fundamental problems that would require a different approach.
66. However, ESMA made some amendments to the Guidelines in order to address some of the respondents' concerns. As stated above, the explanatory text concerning restrictions on the use of capital resources is now a Guideline. Furthermore, dividend leakage is now explicitly mentioned in the explanatory text of Guideline 7.

**Question 5: Do you consider that the clarifications in these draft guidelines on how text provided elsewhere should be cross-referred to are useful?**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
3	4	1	3

67. Ten of the eleven respondents (three banking, 4 issuers and investment services, one legal and accountancy and two ‘others’) to Question 5 supported the explanatory text in draft Guidelines 5, 6, 7 and 8, which provides for referencing information elsewhere in the prospectus in order to avoid the duplication of information. Two of these respondents (one banking and one ‘other’) went further to state that such referencing improves readability. Two other respondents (both issuers and investment services) stated that it makes sense to refer to the cash flow statement in discussion of capital resources, as its presentation is subject to accounting standards and it provides a common reporting basis for investors.

*ESMA’s response*

68. ESMA appreciates respondents’ support of the approach taken on capital resources in relation to referencing information elsewhere in the prospectus. Considering this support, no changes were made to the Guidelines in relation to this topic.

**Question 6: Do you believe the application of draft guidelines 5, 6, 7 and 8 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
2	1	1	3

69. Four respondents (two banking, one issuer and investment services and one legal and accountancy) stated that the application of draft Guidelines 5, 6, 7 and 8 will not result in any additional costs for the persons responsible for the prospectus. One respondent (‘other’) states that it represents investors so that difficult for it to assess the costs associated with the preparation of a prospectus. Two respondents (both ‘other’) observed that the application of these Guidelines will possibly result in additional costs, but stated that this will depend on whether competent authorities take a uniform and proportionate approach to the Guidelines. These respondents expected the costs to vary



depending on the issuer and the jurisdiction and did not provide quantitative information on the costs.

*ESMA's response*

- 70. ESMA has taken note of the general impression that these Guidelines will not result in additional costs for the persons responsible for the prospectus.

**3.2.3. 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?**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
3	4	6	3

- 71. Three respondents (legal and accountancy) questioned the approach of carrying over the CESR recommendations because the Commission Delegated Regulation no longer requires an accountant's report for profit forecasts.
- 72. **Draft Guideline 10:** (Paragraph 47) One respondent (legal and accountancy) asked what is meant by 'factual' in the context of profit forecasts; adding that profit forecasts are based on assumptions. Another respondent (issuers and investment services) asked if a reference to 'competitive position' could be added in the explanatory text.
- 73. **Draft Guideline 10:** (Paragraphs 48-50) One respondent (legal and accountancy) asked for these paragraphs to state that it is more important for a profit forecast to be comparable with the financial information covering the period to which the profit forecast relates than prior financial periods.
- 74. (Paragraph 49) Two respondents (legal and accountancy) questioned the idea of comparing profit forecasts with pro forma information. The respondents stated that pro forma information covers a hypothetical situation, whereas a profit forecast is supposed to deal with an actual or prospective situation.
- 75. (Paragraph 50) Three respondents (legal and accountancy) were concerned by a sentence in paragraph 50 of the Consultation Paper, which appeared to suggest that issuers should restate their historical financial information where they have made changes to their accounting policies. The respondents argued that the Commission Delegated Regulation only requires the restatement of historical financial information where issuers choose to change their entire accounting framework and not where there



are changes within an accounting framework. The respondents argued that any changes in accounting policies should be disclosed via the application of IAS 8.

76. Finally, two respondents (legal and accountancy) stated that draft Guidelines 10 and 11 appear to address the concept of 'comparability' differently. The respondents believed that draft Guideline 10 appeared to require adjusted financial information, whereas draft Guideline 11 requested an additional explanation to ensure comparability.
77. **Draft Guideline 10:** (Paragraph 52) One respondent (legal and accountancy) asked whether paragraph 52 intended to imply that assumptions are not as relevant to profit estimates because the reporting period has ended.
78. **Draft Guideline 11:** Two respondents (issuers and investment services) suggested that draft Guideline 11 is unnecessary because the clean statement required by Annex 1, Item 11.3 of the Commission Delegated Regulation is clear and straightforward. If the Guideline is carried forward, these respondents suggested applying it differently depending on the type of prospectus, e.g., depending on whether it relates to equity versus non-equity, as the respondents argued that profit forecasts are more important for IPOs than small debt transactions.
79. **Draft Guideline 12:** (Paragraph 57) Where an entity has been acquired and the acquired entity has previously published a profit forecast, one respondent (legal and accountancy) asked if it is ESMA's intention to require a pro forma statement which combines the target's profit forecast with the issuer's financial information.

*Input from the SMSG*

80. The SMSG provided a small number of drafting suggestions in this area. The first suggestion was in relation to draft Guideline 9 and concerned the following text: "*The persons responsible for the prospectus should apply due care and diligence when compiling profit forecasts and estimates to ensure that they are not misleading to investors*". The SMSG suggested to replace the words 'to ensure' with 'and ensure'. The SMSG's argument was that liability for misleading statements may be avoided if the persons responsible for the prospectus simply state that they applied due care and diligence when preparing the profit forecast or estimate.
81. The SMSG's second drafting suggestion was in relation to paragraph 44 of the Consultation Paper. The SMSG suggested the paragraph should acknowledge that the principles for preparing profit forecasts and estimates should also apply in the context of supplements and amendments.

*ESMA's response*<sup>26</sup>

82. ESMA agrees with the SMSG's analysis and incorporated both of their suggestions into the Guidelines.
83. **Draft Guideline 10:** (Paragraph 47) 'Factual' means factually supportable in this context. Additionally, the Commission Delegated Regulation states that profit forecasts or estimates must be compiled on a basis which is comparable with the issuer's historical financial information and consistent with the issuer's accounting policies. This is something which should also be taken into account in the context of what is 'factual'.
84. ESMA sees no need to explicitly refer to 'competitive position'. The Guideline refers to an "analysis of the issuer's business" and ESMA expects that a discussion of 'competitive position' would form an integral part of such analysis.
85. **Draft Guideline 10:** (Paragraphs 48-50) Commission Delegated Regulation requires a statement that the issuer's profit forecast or estimate has been compiled and prepared upon a basis which is both (i) comparable with the issuer's historical financial information and (ii) consistent with the issuer's accounting policies.<sup>27</sup> ESMA does not consider it is necessary to clarify this in the Guidelines, because it is clear in the Commission Delegated Regulation.
86. ESMA understands the concerns about comparing a profit forecast and pro forma information and agrees that the concepts of pro forma and profit forecasts are different. However, ESMA notes that when profit forecasts are prepared on the basis of pro forma information, the pro forma profit forecast should be comparable and prepared consistently with the principles used by the issuer when preparing the pro forma information. For example, this would be the case when a profit forecast illustrates the future profit resulting from a significant gross change.
87. ESMA included a reference to the application of IAS 8 where a change in accounting policy occurs. A reference to any other similar 'transitional disclosures' was also included in the event that these transitional disclosure are relevant. The reference to 'restated' was removed as this is not what was intended.
88. Finally, ESMA amended Guideline 11 to alleviate the inconsistencies in the concept of 'comparability' in draft Guidelines 10 and 11 of the Consultation Paper. Now, Guideline 11 deals with 'comparability', while Guideline 12 deals with the requirement to provide a clean statement that the profit forecast has been prepared and compiled on a basis comparable with the issuer's historical financial information and consistent with the issuer's accounting policies.

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<sup>26</sup> Please note that ESMA has responded to stakeholders using the Consultation Paper references provided, e.g. **Draft Guideline 10:** (Paragraphs 48-50). However, the numbering has changed in the Guidelines contained in Annex III, e.g. Draft Guideline 10 is now Guideline 11.

<sup>27</sup> Annex 1, Item 11.3 of Commission Delegated Regulation (EU) 2019/980.

89. **Draft Guideline 10:** (Paragraph 52) ESMA confirms the respondent’s understanding that profit estimates are less sensitive to assumptions because the reporting period has ended.
90. **Draft Guideline 11:** Guideline 12 clearly communicates that clean statements should not be caveated. This is a clarification of the requirements in Annex 1, Item 11.3 of the Commission Delegated Regulation. ESMA considers it likely that there will be discussions about the inclusion of caveats without this clarification.
91. Regarding the suggestion to treat IPOs and non-equity transactions differently, ESMA notes that the requirements included in Annex 1, Item 11.3 of the Commission Delegated Regulation apply equally in equity and non-equity transactions. Therefore, there is no legal basis for distinguishing between profit forecasts given in relation to different types of transactions.
92. **Draft Guideline 12:** Where an entity has been acquired and that acquired entity has published a profit forecast which is still valid, the intention is to require a statement which outlines the impact of the target’s profit forecast on the issuer’s financial information. The information used as the basis of such disclosure should contain the necessary adjustments. The final explanatory text in the Guideline was amended to highlight that the principles of comparability should apply if the target’s profit forecast is prepared using a different accounting basis.

**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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	1	4	3

93. Seven respondents (four legal and accountancy, one issuers and investment services, two ‘other’) believed that costs would increase. One respondent (banking) stated that costs should not increase and another (banking) did not express a view. Another respondent (‘other’) observed that it is difficult to assess.
94. Four respondents (two legal and accountancy and two ‘other’) believed that the preparation of restated information to ensure comparability between profit forecasts and the issuer’s historical financial information will impose additional costs.

95. Three respondents (one banking, one issuer and investment services and one 'other') believed that draft Guideline 12 may result in additional costs; as issuers may be unfamiliar with the accounting systems and principles of acquired entities.
96. Lastly, one respondent (issuers and investment services) believed that the obligation to assess and ensure that outstanding profit forecasts are up to date may impose additional costs. The respondent suggested amending paragraph 44 of the Consultation Paper to clarify whether issuers need to continuously update their prospectuses in the case of changes to profit forecasts and estimates.

*ESMA's response<sup>28</sup>*

97. ESMA welcomes the feedback on the costs associated with draft Guidelines 9, 10, 11 and 12.
98. Regarding the comments on restated historical financial information, ESMA amended the Guideline to make it clear that restatements are not required. As previously mentioned in the responses to Question 7, the amended text includes a reference to IAS 8.
99. ESMA appreciates the comments concerning the costs which may arise from the inclusion of an acquired entity's profit forecast. However, ESMA considers these costs to be an inevitable consequence of the transaction. ESMA notes that if an issuer wants to avoid these costs they may choose to withdraw the relevant profit forecast.
100. Finally, ESMA notes the concerns on updating profit forecasts. However, the explanatory text of Guideline 10 simply reminds issuers of the requirement to amend or supplement a profit forecast or estimate when it is no longer valid, as set out in the Commission Delegated Regulation. Consequently, ESMA considers that no new costs are being imposed on issuers via Guideline 10.

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<sup>28</sup> For the sake of clarity. The numbering in the Consultation Paper and the Guideline in Annex III is different, e.g. Draft Guideline 10 is now Guideline 11.

### 3.2.4. 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
2	1	5	4

101. Seven stakeholders (one banking, two legal and accountancy and four ‘other’) were of the view that it would be helpful to receive guidance on how the bridge approach should be applied when a prospectus includes historical financial information covering a period of less than three years. The remaining five respondents (one banking, one issuer and three legal and accountancy) to this question were doubtful about the positive impact of further clarifying the bridge approach. In their opinion, the application of the bridge approach is not relevant for prospectuses presenting two years of financial information.

*ESMA’s response*

102. ESMA appreciates the input provided in response to Question 9 and acknowledges that the application of the bridge approach seems more straightforward and potentially less challenging for prospectuses including historical financial information of less than three years. Nonetheless, ESMA sees merit in providing additional guidance in the explanatory text of draft Guideline 14 for the avoidance of doubt regarding the obligations of the persons responsible for the prospectus. To this end, ESMA included paragraphs 76 and 77 in draft Guideline 14 which has now been renumbered as Guideline 15 to provide guidance in relation to prospectuses that are required to include one or two years of historical financial information.

**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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
2	1	6	5

103. Ten respondents (one banking, six legal and accountancy, one issuer and two 'other') voiced concerns over the use of the term 'comparability' in draft Guideline 13 which was renumbered as Guideline 14, flagging that this draft Guideline is requiring that comparability be achieved between financial statements prepared under the current and the new accounting framework. These respondents pointed out that it would be challenging to achieve such comparability and indicated that additional guidance would be required to facilitate compliance with this draft Guideline. The difficulties associated with achieving comparability were also raised by two stakeholders (legal and accountancy) in relation to draft Guideline 15. Another stakeholder (legal and accounting) mentioned that the intention behind paragraph 64 of the Consultation Paper is unclear and requested that the draft Guideline clarify that issuers do not need to include both restated and statutory financial statements in the prospectus.
104. As regards draft Guideline 14, one stakeholder (legal and accountancy) commented that the Guideline does not explain where the requirement for auditing of restated financial information comes from.
105. With reference to draft Guideline 16, three respondents (all legal and accountancy) commented that the current guidance is not entirely clear as to when restated comparatives need to be audited, while one respondent (legal and accountancy) requested the inclusion of guidance on whether issuers would be permitted to include IFRS financial statements without comparatives when only one year of restated financial information is required.
106. Lastly, in relation to draft Guideline 17, one respondent (legal and accountancy) found the requirement to prepare financial information for inclusion in the prospectus when it is not mandated under the issuer's accounting framework to be onerous. Another respondent suggested that the information that is derived from the restated financial information should be clearly labelled as unaudited financial information. Two respondents flagged that the wording of the Guideline should be modified in order to apply to third country issuers.

#### *ESMA's response*

107. ESMA welcomes stakeholders' responses to Question 10. In particular, ESMA takes note of the arguments provided with regard to the term 'comparability' referred to in draft Guidelines 13<sup>29</sup> and 15. ESMA appreciates that using this term is likely to make the application of these Guidelines challenging.
108. Considering the feedback received, ESMA revisited the drafting of Guideline 13, which is now included as Guideline 14. The revised Guideline explains that in order to draw up the restated historical financial information, preparers of prospectuses should apply the new applicable accounting framework, namely the framework that the issuer intends to

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<sup>29</sup> This guideline has been renumbered as Guideline 14.

adopt in its next published financial statements. ESMA is confident that this new drafting is clear with regard to the obligations of the persons responsible for the prospectus without introducing additional requirements. As regards the request to clarify the intention behind paragraph 64, ESMA introduced a small drafting change to address this point.

109. On the basis of the input provided, ESMA reconsidered the usefulness of draft Guideline 15 as a stand-alone guideline. ESMA appreciates that the presentation format of historical financial information is dictated by the applicable accounting framework. In this regard, ESMA understands the difficulties associated with comparing the presentation format of financial information prepared under different accounting frameworks and clarifies that it does not intend to impose a rule in relation to the presentation format of restated historical financial information. However, ESMA still believes that the guidance in relation to the presentation of restated financial information is helpful when applying the bridge approach set out in draft Guideline 14. With this in mind, ESMA deleted draft Guideline 15 and moved the guidance provided under this Guideline into the explanatory text relating to what was Guideline 14 in the Consultation Paper, but has now been renumbered as Guideline 15.
110. In relation to the comments concerning the audit of restated historical financial information, ESMA notes that historical annual financial information should be independently audited under the Commission Delegated Regulation, for instance pursuant to Annex 1, Item 18.3 to the Commission Delegate Regulation and equivalent Items in other Annexes. ESMA understands that the requirement to audit historical financial information equally applies to restated historical financial information. Furthermore, ESMA points out that the inclusion of unaudited restated financial information in the prospectus would not provide comfort to investors on the reliability of such information and it would be detrimental to investor protection.
111. As regards the request to clarify whether it is permitted to include IFRS financial statements without comparatives, ESMA notes that the revised Guideline 15 explains that the inclusion of comparative restated financial information in the prospectus would be expected where it is required by the issuer's accounting framework and has been prepared by the issuer. However, ESMA considers that where comparative restated financial information is not required by the issuer's accounting framework, the inclusion of comparable financial information is not required in prospectuses which are only required to include one year of historical financial information.
112. With reference to the comments provided on draft Guideline 17, ESMA points out that the requirement to include specific components of the financial statements, such as the cash flow statement, is set out in Level 2 provisions which aim at ensuring investor protection by mandating the inclusion of specific historical financial information in the prospectus. As regards the suggestion to clearly label the restated financial information that is not audited, ESMA reiterates its response that the restated financial information should be audited in accordance with Level 2 requirements. Lastly, ESMA amended the wording of draft Guideline 17 to encompass third country issuers.

**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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
2	1	3	3

113. Five respondents (one banking, three legal and accountancy and one issuer) did not support including additional guidance concerning the restatement of historical financial information in the case of prospectuses that include less than three years of financial information. Two stakeholders ('other') considered that additional guidance on the presentation of historical financial information relating to a single bridge year might be beneficial, while one respondent ('others') was doubtful on whether additional guidance is warranted, and another respondent ('others') commented that two years of restated historical financial information should be included in the prospectus without expressing a view on whether additional guidance is necessary in this case.

*ESMA's response*

114. ESMA takes note of the responses provided to Question 11. In particular, ESMA acknowledges that stakeholders generally did not consider it necessary to include targeted explanations concerning restated financial information in prospectuses presenting less than three years of financial information. In view of the feedback received, the lack of concrete suggestions from stakeholders who were supportive of this suggestion and taking into account the additional clarifications on the use of the "bridge" approach already provided in draft Guideline 14, ESMA does not see any scope for providing further guidance on this topic.



**Question 12: Do you believe the application of any of the draft guidelines 13, 14, 15, 16 and 17 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
2	1	0	3

115. Three stakeholders (one banking, three ‘other’) indicated that the actual costs from the restatement of historical financial information may vary and are difficult to quantify and suggested requiring a description of the general aspects of the restatement to be included in the prospectus. One respondent (issuer) mentioned that the Guidelines would entail financial burdens for the persons responsible for the prospectus without providing specific input on these costs. Lastly, two respondents (one banking and one ‘other’) were of the view that the application of the Guidelines would not bring about additional costs.

*ESMA’s response*

116. ESMA takes note of the responses provided to Question 12. ESMA points out that respondents did not provide precise input or evidence on potential costs related to the application of the Guidelines on historical financial information. ESMA appreciates the costs associated with presenting and preparing historical financial information under two accounting frameworks. Nevertheless, ESMA considers that these costs do not derive from the Guidelines, since historical financial information was restated under the previous prospectus regime too in accordance with the CESR recommendations. Furthermore, considering that respondents did not provide an indication of these costs, ESMA did not make any additional revisions to these Guidelines based on the responses to Question 12.

### 3.2.5. Pro forma 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?**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	3	7	2

117. Twelve respondents (five legal and accountancy, two ‘other’, two banking and three issuers and investment services) supported the indicators and believed that no further indicators are necessary. Two of these respondents (legal and accountancy) explained that no further indicators are necessary because the draft Guideline allows for the use of ‘alternative indicators’ where this is appropriate, e.g. such as for anomalous results.
118. One respondent requested the inclusion of ‘total liabilities before equity’ as an indicator. The respondent stated that this indicator might be relevant where transactions are performed for tax optimisation purposes, such as a loss carry forward or where a company needs to be saved.
119. Another respondent requested more guidance on the 25% threshold referred to in the explanatory text. More specifically, the respondent asked how the threshold would apply in relation to an acquisition where the target’s historical total assets, revenue and profit or loss are insignificant, but the acquisition price is significant and results in a change of more than 25% in the issuer’s total assets. The respondent also states that it is unclear whether pro forma financial information is required in situations where the acquisition was already reflected in the most recent historical balance sheet presented.

*ESMA’s response*

120. ESMA appreciates the support for the indicators in draft Guideline 18. After taking respondents’ comments into consideration, ESMA decided not to introduce any new indicators in the Guideline. ESMA does not believe it is necessary to add ‘total liabilities before equity’ to the list of indicators. No other respondent requested its inclusion and the use of this indicator is not prohibited if it is appropriate.
121. With regard to the 25% threshold, in the situation described by the respondent, ESMA advises the respondent to consider paragraph 87 of the Guidelines which deals with anomalous results. Additionally, if the acquisition is already reflected in the most recent balance sheet, the pro forma requirement falls away. ESMA would also like to refer the respondent to Guideline 22 which concerns transactions that are already covered in the financial information provided.

**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?**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	3	6	2

122. Draft Guideline 18 introduced a policy change in the area of pro forma. This policy change comprised of a shift from calculating the 25% change on the basis of a single transaction to calculating the 25% change on the basis of several transactions.
123. Two respondents (one issuers and investment services and one legal and accountancy) agreed with the proposal. One of them, however, considered that the rationale for the change in approach was not clearly explained. The remaining responses are described below.
124. Four respondents (two issuers and investment services, one legal and accountancy, and one bank) expressly disagreed with the change in approach. They argued that pro forma information should only be produced for individual transactions and were opposed to the systematic expansion of scope to multiple transactions. While the remaining respondents did not categorically state that they were opposed, three of them (two ‘other’ and one banking) argued that it could become very costly and time consuming to produce pro forma as a result, and two (legal and accountancy) stated that such pro forma information may be of little benefit.
125. Six respondents (four legal and accountancy and two ‘other’) were critical of the ‘disproportionately burdensome’ caveat. Two of these respondents consider the test for what constitutes disproportionately burdensome to be ill-defined and another two said the caveat would not be applied with any degree of consistency. Additionally, one of the six respondents argued that it is always disproportionately burdensome to produce pro forma information for several small transactions. The respondent questioned whether pro forma information, as envisaged by the draft Guideline, will provide investors with relevant information for making an investment decision. Another out of the six respondents observed that matters become more complex where different accounting frameworks are used by target companies.
126. One respondent (legal and accountancy) asked how the disproportionately burdensome caveat would apply in the following specific situation: Two transactions, which each

consist of an 11% change in size, have taken place and those transactions are followed by a third consisting of a 4% change in size.

127. Three respondents (two 'other' and one legal and accountancy) stated that it may be more difficult for certain issuers to produce pro forma information over others. The respondents stated that such difficulties might lead to inconsistency in the application of the Guideline. The respondents also observed that investors might react negatively towards issuers who, for reasons beyond their control, are not able to present pro forma financial information in the prospectus.
128. Finally, two respondents ('other') asked if the determination of 'disproportionately burdensome' will be a matter for competent authorities to decide.

#### *Input from the SMSG*

129. The SMSG welcomed and supported the idea of aggregating several transactions. They were concerned, however, about the 'disproportionately burdensome' caveat and warned that in the absence of additional guidance the caveat could limit the value of this new policy. Furthermore, the SMSG felt that the example in paragraph 84 of the Consultation Paper<sup>30</sup> could be perceived as setting an absolute threshold. The SMSG suggested that care should be taken to avoid giving such an impression.

#### *ESMA's response*

130. ESMA acknowledges that the new policy causes concern among some stakeholders. In spite of this, ESMA carried forward the new policy of aggregating several transactions as it provides for more robust investor protection. For example, ESMA observes that two transactions, each constituting 20% changes, which occurred under the previous policy may have avoided the pro forma requirements. In ESMA's view, that is not a desirable situation, as in substance these two transactions constitute a change that is higher than 25%.
131. ESMA recognises that rigid application of the new policy is not necessary in all situations. As such, ESMA carried forward the 'disproportionately burdensome' caveat. The aim of the disproportionately burdensome caveat is to provide flexibility for the situations in which aggregation by default is unnecessary. The disproportionately burdensome test is as follows:

*"...the persons responsible for the prospectus should consider the costs of producing the pro forma information versus the value of the information for investors."*

132. ESMA understands that certain respondents considered the disproportionately burdensome test to be ill-defined. However, ESMA also notes that no alternative

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<sup>30</sup> The 1% and 27% transactions example, in which the 1% transaction was deemed unnecessary for the purposes of aggregation.

suggestions were provided. Due to the absence of alternative suggestions, ESMA carried the definition forward. Furthermore, ESMA observed that a similar construct was previously used in the prospectus sphere.<sup>31</sup>

133. To facilitate the use of the disproportionately burdensome test, ESMA included additional examples with percentages in the Guideline. In that respect, ESMA took note of the SMSG’s warning on examples. While ESMA sympathises with the SMSG’s concerns, it is difficult to avoid using examples in this Guideline. Nevertheless, in light of the SMSG’s concerns, ESMA would like to stress that the examples should not be understood as setting absolute thresholds. The examples are indicative only and each assessment should be carried out on a case-by-case basis.
134. ESMA acknowledges that the application of Guideline 18 may prove more challenging for some issuers than for others and that complexities can arise where targets use different accounting frameworks. However, ESMA reiterates its standpoint that if several transactions have the same impact on an issuer’s financial statements as one large transaction, disclosure should be required on that basis.
135. Finally, it is for the issuer and its advisors to determine if it is disproportionately burdensome to produce pro forma information. The reasons for why it is disproportionately burdensome should be communicated to the competent authority.

**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?**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	3	6	3

136. The responses to Question 15 largely repeated the responses to Question 14. Therefore, the following paragraphs only present additional comments which were raised directly in response to Question 15.
137. One respondent (legal and accountancy) disagreed with the approach of aggregation. The respondent considered that the information on certain small transactions might

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<sup>31</sup> Albeit raised in a slightly different context, and in a since repealed piece of legislation, Recital 13 of Commission Regulation (EC) 211/2007 of 27 February 2007 contained the following text: “Similarly, it may not be proportionate [...] to require the auditing or restatement of supplementary financial information if the costs to the issuer of complying with that requirement outweigh any potential benefit to the investor” (underline added).

distract investors from the information on transactions greater than 25%. Another respondent (banking) suggested that only the 25% transaction should be included.

138. Another respondent ('other') stated that pro forma information is of major importance. The respondent stated that investors partly base their valuations of a company on pro forma statements, and added that this is important for issuers when seeking to attract capital at a certain price. The respondent suggested that the threshold for pro forma should be 15% rather than 25% and argued that if a company foregoes on pro forma information, it puts the burden of making assessments on the investor for whom it is more difficult to aggregate information.

*ESMA's response*

139. Firstly, ESMA encourages stakeholders to read the responses to Question 14.
140. ESMA acknowledges the point raised concerning small transactions and highlights that this is why the 'disproportionately burdensome' caveat was carried forward in the explanatory text of Guideline 18. ESMA refers to its response to Question 14 for the discussion of the disproportionality burdensome caveat.
141. Regarding the suggestion to lower the threshold from 25% to 15%, ESMA appreciates the arguments presented by the respondent, but observes that the threshold for significant gross change is set in the Commission Delegated Regulation and cannot be amended via the Guidelines.

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

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	3	8	4

142. The feedback was mixed. Seven respondents (three legal and accountancy, two 'other', one issuers and investment services and one banking) agreed with the proposal. Six respondents (two legal and accountancy, two issuers and investments services, one 'other' and one banking) disagreed and in certain cases were uncertain about the wording of the draft Guideline. The remaining four respondents (three legal and accountancy, one 'other') sought clarifications.
143. One respondent ('other') stated that the persons responsible for the prospectus cannot be liable for a report prepared by an auditor. Another respondent (legal and accountancy) warned against prohibiting auditors from providing a qualified opinion. A further three respondents (one issuer and investment services, one banking and one

'other') disagreed with the prohibition of emphases of matter and stated that this may deprive investors of material information that is likely to emerge when the annual report is published.

144. Two respondents (one legal and accountancy and one 'other') said that competent authorities have different approaches to applying the equivalent disclosure Item in Regulation (EC) 809/2004. The respondents stated that some competent authorities prohibited modified opinions and others allowed them. Hostile takeovers were provided as an example of where differences between competent authorities have emerged in the past. The respondents said some competent authorities refused pro forma from being included in the prospectus because the accountant / auditor's opinion could not be made clean, while other competent authorities were willing to accept a lower standard of 'factually supportable'. The respondents asked ESMA to clarify which approach should be taken by competent authorities.

#### *Input from the SMSG*

145. The SMSG focused on the prohibition of emphases of matter and qualifications. The SMSG highlighted that emphases of matter paragraphs follow opinion paragraphs and have been defined in International Standards on Auditing as referring to "*a matter appropriately presented or disclosed in the financial statements that, in the auditor's judgment, is of such importance that it is fundamental to users' understanding of the financial statements*".
146. The SMSG acknowledged that the inclusion of emphases of matter can cause confusion and constitute a type of qualification. However, the SMSG considered that emphases of matter do provide investors with useful information and do not modify the opinions of the auditors. Furthermore, emphases of matter highlight a situation that is very relevant to correctly understand the financial statements. Therefore, the SMSG suggested that a complete prohibition on their inclusion might prove to be counterproductive.
147. As a general comment concerning the area of pro forma, the SMSG stated they had discussed the potential benefit to investors of inserting ratios in the area of pro forma and advised ESMA to consider this possibility for the Guidelines.

#### *ESMA's response*

148. Draft Guideline 25 appears to have been insufficiently clear. ESMA redrafted the Guideline to communicate the following message:
- The statement concerning how the pro forma information is prepared should be clean and qualifications or emphases of matter should not be included in that regard.
  - Qualifications or emphases of matter can be included but only to highlight issues with the underlying material used when preparing the pro forma information, e.g.

if the underlying historical financial information was qualified or presented an emphasis of matter.

149. ESMA believes the new drafting addresses the concerns raised by the SMSG and respondents; including matters such as divergence in the area of hostile takeovers.
150. Regarding the SMSG’s suggestion on ratios, ESMA recognises the benefit of ratios but has decided not to include them in the Guidelines on pro forma. ESMA believes that the Guidelines on pro forma have already introduced some significant changes and that the introduction of ratios may be too burdensome at this point. Furthermore, any such ratios would have to be audited and different ratios would have to be developed for different industries.

**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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	2	8	4

151. Four respondents (two legal and accountancy, one ‘other’ and one banking) agreed with these draft Guidelines and had no further comments. The remaining respondents also agreed but had comments on various parts. In the following paragraphs, ESMA highlights some of these comments. The summary is broken down by draft Guideline and paragraph to make it more readable.
152. **Draft Guideline 19:** (Paragraphs 87-90) Four respondents (legal and accountancy) stated that, if pro forma information is prepared for both a full financial year and a subsequent interim period, any non-recurring adjustments, such as transaction costs, would have to be included as adjustments twice, i.e. once in each pro forma income statement. These respondents argued that if pro forma income statements are presented for more than one period, they should be presented as of the earliest period presented, i.e. as if the transaction took place on the first day of the first period which is presented.
153. **Draft Guideline 21:** (Paragraphs 96) One respondent (legal and accountancy) stated that paragraph 96 appeared to restrict interim information to either half-yearly or quarterly information and argued that the Commission Delegated Regulation does not.



154. **Draft Guideline 22:** (Paragraph 102) One respondent (legal and accountancy) asked what is meant by ‘fully reflects’ in the final sentence of paragraph 102. More specifically, the respondent asked if it meant that a full year’s pro forma income statement is required for any mid-year acquisitions and, similarly, if it meant that a full interim pro forma income statement is required for an acquisition which occurs part way through an interim period.
155. **Draft Guideline 23:** (Paragraph 104) One respondent (legal and accountancy) asked what is meant by ‘rare situations’ in paragraph 104. Another respondent (legal and accountancy) stated that the interplay between draft Guideline 23 and Article 18(1)(2) of the Commission Delegated Regulation is unclear. More specifically, the respondent was uncertain as to how the Guideline relates to the requirement for information “*on the entity other than the issuer*”. The respondent said that competent authorities are likely to interpret the requirement to “*make an informed investment*” differently.
156. **Draft Guideline 24:** (Paragraphs 109 and 111) One respondent (legal and accountancy) stated that the heading “*Which events to cover with pro forma information*” is misleading. The respondent argued that the draft Guideline did not provide any example of the type of event for which pro forma information is required.
157. Two respondents (legal and accountancy) argued that it is incorrect to say adjustments should not be made to reflect deferred or contingent consideration. The respondents stated that the issuer’s accounting policies will outline how an estimate of any contingent consideration should be reflected in the pro forma information. One of these respondents observed that the seventh sentence in paragraph 109 may be in conflict with the requirements of the issuer’s applicable accounting framework, e.g., IFRS 3.39, which require the acquirer to recognise the acquisition date fair value of contingent consideration as part of the consideration transferred in exchange for the acquiree. This respondent suggested the following wording to address the issue (the underlined wording was added by the respondent):
- “For instance, the persons responsible for the prospectus should as a rule not include deferred or contingent consideration, other than consideration that is recognised as part of the consideration transferred in exchange for the acquiree under the applicable accounting framework, if that consideration is not directly attributable to the transaction but to a future event.”*
158. The same respondent also asked which type of adjustments may be included as per the explanatory text in paragraph 109.
159. Four respondents (legal and accountancy) stated paragraph 111 could imply that, if acquisitions are not conditional on a capital increase, the effects of the capital increase do not need to be reflected in the pro forma financial information. These respondents suggested this sentence should be redrafted, as there may be no conditionality but it may still be appropriate to reflect both the acquisition and associated financing in the pro forma information.

160. **Draft Guideline 26:** (Paragraphs 114-116) One respondent (legal and accountancy) questioned what is meant by 'voluntary pro forma information'. The respondent asked if the Guideline should apply where an issuer presents one or several KPIs labelled as 'on a pro forma basis', e.g. pro forma revenue in connection with an acquisition which does not meet the 25% threshold.
161. Another respondent (legal and accountancy) suggested clarifying that for a significant gross change or significant financial commitment the underlying legal obligation must be 'predominantly probably', e.g. a binding agreement which does not exceed the pro forma thresholds.

*Input from the SMSG*

162. The SMSG welcomed the proposals in relation to draft Guidelines 23 and 24.

*ESMA's response*

163. ESMA wishes to highlight that many small suggestions and comments were submitted in response to Question 17. The volume of small comments and suggestions reflects the breadth of the question. For example, ESMA took note that some respondents referred to multiple paragraphs simultaneously to highlight a minor issue which could be addressed with a wording adjustment.
164. Consequently, to condense this section, ESMA did not explicitly flag each minor modification made pursuant to these requests. However, ESMA provided answers in the following paragraphs to the comments set out above.
165. **Draft Guideline 19:** (Paragraphs 87-90) ESMA amended the explanatory text in both Guidelines 19 and 20. Furthermore, references to 'and / or' were inserted to highlight that Annex 20 of the Commission Delegated Regulation creates an 'and / or' option in this context. ESMA additionally incorporated the proposal concerning the 'earliest period presented'.
166. **Draft Guideline 21:** (Paragraph 96) ESMA amended the explanatory text, in paragraph 101 of the Guidelines, and included references to half-yearly and quarterly as examples. This should dispel any notion of a restriction. For consistency, the same approach was taken in paragraph 104 of the Guidelines.
167. **Draft Guideline 22:** (Paragraph 102) ESMA confirms that the respondent's understanding of 'fully reflects' is correct. The pro forma income statement should cover the relevant period as if the transaction occurred on the first day of that period.
168. **Draft Guideline 23:** (Paragraph 104) ESMA replaced the word 'rare' with 'exceptional' to ensure consistency within the Guideline itself. Furthermore, another example was added to the list of exceptional situations. The new example refers to a simplified (audited) pro forma profit and loss account which can be used to avoid presenting complex assumptions and partial information.

169. Additionally, Guideline 23 tries to explain what to do in exceptional situations and, as such, should be applied on a case-by-case basis. ESMA will work with competent authorities to ensure consistency in this regard.
170. **Draft Guideline 24:** (Paragraphs 109 and 111) ESMA moved the example of an event requiring pro forma to the beginning of the Guideline to make it more prominent. Additionally, as the remainder of the Guideline focuses on the presentation of adjustments, a sub-heading was added.
171. ESMA incorporated the respondent's drafting suggestion concerning contingent and deferred consideration into the Guideline. ESMA did not provide examples of adjustments, as such examples are difficult to enumerate because they depend on the types of contracts entered into. This is why the Guideline provides for case-by-case discussion with competent authorities.
172. ESMA agrees that there is no need for the conditionality for the capital increase to be described. The Guideline was amended to make this clear.
173. **Draft Guideline 26:** (Paragraph 114-116) ESMA clarifies that 'voluntary pro forma information' has no special or fixed meaning. The Guideline simply relates to situations where an issuer's acquisition(s) did not trigger the 25% threshold, but the issuer still chooses to include pro forma information in the prospectus.

**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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	1	3	3

174. One respondent (legal and accountancy) stated that these Guidelines will not increase costs. Two respondents (one legal and accountancy, one 'other') found it difficult to assess whether the Guidelines will increase costs.
175. Three respondents (one banking, one issuers and investment services, one 'other') stated that the costs will depend on the specific case. Two respondents (one banking, one 'other') believed that preparing pro forma financial information covering several acquisitions may be costly and time consuming, and that ESMA should reconsider its proposals. Finally, one respondent (legal and accountancy) stated that the preparation of pro forma financial information is generally costly for a company.

*ESMA's response*

176. ESMA understands that the aggregation of information concerning several transactions will most likely increase costs for issuers. However, as explained in previous answers, ESMA maintained this approach for reasons of investor protection. ESMA will work closely with competent authorities to ensure consistency in the application of the new rules.

### 3.2.6. 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?**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	3	6	3

177. Nine respondents (three issuers and investment services, two banking, one legal and accountancy and three 'other') agreed with the proposal. The remaining respondents sought additional clarifications.
178. Three respondents (legal and accountancy) stated that the draft Guidelines on interims did not appear to add anything to the material already included in the Commission Delegated Regulation. However, these respondents suggested that guidance might be helpful in relation to the wording "*If the quarterly or half-yearly financial information has been audited or reviewed, the audit or review report must also be included*" in Annex 1, Item 18.2.1 of the Commission Delegated Regulation. The respondents asked if the audit or review report should be included in the prospectus if it has not been published and there is no other requirement for it to be published.
179. Finally, two respondents (legal and accountancy) questioned the expression 'the same level of care' in paragraph 119(ii) of the Consultation Paper and suggested the following as a replacement (underlined text was added by the respondents):

*"When interim financial information for the third quarter also covers the first nine months of the year and is prepared in accordance with the same interim accounting standard as for the half-year financial information, the half-yearly financial information does not need to be disclosed."*

*ESMA’s response*

180. ESMA carried over both Guidelines 27 and 28. They do not appear to impose any burden and they provide clarification for questions which arise in the context of supervision, e.g. whether the term ‘interims’ means half-yearly, quarterly or nine months. As for the inclusion of audit or review reports, ESMA understands the requirement in the Commission Delegated Regulation to mean that they should be included if they have been audited or reviewed.
181. However, in paragraph 126 of the Guidelines, ESMA replaced the wording ‘the same level of care’ with the wording suggestion provided by the respondents.

**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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	2	2	2

182. Six respondents (two issuers and investment services, two banking and two legal and accountancy) believed these Guidelines will not increase costs. One respondent (‘other’) considered it difficult to assess. The remaining respondent (‘other’) stated that there may be some potential for adaptive costs and said that variations in the application of the final Guidelines by different competent authorities might have an impact.

*ESMA’s response*

183. ESMA does not believe that these Guidelines will impose major costs. As for variations in their application, ESMA will monitor this aspect.

### 3.2.7. 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
2	0	7	3

184. Two respondents (both legal and accountancy) agreed with the approach in draft Guideline 31. Eight other respondents (two banking, five legal and accountancy and one ‘other’) appeared to generally support allowing issuers to include the proceeds of an offering but offered additional comments and concerns. One respondent (‘other’) did not clearly indicate whether they agreed or disagreed with the Guideline but did provide comments relating to it. One respondent (‘other’) did not support the proposal in draft Guideline 31. ESMA has summarised the most important points raised by respondents below.
185. Two respondents (both legal and accountancy) suggested that the draft Guideline should clarify that any bank facilities that are included in the calculation of an issuer’s working capital should be committed, subject to normal market terms.
186. Another two respondents (both legal and accountancy) proposed that an analysis of the creditworthiness of the entities providing the underwriting and the irrevocable undertaking and any conditionality in the underwriting should be considered when assessing whether the proceeds of an offering may be included in the calculation of an issuer’s working capital.
187. Furthermore, two respondents (both legal and accountancy) suggested that draft Guideline 31 should be amended to take into account that underwriting agreements provide no guarantee of a particular amount being underwritten and that the amount of the proceeds of the offering will only be determined at pricing, which is after the publication of the prospectus.
188. Three respondents (one banking, one legal and accountancy and one ‘other’) argued that there should be no limitations on including the proceeds of an offering if there is no uncertainty that the offering will occur, because investors will not acquire the securities if the offering fails.
189. One respondent (banking) suggested that it would be useful to consider appropriate disclosure for any unconditional ‘pre-commitments’, which are often used in the life sciences sector. Similarly, several respondents requested clarifications in draft

Guideline 31. For example, two respondents (both 'other') asked ESMA to define a 'firm commitment basis'. Another respondent (legal and accountancy) requested that ESMA define 'irrevocable undertakings given for placings'. The same respondent went on to suggest that issuers should be allowed to include the proceeds of an IPO in the calculation of their working capital if there is a minimum amount of proceeds.

*Input from the SMSG*

190. As previously stated in the "*General comments to draft Guidelines*" section of this Final Report, the SMSG welcomed the proposals in relation to draft Guideline 31.

*ESMA's response*

191. Based on the responses to Question 21, ESMA understands that respondents agree with the choice to allow issuers to include the proceeds of an offering in the calculation of their working capital if the offering is underwritten on a firm commitment basis or covered by irrevocable undertakings. However, ESMA also takes note of the useful suggestions to improve draft Guideline 31 and provide more guidance about when it is appropriate to include the proceeds of an offering in the calculation of an issuer's working capital.
192. ESMA took several of these suggestions and incorporated them into Guideline 33. One important improvement was to clearly state that the issuer should not count the proceeds of an offering when calculating its working capital if investors will be exposed to the risk that the issuer continues with an offer after the underwriting agreement is cancelled or the irrevocable undertakings are withdrawn. This clarification should help to eliminate any risk that investors will be misled if the proceeds of an offering are included in an issuer's working capital, because the offering will not continue under those circumstances.
193. ESMA also included additional guidance relating to any conditionality in underwriting agreements and irrevocable undertakings in the Guideline's explanatory text. Specifically, the explanatory text was amended to state that the issuer should consider any conditionality when deciding whether it would be appropriate to include the proceeds of the offering in the calculation of the issuer's working capital. In particular, the explanatory text now clarifies that it should not be necessary to make any significant assumptions about the cancellation of the underwriting agreement or the withdrawal of the irrevocable undertakings.
194. ESMA also expanded the explanatory text to clarify that issuers should assess the credit risk associated with any parties underwriting the offering or providing irrevocable undertakings. If the outcome of the assessment is that there is a material credit risk, then those proceeds should not be included in the calculation of the issuer's working capital so that investors are not exposed to that credit risk.
195. ESMA furthermore included a new element in Guideline 33, namely a requirement for issuers to know the minimum amount of proceeds of the offering that will be underwritten

or placed via irrevocable undertakings. If the issuer cannot meet this requirement, it should not include those proceeds in the calculation of the working capital.

196. Although ESMA did not add definitions of ‘firm commitments’ and ‘irrevocable undertakings’ in the Guidelines, it included additional guidance concerning these terms. This should help to alleviate any uncertainty when applying Guideline 33 and to promote a convergent approach by competent authorities.

**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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
2	2	6	3

197. Of the thirteen respondents, two (one bank, one legal and accountancy) agreed with ESMA’s proposal, while eight respondents (one bank, five legal and accountancy and two ‘other’) appeared to generally agree with the proposal but raised several comments. Three respondents (two issuers and one ‘other’) disagreed with ESMA’s proposal.
198. Four respondents (all legal and accountancy) stated that the phrase ‘include liabilities for a minimum of 12 months’ is not entirely clear. While the respondents presumed that the intention is to require that an issuer’s working capital takes account of all amounts that are reasonably expected to be received or fall due in the next 12 months, they requested that this be more clearly stated in draft Guideline 32.
199. One respondent (issuers and investment services) requested further guidance about how issuers should treat acquisitions when assessing their working capital. This respondent was concerned that there are different market practices across Europe and that the draft Guideline 32 will not remedy this situation.
200. Another respondent (banking) stated that it would be preferable to have a working capital statement including the proceeds of the offering, but that there should be clear disclosure on this point in the ‘use of proceeds’ section of the prospectus.
201. Two respondents (both ‘other’) considered that ESMA should not include any prescriptive due diligence standards in relation to the working capital statement. Instead, these respondents argued that the standard of disclosure should be governed by Article 6 of the Prospectus Regulation and that it should be up to the issuer and its advisors to determine what information is necessary for investors to make an informed investment decision.



202. Two respondents (both issuer and investment services) who disagreed with ESMA’s proposal for draft Guideline 32, primarily objected to the obligation to take any acquisitions into account when determining whether an issuer has sufficient working capital for its ‘present requirements’. These respondents argued that acquisitions should only be taken into consideration if there is a firm commitment.

*ESMA’s response*

203. ESMA welcomes the support for draft Guideline 32 and took respondents’ comments into consideration. Based on these comments, ESMA made some revisions to the Guideline, which is now included as Guideline 34. Firstly, ESMA clarified that issuers “...should include all amounts which are reasonably expected to be received or come fall due to be paid for a minimum of the next 12 months from the date of the approval of the prospectus...”. ESMA also clarified that issuers only need to take acquisitions into consideration if there is a ‘firm commitment’.

204. ESMA considers that it is undesirable to include multiple working capital statements in prospectuses. Although multiple statements might provide investors with additional information, this approach is also more complex. ESMA considers that the presentation of the working capital statement should be simple and easy for investors to understand.

205. ESMA takes note of respondents’ objections to providing guidance about the due diligence that should be conducted in relation to an issuer’s working capital statement. However, ESMA considers that such guidance is normally considered useful in competent authorities’ interactions with market participants. In particular, ESMA notes that less experienced issuers appear to appreciate this sort of guidance. Furthermore, ESMA considers that the guidance helps to ensure a minimum level of due diligence necessary for the purposes of investor protection. As such, ESMA maintained this element of draft Guideline 32.

**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?**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
1	1	7	3

206. Four respondents (one bank, one issuer, one legal and accountancy and one ‘other’) agreed with the requirements set out in draft Guideline 34. Four other respondents (all legal and accountancy) generally agreed with the contents of draft Guideline 34, but suggested that the guidance in the Guideline is incomplete. Two respondents (one legal

and accountancy and one 'other') provided comments, while two other respondents (one legal and accountancy and one 'other') disagreed with the proposal.

207. Two respondents (both legal and accountancy) appeared to support ESMA's approach in draft Guideline 34. However, these respondents suggested that the Guideline should not only refer to credit institutions' liquidity, but also to the 'relevant applicable prudential requirements'. One of these respondents referred in particular to issuers' capital adequacy ratios (both at the CET 1 and TCR levels) and projected leverage ratios under a base case and reasonable worst case scenario. Another respondent (legal and accountancy) made similar comments and suggested discussing the Guideline with issuers and practitioners before finalising it.
208. Two respondents (banking and 'other') supported the fact that the proposed Guideline does not require credit institutions to disclose any sensitive prudential information. These respondents considered that the disclosure of such information is unnecessary, because credit institutions are already subject to rigorous capital adequacy requirements.
209. One respondent (legal and accountancy) broadly agreed with ESMA's proposal, but referred to the text in the draft Guideline stating that the working capital statement "*...should be drawn up on a basis that reflects the specificities of their business model by relying on the relevant applicable prudential requirements, except where relying on such requirements would render the working capital statement misleading.*". The respondent requested that ESMA clarify how this should be disclosed where this is the case.

#### *Input from the SMSG*

210. As previously stated in the "*General comments to draft Guidelines*" section of this Final Report, the SMSG welcomed the proposals in relation to draft Guidelines 34 and 35.

#### *ESMA's response*

211. ESMA appreciates respondents' support for its approach to working capital statements issued by credit institutions and took note of the comments received. ESMA included an additional paragraph in Guideline 36 stating that credit institutions should consider their capital adequacy ratios and provided guidance on the ratios they should consider.
212. Considering that only one respondent requested guidance about the disclosure that should be provided in the event that relying on the relevant prudential requirements would render the statement misleading, ESMA chose not to provide such guidance in the Guidelines. ESMA does not believe that this situation will come up often and considers that draft Guideline 34 does not concern the disclosure of information about the issuer's working capital, but the analysis that should be conducted when preparing an issuer's working capital statement. In the event that such a situation arises, the content of the other Guidelines relating to working capital statements still applies.

**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?**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
1	1	7	3

- 213. Seven respondents (one banking, one issuer, three legal and accountancy, two ‘other’) agreed with ESMA’s proposal for draft Guideline 35. Three other respondents (all legal and accountancy) agreed with ESMA’s proposal but provided additional comments, while two other respondents (one legal and accountancy and one ‘other’) disagreed.
- 214. One respondent (legal and accountancy), who agreed with the clarification provided by ESMA, suggested that the guidance in draft Guideline 35 needs expansion to capture the way regulatory capital is assessed for insurance undertakings. Another respondent (legal and accountancy) agreed with ESMA’s proposal, but highlighted that the draft Guideline suggests that liquidity metrics are agreed with the relevant supervisory authorities, while this is not the case in the United Kingdom. This respondent further stated that there is no standalone liquidity requirement for (re)insurance undertakings and suggests removing the text ‘which were agreed with the supervisory authority’ from the Guideline.
- 215. While agreeing with the inclusion of guidance for (re)insurance undertakings, one respondent (legal and accountancy) considered that the Guideline needs to be set in the context of how insurance undertakings are regulated as insurance businesses not only in the EU but also by third countries, because those entities issue securities in the Union. The respondent argued that the nature of these businesses can range from straightforward shorter term general insurance to longer term life insurance and considered that it may not be possible to distil a single approach that covers all cases. This respondent suggested engaging with issuers and practitioners before finalising this Guideline.

*Input from the SMSG*

- 216. As previously stated in the “*General comments to draft Guidelines*” section of this Final Report, the SMSG welcomed the proposals in relation to draft Guidelines 34 and 35.

*ESMA’s response*

- 217. ESMA is pleased that respondents generally support the draft Guideline 35. Considering this support, ESMA refrained from making changes to the draft Guideline, with the

exception of clarifying that (re)insurance undertakings should consider their capital adequacy ratios as well as their Minimum Capital Requirement when analysing their working capital requirements.

218. In response to the suggestion to remove ‘which were agreed with the supervisory authority’ from the Guideline, ESMA notes that the inclusion of this text was discussed and agreed with prudential authorities responsible for the supervision of such entities. Additionally, ESMA notes that even if the relevant liquidity metrics were not agreed with the relevant supervisory authority, (re)insurance undertakings can still take their liquidity metrics into account when analysing their working capital.
219. ESMA took note of one respondent’s suggestion for ESMA to engage with issuers and practitioners before finalising this draft Guideline. ESMA observes that the market consultation is intended to provide the necessary feedback about the appropriateness of the Guidelines. Furthermore, ESMA engaged with prudential authorities responsible for the supervision of (re)insurance undertakings and agreed the content of the Guideline with them.

**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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
1	0	7	3

220. Three respondents (one bank, one legal and accountancy and one ‘other’) agreed outright with this approach. A fourth respondent (‘other’) agreed but had an additional comment. Other respondents (six legal and accountancy and one ‘other’) to this question provided comments.
221. One respondent (legal and accountancy) was concerned about the revisions made to draft Guideline 29, which states that “*The issuer should prepare its working capital statement based on robust procedures to limit the risk that the statement is called into question*”. Four other respondents (three legal and accountancy and one ‘other’) also expressed concerns about this text, suggesting that ESMA revert to the following text in the CESR recommendations: “*Issuers should ensure that there is very little risk that the basis of such a statement is subsequently called into question*” In the view of these respondents, the new text in draft Guideline 29 suggests that there may be a lower standard of certainty in relation to working capital statements.

222. Another respondent (legal and accountancy) provided a number of comments, as follows:

- The level of detail and scrutiny applied to working capital statements is much higher than that applied to a going concern statement, while the explanatory text included in draft Guideline 29 suggests that this is not the case. The respondent appears to suggest amending this text accordingly.
- The reference to advisors should be removed from the following text in draft paragraph 122: “...*considering the issuer’s strategy and plans and the related implementation risks together with checks against evidence and analysis provided by its advisors...*”. The analysis should be the company’s own rather than relying on advisors to support the assumptions.
- Draft paragraph 144 should be clarified so that it only relates to qualifications and emphases of matter in relation to ‘going concern’. The respondent considered that many qualifications and emphases of matter relate to matters other than working capital.

#### *ESMA’s response*

223. ESMA appreciates respondents’ feedback in relation to these Guidelines. After reviewing the comments, ESMA made the following changes to improve the Guidelines:

- To address respondents’ concerns about introducing a lower standard of certainty for working capital statements in draft Guideline 29, ESMA amended the Guideline to state that “*The issuer should prepare its working capital statement based on robust procedures such that there is very little risk that the statement is challenged*”. ESMA’s intention always was to ensure the same level of certainty for working capital statements as was the case under the CESR recommendations.
- ESMA revised draft Guideline 29 so that it no longer suggests that issuers should follow procedures when drawing up their working capital statements that are similar to those applied in concluding that the issuer’s annual accounts can be drawn up on a going concern basis.
- ESMA has clarified the wording in paragraph 144 so that it only relates to qualifications and emphases of matter relating to ‘going concern’.

224. In response to the comments concerning the reference to advisors in draft paragraph 122, ESMA considers that issuers should receive advice from advisors concerning their working capital statements in order to ensure the robustness of the working capital statement. However, ESMA removed the reference to advisors in paragraph 137 of the Guidelines to better reflect the issuer is responsible for the working capital statement.

**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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
0	0	2	3

225. One respondent (legal and accountancy) believed that the draft Guidelines will not impose additional costs on issuers, while another respondent ('other') observed that it is difficult to assess whether issuers will incur additional costs.
226. Two respondents (both 'other') stated that there may be additional costs for issuers in drafting disclosure to meet the requirements of the draft Guidelines . These respondents expected these costs to vary depending on the issuer and the jurisdiction and commented that these costs will also depend on whether competent authorities are consistent and proportionate in their application of the Guidelines.
227. Another respondent (legal and accounting) stated that additional costs may arise depending on what work over and above that performed to ascertain a 'reasonable worst-case scenario' will be required to construct 'reasonable alternative scenarios'.
228. None of the respondents provided any quantitative information on any additional costs.

*ESMA's response*

229. ESMA acknowledges respondents' comments concerning the additional costs that issuers may incur due to the Guidelines. ESMA also acknowledges that any additional costs for issuers should be reduced by competent authorities taking a consistent approach to these Guidelines. ESMA believes that the improvements introduced by the Guidelines relating to working capital statements should help to alleviate any inconsistencies that were observed in the application of the CESR recommendations. In particular, ESMA expects Guideline 33 concerning the inclusion of the proceeds of an offering in the calculation of an issuer's working capital to bring about more convergence.
230. While ESMA recognises that some respondents believe that issuers may incur additional costs in the application of these draft Guidelines, it is difficult to assess whether these costs are material without quantitative information, especially considering the importance of working capital statements for the purpose of investor protection. Furthermore, it does not appear that all respondents necessarily agree that issuers will

incur additional costs. As such, ESMA did not make any additional revisions to these draft Guidelines based on the responses to Question 26.

### 3.2.8. 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.**

#### *Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
1	3	5	3

231. Three respondents (all legal and accountancy) responded that further guidance on what to disclose is necessary. Six other respondents (three issuers, one banking and two ‘other’) did not indicate whether additional guidance would be helpful. Instead, these respondents commented that it is important to ensure that the statement of capitalisation does not go beyond what is required in the Transparency Directive and IFRS. ESMA understands these comments as objections to the requirement to describe the types of guarantees applying to the issuer’s debt obligations and that these respondents would prefer to rely on the disclosure in the issuer’s financial statements.
232. However, two of these respondents (both issuers) stated that they appreciate the explanatory text in draft paragraph 154 of the Guidelines, which clarifies that if a line item is not applicable in the Member State where the issuer has drawn up its financial information, then the persons responsible for the prospectus should adapt the statement of capitalisation in consultation with the competent authority reviewing the prospectus.
233. Two other respondents (both ‘other’) suggested that the format for the statement of capitalisation is prescriptive and should be more flexible so that it is appropriate for the issuers and the GAAP they report under. These respondents also objected to the requirement that the information in the statement of capitalisation be no more than 90 days old, as some issuers may not have such information readily available.

#### *ESMA’s response*

234. Based on the responses to Question 27, ESMA understands that respondents do not desire further guidance concerning the disclosure about which types of guarantees apply to the issuers’ debt obligations. In fact, it appears that respondents would likely object to such guidance since it would likely create new disclosure requirements. Considering this feedback, ESMA did not include such additional guidance in Guideline 38.

235. ESMA takes note of respondents' other comments, which appear to object to any requirements relating to the information in the statement of capitalisation that go beyond the information required to be published under the Transparency Directive or IFRS. Among other things, ESMA understands these comments as objections to the obligation to provide information that is no more than 90 days old in the capitalisation and indebtedness statements, since the Transparency Directive does not require the publication of such information. While ESMA is cognisant that such requirements may impose additional burdens on issuers, ESMA observes that Item 3.2 of Annex 11 to the Commission Delegated Regulation clearly states that the information in the capitalisation and indebtedness statements may not be more than 90 days old. As such, there is no room for the inclusion of information that is more than 90 days old in these tables.
236. Although the nature of the guarantees is described in the issuer's financial statements, ESMA believes that including this disclosure benefits investors by providing an overview of an issuer's capitalisation in one place in the prospectus. Additionally, the requirement that the information in the statement of indebtedness is not more than 90 days old is to provide investors with certainty about the issuer's capitalisation. In fact, ESMA considers that if there have been significant changes to the issuer's capitalisation (or indebtedness) that are not reflected in the issuer's statement of capitalisation (and indebtedness), then the statement should be updated to include such information. Otherwise, it is unlikely that the prospectus satisfies the 'necessary information test' included in Article 6(1) of the Prospectus Regulation.
237. Providing such recent information may impose costs on issuers who do not have it readily available. However, ESMA considers that it is important to include up to date information about an issuer's capitalisation and indebtedness in prospectuses relating to equity securities due to the importance of many of these transactions, which include IPOs and rights issues. While ESMA notes that, in the past, some competent authorities allowed the persons responsible for the prospectus to state that there has been no material change since the last published financial information, other competent authorities would require that the information was no more than 90 days old. Therefore, ESMA chose to require more recent information in every prospectus in order to ensure that competent authorities converge their approach to this requirement.
238. In reaction to the suggestions that the disclosure requirements on the statement of capitalisation are too prescriptive, ESMA notes that it has tried to balance flexibility for issuers with the interests of investors to be able to compare the information in different statements. ESMA understands that the lack of comparability between statements of capitalisation (and indebtedness) was one of the criticisms of the CESR recommendations. Additionally, it should be noted that ESMA attempted to align the content of these Guidelines with IFRS, since a lack of alignment with IFRS was another criticism of the CESR recommendations.
239. Nonetheless, ESMA believes that Guideline 38 offers sufficient flexibility to market participants, especially considering the explanatory text in paragraphs 167 and 170. In particular, paragraph 167 allows issuers reporting under a national GAAP to make



changes to the statement of capitalisation. This should help to reduce the burden of having to adjust an issuer’s financial information into the format of the statement of capitalisation in Guideline 38.

**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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
1	1	4	3

240. Five respondents (four legal and accountancy and one ‘other’) commented that no further guidance is necessary. Two of these respondents (both legal and accountancy) cautioned that any further guidance could conflict with future regulatory requirements for credit institutions and (re)insurance undertakings, as such requirements continue to evolve.
241. Four respondents (two issuers, one banking and one ‘other’) appeared to support additional guidance about how credit institutions and (re)insurance undertakings should adapt the statement of capitalisation. These respondents encouraged ESMA to align with the reporting requirements included in the Transparency Directive, IFRS or relevant prudential regulation.

*ESMA’s response*

242. ESMA takes note of the responses to Question 28 and has decided against including additional guidance in the Guidelines about how credit institutions and (re)insurance undertakings should adapt the statement of capitalisation. ESMA appreciates that a significant number of accountancy organisations cautioned against providing more specific guidance for credit institutions and (re)insurance undertakings due to the evolving nature of prudential regulation. ESMA also believes that the rules need to be flexible since credit institutions and (re)insurance undertakings from third countries may also have prospectuses approved.

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

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
0	3	6	4

243. Three respondents (two legal and accountancy and one ‘other’) agreed with ESMA’s proposal to include trade receivables and trade payables in the indebtedness statement. However, one of these respondents (legal and accountancy) stated that the proposal would change market practice in some jurisdictions, which could increase costs.
244. Eight respondents (two issuers, three legal and accountancy and three ‘other’) disagreed with the proposal. These respondents considered that trade payables and trade receivables form part of an issuer’s working capital used in the ordinary course of business and are not a form of indebtedness. Additionally, several of these respondents mentioned that trade payables and receivables are already covered by the working capital statement included in the prospectus and that including them in the indebtedness statement is therefore unnecessary.
245. Several of these respondents also indicated that including trade payables and trade receivables would require additional effort, which would not reflect current market practice and result in significant additional costs for issuers. These respondents also signalled that this additional consolidation work would be time consuming and could disrupt the tight timelines of many equity transactions. Three respondents (all legal and accountancy) who did not agree with the proposal also suggested using IFRS based financial data in the table and requiring the interim financial information to be included.
246. Lastly, two respondents (one ‘issuer’ and one legal and accountancy) did not clearly agree or disagree with ESMA’s proposal, but suggested that the indebtedness table should be consistent with regular reporting under the Transparency Directive and IFRS.

*Input from the SMSG*

247. As previously stated in the “*General comments to draft Guidelines*” section of this Final Report, the SMSG welcomed the proposals in relation to draft Guideline 39.

*ESMA’s response*

248. ESMA appreciates the support for this approach voiced by several respondents and has also taken note of the significant number of respondents objecting to the proposal. After considering this matter further, ESMA decided not to require trade payables and trade receivables (except non-current trade and other payables) to be included in the

indebtedness statement. ESMA understands market participants' concerns that trade payables and receivables are part of an issuer's working capital. Furthermore, ESMA appreciates that the proposal would have increased the costs of drawing up equity prospectuses, since issuers would need to undertake additional consolidation work in order to incorporate this information in the indebtedness statement.

249. After deciding not to require all trade payables and trade receivables in the indebtedness statement, ESMA considered its reasons for making this proposal in the draft Guidelines. The reasons were (i) to align with the definitions of financial assets and financial liabilities in IFRS to ensure that all those assets and liabilities are included in the table and (ii) to provide additional transparency to investors if an issuer has significant amounts as trade payables / receivables outstanding for long periods (e.g. more than 12 months). Such transparency is particularly relevant in sectors such as in the construction or health care sectors where trade payables and trade receivables may create liquidity and working capital issues. It is also relevant to note that Guideline 31 does not allow any ambiguity in the context of working capital statements.<sup>32</sup>
250. With this in mind, ESMA took an alternative approach to ensuring sufficient transparency to investors, which should be less burdensome for issuers. This approach entails requiring the disclosure of 'non-current trade and other payables'. The logic behind this approach is that non-current trade and other payables have a financing component. From the perspective of investor protection, it is important that the market is aware when an issuer has significant amounts of non-current payables which are a form of long-term financing. This matter is now covered in paragraph 184 of the Guidelines.
251. A new paragraph 184 was also included in the explanatory text of Guideline 39. In this paragraph, ESMA applies the notion of 'significant financing component' in IFRS 15 *Revenue from Contracts with Customers* by analogy to develop a principle for identification of debt in this approach. ESMA expects long-term loans (including those without an explicitly identified interest) to be included in the indebtedness statement, because ESMA expects that, in principle, loans have a financing component.
252. While ESMA appreciates that some issuers may incur additional costs in order to include non-current trade and other payables in the indebtedness statement, it considers that these costs should be lower than the costs associated with including trade payables and receivables in the indebtedness statement. ESMA also expects this analysis to be less burdensome.

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<sup>32</sup> The working capital statement provides a forward-looking perspective regarding an issuer's going concern situation. Issuers are only required to state that they have a sufficient working capital without providing any disaggregated information. If issuers do not have a clean working capital statement, they should include details regarding the shortfalls as well as the solutions to remedy this issue.

**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?**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
0	2	5	2

253. Five respondents (three legal and accountancy and two ‘other’) agreed that financial liabilities from leases should be included under financial debt and be described in further detail in a paragraph after the indebtedness statement. Two other respondents (both legal and accountancy) agreed that the financial liabilities from leases should be included under financial debt, but did not see any need for further disclosure.
254. The final two respondents to Question 30 (both issuers) disagreed . These respondents considered that recommending additional disclosures is not particularly relevant when the disclosures relate to information that can be found in the issuer’s financial statements. These respondents therefore believed that the CESR recommendations should be carried over without any changes.

*Input from the SMSG*

255. As previously stated in the “*General comments to draft Guidelines*” section of this Final Report, the SMSG welcomed the proposals in relation to draft Guideline 39.

*ESMA’s response*

256. ESMA welcomes the support for including financial liabilities from leases under financial debt and for describing these liabilities in further detail after the indebtedness statement. Considering this support, ESMA did not make any changes to the treatment of financial liabilities from leases compared to paragraph 165 of the Consultation Paper.
257. In relation to the respondents that do not see any need for additional disclosure and the respondents that do not consider the disclosures relevant because the information can be found in the issuer’s financial statements, ESMA notes that the capitalisation and indebtedness statements are required in prospectuses relating to equity securities under the Prospectus Regulation and the Commission Delegated Regulation. The purpose of the indebtedness statement is to allow investors to find up to date information about an issuer’s indebtedness in one place in the prospectus. Accordingly, ESMA believes that the indebtedness statement will not fulfil its purpose if investors need to find the relevant information on the issuer’s indebtedness throughout the issuer’s financial statements.

**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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
1	2	4	3

- 258. Three respondents (two legal and accountancy and one ‘other’) stated that they believe the line items are useful. The other seven respondents provided a variety of comments.
- 259. One respondent (legal and accountancy) commented that it is unnecessary to present cash and cash equivalents separately, because these items are presented in a single item in IFRS financial statements and issuers with a complex structure may have issues determining these amounts. The respondent also did not see any benefit for investors if cash and cash equivalents are presented separately.
- 260. Another three respondents (one bank and two ‘other’) stated that the capitalisation and indebtedness statements should contain any line items that are not already required in regular reporting under the Transparency Directive and IFRS. These respondents observed that any additional reporting will lack sufficient guidance in accounting standards, meaning that consistency among various issuers is not ensured. As a result, such line items are not meaningful to investors and the additional effort to provide this financial information creates unnecessary cost for issuers.

*ESMA’s response*

- 261. Based on the responses to Question 31, ESMA decided not to make any changes to the line items in the capitalisation and indebtedness statements. ESMA notes the various technical comments and, in response, once again emphasises the constraints presented by the purpose of the capitalisation and indebtedness statements, which is to provide an overview of an issuer’s capitalisation and indebtedness in one place.
- 262. An additional factor to take into account when drawing up the Guidelines relating to capitalisation and indebtedness is the text of Item 3.2 of Annex 11 to the Commission Delegated Regulation, which is the legal basis for requiring capitalisation and indebtedness statements. The requirements of Item 3.2 of Annex 11 are, to some extent, specific and may not reflect the content of the documents published by issuers under the Transparency Directive.
- 263. In relation to the comment concerning splitting cash and cash equivalents, ESMA considers that cash and cash equivalents are of a different nature and that it can be

useful to have them provided separately. Furthermore, ESMA did not receive any compelling evidence that it will be burdensome for issuers to provide them separately.

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

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
0	1	8	1

264. The responses to Question 32 can be divided into three topics: (i) the meaning of ‘indirect’ indebtedness, (ii) the consistency of the information in the capitalisation and indebtedness statements and (iii) requests for clarifications.
265. Four respondents (all legal and accountancy) requested a clearer explanation of what is meant by ‘indirect’ indebtedness. These respondents stated that the example in paragraph 166 of the Consultation Paper refers to contingent liabilities and not indirect indebtedness. They also remarked that it is unclear whether ‘indirect’ and ‘contingent’ indebtedness relate to IFRS / IAS items such as contingent liabilities, provisions, and contractual commitments (for example, IAS 16), and whether these are items that have been recognised and / or disclosed in the financial statements.
266. Two respondents (both legal and accountancy) voiced concerns about the consistency of the information in the capitalisation and indebtedness statements with the issuer’s financial statements. These respondents believed that the issuer should simply be able to extract the information to be included in the capitalisation statement from its financial statements, as opposed to having to make any adjustments to this information for the purposes of the capitalisation and indebtedness statements. These respondents specifically question the fact that paragraph 156 of the Consultation Paper states that ‘Legal reserve(s)’ and ‘Other reserves’ should not include the profit and loss for the accounting period.
267. A significant number of comments requested clarifications to Guidelines 38 and 39. Many of these comments related to the inclusion of trade payables and trade receivables in the indebtedness statement. The responses to Question 29 above provide a summary of respondents’ concerns in this regard.
268. Other comments included the following issues:
- Paragraphs 158-160 of the Consultation Paper provide guidance about including an additional column in the capitalisation statement in order to reflect the effects of a significant change in the issuer’s business or a future change, such as an

acquisition or capital raising, on an issuer's capitalisation<sup>33</sup>. One respondent (legal and accountancy) wondered whether this guidance also applies to other types of financial instruments issued to raise funds for an acquisition (such as debt instruments).

- Paragraph 165 of the Consultation Paper provides a definition of 'Trade and other payables'. One respondent (legal and accountancy) stated that issuers may wonder if contractual assets and liabilities form a part of trade and other payables.

#### *ESMA's response*

269. In relation to the meaning of 'indirect indebtedness', ESMA notes that Item 3.2 of Annex 11 to the Commission Delegated Regulation specifically refers to indirect indebtedness. As such, the Guidelines must address indirect indebtedness, even if the concept does not exist in IFRS. After considering this issue further, ESMA came to the conclusion that 'indirect and contingent' indebtedness should continue to be used as a *catch-all* to ensure that any indebtedness that is not recognised in the issuer's financial information is included in the prospectus.
270. ESMA amended the Guidelines so that paragraphs 186-188 now explain that indirect and contingent indebtedness is intended to provide investors with an overview of any material indebtedness that is not reflected in the statement of indebtedness. The paragraphs were also updated to include examples of indirect and contingent indebtedness, which should address respondents' comments about the examples in the Consultation Paper.
271. Regarding respondents' comments about the consistency of the capitalisation and indebtedness statements with the issuer's financial statements, ESMA notes that this Guideline largely carries over the CESR recommendations. ESMA therefore kept the general format of the capitalisation and indebtedness statements required under the CESR recommendations.
272. In relation to the individual comments concerning the inclusion of an additional column in the capitalisation and indebtedness statements and the request for further clarification of the definition of trade and other payables, ESMA's response is as follows:
- Paragraphs 171-174 of the Guidelines provide guidance to market participants and competent authorities about including an additional column in the capitalisation and indebtedness statements. These paragraphs allow for an additional column to be included if the issuer's business has recently undergone a change or there will be a future change to the issuer's business. ESMA notes that this provides the persons responsible for the prospectus with a broad range

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<sup>33</sup> As noted in paragraph 167 of the Guidelines, paragraphs 157-160 apply mutatis mutandis to the indebtedness statement.

of situations in which they may be able to include an additional column in the capitalisation and indebtedness tables. This includes situations where the transaction described in the prospectus covers the issuance of debt securities or the use of other financial instruments. However, ESMA notes that the requirements set out in paragraphs 171-174 of the Guidelines should be satisfied and, in particular, the inclusion of the additional column should not be misleading to investors.

- ESMA included additional explanatory text in the Guidelines in relation to trade and other payables. This explanatory text clarifies that trade and other payables includes non-remunerated debt for which there is a significant financing component, either explicitly or implicitly. The explanatory text in paragraph 185 now also clarifies that the persons responsible for the prospectus should consider by analogy the guidance provided in paragraphs 60-63 of IFRS 15 *Revenue from Contracts with Customers* as endorsed by the EU when assessing whether trade payables have a significant financing component.
- Consistent with the approach followed in the CESR recommendations, ESMA decided to carry over the requirement to exclude the profit or loss from the capitalisation and indebtedness table. ESMA made this decision to better reflect the capital structure of an entity, taking into account that the profit or loss for the accounting period may vary significantly over time and may be distributed at the end of the reporting period and thus not be used to finance the business activity of the entity.

**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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
0	1	4	2

273. While one respondent (legal and accountancy) believed that Guidelines 38 and 39 will not impose any additional costs and another respondent ('other') stated that it is difficult to assess, the other five respondents (one issuer and three legal and accountancy) believed that these Guidelines will impose additional costs due to the additional disclosure required in the capitalisation and indebtedness statements. Respondents' concerns about additional costs appear to focus on the information in the indebtedness statement, and ESMA understands that respondents are particularly concerned about the inclusion of trade payables and receivables in the indebtedness statement.



274. The last respondent ('other') commented that there may be adaptive costs for market parties, but that these costs will vary from issuer to issuer and jurisdiction to jurisdiction. The respondent went further to state that the level of costs will depend on whether competent authorities apply the Guidelines in a consistent manner and that the costs will only be quantifiable once the Guidelines have been in force for a significant period of time.
275. None of the respondents provided any quantification of the additional costs associated with Guidelines 38 and 39.

*ESMA's response*

276. ESMA acknowledges respondents' concerns about the additional costs imposed by Guidelines 38 and 39. While ESMA believes that it is reasonable to impose some costs in order to include an overview of an issuer's capitalisation and indebtedness that is not more than 90 days old in prospectuses, ESMA also reviewed its proposal for capitalisation and indebtedness statements in the Consultation Paper.
277. After this review, ESMA decided to no longer require the inclusion of trade payables and receivables (except for non-current trade payables). This decision is based on respondents' arguments set out in their responses to Question 29, which explicitly include the costs imposed on the persons responsible for the prospectus. While the alternative proposal to require the inclusion of non-current trade and other payables in the indebtedness statement may also impose some costs, ESMA expects that these costs will be lower in most cases. This is because this information should already be available in the financial statements and ESMA would expect that issuers have this information available when assessing their working capital statement. Furthermore, ESMA expects the analysis necessary to produce this data to generally be less time consuming than including all trade payables and receivables in the indebtedness statement.

### 3.3. Non-financial information issues

#### 3.3.1. Remuneration

**Question 34: Do you agree with the approach taken for this draft guideline, i.e. to almost entirely replicate the existing CESR recommendations? If not, please provide your reasoning and suggest an alternative approach.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
1	2	4	3

278. Nine respondents (four legal and accountancy, two ‘other’, one banking and one issuers and investments services) agreed with this draft Guideline and two of them (both legal and accountancy) also welcomed the reference to the remuneration report. The remaining respondent (‘other’) did not expressly disagree.
279. One respondent (legal and accountancy) stated that the stock option disclosure requirements in the draft Guideline differ from similar requirements in Article 9(b)(1)(d) of the Shareholder Rights Directive (SRD). The respondent asked if the draft Guideline requirements for stock option disclosure could be aligned with those in SRD and suggested that ESMA should reconsider the draft Guideline when the Commission issues guidelines under Article 9(6) of the SRD.
280. Finally, one respondent (‘other’) suggested that the term ‘stock options’ should be replaced by ‘share-based remuneration’. The respondent argued that stock options are not the only instrument used for longer-term bonus programmes.

*ESMA’s response*

281. ESMA recognises that the SRD requirements are similar to those covered in this Guideline and understands the calls for reconciliation. However, SRD sets out detailed requirements for directors and executive remuneration only, whereas the Commission Delegated Regulation concerns the remuneration of a broader range of parties, e.g. senior managers, founders, partners, etc. Furthermore, SRD requirements are limited to a period of one year, whereas the prospectus requirements are not. As such, it is difficult to fully align the requirements.
282. Lastly, in relation to the term ‘stock options’, ESMA agrees with the respondent and has incorporated the term ‘share-based payments’ in the Guideline.

**Question 35: Do you believe the application of draft guideline 40 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
1	2	1	3

283. Three respondents (two issuers and investment services, one legal and accountancy) believed these draft Guidelines will not increase costs. One respondent ('other') believes that it is difficult to assess. Another respondent ('banking') stated that it will not add additional costs so long as prospectuses may refer to where information on remuneration can be found instead of having that information duplicated in the prospectus. Finally, two respondents ('other') stated that there may be some potential for adaptive costs and suggested that variations in the application of the final Guidelines by different competent authorities might have an impact.

*ESMA's response*

284. ESMA does not expect this Guideline to add major costs. As submitted by one respondent, incorporation by reference is a prominent feature in the Prospectus Regulation. Therefore, where disclosure is available in other regulated documentation, the option to cross-refer should curtail any major concerns. As for variations in the application of the Guidelines, ESMA will monitor this aspect.

**3.3.2. Related party transactions**

**Question 36: Do you agree with the content of this draft guideline? Do you think it provides further clarity to the market? If not, please explain.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
1	1	5	3

285. Three respondents (legal and accountancy) stated that the draft Guideline is clear and supported it. The remaining respondents sought additional clarifications without expressly disagreeing with the draft Guideline.

286. Two respondents (legal and accountancy) questioned the requirement for disclosure on the amount and percentage, relative to turnover, assets and liabilities, which related party transactions comprise. The respondents stated that the requirements go beyond what is in IAS 24 and would impose undue burdens on those who do not apply IAS 24. It was suggested that the wording should be amended so that the requirements seek the same level of information as IAS 24.
287. One respondent (issuers and investment services) believed that requiring the IFRS definition of related party transactions to be applied, in a situation where an issuer is permitted to include non-IFRS financial statements, is a substantial burden on issuers that is not outweighed by any significant benefit to investors.
288. One respondent ('other') asked for a requirement to be included which would oblige the company to state whether it has followed the approval process for related party transactions as required by Article 9(c) of the SRD. Another respondent (banking) stated that issuers should be obliged to prepare the information concerning related party transactions in accordance with IAS 24. Furthermore, this respondent suggested that the disclosure should only apply to material transactions that are not part of the ordinary course of business of the issuer or which are not carried out under market conditions.
289. Finally, two respondents ('other') argued that the correct approach is to encourage issuers who do not apply IAS 24 to use the definition of related party transactions in the relevant GAAP for each year covered by the financial statements.

*Input from the SMSG*

290. The SMSG noted that the guidance covers the situation in which an issuer does not apply IAS standards but is required to provide disclosure on related party transactions.
291. The SMSG advised ESMA to align the disclosure requirements of the draft Guideline with the requirements of the SRD for related party transactions.

*ESMA's response*

292. Regarding the percentage disclosure requirements, ESMA acknowledges that the requirements may go beyond what is set out in IAS 24. However, ESMA wishes to highlight that these requirements stem from Annex 1, Item 17.1 of the Commission Delegated Regulation. Similarly, ESMA takes note of the comment concerning the use of an IFRS definition, but this also comes from Annex 1, Item 17.1 of the Commission Delegated Regulation. ESMA cannot modify the Commission Delegated Regulation requirements via the Guidelines.
293. ESMA notes the comments from both the SMSG and the respondent concerning SRD. While the SMSG suggests that the disclosure should be in line with the requirements of SRD, ESMA believes this reconciliation between SRD and the Commission Delegated Regulation is not possible to achieve via the Guidelines. The requirements in the draft Guideline are based on the requirements in the Commission Delegated Regulation, as such, the reconciliation would need to occur therein. However, ESMA included a new

sentence in the final explanatory text of the Guideline to encourage issuers to state whether they have followed the approval process in Article 9(c) of the SRD.

294. According to the Commission Delegated Regulation, issuers should consult IAS 24 to understand the meaning of ‘related party transactions’. If the issuer has entered into related party transactions, as explained in IAS 24, the issuer needs to provide the disclosure required in Annex 1, Item 17.1 of the Commission Delegated Regulation.

**Question 37: Do you believe that the application of draft guideline 41 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Others
1	1	1	3

295. Three respondents (one issuers and investment services, one banking and one legal and accountancy) believed that these draft Guidelines will not increase costs. One respondent (‘other’) believed it is difficult to assess. Two respondents (‘other’) stated that there may be some potential for adaptive costs and suggested that variations in the application of the Guidelines by different competent authorities might have an impact.

*ESMA’s response*

296. Most of the issues raised in relation to this Guideline stem from the Commission Delegated Regulation. The Guideline merely tries to clarify the Commission Delegated Regulation disclosure Items for related party transactions. As such, ESMA does not anticipate that the Guideline, itself, will introduce major costs, as the source of most comments is in fact the underlying provision.
297. As for consistency in the application of the Guideline, ESMA will monitor this aspect.

### 3.3.3. Acquisition rights and undertaking to increase capital

**Question 38: Do you agree with the general approach taken for this draft guideline, i.e. to almost entirely replicate the existing CESR recommendations? If not, please provide your reasoning and suggest an alternative approach.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	3	1	3

298. All nine respondents were in favour of the draft Guideline.

*ESMA's response*

299. ESMA carried this Guideline forward without any changes.

**Question 39: Do you believe the application of draft guideline 42 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	2	1	3

300. Five respondents (two issuers and investment services, two banking, and one legal and accountancy) believed that this draft Guideline will not increase costs. One respondent ('other') stated that it is difficult to assess. Finally, two respondents ('other') believed that there may be some potential for adaptive costs and suggested that variations in the application of the Guideline by different competent authorities might have an impact.

*ESMA's response*

301. ESMA does not expect this Guideline to add major costs considering that it is similar to the relevant CESR recommendations. As for variations in the application of the final Guidelines, ESMA will monitor this aspect.

### 3.3.4. Options agreements

**Question 40: Do you agree with the general approach taken for this draft guideline, i.e. to almost entirely replicate the existing CESR recommendations? If not, please provide your reasoning and suggest an alternative approach.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
1	3	1	3

302. Three respondents (two issuers and investment services, one legal and accountancy) were in favour of ESMA’s approach. A fourth respondent (‘other’) also supported ESMA’s approach, but added that, if there are option agreements with parties other than employees and management, these counterparties should also be identified in the prospectus. Two respondents (one banking and one issuer’s and investment services) only disagreed with the inclusion of the requirement for dilution.
303. Two respondents (‘other’) stated that the information required by the draft Guideline should only be provided to the extent that it is material. The same respondents added that either point (iv) or (v) of paragraph 179 of the Consultation Paper should be deleted because the points duplicate one another.

*ESMA’s response*

304. ESMA carried forward the Guideline without major changes.
305. Firstly, on the identification of more counterparties, ESMA believes that the Guideline is sufficiently far-reaching and that no further expansion is necessary. The matter concerning dilution is addressed in Question 41.
306. As regards the materiality comment, ESMA generally agrees. However, ESMA would like to add that it is for the issuer and its advisors to make such a determination. Finally, to avoid duplication in the Guideline, ESMA merged points (iv) and (v) which were presented separately in paragraph 179 of the Consultation Paper.

**Question 41: Do you agree with the introduction of a specific disclosure point on the potential dilution effects connected to the exercise of option agreements?**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
1	3	2	3

307. Four respondents (two ‘other’, one legal and accountancy and one banking) agreed with the proposal but had additional comments. Two respondents (‘other’) agreed with the new requirement as long as it relates only to issuers of shares. A third respondent (legal and accountancy) also agreed provided the information required does not go beyond what is set out in IAS 33 and IFRS 2. A further respondent (banking) also supported the proposal, as long as an issuer can explain any conditionality, e.g. provided the issuer can explain that the events which trigger the exercise of an option may have a remote chance of occurring and may depend on the will of third parties.
308. One respondent (other) argued that the new requirement concerning dilution should only apply in respect of the issuer and significant subsidiaries, and stated that disclosing the potential impact of dilution is not of significance in the context of non-material group companies. Three respondents (issuers and investment services) argued that the new requirement is inconsistent with Annex 1, Item 19.1.6 of the Commission Delegated Regulation. The respondent argued that no requirement to disclose information on potential dilution is contained therein.
309. One respondent (legal and accountancy) questioned whether the disclosure proposed by ESMA would be helpful and argued that it is debatable whether disclosure of the maximum dilutive effect will provide investors with a realistic situation. If the Guideline is maintained, the same respondent argued that it should be made clear that the potential dilutive effect would only be relevant to the extent it is material. Moreover, the respondent stated that it would be helpful if ESMA could provide guidance on how, and as of what date, the possible dilutive effect should be calculated.

*ESMA’s response*

310. ESMA notes that respondents are generally supportive of this new requirement. In particular, ESMA notes that respondents support it to the extent that it leads to material disclosure and subject to the condition that issuers can explain why certain disclosure is





not necessary. In view of this, ESMA added the following text and footnote to the Guideline: “...unless the effect is immaterial”.<sup>34</sup>

- 311. In response to the first comment, ESMA confirms that this disclosure relates to equity securities. As regards the comment on IAS 33 / IFRS 2, ESMA confirms that the Guideline should not be applied in a way which goes beyond the requirements in those standards.
- 312. Regarding the basis for this requirement, ESMA notes that Annex 1, Item 19.1.6 of the Commission Delegated Regulation is a general disclosure requirement related to capital under option. Dilution is one of the major risks associated with options; accordingly, ESMA considers that the basis for this disclosure requirement is present in the Annex Item.
- 313. Finally, as previously mentioned, ESMA added new wording concerning the materiality of the information to the Guideline. Additionally, ESMA included a footnote in the Guideline which refers to IAS 33 (or similar requirements in the applicable accounting framework) principles. This should help in responding to questions concerning how the possible dilutive effect should be calculated.

**Question 42: Do you believe the application of draft guideline 43 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
1	2	1	3

- 314. One respondent (legal and accountancy) stated that Guideline 43 will not add additional costs. One respondent (‘other’) stated that it is difficult to assess. Three respondents (two issuers and investment services, one banking) believed that the additional disclosure requirement will create extra costs. The remaining two respondents (‘other’) stated that there may be some potential for adaptive costs and suggest that variations in the application of the Guidelines by different competent authorities might have an impact.

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<sup>34</sup> Materiality in this context should be assessed by reference to Article 6 of the Prospectus Regulation. Furthermore, persons responsible for the prospectus should consider reporting standards such as IAS 33 (or similar requirements in the applicable accounting framework) as an aid when complying with this guideline.

*ESMA's response*

315. ESMA appreciates that the new requirement concerning potential dilution may increase costs. However, the new requirement will only apply to the extent that the disclosure is material. Given its relevance in the context of options, ESMA considers it important to maintain this requirement. As for the final comment, ESMA will monitor the application of the Guideline to ensure consistency.

### 3.3.5. History of share capital

**Question 43: Do you agree with the guidance set out in draft guideline 44 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	3	1	2

316. All respondents were in favour of the proposal.

*ESMA's response*

317. ESMA carried the Guideline forward.

**Question 44: Do you believe the application of draft guideline 44 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	2	1	2

318. Five respondents (two issuers and investment services, two banking and one legal and accountancy) believed that costs will not increase. One respondent ('other') stated that it is difficult to assess. The remaining respondent ('other') stated that there may be some potential for adaptive costs and that variations in the application of the Guidelines by different competent authorities might have an impact on costs.

*ESMA's response*

319. ESMA does not expect this Guideline to add major costs considering that few changes were made to the original text from the CESR recommendations. As for variations in its application, ESMA will monitor this aspect.

**3.3.6. Description of the rights attaching to shares of the issuer**

**Question 45: Do you agree with the guidance set out in draft guideline 45 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	3	1	3

320. Seven respondents (three issuers and investment services, two banking, one 'other' and one legal and accountancy) agreed with the draft Guideline.
321. One respondent ('other') asked for 'shareholder rights' disclosure to be added. More specifically, the respondent requested the inclusion of the following disclosure requirements: i) disclosure concerning the threshold for shareholders to submit a shareholder resolution, ii) disclosure concerning the shareholders' procedure to nominate candidates for the board, and iii) disclosure concerning the procedure to initiate a shareholder action to dismiss one or more board members.
322. One respondent ('other') stated that the disclosure provided should only be that which is material about the issuer and the securities.

*ESMA's response*

323. As a clear majority of respondents agreed and did not raise any concerns, ESMA carried the Guideline forward.
324. ESMA decided against incorporating the proposals concerning 'shareholder rights'. That type of disclosure is, to an extent, already catered for within the Commission Delegated Regulation. Moreover, there are other EU rules applicable to listed issuers which cover these types of disclosures, e.g. SRD.
325. Lastly, ESMA generally agrees with the comment on materiality. ESMA would also like to reiterate that it is for the issuer and its advisors to determine materiality.

**Question 46: Do you believe the application of draft guideline 45 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	2	1	2

326. Five respondents (two issuers and investment services, two banking and one legal and accountancy) believed that costs will not increase. One respondent ('other') stated that it is difficult to assess. The remaining respondent ('other') believed there may be some potential for adaptive costs and that variations in the application of the Guidelines by different competent authorities might have an impact on costs.

*ESMA's response*

327. ESMA does not expect this Guideline to add major costs considering that few changes were made to the original text from the CESR recommendations. As for variations in its application, ESMA will monitor this aspect.

### 3.3.7. 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
1	2	4	3

328. Five respondents (two issuers and investment services, one 'other', one banking and one legal and accountancy) agreed with the draft Guideline. The remaining respondents did not expressly disagree. There were some clarifications requested on certain points.
329. Three respondents (legal and accountancy) asked if an auditor, who produces a pro forma report, should be considered an expert for the purpose of this Guideline. According to the respondents, there are inconsistent views across competent authorities.

330. Three respondents (two ‘other’, one legal and accountancy) questioned whether the draft Guideline assumes that experts will always be natural persons. The respondents stated that this may not always be the case. Additionally, two respondents (legal and accountancy) asked what should be understood by ‘relevant compensation’ in paragraph 190 of the Consultation Paper.
331. Lastly, referring to paragraph 188 of the Consultation Paper, one respondent (banking) argued that the scope of a ‘full’ description is unclear. The respondent believed that a ‘simple’ description of any material interest should be sufficient.

*ESMA’s response*

332. ESMA carried the Guideline forward. A majority of respondents clearly agreed with it and those who did not explicitly support it did not object. There were only a couple of clarifications requested.
333. ESMA does not believe that the Guideline should apply where an auditor provides a pro forma report. More generally, auditors should not be considered as ‘experts’ for the purpose of this Guideline. The Guideline should apply where independent experts provide opinions such as on property valuations. The systematic application of this Guideline is not expected for auditors who are furnishing reports required by Commission Delegated Regulation and which are drawn up pursuant to standardised convention.
334. ESMA does not assume that experts are necessarily natural persons. ESMA added the following wording to the Guideline: “An ‘expert’ may be a natural or legal person”. With regard to ‘relevant compensation’, ESMA considers this to relate to any pecuniary benefits.
335. Finally, ESMA clarifies that ‘full’ in this context means that an appropriate description is provided where the information is material.

**Question 48: Do you believe the application of draft guideline 46 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	1	2	2

336. Three respondents (one banking, one issuer, one legal and accountancy) believed that costs will not increase. One respondent (‘other’) stated that it is difficult to assess and another (legal and accountancy) did not express a view.

337. Two respondents (one banking, one ‘other’) believed that point (iv) of the draft Guideline (connections to financial intermediaries involved if the offer / listing) could require the establishment of additional monitoring systems.

*ESMA’s response*

338. ESMA does not expect this Guideline to add major costs considering that few changes were made to the original text from the CESR recommendations. ESMA notes the comment concerning additional monitoring systems. However, the draft Guideline introduced no changes in comparison to the CESR recommendation.

### 3.3.8. Information on holdings

**Question 49: Do you agree with the proposal to carry over only part of the CESR recommendations on information on holdings? If not, please indicate what further CESR recommendations should be retained and the legal basis for their inclusion in these draft guidelines.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
1	3	2	3

339. Six respondents (three issuers and investment services, two legal and accountancy and one ‘other’) agreed with the draft Guideline.
340. Two respondents (‘other’) agreed, but suggested that further streamlining is desirable. They argued against a requirement for details on an undertaking’s registered office; as they believe that such information is unlikely to be material. Furthermore, these respondents stated that the level of detail required by the draft Guideline should only be provided to the extent it is material and only if it has not been disclosed in the consolidated financial statements.

*ESMA’s response*

341. ESMA carried the Guideline forward with only minor changes. These minor changes were mostly to improve readability.
342. ESMA did not remove the requirement relating to an undertaking’s registered office. Obtaining such information should be of little difficulty considering that it is so basic. Inversely, ESMA added a requirement for LEI disclosure, if an LEI is available. As for the comment on materiality, ESMA generally agrees with that assessment and would draw attention to Article 6 of the Prospectus Regulation.

**Question 50: Do you consider the clarification on the general principle whereby this draft guideline does not apply when the required information is provided in the issuer’s consolidated / separate financial statements prepared in accordance with IFRS to be useful?**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
1	3	3	3

343. Eight respondents (three issuers and investment services, three ‘other’, two legal and accountancy) supported this clarification. There were no major objections to its inclusion.

*ESMA’s response*

344. ESMA carried the Guideline forward.

**Question 51: Do you believe the application of draft guideline 47 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
1	2	1	2

345. Four respondents (one banking, one issuers and investment services, one legal and accountancy and one ‘other’) believed that the Guideline will not impose additional costs. One respondent (‘other’) considered it difficult to assess whether it will impose additional costs. One respondent (‘other’) stated that there may be some potential adaptive costs and that variations in the application of the final Guidelines by different competent authorities may have an impact on costs.

*ESMA’s response*

346. ESMA does not expect this Guideline to contribute significantly to costs considering that few changes were made to the original text from the CESR recommendations. As for variations in its application, ESMA will monitor this aspect.

### 3.3.9. Interest of natural and legal persons involved in the issue / offer

**Question 52: Do you agree with the guidance set out in draft guideline 48 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.**

#### *Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
1	3	1	3

347. Six respondents (three issuers and investment services, one ‘other’, one banking and one legal and accountancy) agreed with the draft Guideline.
348. Two respondents (‘other’) had additional comments. Both of these respondents were concerned by the fact that there is no express time limitation on the disclosure requirement concerning experts’ former employment. These respondents suggested that the draft Guideline will lead to extensive disclosure of historic information which may be both costly and time consuming to produce and which may not be material for investors in shares.
349. One of those respondents stated that it is only relevant for investors to know about the interests of experts whose statements are included in a prospectus and that the interests of any other persons involved in the issue / offer are not necessarily relevant.

#### *ESMA’s response*

350. As a clear majority of respondents agreed and did not have any concerns, ESMA carried the Guideline forward.
351. ESMA considers that conflicts of interest do not necessarily have time limitations and presumably this is why the Commission Delegated Regulation does not limit the disclosure to a particular time period. Additionally, conflicts of interest can arise in various forms, e.g. economic interests or former employment in the issuer.
352. Lastly, ESMA notes that the requirements set out in Annex 11, Item 3.3<sup>35</sup> of the Commission Delegated Regulation are broad. Consequently, there is no basis to restrict the scope of the disclosure to experts who provide statements in the prospectus.

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<sup>35</sup> In addition to being set out in Annex 11, Item 3.3, this requirement also appears in a number of other Annexes.



**Question 53: Do you believe the application of draft guideline 48 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
2	2	1	2

353. Four respondents (one banking, one issuers and investment services, one legal and accountancy and one 'other') did not foresee additional costs. One respondent stated that this is because the draft Guideline is essentially the same as the corresponding text in the CESR recommendations. One respondent ('other') stated that it is difficult to assess if additional costs will arise. Another respondent believed that there may be some potential for adaptive costs and that variations in the application of the Guidelines by competent authorities may have an impact.

*ESMA's response*

354. ESMA does not expect this Guideline to contribute significantly to costs considering that few changes were made to the original text from the CESR recommendations. As for variations in its application, ESMA will monitor this aspect.

### 3.3.10. Collective investment undertakings

**Question 54: Do you agree with the guidance set out in the draft guidelines which have been subject only to minor revision, i.e. draft guidelines 49, 50, 52, 53, 54, 55 and 57? If not, please elaborate on your reasoning and suggest an alternative approach.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
1	0	3	3

355. All respondents agreed with these draft Guidelines. One respondent suggested that draft Guideline 50 should have an additional element which would require issuers to provide a breakdown of claims which the collective investment undertaking has in equity or debt.



*ESMA's response*

356. ESMA carried these draft Guidelines forward. ESMA notes the request concerning claims in equity or debt. However, this is already covered by Guideline 57 points (i) and (ii). For the sake of clarity, ESMA confirms that it has also carried forward each of those points.

**Question 55: Do you agree with the inclusion of new draft guideline 51? If not, please explain and indicate an alternative approach that would provide sufficient investor protection.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
1	0	1	1

357. All respondents agreed with the draft Guideline.

*ESMA's response*

358. ESMA carried the Guideline forward.

**Question 56: Do you agree with the inclusion of new draft guideline 56? If not, please explain and indicate an alternative approach that would provide sufficient investor protection.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
1	0	1	1

359. All respondents agreed with this draft Guideline.

*ESMA's response*

360. ESMA carried the Guideline forward.

**Question 57: Do you believe the application of any of the draft guidelines 49, 50, 51, 52, 53, 54, 55, 56 and 57 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.**

*Stakeholder feedback*

Banking	Issuers and investment services	Legal and accountancy	Other
0	0	1	1

361. One respondent (legal and accountancy) believed these Guidelines will impose no additional costs. One respondent ('other') stated that it is difficult to determine whether additional costs will be imposed.

*ESMA's response*

362. ESMA does not expect these Guidelines to contribute to costs considering that, in most cases, few changes were made to the original text from the CESR recommendations. Additionally, it appears that respondents have few concerns related to the new Guidelines.



## **Annex I: Cost-benefit analysis**

## 1. Executive summary

### Reasons for publication

In 2005, ESMA's predecessor CESR adopted recommendations<sup>1</sup> in order to provide guidance to financial market participants about how to comply with various disclosure requirements in the Prospectus Directive.<sup>2</sup> A significant amount of time has passed since the CESR recommendations were written. Additionally, the CESR recommendations were not adopted as Guidelines under Article 16 of the ESMA Regulation,<sup>3</sup> which means that the comply-or-explain mechanism does not apply to them.

With the Prospectus Directive replaced by the Prospectus Regulation as of 21 July 2019, ESMA believes that it is appropriate to update the CESR recommendations in order to make them consistent with the contents of the Prospectus Regulation<sup>4</sup> while at the same time converting them into Guidelines.

The cost-benefit analysis (CBA) aims to provide the reader with an overview of findings regarding the potential impact of the proposed Guidelines on prospectus disclosure.

### Contents

Section 2 introduces the CBA by describing ESMA's approach to updating the CESR recommendations as well as by describing the nature of the CBA, together with its structure.

Section 3 analyses the costs and benefits connected with the Guidelines.

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<sup>1</sup> ESMA update of the CESR recommendations for the consistent implementation of the Commission Regulation (EC) 809/2004, ESMA/2013/319 | 20 March 2013.

<sup>2</sup> Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ L 345, 31.12.2003, p.64-89.

<sup>3</sup> Regulation (EU) 1095/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15.12.2010, p. 84.

<sup>4</sup> Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, OJ L 168, 30.06.2017, p. 12-82.



## 2. Introduction

This CBA was developed in the context of the finalisation of the Guidelines in order to assess their impact on stakeholders. The Guidelines were drawn up to ensure that market participants have a uniform understanding of the relevant disclosure required in the various Annexes included in the Commission Delegated Regulation.<sup>5</sup>

The content of the Guidelines was generally carried over from the CESR recommendations, as these were considered to work well for both competent authorities and market participants. However, some content was amended for the following reasons:

- the CESR recommendations were no longer up to date as they were originally published in 2005 and only subject to a limited update in 2013;
- the updated content of several Q&As that were originally published in relation to the Prospectus Directive would fit better within the Guidelines;
- the Commission Delegated Regulation introduced changes that needed to be addressed in order to ensure supervisory convergence;
- divergent practices had emerged in some areas and new Guidelines were therefore introduced to promote convergence; and
- the recommendations needed to be redrafted in a form appropriate for Guidelines.

The CBA aims at assessing the impact of the Guidelines on various stakeholders. Problem identification and analysis of market / regulatory failure were undertaken by the Commission during the elaboration of the Prospectus Regulation in 2015 and therefore do not need to be undertaken herein.

### The stakeholder consultation

ESMA published a Consultation Paper<sup>6</sup> in relation to the proposed Guidelines on 12 July 2019. The consultation was open until 4 October 2019. Market participants provided a significant amount of helpful feedback on the proposed Guidelines, which was useful to draw up this CBA. Despite its volume and its usefulness, the feedback did not provide much input in terms of quantitative information about the costs associated with the Guidelines.

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<sup>5</sup> Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) 809/2004, OJ L 166, 21.6.2019, p.26-176.

<sup>6</sup> [ESMA31-62-1239](#) Consultation Paper – *Draft Guidelines on disclosure requirements under the Prospectus Regulation*, 12 July 2019

## **A qualitative approach**

Due to the absence of quantitative information in the responses to the market consultation and to an overall lack of public information about the costs of drawing up a prospectus, this CBA takes a qualitative approach to assessing the costs associated with the Guidelines.

### **Baseline scenario**

The baseline scenario is the application of the CESR recommendations, without any changes. Therefore, the costs and benefits identified in this CBA are those caused by the changes introduced by the Guidelines.

## **3. Analysis of proposed measures**

This analysis first presents the baseline scenario and then the policy options considered by ESMA. The impact of each of the individual policy options is assessed thereafter. The responses to the market consultation are also touched upon in the analysis, however, readers should consult the summary of the feedback and amendments to the Guidelines for a more complete overview.

Most of the measures proposed in the draft Guidelines carry over the content of the CESR recommendations. Considering that the CESR recommendations also form the baseline of this CBA, most of the proposed measures will not have an impact on competent authorities and market participants. Therefore, this CBA only analyses the impact of the following proposed measures that materially depart from the content of the CESR recommendations:

- The requirement to provide additional information if an issuer substitutes its management report for the operating and financial review (OFR) section of the prospectus, but its management report does not include all of the necessary information required by Items 7.1.1 and 7.1.2 of Annex 1 to the Commission Delegated Regulation (Guidelines 3 and 4).
- The specific requirements for credit institutions and (re)insurance undertakings in relation to capital resources and working capital statements (Guidelines 6, 36 and 37).
- The revised requirements for profit forecasts, which no longer require a statement from an accountant (Guidelines 10, 11, 12 and 13).
- The requirement to aggregate acquisitions when determining whether pro forma financial information must be included in a prospectus (Guideline 18).
- The inclusion of the proceeds of an offering in the calculation of an issuer's working capital (Guideline 33).
- The amendments to the capitalisation and indebtedness statements (Guidelines 38 and 39).

### 3.1. The requirement to provide additional information if an issuer substitutes its management report for the OFR section of the prospectus

In this section, ESMA analyses potential approaches for Guidelines relating to the OFR, taking into account the disclosure requirements in the Commission Delegated Regulation. The section starts by clarifying the policy objectives of the Guidelines. The section then examines the costs and benefits of each option and provides the reasoning for the decision to pursue Option 2.

#### 3.1.1. Technical options

Policy objective:	Ensuring that a new feature introduced by the Commission Delegated Regulation (i.e. the option to substitute the OFR section of a prospectus with a management report) is consistently applied.
Option 1:	Provide no guidance on this new feature and leave it to competent authorities and the market to settle its application.
Option 2:	Provide a Guideline which aims to streamline the application of this new disclosure requirement. The Guideline should consider any differences in management reports arising at national level due to transpositions of the Accounting Directive, and it should provide guidance as to what should happen where a management report's content is out of date, etc.
Preferred option:	Option 2.

#### 3.1.2. Cost-benefit analysis

<b>Option 1</b>	
	<i>Qualitative description</i>
Benefits:	Competent authorities and the market have discretion over how the requirement should be applied.
Costs to regulator:	
- One-off	Each competent authority will have the one-off cost of developing an approach to the review of the information in the OFR and the management report.
- Ongoing	No additional ongoing costs are expected for competent authorities.



Compliance costs:	
<ul style="list-style-type: none"> <li>- One-off</li> <li>- Ongoing</li> </ul>	Both the one-off and the ongoing compliance costs could be quite low or could be significant depending on the differences in the application of the new disclosure requirement, and to what extent national practices develop concerning the substitution of an issuer's management report for the OFR.
Costs to other stakeholders:	None.
Indirect costs:	None.

<b>Option 2</b>	
	<i>Qualitative description</i>
Benefits:	<p>Competent authorities and market participants understand how the disclosure requirements relating to the OFR in the Commission Delegated Regulation will be applied in their jurisdiction, which promotes supervisory convergence and creates a level playing field.</p> <p>Furthermore, this option ensures that OFRs include all of the information required under the Commission Delegated Regulation, even if the management report is substituted for the OFR.</p>
Costs to regulator:	<ul style="list-style-type: none"> <li>- One-off: There may be one-off costs for competent authorities when implementing the new Guidelines, but these should not be significant.</li> <li>- Ongoing: Competent authorities should not incur significant ongoing costs, because they are already required to scrutinise all of the sections of the prospectus, including the OFR.</li> </ul>
Compliance costs:	<ul style="list-style-type: none"> <li>- One-off: Issuers may have additional compliance costs because the Guidelines bring the content of the management report in line with the content of the OFR. Issuers that choose to substitute their management report for the OFR may therefore have one-off compliance costs depending on</li> </ul>

- Ongoing	whether they need to supplement the information in their management report.  While some issuers may incur minor costs if information is missing from their management report, ESMA expects issuers will be able to anticipate the required disclosure once they are familiar with the relevant disclosure requirements for the OFR.
Costs to other stakeholders:	None.
Indirect costs:	None.

### 3.2. Specific requirements for credit institutions and (re)insurance undertakings in relation to capital resources

In this section, ESMA analyses the possible approaches to providing guidance about the disclosure that should be made available by credit institutions and (re)insurance undertakings in the parts of the Guidelines concerning capital resources. The section starts by clarifying the policy objectives of the Guidelines providing the additional guidance to credit institutions and (re)insurance undertakings and goes into two options. The section then examines the costs and benefits of each option and provides background reasoning for the decision to pursue Option 1.

#### 3.2.1. Technical options

Policy objective:	Ensuring that credit institutions, (re)insurance undertakings and other entities subject to prudential supervision provide disclosure about their funding and treasury policies in the context of their capital requirements.
Option 1:	Subjecting credit institutions, (re)insurance undertakings and other entities under prudential supervision to the general obligation to provide disclosure about funding and treasury policies in the context of their capital requirements, without requiring the disclosure of specific prudential metrics.
Option 2:	Providing specific disclosure requirements for credit institutions, (re)insurance undertakings and other entities subject to prudential supervision, including the disclosure of specific prudential metrics.
Preferred option:	Option 1

### 3.2.2. Cost-benefit analysis

<b>Option 1</b>	
	<i>Qualitative description</i>
Benefits:	This option has the benefit of setting out minimum standards for the disclosure of the impact of credit institutions, (re)insurance undertakings funding and treasury policies in the context of their capital requirements without forcing them to use a particular format. This improves the readability of the prospectus and allows issuers to focus on the information that is most relevant for investors. Furthermore, this provides clarity to the market without requiring the disclosure of prudential information which they are not already required to disclose.
Costs to regulator:	
- One-off	Competent authorities are unlikely to incur one-off costs.
- Ongoing	Competent authorities may incur more ongoing costs due to the discussions about the content of the OFR because of the discretion provided to issuers. These costs should not be significant.
Compliance costs:	
- One-off	Credit institutions and reinsurance undertakings already include information in prospectuses about their funding and treasury policies in the context of their prudential requirements. They may have minor costs to the extent that they do not satisfy the minimum standards for disclosure.
- Ongoing	It is unlikely that credit institutions and (re)insurance undertakings will incur significant ongoing compliance costs after they have adapted their disclosure to take the Guidelines into account. There may be some minor costs associated with discussions with competent authorities.
Costs to other stakeholders:	None.
Indirect costs:	None.

<b>Option 2</b>	
	<i>Qualitative description</i>
Benefits:	This option has the benefit of providing detailed guidance to credit institutions, (re)insurance undertakings and other entities about the disclosure to be included in prospectuses concerning their funding and treasury policies. These entities will also provide more similar disclosure so that the information about their funding and treasury policies is more comparable and this option provides less room for divergent practices to develop.
Costs to regulator:	
- One-off	Competent authorities may have some minor one-off costs related to adapting their procedures in line with this option.
- Ongoing	Competent authorities are not likely to have ongoing costs.
Compliance costs:	
- One-off	Issuers will have one-off compliance costs drafting the new disclosure.
- Ongoing	There should not be any ongoing compliance costs because issuers are already in possession of the information they need to disclose.
Costs to other stakeholders:	None.
Indirect costs:	Prior experience has shown that very rigid, prescriptive disclosure requirements can negatively affect the readability of prospectuses.  Credit institutions, (re)insurance undertakings and / or prudential authorities may object to some sensitive prudential information being made public in prospectuses.

### **3.3. Specific requirements for credit institutions and (re)insurance undertakings in relation to working capital statements**

In this section, ESMA analyses the possible approaches to providing guidance about the analysis that should be provided by credit institutions and (re)insurance undertakings in the parts of the Guidelines concerning working capital statements. The section starts by clarifying the policy objectives of these Guidelines and goes into two options. The section then examines

the costs and benefits of each option and provides background reasoning for the decision to pursue Option 2.

### 3.3.1. Technical options

Policy objective:	Ensuring that credit institutions and (re)insurance undertakings take their prudential requirements into account when analysing whether they should provide a qualified or unqualified working capital statement.
Option 1:	Not providing any guidance to credit institutions and (re)insurance undertakings about how they should take their prudential requirements into account when analysing their working capital requirements.
Option 2:	Providing specific guidance about the factors that credit institutions and (re)insurance undertakings should take into account when analysing their working capital requirements.
Preferred option:	Option 2.

### 3.3.2. Cost-benefit analysis

<b>Option 1</b>	
	<i>Qualitative description</i>
Benefits:	This option has the benefit of maintaining the status quo.
Costs to regulator:	
- One-off	Competent authorities should have no one-off costs because no changes are introduced with this option.
- Ongoing	Competent authorities should have no ongoing costs because no changes are introduced with this option.
Compliance costs:	
- One-off	Issuers should have no one-off compliance costs because no changes are introduced via this option.
- Ongoing	Issuers should have no ongoing compliance costs because no changes are introduced via this option.

Costs to other stakeholders:	None.
Indirect costs:	Investors may be presented with working capital statements that are based on divergent approaches to the analysis underlying the working capital statement in different jurisdictions. However, ESMA notes that this is already the case today.

<b>Option 2</b>	
	<i>Qualitative description</i>
Benefits:	<p>This option has the benefit of providing clear guidance to credit institutions and (re)insurance undertakings about how to take into account their prudential requirements when analysing their working capital. This should result in a more rigorous analysis.</p> <p>This approach also ensures that credit institutions and (re)insurance undertakings take a similar approach to taking their prudential requirements into account, which should promote supervisory convergence and a level playing field.</p>
Costs to regulator:	
- One-off	Competent authorities may incur minor costs adapting to these rules.
- Ongoing	Competent authorities are unlikely to incur ongoing costs.
Compliance costs:	
- One-off	<p>Credit institutions and (re)insurance undertakings may incur minor costs, but it is doubtful that they will incur significant costs, because they already possess the relevant information about their prudential requirements.</p> <p>There may be additional compliance costs if the due diligence relating to providing the working capital statement becomes time consuming.</p>
- Ongoing	ESMA does not expect any ongoing compliance costs for issuers, unless they regularly have prospectuses approved relating to equity securities.
Costs to other stakeholders:	Investors may have minor adaptation costs if they familiarise themselves with the new disclosure requirements.

Indirect costs:	None.
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### 3.4. Revised requirements for profit forecasts

In this section, ESMA analyses potential approaches for Guidelines in the area of profit forecasts. The section starts by clarifying the policy objectives of the Guidelines. The section then examines the costs and benefits of each option and provides the reasoning for the decision to pursue Option 2.

#### 3.4.1. Technical options

Policy objective:	Ensuring consistent application of the disclosure requirements concerning profit forecasts and that investors are provided sufficient information about profit forecasts to make an investment decision.
Option 1:	Allowing market practices to develop in relation to the disclosure included in profit forecasts by refraining from providing guidance on the new requirements related to profit forecasts and the fact that an accountant's report is no longer required.
Option 2:	Providing additional guidance to market participants and competent authorities about the new requirements concerning profit forecasts, including addressing the fact that an accountant's report is no longer required.
Preferred option:	Option 2.

#### 3.4.2. Cost-benefit analysis

<b>Option 1</b>	
	<i>Qualitative description</i>
Benefits:	This option provides issuers with more flexibility to determine which information they include in prospectuses. Market practices would develop based on the application of the requirements for profit forecasts in the Commission Delegated Regulation.
Costs to regulator:	
- One-off	Competent authorities will likely have one-off costs adapting to issuers' approaches to profit forecasts.

- Ongoing	Competent authorities will likely have ongoing costs relating to the additional time that will be necessary to review profit forecasts in prospectuses. This is particularly the case if issuers adopt different approaches or if national practices develop and issuers are not familiar with such national practices.
Compliance costs:	
- One-off	Costs may vary depending on national practices. Additionally, it may be more difficult to develop a convergent approach to profit forecasts. This may increase costs for issuers, who will find it more difficult to know what to expect from competent authorities in relation to the disclosure of profit forecasts.
- Ongoing	The compliance costs could be quite low or could be significant depending on the differences in the application of the new disclosure requirement.
Costs to other stakeholders:	Costs for investors may be similar to those for competent authorities if they have to adapt their analyses depending on the information provided by issuers.
Indirect costs:	It is unlikely that this option will result in supervisory convergence.

<b>Option 2</b>	
	<i>Qualitative description</i>
Benefits:	There will be clear guidance about the new disclosure requirements for profit forecasts in the Commission Delegated Regulation. This approach is more likely to ensure supervisory convergence as well as a high level of investor protection.
Costs to regulator:	
- One-off	Competent authorities will likely have one-off implementation costs as the market familiarises itself with the new rules.
- Ongoing	ESMA considers it unlikely that competent authorities will have significant ongoing costs.



Compliance costs:	
- One-off	Issuers may have one-off compliance costs adapting to the new disclosure requirements for profit forecasts.
- Ongoing	It is likely that issuers would incur at least a portion of these costs if they update their profit forecasts, even without the Guidelines.
Costs to other stakeholders:	None.
Indirect costs:	Investors may have one-off compliance costs as they familiarise themselves with the new rules.

### 3.5. Pro forma financial information and the aggregation of transactions

In this section, ESMA analyses potential approaches to Guidelines in the area of pro forma financial information. The section starts by clarifying the policy objectives behind a major change of approach introduced by certain Guidelines. The section then examines the costs and benefits of each option and provides the reasoning for the decision to pursue Option 2.

#### 3.5.1. Technical options

Policy objective:	Ensuring that material disclosures on transactions which have / will occur(red) are not excluded from the information provided to prospective investors, e.g. because they are not reflected in the financial statements of the issuer.
Option 1:	Maintain the status quo as per the CESR recommendations, i.e. only consider individual transactions for the purposes of pro forma. This would mean that only individual transactions which constitute a 25% gross change or significant financial commitment would trigger pro forma disclosure requirements.
Option 2:	Consider multiple transactions for the purposes of pro forma, i.e. aggregate multiple transactions to establish if a change of more than 25% in the situation of the issuer has / will occur(red). If multiple transactions lead to a more than 25% change, this should trigger the pro forma disclosure requirements.  Acknowledging that not all transactions are necessarily material by providing an exception to the general rule, whereby issuers are not required to aggregate transactions if it would be unreasonably burdensome.

Preferred option:	Option 2.
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### 3.5.2. Cost-benefit analysis

<b>Option 1</b>	
	<i>Qualitative description</i>
Benefits:	This option would simply maintain the status quo which stakeholders are already familiar with. This approach does not subject issuers to additional compliance costs, while still ensuring that investors are presented with valuable pro forma financial information in relation to many transactions.
Costs to regulator:	
- One-off	None. Competent authorities should not have any one-off costs as the approach applied under the CESR recommendations is maintained.
- Ongoing	None. Competent authorities should not have any ongoing costs because the approach applied under the CESR recommendations is maintained.
Compliance costs:	
- One-off	None. Issuers should not have any one-off compliance costs because the approach applied under the CESR recommendations is maintained.
- Ongoing	None. Issuers should not have any ongoing compliance costs because the approach applied under the CESR recommendations is maintained.
Costs to other stakeholders:	Investors may be presented with less relevant information to take their investment decision than under Option 2.
Indirect costs:	None.

<b>Option 2</b>	
	<i>Qualitative description</i>
Benefits:	This option improves investor protection by broadening the scope of the obligation to provide pro forma financial information to situations in which

	one or more transactions together constitute a 25% gross change or significant financial commitment. This should ensure that investors are better informed about the effects of a significant group of transactions on the issuer.
<p>Costs to regulator:</p> <ul style="list-style-type: none"> <li>- One-off</li> <li>- Ongoing</li> </ul>	<p>Competent authorities may have some one-off implementation costs, but these are expected to be small.</p> <p>Competent authorities may have ongoing costs related to discussions about whether it is unreasonably burdensome to provide pro forma financial information.</p>
<p>Compliance costs:</p> <ul style="list-style-type: none"> <li>- One-off</li> <li>- Ongoing</li> </ul>	<p>Some of these costs may be mitigated due to current accounting practices. Some issuers already include the pro forma financial information required under this option in their prospectus, even if they are not required to.</p> <p>It is likely that more pro forma disclosure will be necessary as a result of this change in policy, which may create some ongoing costs for issuers. Some issuers may also incur additional costs relating to discussions with competent authorities concerning whether the inclusion of pro forma financial information is unreasonably burdensome. Some of these costs may be mitigated because financial reporting standards already require similar disclosures when IFRS 3 <i>Business Combinations</i> is applicable.</p>
Costs to other stakeholders:	None.
Indirect costs:	This approach could lead to a lack of supervisory convergence in the treatment of situations in which an issuer considers it unreasonably burdensome to draw up pro forma financial information.

### 3.6. The inclusion of the proceeds of an offering in the calculation of working capital

In this section, ESMA analyses the possible approaches to the inclusion of the proceeds of an offering in the calculation of an issuer’s working capital. The section starts by clarifying the policy objectives of the guidance on the calculation of an issuer’s working capital. The section then examines the costs and benefits of each option and provides background reasoning for the decision to pursue Option 2.

#### 3.6.1. Technical options

Policy objective:	Ensuring that issuers only include the proceeds of an offering when there is a high level of certainty that the issuer will receive the proceeds.
Option 1:	Allowing for the inclusion of the proceeds of an offering when there is a firm commitment to underwrite the offer or there are irrevocable undertakings.
Option 2:	Allowing for the inclusion of the proceeds of an offering when there is a firm commitment to underwrite the offer or there are irrevocable undertakings, while providing additional clarifications about when there is a sufficiently high level of certainty that the issuer will receive the proceeds of the offering.
Preferred option:	Option 2.

#### 3.6.2. Cost-benefit analysis

<b>Option 1</b>	
	<i>Qualitative description</i>
Benefits:	This option has the benefit of providing issuers with the flexibility of including the proceeds of the offering in the calculation of their working capital. This option creates a more level playing field because there are currently different national practices in relation to the inclusion of the use of proceeds in the calculation of an issuer’s working capital.
Costs to regulator:	
- One-off	Competent authorities may have one-off compliance costs adjusting to this option, to the extent that they do not already allow for the inclusion of the proceeds in the calculation of an issuer’s working capital.

- Ongoing	To the extent that national practices continue to exist concerning when there is a firm commitment or irrevocable undertakings, competent authorities may have ongoing costs dealing with issuers who are unfamiliar with the national practices in their jurisdiction.
Compliance costs:	
- One-off	Issuers may have minor one-off compliance costs adjusting to the possibility to include the proceeds of their offering in the calculation of their working capital.
- Ongoing	Issuers may have ongoing compliance costs if national practices develop and issuers are unfamiliar with certain practices. This will depend on the nature of the national practices.
Costs to other stakeholders:	None.
Indirect costs:	If national practices develop in relation to when there is a firm commitment or an irrevocable undertaking, it may not be clear to investors how certain it is that an issuer will receive the proceeds of the offering.

<b>Option 2</b>	
	<i>Qualitative description</i>
Benefits:	<p>This option allows for the inclusion of the proceeds of an offering but provides additional guidance about the analysis that should be made when determining whether there is sufficient certainty to allow for the inclusion of the proceeds in the calculation. This approach helps to ensure investor protection by providing more guidance to issuers concerning when there is sufficient certainty that they will receive the proceeds of an offering to justify including it in the calculation of their working capital.</p> <p>Furthermore, this option promotes supervisory convergence.</p>
Costs to regulator:	
- One-off	Competent authorities may have one-off costs implementing the Guidelines in their supervision.

- Ongoing	It is unlikely that competent authorities will have any additional ongoing costs.
Compliance costs:	
- One-off	Issuers and other parties involved in underwriting offerings or that provide irrevocable undertakings may have additional one-off costs adapting to the new rules.
- Ongoing	Issuers may have higher costs for any underwriting if they would like to include the proceeds of the offering in the calculation of their working capital. This is because the less expensive forms of underwriting will often not offer sufficient certainty that the issuer will receive the proceeds of the offering at the time the issuer calculates its working capital.
Costs to other stakeholders:	None.
Indirect costs:	None.

### 3.7. The amendments to the indebtedness statement

In this section, ESMA analyses the possible approaches to the indebtedness statement included in Guideline 39. The section starts by clarifying the policy objectives of the indebtedness statement. The section then examines the costs and benefits of each option and provides background reasoning for the decision to pursue Option 2.

#### 3.7.1. Technical options

Policy objective:	Ensuring that investors are provided with an overview of an issuer's indebtedness in a single table.
Option 1:	Requiring issuers to include trade payable and receivables in their indebtedness statement. This approach ensures that the indebtedness statement includes all financial assets and liabilities under IAS 32.AG4.
Option 2:	Requiring issuers to include non-current trade and other payables in their indebtedness statements. This information should include non-remunerated debt for which there is a significant financing component, either implicitly or explicitly (for example debt to suppliers beyond a period of 12 months). Any non-interest bearing loans should also be included in this line item.

Preferred option:	Option 2.
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### 3.7.2. Cost-benefit analysis

<b>Option 1</b>	
	<i>Qualitative description</i>
Benefits:	This approach ensures that the indebtedness statement covers all financial assets and liabilities which, according to IAS 32.AG4, comprise trade receivables and payables. The indebtedness statement would provide a full picture of the issuer's indebtedness, regardless of whether it is interest-bearing. In some sectors, such as health care, construction and service concession agreements, trade payables and receivables can represent significant amounts, and leaving them out of the indebtedness statement could be misleading.
Costs to regulator:	
- One-off	Competent authorities may have minor one-off costs implementing this option.
- Ongoing	Competent authorities are not expected to have any ongoing costs relating to this option.
Compliance costs:	
- One-off	Issuers may have significant one-off costs adjusting to this guidance. These costs will be particularly high if the issuer does not have up-to-date data relating to the trade payables and receivables. This is an issue because the information in the indebtedness statement may not be more than 90 days old from the date of the approval of the prospectus.
- Ongoing	Issuers may also have similar costs on an ongoing basis depending on the frequency at which they need to include a capitalisation and indebtedness statement in a prospectus.
Costs to other stakeholders:	None.
Indirect costs:	None.

<b>Option 2</b>	
	<i>Qualitative description</i>
Benefits:	<p>Non-current trade and other payables have debt characteristics and their inclusion provides investors with insight into an issuer's indebtedness.</p> <p>This approach is more in line with market participants' understanding of indebtedness, especially considering that most respondents to the market consultation on the Guidelines considered that trade payables and trade receivables form part of an issuer's working capital used in the ordinary course of business and are not a form of indebtedness.</p> <p>This approach is more proportionate than requiring the inclusion of all trade payables and receivables in the indebtedness statement.</p>
Costs to regulator:	
- One-off	Competent authorities may have minor one-off costs implementing this option.
- Ongoing	Competent authorities are not expected to have any ongoing costs relating to this option.
Compliance costs:	
- One-off	Issuers may have one-off costs related to collecting this information, since they may not have this information readily available. This is especially the case considering that this information may not be more than 90 days old. ESMA expects these costs to be lower than the costs associated with Option 1.
- Ongoing	Issuers may also have similar costs on an ongoing basis depending on the frequency at which they need to include a capitalisation and indebtedness statement in a prospectus.
Costs to other stakeholders:	None.
Indirect costs:	None.



## **Annex II: SMSG advice**

### **ADVICE TO ESMA**

#### **ESMA's Consultation Paper - Draft Guidelines on Disclosure Requirements under the Prospectus Regulation (ESMA31-62-1239, 12 July 2019)**

##### **I. The role of the SMSG**

The Securities and Markets Stakeholder Group (SMSG) advises ESMA on all regulatory and supervision matters. In compliance with EU Law, it is composed of expert representatives of financial market participants operating in the Union, of their employees, of consumers, of users of financial services and of independent top-ranking academics.

##### **II. Background**

The SMSG wishes to address a number of issues raised in ESMA's Consultation Paper - Draft Guidelines on Disclosure Requirements under the Prospectus Regulation (ESMA31-62-1239, 12 July 2019). It notes that the Draft Guidelines are based on CESR recommendations which were originally adopted in 2005, reissued by ESMA in 2011 and updated in 2013.<sup>1</sup> The Draft Guidelines update the CESR recommendations to take into account the Prospectus Regulation<sup>2</sup> and subsequent developments in the capital markets. In addition, by converting the CESR recommendations into guidelines, the comply-or-explain mechanism will apply.

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<sup>1</sup> ESMA update of the CESR recommendations for the consistent implementation of the Commission Regulation (EC) No 809/2004, ESMA/2013/319 | 20 March 2013.

<sup>2</sup> Regulation (EU) 2017/1129, OJ L 168, 30.06.2017, p. 12-82.



The stated aims of the Draft Guidelines are: to ensure that market participants, especially the persons responsible for the prospectus, have a uniform understanding of the relevant disclosure requirements set out in the various annexes included in the Commission Delegated Regulation<sup>3</sup>; to assist the assessment by competent authorities of the completeness, comprehensibility and consistency of information in prospectuses; and to promote consistency across the EU in the way that the annexes are interpreted. In addition, they seek to ensure that information which is not material in the context of the issuer or the securities or which is repetitious will not be included in the prospectus. These aims set the criteria against which the SMSG has assessed the Draft Guidelines.

While a number of new guidelines and new explanatory texts have been included in the Draft Guidelines, they generally follow the content of the CESR Recommendations as applicable to the Prospectus Regulation. It was noted however that the CESR recommendations relating to specialist issuers set out in Annex 29 of the Commission Delegated Regulation have not yet been included and are the subject of further consideration.

### **III. General Comment**

In general, the SMSG welcomes the draft Guidelines. This is the case in particular with reference to the changes introduced to Guidelines 23 and 24 (Q.17), Guideline 31 (Q.21), Guidelines 34 and 35 (Q.23 and q.24) and Guideline 39 (Q.29 and Q.30).

### **IV. Overarching Principles of the Operating and Financial Review (OFR) - Guideline 2**

Guideline 2 sets out the overarching principles that should be used by the persons responsible for the prospectus in compiling information for the OFR. These are: audience, time-frame, reliability and comparability.

In respect of the audience criterion, paragraph 18 of the Explanatory Memorandum states that the persons responsible for the prospectus should not assume that investors have detailed prior knowledge of the business or the significant features of its operating environment. We consider that the reference to “qualified investors” which follows is not necessary and may cause confusion.

In respect of the comparability criterion, paragraph 21 of the Explanatory Memorandum states that the persons responsible for the prospectus should ensure that investors can “compare the information in the OFR with similar information provided elsewhere”. As indicated in paragraph 25 of guideline 3, we understand that the comparability of the OFR should be appreciated with similar information provided elsewhere in the prospectus. However, in order to avoid any confusion on the scope of this requirement,

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<sup>3</sup> Commission Delegated Regulation (EU) 2019/980, OJ L 166, 21.06.2019, p. 26-176.



it would be useful to provide further information on its scope and in particular on the nature and reliability of the comparable information.

### **V. Content of the OFR - Guideline 3**

Guideline 3 provides that the OFR should include details on returns to shareholders and information to allow investors to assess the sustainability of future earnings and cash flow. The Consultation notes that the only change to the CESR Recommendations relates to ESG disclosures. The SMSG welcomes the requirement in the Explanatory Memorandum that the persons responsible for the prospectus discuss performance in the context of the issuer's long-term objectives (paragraph 23).

The OFR is designed to provide a fair review of the development and performance of the issuer's business and of its position for each period for which historical financial information is required. Annex 1 (equity securities) Item 7.1 of Commission Delegated Regulation states "To the extent necessary for an understanding of the issuer's development, performance or position, the analysis shall include both financial and, where appropriate, non-financial Key Performance Indicators relevant to the particular business." Annex 24 (EU Growth Prospectus) Item 2.5 is similar but refers specifically to "environmental and employee matters" as information which might be included in the analysis of non-financial KPIs.

Paragraph 26 of the Explanatory Text states "If non-financial key performance indicators that are relevant to the particular issuer (i.e. key value drivers) are disclosed in the OFR, information relating to environmental, social and governance (ESG) matters should be included to the extent it is necessary for investors to understand the company's development, performance and condition." It is submitted that the new text requires clarification. The Consultation Paper states the Guidelines "update" previous wording related to environmental and employee matters by referencing ESG disclosure. Clearly, ESG matters are more wide-ranging than purely environmental and employee matters. While, the Commission Delegated Regulation makes no reference to governance issues or social issues other than employee matters, paragraph 26 appears to suggest that such information should be included (a) to the extent non-financial KPIs are disclosed in the OFR and (b) to the extent such information is necessary for investors to understand the company's development, performance and condition. Yet, it might be considered that in reality ESG issues are always relevant to investors' understanding of the company's development, performance and condition and that information relating to them should always be included in the OFR. Alternatively, adopting a literal interpretation of the guidance, one might consider that it provides that the ESG information is only required where (a) and (b) above apply. If so, the person responsible for the prospectus might avoid including such information by not identifying it as a KPI. This would not be consistent with the wording of the Commission Delegated Regulation. The SMSG also notes that the reference in this Guideline to information "necessary for investors to understand the company's development, performance **and** conditions" narrows the Level 1 text insofar as this states "necessary for an understanding of the issuer's development, performance **or** position". The SMSG suggests an amendment to the Guideline accordingly by replacing "and" by "or". Furthermore, if the



ESG issue relates to a non-financial KPI disclosed in the OFR on an environmental issue, paragraph 26 might be interpreted as suggesting that social and governance issues necessary for investors to understand the company's development, performance or condition should also be disclosed. Paragraph 26 should be amended to remove any uncertainty.

## **VI. Due Care and Diligence - Guideline 9**

Guideline 9 provides that "The persons responsible for the prospectus should apply due care and diligence when compiling profit forecasts and estimates to ensure that they are not misleading to investors." This may suggest that liability for misleading statements may be avoided if the person responsible for the prospectus applied due care and diligence. To avoid such an interpretation, the phrase "to ensure" should be replaced with "and ensure".

Paragraph 44 of the Explanatory Text clarifies that profit forecasts and estimates must be updated via a supplement or an amendment to the URD/RD. For the avoidance of doubt, the text might also note that the principles for preparing profit forecasts and estimates in Guideline 10 (ie understandable, reliable) also apply to any such supplements or amendments.

## **VII. Pro Forma Financial Information: Assessments of Significant Gross Changes and Significant Financial Commitments - Guideline 18**

Guideline 18 sets out three indicators of whether a transaction constitutes a variation of more than 25% to the size of the issuer's business. These are to be used in assessing whether a transaction constitutes either a significant gross change or a significant financial commitment. These size indicators are: total assets; revenue; or profit or loss.

Paragraph 83 of the Explanatory Text sets out a new approach to the 25% threshold in relation to these assessments where the issuer is involved in multiple transactions. It states that if an issuer is involved in several transactions which collectively, though not individually, constitute more than a 25% variation in the issuer's size or if an issuer is involved in more than one transaction only one of which constitutes more than a 25% variation, pro forma information should be required for all the transactions unless it is disproportionately burdensome to produce it. Currently no pro forma information would be required<sup>4</sup> in such cases and this change is welcomed. However, paragraph 83 states that this determination is made by the persons responsible for the prospectus on the basis of cost and value of the information to investors. While we welcome the proportionality of the approach, we caution that in the absence of guidance at the NCA or ESMA level this could unduly limit the value of this new approach. Furthermore, the example given in paragraph 84 suggests requiring pro forma information in respect of a transaction which constitutes a 1% increase in the context of another constituting a 27% increase might be unduly

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<sup>4</sup> ESMA Q&A 52.

burdensome compared to the potential value of the additional information to investors. This would seem to suggest that the smaller transaction would need to be of a particular percentage to justify the additional information. Care should be taken to avoid setting outright thresholds, which may be burdensome and will not always be appropriate. Ultimately the National Competent Authorities have control over this process and the objective of the Guidelines is to encourage supervisory convergence.

### **VIII. Accountant / Auditor Report - Guideline 25**

Guideline 25 provides that the persons responsible for the prospectus must ensure that the report of the accountant or auditor under Annex 20, Section 3 of the Commission Delegated Regulation must follow the exact wording of that section. Annex 20, Section 3 requires the prospectus to include a report prepared by the independent accountants or auditors stating that in their opinion: the pro forma financial information has been properly compiled on the basis stated and that the basis referred to in (a) is consistent with the accounting policies of the issuer.

The Explanatory Text in paragraph 113 prohibits the inclusion of emphases of matter as well as qualifications on the basis that they reduce clarity and cause confusion as to the conclusion of the report. Emphases of matter paragraphs follow the opinion paragraphs and have been defined in International Standards on Auditing as referring to “a matter appropriately presented or disclosed in the financial statements that, in the auditor's judgment, is of such importance that it is fundamental to users' understanding of the financial statements”. The auditors are signifying their agreement with the management on how a transaction is treated but are perhaps also indicating a degree of uncertainty about its future impact or identifying it as a matter the management should address. The SMSG accepts that this might be done in an attempt to reduce potential litigation on their part. An argument might also be made that including emphases of matter causes confusion and constitutes some sort of qualification. However, the SMSG considers that emphases of matter do provide investors with useful information and do not modify the opinions of the auditors, but merely highlight a situation that is very relevant to a correct understanding of the financial statements. A complete prohibition on their inclusion might thus prove counterproductive.

In relation to pro forma information, the SMSG also discussed the potential benefits to investors of inserting ratios and advises ESMA to consider this possibility.

### **IX. Related Party Transactions - Guideline 41**

Guideline 41 sets out guidance on information provided under the Commission Delegated Regulation<sup>5</sup> in relation to details of related party transactions that are to be disclosed when the respective standards

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<sup>5</sup> Commission Delegated Regulation (EU) 2019/980 supplementing Regulation (EU) 2017/1129.



under the IAS Regulation do not apply. The SMSG advises ESMA to add to the Guidelines that disclosure should be in line with the requirements of the Shareholders' Rights Directive<sup>6</sup> in this context.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 3 October 2019

[signed]

Veerle Colaert  
Chair  
Securities and Markets Stakeholder Group

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<sup>6</sup> Directive (EU) 2017/828 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.



## **Annex III: The Guidelines on disclosure requirements under the Prospectus Regulation**

### **I. Scope**

#### **Who?**

1. These Guidelines apply to competent authorities as defined in the Prospectus Regulation and market participants, including the persons responsible for a prospectus under Article 11(1) of the Prospectus Regulation.

#### **What?**

2. The purpose of these Guidelines is to help market participants to comply with the disclosure requirements set out in the Commission Delegated Regulation and to enhance consistency across the Union in the way that the Annexes to the Commission Delegated Regulation are understood. The Guidelines have been drafted pursuant to Article 16(3) of the ESMA Regulation.

#### **When?**

3. These Guidelines apply from two months after the date of their publication on ESMA's website in all official languages of the EU.

## II. Legislative references, acronyms and definitions

### Legislative references

Commission Delegated Regulation / Commission Delegated Regulation (EU) 2019/980	Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) 809/2004 <sup>48</sup>
Prospectus Regulation	Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC <sup>49</sup>
ESMA Regulation	Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC <sup>50</sup> , as amended by Regulation (EU) 2019/2175 <sup>51</sup>
Accounting Directive	Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC <sup>52</sup>
EU Regulation 1606/2002	Regulation (EC) 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards <sup>53</sup>
Audit Directive	Regulation 2014/56/EU of the European Parliament and Council of 16 April 2014 amending Directive 2006/43/EC on

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<sup>48</sup> OJ L 166, 21.6.2019, p. 26–176.

<sup>49</sup> OJ L 168, 30.06.2017, p. 12-82.

<sup>50</sup> OJ L 331, 15.12.2010, p. 84-119.

<sup>51</sup> OJ L 334, 27.12.2019, p. 1–145.

<sup>52</sup> OJ L 182, 29.06.2013, p. 19-76.

<sup>53</sup> QJ L 243, 11.09.2002, p. 1-4.





statutory audits of annual accounts and consolidated accounts<sup>54</sup>

Audit Regulation

Regulation (EU) 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC<sup>55</sup>

Transparency Directive

Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC<sup>56</sup>

Capital Requirements Regulation

Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) 648/2012<sup>57</sup>

Commission Delegated Regulation (EU) 2015/61

Commission Delegated Regulation (EU) 2015/61 of 10 October 2014 to supplement Regulation (EU) 575/2013 of the European Parliament and the Council with regard to liquidity coverage requirement for Credit Institutions<sup>58</sup>

Solvency II

Directive 2009/138/EC of the European Parliament and of the Council of the 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)<sup>59</sup>

Commission Implementing Regulation (EU) 680/2014

Commission Implementing Regulation (EU) 680/2014 of 16 April 2014 laying down implementing technical standards with regard to supervisory reporting of institutions according to Regulation (EU) 575/2013 of the European Parliament and of the Council<sup>60</sup>

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<sup>54</sup> OJ L 158, 27.05.2014, p 196-226.

<sup>55</sup> OJ L 158, 27.05.2014, p. 77-112.

<sup>56</sup> OJ L 390, 31.12.2004, p. 38-57.

<sup>57</sup> OJ L 176, 27.06.2013, p. 1-337.

<sup>58</sup> OJ L 11, 17.01.2015, p. 1-36.

<sup>59</sup> OJ L 335, 17.12.2009, p. 1-155.

<sup>60</sup> OJ L 191, 28.06.2014, p. 1-1861.



Shareholder Rights Directive / SRD	Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies <sup>61</sup>
Commission Decision 2008/961/EC	Commission Decision 2008/961/EC of 12 December 2008 on the use by third countries' issuers of securities of certain third country's national accounting standards and International Financial Reporting Standards to prepare their consolidated financial statements (notified under document number C(2008) 8218 <sup>62</sup>
SFT Regulation	Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) 648/2012 <sup>63</sup>

### **Acronyms**

ESMA	European Securities and Markets Authority
EU / Union	European Union
IAS / IFRS	International Accounting Standards / International Financial Reporting Standards
OFR	Operating and financial review
ESG	Environmental, social and governance
GAAP	Generally Accepted Accounting Principles
IPO	Initial public offer
CET 1	Common Equity Tier 1
SFT	Securities financing transactions

### **Definitions**

Competent authority	A competent authority responsible for approving prospectuses under the Prospectus Regulation
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<sup>61</sup> OJ L 184, 14.07.2007, p 17-24.

<sup>62</sup> OJ L 340, 19.12.2008, p. 112-114.

<sup>63</sup> OJ L 337, 23.12.2015, p. 1-34.



Annex(es) / Annex Item	Annexes (disclosure schedules) in Commission Delegated Regulation (EU) 2019/980
Persons responsible for the prospectus	The persons to whom responsibility for the information in a prospectus attaches, that is, as the case may be, the issuer or its administrative, management or supervisory bodies, the offeror, the persons asking for the admission to trading on a regulated market or the guarantor and any further persons responsible for the information given in the prospectus and identified as such in the prospectus
Profit forecast	As defined in Article 1(d) of Commission Delegated Regulation
Registration document / Universal registration document	Registration document or universal registration document as referred to in the Prospectus Regulation
Applicable accounting framework / Accounting framework	For the purpose of these Guidelines, any of the following:  (i) International Financial Reporting Standards (IFRS) as adopted in the EU pursuant to Regulation (EC) 1606/2002 on the application of international accounting standards; <sup>64</sup> or  (ii) National Generally Accepted Accounting Principles (GAAP), i.e. the accounting requirements stemming from the transposition of the European Accounting Directives into the legal system of the Member States of the European Union; or  (iii) GAAP laying down equivalent requirements in accordance with Commission Regulation (EC) 1569/2007 <sup>65</sup> establishing a mechanism for the determination of equivalence of accounting standards applied by third country issuers of securities pursuant to Directive 2003/71/EC and 2004/109/EC of the European Parliament and of the Council for issuers that are exempted from the requirement of preparing IFRS as endorsed in the EU
European Accounting Directives	The Accounting Directives refer to Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, Council Directive 91/674/EEC on annual accounts and consolidated accounts

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<sup>64</sup> OJ L 243, 11.09.2002, p. 1-4.

<sup>65</sup> OJ L 340, 22.12.2007, p. 66-68.



	of insurance undertakings as well as Council Directive 86/635/EEC on annual accounts and consolidated accounts of banks and other financial institutions
Supplement or amendment	A supplement or amendment as referred to in the Prospectus Regulation
Profit estimate	As defined in Article 1(c) of Commission Delegated Regulation
Equity securities	As defined in Article 2(b) of the Prospectus Regulation
Significant financial commitment	As referred to in Article 18(4) of Commission Delegated Regulation (EU) 2019/980
Significant gross change	As defined in Article 1(e) of Commission Delegated Regulation (EU) 2019/980
Complex financial history	As referred to in Article 18(3) of Commission Delegated Regulation (EU) 2019/980
Non-equity securities	As defined in Article 2(c) of the Prospectus Regulation
Liquidity Coverage Ratio	Liquidity coverage ratio as defined in Article 4(1) of Commission Delegated Regulation (EU) 2015/61 of 10 October 2014 to supplement Regulation (EU) 575/2013 of the European Parliament and the Council with regard to liquidity coverage requirement for Credit Institutions
Minimum Capital Requirement	Minimum capital requirement as defined in Article 248 of Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Solvency II
Net Stable Funding Ratio	Net stable funding ratio as defined in Article 428(b) of Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) 648/2012.
Total capital ratio / TCR	As defined in Article 92(2)(c) of the Credit Requirements Regulation.
Equivalent accounting framework / Equivalent third country accounting framework	See Commission Decision 2008/961/EC



Restatement of financial information

For the purpose of these Guidelines, restatement of historical financial information refers to situations when because of the change in the accounting framework that will be applied by the issuer in the next year's financial statements, the historical financial statements will be revised and presented in accordance with this new accounting framework.

### **III. Purpose**

4. These Guidelines are based on Article 20(12) of the Prospectus Regulation and Article 16(1) of the ESMA Regulation. The objectives of these Guidelines are to establish consistent, efficient and effective supervisory practices among competent authorities when assessing the completeness, comprehensibility and consistency of information in prospectuses as well as to ensure the common, uniform and consistent application of the disclosure requirements set out in the Commission Delegated Regulation.

### **IV. Compliance and reporting obligations**

#### **Status of the Guidelines**

5. In accordance with Article 16(3) of the ESMA Regulation, competent authorities and financial market participants must make every effort to comply with these Guidelines.
6. Competent authorities to which these Guidelines apply should comply by incorporating them into their national legal and / or supervisory frameworks as appropriate, including where particular Guidelines are directed primarily at financial market participants. In this case, competent authorities should ensure through their supervision that financial market participants comply with the Guidelines.

#### **Reporting requirements**

7. Within two months of the date of publication of the Guidelines on ESMA's website in all official EU languages, competent authorities to which these Guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the Guidelines.
8. In case of non-compliance, competent authorities must also notify ESMA within two months of the date of publication of the Guidelines on ESMA's website in all official EU languages of their reasons for not complying with the Guidelines.
9. A template for notifications is available on ESMA's website. Once the template has been filled in, it shall be transmitted to ESMA.
10. Financial market participants are not required to report whether they comply with these Guidelines.

## V. Guidelines on prospectus disclosure

### V.1. Introduction

11. The purpose of these Guidelines is to provide guidance to market participants relating to the assessment of the information to be supplied under certain Items of an Annex to the Commission Delegated Regulation and to promote consistency across the Union in the way that the Annexes to the Commission Delegated Regulation are applied.
12. The Guidelines relating to the disclosure of financial information have a close relationship with financial reporting. ESMA recommends that issuers involve financial reporting experts in order to ensure that the financial information in prospectuses satisfies the requirements set out in these Guidelines, as well as the general obligation in Article 6(1) of the Prospectus Regulation to ensure that their prospectus contains the information necessary for investors to make an informed assessment of the assets and liabilities, profits and losses, financial position, and prospects of the issuer and of any guarantor. Likewise, competent authorities should ensure that their supervisors are familiar with the contents of the Guidelines and that expertise in financial reporting is available to deal with issues that arise when applying these Guidelines.
13. When determining which information is to be supplied under a certain Item of an Annex to the Commission Delegated Regulation, ESMA expects that the persons responsible for the prospectus will refrain from disclosing information that is not material in the context of the issuer or the securities. As stated in Recital 27 of the Prospectus Regulation, a prospectus should not contain information that is not material or specific to the issuer and the securities concerned, as that could obscure the information relevant to the investment decision and undermine investor protection. This is also reflected in Article 6(1) of the Prospectus Regulation which states that a prospectus shall contain the necessary information which is material to an investor for making an informed assessment of the information specified in that paragraph.
14. ESMA also notes that the duplication of information in prospectuses should be avoided. Therefore, issuers may refer to where information can be found instead of duplicating it, provided that this does not harm the comprehensibility of the prospectus. For example, the persons responsible for the prospectus may cross-refer to relevant information provided in the financial statements, e.g. under IAS 7 and IAS 12, in order to provide information on treasury and funding policies required under these Guidelines.

### V.2. Operating and financial review (OFR)

#### Purpose of the OFR

*Article 2 (Annex 1, Item 7.1) and Article 28 (Annex 24, Item 2.5) of the Commission Delegated Regulation.*

15. **Guideline 1: The persons responsible for the prospectus should ensure that the OFR assists investors in assessing the issuer's business, financial condition and performance and that it informs investors of any material changes in the issuer's results.**

16. Together with a description of the principal risks and uncertainties the issuer faces, the OFR should provide an analysis of the development of the issuer's business, financial condition and performance. In order to provide investors with a historical review of the issuer's business, financial condition and performance through the eyes of its management, this analysis should be balanced, comprehensive and consistent with the size and complexity of the issuer's business. When preparing the OFR, the persons responsible for the prospectus should focus on the issues which they consider significant for the issuer's business overall. If a certain business line or segment is particularly relevant it should be considered significant.

### **Overarching principles of the OFR**

*Article 2 (Annex 1, Item 7.1) and Article 28 (Annex 24, Item 2.5) of the Commission Delegated Regulation.*

17. **Guideline 2: The persons responsible for the prospectus should ensure that the OFR is tailored to the target audience, covers a relevant time frame and is both reliable and comparable.**
18. Audience: The persons responsible for the prospectus should ensure that the OFR focuses on matters that are relevant to investors. It should not be assumed that investors will have detailed knowledge of the issuer's business or of the significant features of the issuer's operating environment.
19. Time frame: The persons responsible for the prospectus should ensure that the OFR provides information on the issuer's performance in the periods for which historical or interim financial information is included in the prospectus. In doing so, they should identify the trends and factors which are relevant to an investor's assessment of the past, and which are likely to affect the issuer's business in subsequent periods and the achievement of its objectives.
20. Reliability: The persons responsible for the prospectus should ensure that the OFR is neutral and free from bias and that it treats positive and negative aspects in a balanced way.
21. Comparability: The persons responsible for the prospectus should ensure that investors can compare the information in the OFR with similar information provided elsewhere in the prospectus, such as in the historical financial information of the issuer for the period under review.



## Content of the OFR

*Article 2 (Annex 1, Item 7.1) and Article 28 (Annex 24, Item 2.5) of the Commission Delegated Regulation.*

- 22. Guideline 3: The persons responsible for the prospectus should ensure that the OFR provides information on returns to shareholders, including information on distributions and share repurchases, and that it facilitates an investor's assessment of the future sustainability of earnings and cash flows. Information should be included about:**
- (i) the material components of the issuer's earnings and cash flow;**
  - (ii) the issuer's material business assets and liabilities;**
  - (iii) the extent to which items (i) and (ii) are recurring<sup>66</sup> elements; and**
  - (iv) the extent to which items (i) and (ii) are likely to be impacted by the issuer's financial and non-financial objectives and strategy (e.g. by providing disclosure on ESG matters).**
23. The persons responsible for the prospectus should ensure that the OFR discusses performance in the context of the issuer's objectives. The information should cover any special factors that have affected performance in the period under review. This includes factors whose effect cannot be quantified and any specific non-recurring<sup>67</sup> items identified in the same financial period.
24. The persons responsible for the prospectus should also ensure that the OFR discusses the issuer's material assets and liabilities, as well as the changes from year to year, to the extent it helps to provide a comprehensive view of the issuer's business and activities.
25. If information about future developments or activities in the field of research and development is included in the OFR, it should be balanced and consistent with the information provided elsewhere in the prospectus. In case any of this information qualifies as a profit forecast, the persons responsible for the prospectus should consider Guidelines 10-13.

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<sup>66</sup> Paragraph 25 of [ESMA/2015/1415](#) Guidelines – *ESMA's Guidelines on Alternative Performance Measures*, 5 October 2015, elaborate on the concept 'non-recurring items': "Issuers or persons responsible for the prospectus should not mislabel items as nonrecurring, infrequent or unusual. For example items that affected past periods and will affect future periods will rarely be considered as non-recurring, infrequent or unusual (such as restructuring costs or impairment losses)."

<sup>67</sup> Ibid.

### **Use of the management report**

*Article 2 (Annex 1, Item 7.1) and Article 28 (Annex 24, Item 2.5) of the Commission Delegated Regulation.*

- 26. Guideline 4: If the OFR requirement is satisfied by the inclusion of the entire management report<sup>68</sup> prepared in accordance with national laws, regulations and administrative provisions transposing Article 19 or Article 29 and, where applicable, Article 19a and 29a of the Accounting Directive, in addition to Guidelines 1, 2 and 3, the persons responsible for the prospectus should ensure that the management report is comprehensible and consistent with the prospectus.**
27. The persons responsible for the prospectus should assess whether the management report is still up to date and consistent with the information in the prospectus. For example, they should check that the information on operating results, capital resources and any prospective information such as trends and profit forecasts is up to date. If this is not the case, the persons responsible for the prospectus should provide necessary clarifications to the extent they are material, e.g additional information should be provided if a change in group structure has occurred and clarifications should be provided where there is doubt about certain explanations in the management report. Any updated information should be clearly labelled to distinguish it from the original text of the management report.
28. If the OFR covers the last three years and any subsequent interim period, the related management reports should cover the same period. Where applicable, if non-financial information is contained in a separate report, in accordance with the national transposition of Article 19a(4) / 29a(4) of the Accounting Directive, and that non-financial information is necessary for the purposes of Article 6 of the Prospectus Regulation, then such information should also be included in the prospectus.

## **V.3. Capital resources**

### **Cash flows**

*Article 2 (Annex 1, Item 8.2) of the Commission Delegated Regulation.*

- 29. Guideline 5: The persons responsible for the prospectus should disclose the following information in the prospectus:**
  - (i) cash inflows and outflows during the latest financial period and any subsequent interim period;**
  - (ii) any material changes to the issuer's cash flows thereafter; and**
  - (iii) any material unused sources of liquidity.**

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<sup>68</sup> This is equally relevant to EU Growth Prospectuses.

30. The narrative description should cover the latest financial period and any subsequent interim financial period. The information in the description should be consistent with the historical financial information.
31. For the purpose of this disclosure, the persons responsible for the prospectus may refer to relevant information provided in the financial statements included in the prospectus, prepared in accordance with the applicable accounting framework.

### **Funding and treasury policies**

*Article 2 (Annex 1, Item 8.3) of the Commission Delegated Regulation.*

32. **Guideline 6: The persons responsible for the prospectus should ensure that information on the issuer's funding and treasury policies is included in the prospectus.**
33. This information should cover the issuer's objectives in terms of the control of treasury activities, the currencies in which cash and cash equivalents are held, the extent to which borrowings are at fixed rates and the use of financial instruments for hedging purposes.
34. Credit institutions, insurance and (re)insurance undertakings and other entities subject to prudential supervision should discuss their funding and treasury policies in the context of their capital and liquidity requirements. These institutions and undertakings may also find it useful to disclose relevant prudential metrics, such as information from their Pillar 3 reports in the case of credit institutions. However, this does not in and of itself mean that such issuers are required to disclose these metrics in the prospectus.
35. For the purpose of this disclosure, the persons responsible for the prospectus may refer to relevant information provided in the financial statements included in the prospectus, prepared in accordance with the applicable accounting framework.

### **Discussion of material restrictions on the use of capital resources**

*Article 2 (Annex 1, Item 8.4) of the Commission Delegated Regulation.*

36. **Guideline 7: The persons responsible for the prospectus should ensure that information is provided in the prospectus on:**
  - (i) **the nature and extent of any material legal or economic restrictions on the ability of subsidiaries to transfer funds to the issuer in the form of cash dividends, loans or advances; and**
  - (ii) **the impact that such restrictions have had or are expected to have on the ability of the issuer to meet its cash obligations.**

37. Examples of restrictions include exchange controls and taxation consequences of transfers. Although dividend leakage<sup>69</sup> is not a restriction as such, dividend leakage can impact the ability of the issuer to meet its obligations. Accordingly, dividend leakage should be included in any discussion of material or economic restrictions on the ability of subsidiaries to transfer funds to the issuer.
38. Where the information on material restrictions on the use of capital resources (or other information on capital resources) overlaps with the information provided in a qualified working capital statement (Item 3.1 in Annex 11 and Item 1.1 in Annex 13 of the Commission Delegated Regulation), the persons responsible for the prospectus may refer to a qualified working capital statement.

### **Covenants**

*Article 2 (Annex 1, Item 8.4) of the Commission Delegated Regulation.*

39. **Guideline 8: The persons responsible for the prospectus should ensure disclosure of information on:**
  - (i) **whether the issuer has entered into covenants with lenders which could materially restrict the use of credit facilities;**
  - (ii) **the content of those covenants; and**
  - (iii) **whether material negotiations with the lenders on the operation of these covenants are taking place.**
40. **Where a breach of a covenant has occurred or there is a substantial risk it may occur, information should be disclosed in the prospectus on the impact of the breach and how the issuer will remedy the situation.**
41. This Guideline also applies to restrictions on the use of capital resources that are similar to covenants. Examples of such restrictions include, but are not limited to, any conditions placed upon funding from a government entity and any conditions attached to equity funding.
42. Where the information on breach of covenants (or other information on capital resources) overlaps with the information provided in a qualified working capital statement, the persons responsible for the prospectus may ensure consistency of this information by referring to the qualified working capital statement.

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<sup>69</sup> Dividend leakage refers to situations where the entire amount of a dividend paid by a subsidiary is not received by the issuer. Dividend leakage does not include the effects of withholding tax. An example of dividend leakage is the following: the issuer holds 70% of the shares in an investee. The other 30% of the shares in the investee are held by a third party. The investee is consolidated into the issuer's accounts, because it controls the investee. However, the issuer only receives 70% of any dividend paid by the investee (the other 30% being allocated to the non-controlling interest, even though it appears that the issuer receives 100% of the dividends in the issuer's financial statements).

## Liquidity

*Article 2 (Annex 1, Item 8.4) of the Commission Delegated Regulation.*

- 43. Guideline 9: The persons responsible for the prospectus should provide information in the prospectus on the issuer's liquidity and the anticipated sources of the funds which the issuer will need to fulfil its commitments.**
44. This information should include the level of borrowings, the seasonality of borrowing requirements (indicated by the peak level of borrowings during the financial period in question) and the maturity profile of both borrowings and undrawn committed borrowing facilities.
45. The prospectus should discuss the issuer's trade receivables and payables if these are material to understand the issuer's capital resources. In particular, the prospectus should disclose whether the issuer has a significant amount of trade receivables and / or payables, including any possible risks relating to the financing of such receivables. Additionally, the issuer should disclose if a material amount of its trade receivables and / or payables have a maturity of over 12 months.
46. For the purpose of this disclosure, the persons responsible for the prospectus may refer to relevant information provided in the financial statements included in the prospectus, prepared in accordance with the applicable accounting framework.

## V.4. Profit forecasts and estimates

### Due care and diligence

*Article 2 (Annex 1, Item 11.2), Article 4 (Annex 3, Item 7.2), Article 7 (Annex 6, Item 8.2), Article 8 (Annex 7, Item 8.1), Article 9 (Annex 8, Item 7.2), Article 28 (Annex 24, Item 2.7.2) and Article 29 (Annex 25, Item 2.5.1) of the Commission Delegated Regulation.*

- 47. Guideline 10: The persons responsible for the prospectus should apply due care and diligence when compiling profit forecasts and estimates, and should ensure that profit forecasts and estimates are not misleading to investors.**
48. The following non-exhaustive list contains factors that the persons responsible for the prospectus should take into consideration when preparing profit forecasts:
- (i) past results, market analysis, strategic evolutions, market share and market position of the issuer;
  - (ii) financial position and possible changes therein;
  - (iii) the impact of an acquisition or disposal, change in strategy or any major change in environmental matters and technology;
  - (iv) changes in legal and tax environment; and
  - (v) commitments toward third parties.

49. The persons responsible for the prospectus should always assess the accuracy of the information they include in the prospectus. Due to the sensitivity of profit forecasts and estimates to changing circumstances, where a registration document or universal registration document contains profit forecasts or estimates and is used as a constituent part of a prospectus, the persons responsible for the prospectus should specifically assess whether the profit forecasts or estimates remain valid and correct. If they are no longer valid and correct, the persons responsible for the prospectus should amend the profit forecasts or estimates, as of the date of approval of the prospectus, by filing a supplement or amendment. For the avoidance of doubt, the principles for preparing profit forecasts and estimates should also apply to profit forecasts and estimates in supplements or amendments.

### **Principles for preparing profit forecasts and estimates**

*Article 2 (Annex 1, Item 11.3), Article 4 (Annex 3, Item 7.3), Article 7 (Annex 6, Item 8.3), Article 8 (Annex 7, Item 8.2), Article 9 (Annex 8, Item 7.3), Article 28 (Annex 24, Item 2.7.3) and Article 29 (Annex 25, Item 2.5.2) of the Commission Delegated Regulation.*

50. **Guideline 11: The persons responsible for the prospectus should ensure that profit forecasts and estimates are:**
- (i) **understandable;**
  - (ii) **reliable;**
  - (iii) **comparable; and**
  - (iv) **relevant.**
51. Understandable: Profit forecasts and estimates should contain disclosure that is not too complex for investors to understand. For example, when it comes to the disclosure of after-tax profits that are materially affected by tax.
52. Reliable: Profit forecasts should be supported by a thorough analysis of the issuer's business and should represent factual, as opposed to hypothetical, strategies, plans and risk analysis.
53. Comparable: Profit forecasts and estimates should be drawn up in a way which makes it easy for investors to compare them with the historical and interim financial information which is included in the prospectus. For example, the same applicable accounting framework should be used and the format and presentation should be similar.
54. If a profit forecast or estimate is based on pro-forma or additional financial information, it should be made clear that this is the case. If so, the profit forecast or estimate should be compared with the pro-forma or additional financial information. In such a situation the pro forma profit forecast or estimate should be prepared in a similar manner to the the pro forma or additional information, i.e. the same principles should be used when preparing the pro forma profit forecast or estimate as when preparing the pro forma information.

55. Additional comparative information may be relevant to compare profit forecasts or estimates with historical and interim financial information. For example, if a significant legal dispute has arisen after the date on which historical financial information<sup>70</sup> was prepared, the impact of this uncertainty on the profit forecast or estimate should be explained, and it should also be made clear that the legal dispute did not exist at the end of the previous period.
56. If changes have occurred within the issuer's accounting policy and a profit forecast or estimate is prepared, the persons responsible for the prospectus should apply the principles of IAS 8 or any other transitional disclosure principles under IFRS<sup>71</sup> or a similar requirement of the applicable accounting framework. This should ensure that the profit forecast or estimate is comparable with the historical and interim financial information of the issuer. The persons responsible for the prospectus should also specify whether the profit forecast or estimate has been audited or subject to review.
57. **Relevant:** Profit forecasts and estimates should have an ability to influence economic decisions of investors and assist in confirming or correcting past evaluations or assessments of historical financial information.
58. The persons responsible for the prospectus should note that, as opposed to profit forecasts, profit estimates are not expected to be particularly sensitive to assumptions because estimates refer to economic transactions that have already occurred.

**Clean statement of comparability and consistency of the profit forecast or estimate**

*Article 2 (Annex 1, Item 11.3), Article 4 (Annex 3, Item 7.3), Article 7 (Annex 6, Item 8.3), Article 8 (Annex 7, Item 8.2), Article 9 (Annex 8, Item 7.3), Article 28 (Annex 24, Item 2.7.3) and Article 29 (Annex 25, Item 2.5.2) of the Commission Delegated Regulation.*

59. **Guideline 12: The persons responsible for the prospectus should ensure that the statement required is clean.**
60. The persons responsible for the prospectus should avoid qualifying that statement with any caveats.

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<sup>70</sup> The historical financial information concerning the preceding financial period.

<sup>71</sup> For example, under IFRS 16 appendix (c) paragraph C5(b).

### **Profit forecast or estimate in relation to a material undertaking**

*Article 2 (Annex 1, Item 11.1), Article 4 (Annex 3, Item 7.1), Article 7 (Annex 6, Item 8.1), Article 9 (Annex 8, Item 7.1) and Article 28 (Annex 24, Item 2.7.1) of the Commission Delegated Regulation.*

- 61. Guideline 13: Where there is an outstanding profit forecast or estimate related to a material undertaking which the issuer has acquired, the persons responsible for the prospectus should consider whether the profit forecast or estimate made by the material undertaking is still valid and correct, and whether it is necessary to provide disclosure on this matter in the prospectus.**
62. Where applicable, the persons responsible for the prospectus should report the effects of the acquisition and the profit forecast or estimate made by the material undertaking on the issuer's financial position and / or profits, as if the profit forecast or estimate had been made by the issuer itself. Before making such disclosure, the persons responsible for the prospectus should check if the profit forecast or estimate of the material undertaking is prepared using the same accounting principles as the ones used by the issuer / combined entity - see also Guideline 11 and the sub-heading 'comparable'.

## **V.5. Historical financial information**

### **Examples relating to Guidelines 14 to 16 on historical financial information**

63. Guidelines 14 to 16 apply to issuers that will adopt a new accounting framework in their next published financial statements. Points (i), (ii) and (iii) below are used as examples to illustrate how the Guidelines should be applied.
  - (i) The issuer is a new applicant for admission to trading on an EU regulated market of equity securities in 2020. It used national GAAP as the basis for its consolidated financial statements in 2017, 2018 and 2019. Pursuant to the EU Regulation 1606/2002, the issuer will have to apply IFRS as of 1 January 2020, i.e. for the reporting periods ending after the date of the admission to trading (and present comparatives for 2019). If the prospectus for the IPO is approved after April 2020, the next published annual financial statements will be the 2020 financial statements, i.e. IFRS financial statements as at 31 December 2020. These financial statements will be published by April 2021 at the latest.
  - (ii) A similar situation is that of an issuer which always presented historical financial information under national GAAP. However, this issuer decides at the time of the public offer to voluntarily adopt IFRS for the preparation of the financial statements for the reporting periods starting on or after 1 January 2020.
  - (iii) A third example is that of an issuer which prepared its statutory financial statements in 2017, 2018 and 2019 under national GAAP of Member State A. However, as of 1 January 2020 the issuer has moved its registered office to Member State B. As a result of this change, the issuer will adopt the accounting framework of that Member State.



64. The examples refer to mandatory and / or voluntary adoption of a new accounting framework. For the purpose of the restatement, it is not relevant whether the adoption of a new accounting framework is mandatory or voluntary.

#### **Restatement of historical financial information**

*Article 2 (Annex 1, Item 18.1.4), Article 7 (Annex 6, Item 11.1.4), Article 10 (Annex 9, Item 8.2.3), Article 28 (Annex 24, Item 5.1.4) and Article 29 (Annex 25, Item 5.1.4) of the Commission Delegated Regulation.*


- 65. Guideline 14: The persons responsible for the prospectus should apply to the restated historical financial information the accounting framework that will be adopted in the next published financial statements.**
66. In order to do so, the persons responsible for the prospectus should apply the new accounting framework to the period being restated (for instance, IFRS as endorsed in the Union). The restatement should apply to all parts and aspects of the financial information. However, the obligation to restate the financial information in a form consistent with that which will be adopted in the issuer's next published annual financial statements does not mean that an issuer should adopt amended or new standards before their effective date.
67. For example, an issuer who is going to adopt IFRS as of 1 January 2020 should apply the relevant requirements under IFRS. In particular, the issuer should apply IFRS 1 which sets out principles for adopting IFRS for the first time and provides guidance in relation to the transition from the accounting framework which the issuer previously applied (e.g. national GAAP).
68. The persons responsible for the prospectus are not required to restate the first year of financial statements in case of prospectuses covering three years of financial information to comply with the requirements set out in the Commission Delegated Regulation. Referring to the examples provided above, the persons responsible for the prospectus are not required to restate the 2017 financial statements. However, the historical financial information of the first year should be included in the prospectus pursuant to the Commission Delegated Regulation.
69. Where the prospectus contains pro forma financial information, the persons responsible for the prospectus should draw up the pro forma financial information in accordance with the new accounting framework applied to the restated financial information. This will enable investors to compare the restated financial information with the pro forma financial information.
70. Where the entire annual historical financial information that is required to be included in the prospectus has been restated to comply with the Commission Delegated Regulation, the persons responsible for the prospectus may present the audited restated financial statements and their comparatives in the prospectus as a substitute for the statutory financial statements. In this way, the statutory financial statements could be replaced by the audited restated financial information covering the time period required pursuant to the Commission Delegated Regulation.

### Application of bridge approach

Article 2 (Annex 1, Item 18.1.4), Article 7 (Annex 6, Item 11.1.4), Article 10 (Annex 9, Item 8.2.3), Article 28 (Annex 24, Item 5.1.4) and Article 29 (Annex 25, Item 5.1.4) of the Commission Delegated Regulation.

71. **Guideline 15: Where the prospectus is required to include historical financial information for three financial years, and not all of those years of financial information are restated, the persons responsible for the prospectus should present and prepare the middle period under both the current and the new accounting framework and should present and prepare the last period only under the new accounting framework.**
72. According to the Commission Delegated Regulation, the persons responsible for the prospectus are required to completely restate the financial statements covering the last two financial years. In this case, the middle period is used as a bridge between the first and the third year while the first financial year may be presented and prepared under the previous accounting framework. Figure 1 sets out an approach that the persons responsible for the prospectus may use when the historical financial information in the prospectus is required to cover three financial years in the situations mentioned under points (i), (ii) and (iii) in paragraph 63.
73. The bridge approach illustrated in Figure 1 does not indicate a specific form of presentation for the historical financial information included in the prospectus. The bridge approach should be consistently applied across all parts and sections of the prospectus, such as for example in the key financial information included in the summary of the prospectus or the OFR section.

Figure 1: Application of bridge approach for prospectuses that include three years of financial information



	Year 2019	Year 2018	Year 2018	Year 2017
Items of financial statements	Application of IFRS or new GAAP (restated)	Application of IFRS or new GAAP (restated as comparative)	Application of previous GAAP (as previously published)	Application of previous GAAP (as published)

74. Referring to Figure 1, equity issuers should apply IFRS 1 in the 2019 financial statements (as restated under IFRS), taking into consideration that such issuers are required to present in the prospectus audited financial statements restated under IFRS for the last year, containing comparative information for the previous year, pursuant to the Commission Delegated Regulation. This implies that the financial information related to 2018 will be restated into IFRS as comparatives in the 2019 IFRS financial statements.
75. For prospectuses which are required to include two years of historical financial information, the persons responsible for the prospectus should, pursuant to the

Commission Delegated Regulation, restate the financial information for the last year containing comparative historical financial information for the previous year and include both the financial information for the last year and comparative financial information for the previous year in the prospectus under the new accounting framework. In this case, the financial information covering the first year (as prepared under the 'old' framework) should also be included in the prospectus, unless the restated financial information covers all the periods required to be included in the prospectus (see paragraph 70 above).

76. Where the requirement to restate the historical financial information applies to prospectuses that are required to include only one year of historical financial information,<sup>72</sup> the persons responsible for the prospectus should restate the historical financial information for that year and present it under the new accounting framework. When the applicable accounting framework requires that the financial statements of the last year include comparative information and the issuer prepares such financial statements that contain comparative information, this should be included in the prospectus. However, where not required by the applicable accounting framework, the comparative information does not need to be presented in the new accounting framework solely for the purposes of the prospectus.
77. The persons responsible for the prospectus should follow the new applicable accounting framework regarding the presentation of the restated historical financial statements. For instance, in case of restatement to IFRS, the applicable accounting standard would be IFRS 1.
78. As regards, the presentation of the restated historical financial information in the prospectus, for example in the summary or the OFR section, the persons responsible for the prospectus should assess whether the presentation format of the statutory financial statements is sufficiently compatible with the presentation format of the restated financial information in order to allow investors to obtain a clear understanding of the issuer's performance and financial development over time. Where the persons responsible for the prospectus consider that there is sufficient compatibility between the presentation format of the restated financial information and the presentation format of the financial information prepared under the current accounting framework, they may choose to present them together. Where the persons responsible for the prospectus consider that there is insufficient compatibility they should present the historical financial information prepared under the two accounting frameworks separately. This could for example be due to significant differences in the presentation format of the current and the new accounting framework or where such presentation is not consistent with the general principles of the new accounting framework.

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<sup>72</sup> This requirement applies to EU Growth prospectuses relating to non-equity securities.

### **Audit of the restated historical financial information**

*Article 2 (Annex 1, Item 18.1.4), Article 7 (Annex 6, Item 11.1.4), Article 10 (Annex 9, Item 8.2.3), Article 28 (Annex 24, Item 5.1.4) and Article 29 (Annex 25, Item 5.1.4) of the Commission Delegated Regulation.*

- 79. Guideline 16: The persons responsible for the prospectus should ensure that the audit report produced for the purposes of the prospectus covers the restated historical financial information, including any comparative information in accordance with the new accounting framework, presented in the prospectus.**
80. Where applicable, the audit report will be presented in accordance with the Audit Directive and the Audit Regulation. Where these are not applicable, the following should be applied:
- (i) the auditor should audit the restated financial information in accordance with auditing standards applicable in a Member State or equivalent standards.<sup>73</sup> The auditor should include an audit opinion regarding whether the restated historical financial information gives, for the purposes of the prospectus, a true and fair view in accordance with the relevant accounting framework; and
  - (ii) if the auditor has refused to provide an audit report on the restated historical financial information, or if the auditor has included qualifications, modifications of opinion, disclaimers or an emphasis of matter in the audit report, the persons responsible for the prospectus should reproduce the qualifications, modifications, disclaimers or emphasis of matter in full in the prospectus and give the reasons for them.
81. If the persons responsible for the prospectus use the bridge approach set out in Guideline 15 and present the middle year (2018) under the two accounting frameworks, the audit report relating to the restatement that is produced for the purpose of the prospectus is only required to cover the restated historical financial information. This audit report should include an opinion on whether the restated information gives a true and fair view of the issuer's financial performance and position and, where applicable, the issuer's cash flow statements. In the example provided in Guideline 15, the audit report of the last year (2019) will cover the restated historical financial information for 2019 that includes comparative information for 2018, which will be covered in the same audit report as comparative information.
82. Furthermore, to comply with the disclosure requirements in the Commission Delegated Regulation, the historical financial information prepared under the current accounting framework – in the example provided in Guideline 15, the 2018 and 2017 historical financial information – will be covered by the statutory audit reports in respect of each year that will be included in the prospectus. For the avoidance of doubt, the persons responsible for the prospectus should use the disclosure requirements that refer to the

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<sup>73</sup> The equivalence regime set out in Articles 45 and 46 of the Audit Directive allows audit reports issued by auditors registered in a third country to be valid in the Union when a third country has been deemed as equivalent.

change of accounting framework in the relevant Annexes of the Commission Delegated Regulation in conjunction with the information required on the auditing of historical financial information pursuant to that Regulation.

83. The case in which the competent authority requested additional disclosures or even a restatement of the accounts following a review of the statutory financial information should be distinguished from the case where a restatement is made for example in accordance with Annex 1, Item 18.1.4. This Guideline will apply if the restatement is made in accordance with Annex 1, Item 18.1.4, or other Annex Items relating to the change of accounting framework. However, when a restatement is made by the issuer as a result of an enforcement procedure, the restated information should be included in the prospectus along with the original accounts, unless the original accounts are officially corrected (reissued). In this case, the restated information does not necessarily have to be audited as this will depend on the circumstances of the case.

#### **Content of historical annual financial information**

*Article 2 (Annex 1, Item 18.1.5) and Article 7 (Annex 6, Item 11.1.5) of the Commission Delegated Regulation.*

84. **Guideline 17: If the applicable accounting standards do not require the inclusion in the annual financial information of some components of the financial statements required by the applicable Annexes of the Commission Delegated Regulation, the persons responsible for the prospectus should ensure that the additional statements required by that Regulation are prepared in accordance with the applicable accounting framework.**
85. In some cases, the applicable accounting framework will not require issuers to prepare all the components of the historical financial information required under the relevant Annexes of Commission Delegated Regulation, for instance the cash flow statement or the statement of changes in equity. In such cases, the persons responsible for the prospectus should prepare the missing information for the purposes of the prospectus. Where the applicable accounting framework contains principles for the preparation of such information, the persons responsible for the prospectus should follow those principles. Where the applicable accounting framework does not contain such principles, the persons responsible for the prospectus should consider following the principles set out in IFRS to the extent possible.

## V.6. Pro forma financial information

### **Assessing if a transaction constitutes a significant gross change or a significant financial commitment**

*Article 1(e) and Article 18(4) of the Commission Delegated Regulation.*

- 86. Guideline 18: To assess whether a transaction constitutes a significant gross change within the meaning of Article 1(e) of the Commission Delegated Regulation or a significant financial commitment within the meaning of Article 18(4) of that Regulation, the persons responsible for the prospectus should consider the size of the transaction relative to the size of the issuer's business. This should be done based on figures which reflect the issuer's business before the transaction took place and by using appropriate indicators of size which will generally be one of the following line items:**
- (i) total assets;**
  - (ii) revenue; or**
  - (iii) profit or loss.**
87. Where those indicators of size produce an anomalous result or are inappropriate to the specific industry of the issuer or to the transaction itself, the persons responsible for the prospectus may use alternative indicators. For instance, an anomalous result could arise where a large company, with a profit close to zero or a loss, acquires a company with much smaller assets and revenue but which has a small positive profit. This could lead the profit of the acquiring company to increase by more than 25%. However, considering the acquisition of the small company as a significant gross change could be misleading. In such cases, the persons responsible for the prospectus should discuss their proposals for alternative indicators with the competent authority during the prospectus approval process.
88. The calculation of whether the 25% threshold is reached should be based on the size of the transaction relative to the historical financial information before the transaction took place. For example, in the case of an acquisition, the persons responsible for the prospectus should use figures which do not include the acquired company. They should normally use figures from the issuer's audited historical financial information for the last financial year.
89. The calculation of the indicators in paragraph 86 should be made on an annual basis, regardless of the figures which are used. This should be done by using financial statement figures covering a 12-month period to remove any effect of seasonality during the year.
90. Sometimes an issuer will publish a prospectus – including pro forma financial information to cover a significant gross change, complex financial history or significant financial commitment ('the first transaction') – and subsequently undertake or commit to undertake a second transaction and prepare a second prospectus, without publishing any financial information between the two prospectuses. In such cases, the persons

responsible for the prospectus should use the historical information, i.e., the issuer's financial information before the first transaction, to determine if the second transaction constitutes a significant gross change or a significant financial commitment. Where the second transaction constitutes a significant gross change or a significant financial commitment, and pro forma financial information is therefore required, the persons responsible for the prospectus should cover both the first and the second transaction in the pro forma financial information.<sup>74</sup>

91. If an issuer undertakes or commits to undertake several transactions, which individually do not constitute more than a 25% variation to one or more indicators of the size of the issuer's business but which collectively constitute more than a 25% variation, the persons responsible for the prospectus should include pro forma financial information unless it is disproportionately burdensome to produce such pro forma financial information. If an issuer undertakes or commits to undertake several transactions, and only one of them constitutes more than a 25% variation to one or more indicators of the size of the issuer's business, the persons responsible for the prospectus should include pro forma financial information covering all the transactions unless it is disproportionately burdensome to produce pro forma financial information for the transactions which do not constitute more than a 25% variation. When determining if it is disproportionately burdensome, the persons responsible for the prospectus should consider the costs of producing the pro forma financial information versus the value of the information for investors. If it is determined that it is disproportionately burdensome, the persons responsible for the prospectus should explain to the competent authority why they consider it disproportionately burdensome.
92. One example of a situation that could be considered as disproportionately burdensome is where an issuer has undertaken a transaction which constitutes a 27% increase to its total assets and another transaction which constitutes a 1% increase. In this case, the persons responsible for the prospectus might argue that it is disproportionately burdensome to produce pro forma financial information for the 1% increase. Another example could be where an issuer has undertaken transactions which amount to a 30%, 20% and 5% change. Applying the principles throughout Guideline 18, the following conclusions might arise depending on the specific situation and the case:
  - (i) the impact of the 30% transaction is described using pro forma because it exceeds the 25% threshold. It has been demonstrated to the competent authority that the 20%<sup>75</sup> and 5% transactions are both disproportionately burdensome to describe. Therefore, only the 30% transaction is described;
  - (ii) the impact of the 30%, 20% and 5% transactions is described using pro forma. The impact of the 30% transaction is described because it exceeds the 25% threshold and the impact of the 20% and 5% transactions is described due to

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<sup>74</sup> In this example, the second transaction concerns a change which is 25% or more. However, for the sake of clarity, a transaction below 25% may also need to be disclosed via pro forma financial information. The explanatory text in paragraph 91 sets out a general principle of aggregation which should always be considered.

<sup>75</sup> In ESMA's view, it is only in rare circumstances that the persons responsible for the prospectus will be able to argue that disclosure concerning the 20% transaction is disproportionately burdensome.

the application of the aggregation principle. In this case it has not been successfully argued that it is disproportionately burdensome to describe the 20% and 5% transactions; or

- (iii) the impact of the 30% and 20% transactions is described using pro forma but not the 5% transaction. The 30% transaction is described using pro forma because it exceeds the 25% threshold and the 20% transaction is described due to the application of the aggregation principle. In this case it has not been successfully argued that it is disproportionately burdensome to describe the 20% transaction, but it has been successfully argued that it is disproportionately burdensome to describe the 5% transaction.

#### **Hypothetical date of the transaction (pro forma profit and loss account)**

*Article 2 (Annex 1, Item 18.4.1), Article 4 (Annex 3, Item 11.5) and Article 28 (Annex 24, Item 5.7) of the Commission Delegated Regulation.*

#### **93. Guideline 19: In case of a significant gross change:**

- (i) where the persons responsible for the prospectus prepare pro forma financial information with reference to the last completed financial period, they should draw up the pro forma profit and loss account as if the transaction had been undertaken on the first day of that period; and / or**
- (ii) where the persons responsible for the prospectus prepare pro forma financial information with reference to the most recent interim period for which relevant unadjusted information has been published or is included in the registration document / prospectus, they should draw up the pro forma profit and loss account as if the transaction had been undertaken on the first day of that period.**

94. When the issuer's business has undergone a significant gross change and pro forma financial information is prepared, the persons responsible for the prospectus perform a simulation of how the transaction would have affected the issuer if it had taken place at an earlier date. This date is independent from the date on which the prospectus is approved.

95. For example, an equity prospectus is drawn up in May 2020 and includes audited historical financial information covering 2017, 2018 and 2019. The date of the balance sheet which is included in the 2019 historical financial information is 31 December 2019. The issuer has published unaudited financial information for the first quarter of 2020, including a balance sheet dated 31 March 2020, which is also included in the prospectus. The issuer's total assets increased by 27% in April 2020 due to the acquisition of Company XYZ.



According to Annex 20, Item 2.2(a) and (b) of the Commission Delegated Regulation pro forma financial information may only be published in respect of:

- A. the last completed financial period; and / or
- B. the most recent interim period for which relevant unadjusted information has been published or is included in the registration document / prospectus.

On that basis, the persons responsible for the prospectus could draw up the pro forma profit and loss account as if the issuer's acquisition of Company XYZ had taken place on 1 January 2019 'and / or' as if the issuer's acquisition of Company XYZ had taken place on 1 January 2020.

While Annex 20 provides an 'and / or' option, in this example, it would be best to present the pro forma profit and loss information for the full financial period of 2019 - see also Guideline 21 paragraph 103 and the point referring to seasonality. Therefore, the persons responsible for the prospectus should prepare the pro forma information as of 1 January 2019.

However, there may be a situation where it is necessary under Article 6 of the Prospectus Regulation to require the information for both the full financial period and the interim period and this is permitted by Annex 20. In such a case, the pro forma profit and loss account for both periods should be drawn up as if the transaction had been undertaken on the first date of the first period.

96. The persons responsible for the prospectus should make sure that any interim financial information used as the basis for the pro forma profit and loss account has been prepared with due care.

#### **Hypothetical date of the transaction (pro forma balance sheet)**

*Article 2 (Annex 1, Item 18.4.1), Article 4 (Annex 3, Item 11.5) and Article 28 (Annex 24, Item 5.7) of the Commission Delegated Regulation.*

97. **Guideline 20: In case of a significant gross change:**
- (i) **when the persons responsible for the prospectus prepare pro forma financial information with reference to the last completed financial period, they should draw up the pro forma balance sheet as if the transaction had been undertaken on the last day of that period; and / or**
  - (ii) **when the persons responsible for the prospectus prepare pro forma financial information with reference to the most recent interim period for which relevant unadjusted information has been published or is included in the registration document / prospectus, they should draw up the pro forma balance sheet as if the transaction had been undertaken on the last day of that period.**

98. Please refer to the example in paragraph 95:

According to Annex 20, Item 2.2(a) and (b) of the Commission Delegated Regulation pro forma financial information may only be published in respect of:

- A. to the last completed financial period; and / or
- B. the most recent interim period for which relevant unadjusted information has been published or are included in the registration document / prospectus.

On that basis, the persons responsible for the prospectus could draw up the pro forma balance sheet as if the issuer's acquisition of Company XYZ had taken place on 31 December 2019 'and / or' as if the issuer's acquisition of Company XYZ had taken place on 31 March 2020.

While Annex 20 provides an 'and / or' option, in the case of balance sheet information, it may only be relevant for the pro forma financial information to be presented for one period. In this example, the pro forma financial information should be drawn up as if the acquisition had taken place on 31 March 2020.

99. The persons responsible for the prospectus should make sure that any interim financial information used as the basis for the pro forma balance sheet has been prepared with due care.

#### **Time period covered by pro forma information**

*Article 2 (Annex 1, Item 18.4.1), Article 4 (Annex 3, Item 11.5), Article 18 (Annex 20, Item 2.2) and Article 28 (Annex 24, Item 5.7) of the Commission Delegated Regulation in light of the principle of consistency laid down in Article 2(r) of the Prospectus Regulation.*

**100. Guideline 21: The persons responsible for the prospectus should ensure that the time period covered by the pro forma profit and loss account / balance sheet is consistent with the financial information included in the prospectus.**

101. The time period for pro forma financial information should be consistent with the time period covered by the financial information in the registration document or prospectus. As such, the persons responsible for the prospectus can draw up pro forma financial information in relation to:

- (i) the latest financial year which has closed; and / or
- (ii) the interim financial period (e.g. in relation to the latest half year or quarter) for which the issuer has published financial information; and / or
- (iii) the shorter period that the issuer has been in operation.

102. As regards interim financial information, while the persons responsible for the prospectus should normally use half-yearly financial information when drawing up pro

forma statements, they may use quarterly financial information where such information has been prepared with the same level of care as the half-yearly information, e.g. by applying the principles of IAS 34. The half-yearly and quarterly financial information will either be information which the issuer has already published, for example, to comply with the requirements of the Transparency Directive, or which the persons responsible for the prospectus are including in the prospectus.

103. Where the prospectus only contains annual financial statements, the pro forma profit and loss account / balance sheet should cover the full year. Where the prospectus contains annual financial statements as well as interim financial information, the persons responsible for the prospectus may decide to cover only the interim period, only the full year, or both the interim period and the full year in the pro forma profit and loss account / balance sheet. However, if the persons responsible for the prospectus only cover the interim period in the pro forma profit and loss account, they should ensure that this will sufficiently describe how the transaction might have affected the earnings of the issuer. For example, where the issuer's business is affected by seasonality it may not be sufficient to only cover the interim period, and the pro forma profit and loss account may need to cover the full year.
104. To comply with the requirement to include historical unadjusted information in the pro forma profit and loss account / balance sheet, the persons responsible for the prospectus should normally use the (i) audited historical financial information for the last completed financial period (ii) or the most recent interim financial information (e.g. in relation to the latest half year or quarter) published by the issuer or included in the prospectus before the transaction took place. In specific circumstances, this rule will not apply, for example, when the issuer has drawn up financial information specifically for the purpose of the prospectus (e.g. a newly incorporated entity without any previous historical financial information).

#### **Transaction already covered in historical or interim financial information**

*Article 2 (Annex 1, Item 18.4.1), Article 4 (Annex 3, Item 11.5), Article 18 (Annex 20, Item 1.1(b)) and Article 28 (Annex 24, Item 5.7) of the Commission Delegated Regulation.*

105. **Guideline 22: The persons responsible for the prospectus are not required to include a pro forma profit and loss account / balance sheet in the prospectus if the transaction is already fully reflected in the profit and loss account / balance sheet contained in the historical or interim financial information in the prospectus.**
106. If the transaction is already fully reflected in the profit and loss account / balance sheet in the historical or interim financial information included in the prospectus, there is no need to provide a pro forma profit and loss account / balance sheet, as investors have already been provided with the necessary information. For example, where an issuer underwent a significant gross change in November 2018 and a prospectus is prepared in March 2019 containing audited annual financial statements for 2018, the persons responsible for the prospectus should include a pro forma profit and loss account. This is because the profit and loss account in the 2018 annual financial statement does not fully reflect the impact of the transaction for the entire year. However, the persons

responsible for the prospectus do not need to include a pro forma balance sheet in this case, because the balance sheet in the 2018 annual financial statement fully reflects the transaction.

### **Using other information than pro forma financial information**

*Article 2 (Annex 1, Item 18.4.1), Article 4 (Annex 3, Item 11.5) and Article 28 (Annex 24, Item 5.7) of the Commission Delegated Regulation.*

- 107. Guideline 23: In the case of a significant gross change, the persons responsible for the prospectus may exceptionally, in agreement with the competent authority, describe the effect of the transaction other than through pro forma financial information.**
108. As a rule, the persons responsible for the prospectus should provide pro forma financial information in accordance with Annex 20 of the Commission Delegated Regulation to reflect a significant gross change. However, in exceptional situations they may be able to describe the effect of the transaction:
- (i) by providing only a pro forma profit and loss account and no pro forma balance sheet or by providing only a pro forma balance sheet and no pro forma profit and loss account (even if the transaction is not reflected in the profit and loss account / balance sheet contained in the historical or interim financial information in the prospectus, as described in Guideline 22);
  - (ii) by providing some elements of a pro forma profit and loss account which are relevant and not a full pro forma profit and loss account (e.g. a pro forma profit and loss account which might exclude a net result) to facilitate an investor's understanding of certain impacts on items such as turnover or operating profit. In this case, these elements should be covered by an auditors report and should be unbiased, i.e. it should show pro forma losses as well as gains; or
  - (iii) by providing only narrative information and neither a pro forma profit and loss account nor a pro forma balance sheet.
109. These exceptional situations may arise, but are not limited to, where:
- (i) the issuer will acquire another entity and it is not reasonably possible to obtain the relevant financial information relating to that entity;
  - (ii) the issuer has acquired an asset and insufficient financial information is available;
  - (iii) pro forma financial information would not accurately describe the effect of the transaction.
110. Whenever such an exceptional situation arises, it is important to remember that Article 6 of the Prospectus Regulation is relevant in respect of the effect of the transaction being described.

111. The persons responsible for the prospectus should obtain the agreement of the competent authority before proceeding with the approach described in paragraph 108. If the persons responsible for the prospectus follow the approach described in paragraph 108 point (iii), they are not required to include a report prepared by the independent accountants or auditors.

**Which events to cover with pro forma financial information / presentation of adjustments**

*Article 2 (Annex 1, Item 18.4.1), Article 4 (Annex 3, Item 11.5), Article 18 (Annex 20, Item 2.3(b) and (c)) and Article 28 (Annex 24, Item 5.7) of the Commission Delegated Regulation.*

- 112. Guideline 24: When preparing pro forma adjustments, the persons responsible for the prospectus should reflect the transaction giving rise to the pro forma financial information regardless of whether the transaction has already occurred or has not yet occurred. In doing so, they should only reflect matters which are:**

- (i) an integral part of the transaction; and**
- (ii) capable of a reasonable degree of objective determination.**

113. The pro forma adjustments should cover the transaction giving rise to the pro forma financial information regardless of whether the transaction has already occurred (in the case of a significant gross change or a complex financial history) or has not yet occurred (in case of a significant financial commitment).

114. For example, an issuer might undertake a capital increase (requiring a prospectus) to raise funds for the acquisition of another entity. The acquisition might constitute a significant financial commitment. If so, this will trigger a need for pro forma financial information to illustrate the impact of the acquisition as if it had taken place at an earlier date. In addition to illustrating the impact of the acquisition, the persons responsible for the prospectus should also cover the impact of the capital increase and / or any other financial consideration involved, e.g. any debt issuance or other financial contracts needed to complete the acquisition. If there is much uncertainty regarding subscriptions for the offer, the persons responsible for the prospectus should consider adding a risk factor in that regard.

*Presentation of adjustments in pro forma information*

115. Pro forma adjustments must present all significant effects directly attributable to the transaction. However, the persons responsible for the prospectus should not include future effects which are very uncertain, as this could give a misleading picture of the transaction. In particular, pro forma financial information should generally not include adjustments which are dependent on actions to be taken once the transaction has been completed, even where such actions are central to the issuer's purpose in entering into the transaction, e.g. synergies. In addition, the persons responsible for the prospectus should not, as a rule, include deferred or contingent consideration, other than consideration that is recognised as part of the consideration transferred in exchange for the acquiree under the applicable accounting framework, if that consideration is not

directly attributable to the transaction but to a future event. If deferred or contingent consideration is capable of a reasonable degree of objective determination it may be included on a case-by-case basis, depending on the use of the pro forma information and after discussion with the competent authority.

116. The persons responsible for the prospectus should always base pro forma adjustments on reliable and documented evidence. Such evidence will typically consist of published accounts, management accounts, other financial information and valuations contained in the documentation relating to the transaction, purchase and sale agreements and other agreements to the transaction covered by the prospectus. For instance, in relation to management accounts, the interim figures for an undertaking being acquired may be derived from the consolidation schedules underlying that undertaking's interim statements.

#### **Accountant / auditor report**

*Article 2 (Annex 1, Item 18.4.1), Article 4 (Annex 3, Item 11.5), Article 18 (Annex 20, Section 3) and Article 28 (Annex 24, Item 5.7) of the Commission Delegated Regulation.*

117. **Guideline 25: Where the persons responsible for the prospectus prepare pro forma financial information in accordance with Annex 20 of the Commission Delegated Regulation, they should ensure that they do so in a manner that permits the independent accountants or auditors to prepare their report in accordance with the exact wording set out in Section 3 of that Annex.**
118. The purpose of the report prepared by the independent accountants or auditors is to express an opinion that the pro forma financial information was properly compiled by the persons responsible for the prospectus, i.e. properly compiled on the basis stated and that the basis is consistent with the accounting policies of the issuer.
119. The persons responsible for the prospectus should therefore compile the pro forma financial information in a manner which permits the independent accountants / auditors to say that, in their opinion, the pro forma financial information has been properly compiled on the basis stated, and that this basis is consistent with the accounting policies of the issuer.
120. Section 3 of Annex 20 implies that qualifications or emphases of matter should not arise in respect of how the pro forma information was compiled. If, however, the independent accountant or auditor wants to draw an investor's attention to the fact that qualifications or emphases of matter had arisen in respect of the underlying unadjusted historical financial information used to prepare the pro forma financial information, they are not prohibited from doing so. If qualifications or emphases of matter are included in that context, they should be presented separately in the report from the opinion concerning how the pro forma information was compiled.

## **Voluntary pro forma financial information**

*Article 6 of the Prospectus Regulation read in conjunction with Article 2 (Annex 1, Item 18.4.1), Article 4 (Annex 3, Item 11.5), Article 18 (Annex 20) and Article 28 (Annex 24, Item 5.7) of the Commission Delegated Regulation.*

- 121. Guideline 26: The persons responsible for the prospectus should comply with the requirements of Annex 20 of the Commission Delegated Regulation if pro forma financial information is included in a prospectus on a voluntary basis.**
122. Even in the absence of a significant gross change, a significant financial commitment or a complex financial history, the persons responsible for the prospectus may decide to voluntarily include pro forma financial information in the prospectus. The same applies to issuers of non-equity securities.
123. The fact that pro forma financial information is included in the prospectus on a voluntary basis should not imply that it is possible for this information to be provided with less care than when included on a mandatory basis. Pro forma financial information, if not prepared with due care, might confuse or even mislead investors. Therefore, the persons responsible for the prospectus should apply the requirements of Annex 20 if they decide to include pro forma financial information on a voluntary basis.

## **V.7. Interim financial information**

### **Compilation of interim financial information**

*Article 2 (Annex 1, Item 18.2), Article 7 (Annex 6, Item 11.2.1), Article 28 (Annex 24, Item 5.2.1) and Article 29 (Annex 25, Item 5.2.1) of the Commission Delegated Regulation.*

- 124. Guideline 27: Where the most recent financial information published by the issuer is the half-yearly financial report prepared in accordance with the Transparency Directive, the persons responsible for the prospectus should include in the registration document at least the condensed set of financial statements included in that half-yearly financial report.**
- 125. Where the most recent financial information published by an issuer is the quarterly financial report, the persons responsible for the prospectus should include in the registration document at least the condensed set of financial statements included in that quarterly financial report.**
126. Two different situations can be envisaged:
  - (i) An issuer submits a prospectus for approval on 30 July. The issuer has published half-yearly financial information (30 June) and financial information on the first quarter. In that case the latest interim financial information is sufficient (half-yearly).
  - (ii) An issuer submits a prospectus for approval on 30 October. The issuer has published financial information on the third quarter and half-yearly financial

information (30 June). In that case the latest interim financial information is not sufficient, and the issuer should include in its prospectus both quarterly (Q3) and half-yearly financial information provided that there is no duplication of information. When interim financial information for the third quarter also covers the first nine months of the year, and is prepared in accordance with the same interim accounting standard (e.g. IAS 34) as the half-yearly financial information, the half-yearly financial information does not need to be disclosed.

### **Relevant accounting policies and principles**

*Article 2 (Annex 1, Item 18.2), Article 7 (Annex 6, Item 11.2.1), Article 28 (Annex 24, Item 5.2.1) and Article 29 (Annex 25, Item 5.2.1) of Commission Delegated Regulation, should be read in conjunction with the principle of consistency laid down in Article 2(r) of the Prospectus Regulation.*

- 127. Guideline 28: When the issuer has published quarterly or half-yearly financial information, the persons responsible for the prospectus should present the interim financial information according to the issuer's accounting framework.**

## **V.8. Working capital statements**

### **Determining whether the working capital statement should be clean or qualified**

*Article 12 (Annex 11, Item 3.1), Article 13 (Annex 12, Item 3.3), Article 14 (Annex 13, Item 1.1) and Article 30 (Annex 26, Item 2.1) of the Commission Delegated Regulation, which stipulate that the working capital statement can either reflect that the issuer has sufficient working capital to meet its present requirements or that it does not have sufficient working capital to do so, read in light of the duration of the validity of the prospectus established in Article 12 of the Prospectus Regulation.*

- 128. Guideline 29: Where an issuer can state without qualifying wording that it has sufficient working capital to meet its present requirements, it should provide a 'clean' working capital statement. Where the issuer cannot state without qualifying wording that it has sufficient working capital to meet its present requirements, it should provide a 'qualified' working capital statement.**
129. The persons responsible for the prospectus can meet the requirement to include a working capital statement in the prospectus either:
- (i) by including a clean working capital statement, stating that the issuer, in its own opinion and in line with the duration of the validity of the prospectus established in Article 12 of the Prospectus Regulation, has sufficient working capital for a period of at least 12 months; or
  - (ii) by including a qualified working capital statement, stating that the issuer, in its own opinion, does not have sufficient working capital and explaining how it proposes to provide the additional working capital needed.



130. When considering whether its working capital statement should be clean or qualified, the issuer should assess whether it is able to access cash and other available liquid resources in order to meet its liabilities as they fall due.
131. The working capital statement should be consistent with the other parts of the prospectus. Where other parts of the prospectus, for example the risk factors, describe elements that could adversely impact the issuer's ability to meet its present requirements, the issuer should not make a clean working capital statement. Where the auditor's report contains a statement relating to 'going concern', and the working capital statement is clean, the persons responsible for the prospectus should provide explanation for this in the prospectus.
132. An issuer may consider that it has sufficient working capital and that its working capital statement should therefore be clean, but at the same time wish to include qualifying wording such as assumptions, sensitivities, risk factors or potential caveats in the statement. If an issuer finds it necessary to include such qualifying wording, this implies that it cannot firmly state that it has sufficient working capital to meet its present requirements, and it should therefore provide a qualified working capital statement instead of a clean one.
133. When providing a clean working capital statement, an issuer should disclose whether the proceeds of the offer have been included in the calculation of its working capital. For the avoidance of doubt, such disclosure is not considered a qualification or a caveat, but information on the basis of preparation of the working capital statement that is necessary for an investor to make an informed assessment.
134. It is not acceptable for the issuer to state that it is unable to confirm whether it has sufficient working capital. In such cases, the issuer should provide a qualified working capital statement.

### **Robust procedures**

*Article 12 (Annex 11, Item 3.1), Article 13 (Annex 12, Item 3.3), Article 14 (Annex 13, Item 1.1) and Article 30 (Annex 26, Section 2 and Item 2.1) of the Commission Delegated Regulation.*

135. **Guideline 30: The issuer should prepare its working capital statement based on robust procedures such that there is very little risk that the statement is challenged.**
136. The issuer should follow procedures appropriate to ensure the robustness of the statement. Such procedures will normally include:
- (i) preparing unpublished supporting prospective financial information in the form of internally consistent cash flow, profit and loss and balance sheet information;
  - (ii) conducting business analysis covering both the issuer's cash flows and the terms and conditions and commercial considerations associated with banking and other financing relationships;

- (iii) considering the issuer's strategy and plans and the related implementation risks together with checks against evidence and analysis; and
- (iv) assessing whether there are sufficient resources to cover a reasonable worst-case scenario (sensitivity analysis). Where there is insufficient headroom between required and available funding to cover reasonable alternative scenarios, the issuer will need to reconsider its business plans or arrange additional financing if it wishes to provide a clean working capital statement.

### **Not open to more than one interpretation**

*Article 12 (Annex 11, Item 3.1), Article 13 (Annex 12, Item 3.3), Article 14 (Annex 13, Item 1.1) and Article 30 (Annex 26, Section 2 and Item 2.1) of the Commission Delegated Regulation.*

### **137. Guideline 31: The issuer should ensure that the working capital statement is not open to more than one interpretation.**

138. Regardless of whether the working capital statement is clean or qualified, the issuer should make sure it sends a clear message, so that it is obvious to investors whether in the issuer's opinion there is sufficient working capital.

139. In a clean working capital statement, issuers should say that their working capital 'is sufficient'. They should avoid saying that they 'will' or 'may have' sufficient working capital or that they 'believe' they have sufficient working capital, as these latter terms could create confusion regarding when the working capital will be sufficient and which events would have to occur for the working capital to be sufficient. A clean working capital statement could for example have the following wording: 'In the company's opinion, its working capital is sufficient to meet its present requirements over at least the next twelve months.'

### **Content of a qualified working capital statement**

*Article 12 (Annex 11, Item 3.1), Article 13 (Annex 12, Item 3.3), Article 14 (Annex 13, Item 1.1) and Article 30 (Annex 26, Item 2.1) of the Commission Delegated Regulation.*

### **140. Guideline 32: In a qualified working capital statement, the issuer should state that it does not have sufficient working capital for its present requirements. Furthermore, it should describe the following factors:**

- (i) timing;
- (ii) shortfall;
- (iii) action plan; and
- (iv) implications.

141. The issuer should explicitly state that it does not have sufficient working capital to meet its present requirements. After this statement, it should provide information on the

factors listed in paragraph 140 in order to ensure that investors are fully informed as regards the issuer's actual working capital position.

142. Timing: The working capital shortfall could arise immediately or sometime in the future, and investors need information on the timing to assess the urgency of the problem. The issuer should therefore state when it expects to run out of working capital.
143. Shortfall: To allow investors to understand the magnitude of the problem, the issuer should state the approximate amount of the working capital shortfall.
144. Action plan: The issuer should describe how it plans to rectify the working capital shortfall. The description should include details of specific proposed actions, for example refinancing, renegotiation of or new credit terms / facilities, decrease in discretionary capital expenditure, revised strategy / acquisition programme or asset sales. The issuer should explain the timing of the proposed actions and how confident it is that they will be successful.
145. Implications: Where relevant, the issuer should state the consequences of any of the actions proposed in the action plan being unsuccessful (for example whether the issuer is likely to enter into administration or receivership and, if so, when).

#### **Rules for calculation of working capital**

*Article 12 (Annex 11, Item 3.1), Article 13 (Annex 12, Item 3.3), Article 14 (Annex 13, Item 1.1) and Article 30 (Annex 26, Section 2 and Item 2.1) of the Commission Delegated Regulation.*

146. **Guideline 33: When the issuer calculates its working capital, it should only count the proceeds of an offering if the offering is underwritten on a firm commitment basis or if irrevocable undertakings have been given. If only a portion of an offering is underwritten or covered by irrevocable undertakings, only that portion of the offering may be included in the calculation of the working capital. The issuer should not count such proceeds when calculating its working capital if investors will be exposed to the risk that the issuer continues with an offer after the underwriting agreement has been cancelled or the irrevocable undertakings are withdrawn.**
147. Investors should not be confronted with uncertainty about the quality of the underwriting when subscribing for their shares. This is particularly the case when the issuer counts proceeds of the offering when calculating its working capital. As such, the issuer should consider any conditionality in the underwriting agreement or irrevocable undertakings that would allow the cancellation of the underwriting agreement or the irrevocable undertakings.
148. The issuer should not include the proceeds of an offer when calculating its working capital if it is necessary to make any significant assumptions concerning whether the offering will be underwritten or whether any irrevocable undertakings will be withdrawn. Furthermore, if an issuer includes any of the proceeds of an offering in the calculation of its working capital, it should be clear in the disclosure provided in accordance with

Item 5.1.4 of Annex 11 to the Commission Delegated Regulation that the offer will not continue if it is no longer underwritten or the irrevocable undertakings are withdrawn.

149. As mentioned above, investors should also not be confronted by any uncertainty in relation to the quality of the underwriting and any irrevocable undertakings. Such uncertainty also includes any credit risk in relation to any party underwriting the offering or providing irrevocable undertakings. In order to limit such uncertainty, the issuer should assess the credit risk associated with the parties underwriting the offering or providing irrevocable undertakings. If the outcome of this assessment is that there is a material risk that one or more of the parties underwriting the offering or providing irrevocable undertakings will not be able to meet its obligations, the issuer should not include the proceeds of the offering in the calculation of its working capital.
150. Only offerings that are underwritten on a firm commitment basis and irrevocable undertakings should be included in the calculation of an issuer's working capital. This ensures that there is certainty about the proceeds of an offering. For the avoidance of doubt, an intention or agreement to subscribe to an offering of securities is not a firm commitment or an irrevocable undertaking.
151. In order to take the proceeds of an offering into account in the calculation of an issuer's working capital, the issuer should know the minimum amount of proceeds of the offering that will be underwritten or placed via irrevocable undertakings. The proceeds of the offering should not be included in the calculation of the issuer's working capital if the issuer cannot calculate the net proceeds of the offer (for example under the circumstances that there is no minimum price or the underwriting agreement does not guarantee a minimum amount of proceeds).

#### **Rules for calculation of present requirements**

*Article 12 (Annex 11, Item 3.1), Article 13 (Annex 12, Item 3.3), Article 14 (Annex 13, Item 1.1) and Article 30 (Annex 26, Section 2 and Item 2.1) of the Commission Delegated Regulation.*

152. **Guideline 34: For the purpose of the working capital statement and in line with the duration of the validity of the prospectus established in Article 12 of the Prospectus Regulation, the issuer should count in its working capital all amounts which are reasonably expected to be received or fall due to be paid for a minimum of the next 12 months from the date of approval of the prospectus when calculating its present requirements. If it has made a firm commitment to acquire another entity within the 12 months following the date of approval of the prospectus, it should include the impact of the acquisition when calculating its present requirements.**
153. When calculating its present requirements, the issuer should take into account the actions foreseen in its strategy (For example, the issuer's strategy foresees expenditures relating to research and development or equipment).

154. Where the issuer is aware of working capital difficulties that may arise more than 12 months after the date of approval of the prospectus, the persons responsible for the prospectus should consider including supplementary disclosure in the prospectus.

#### **Preparation on a consolidated basis**

*Article 12 (Annex 11, Item 3.1), Article 13 (Annex 12, Item 3.3), Article 14 (Annex 13, Item 1.1) and Article 30 (Annex 26, Section 2 and Item 2.1) of the Commission Delegated Regulation, read in light of the principle of including consolidated information in the prospectus in Article 2 (Annex 1, Item 18.1.6), Article 7 (Annex 6, Item 11.1.6), Article 8 (Annex 7, Item 11.1.5), Article 28 (Annex 24, Item 5.1.6) and Article 29 (Annex 25, Item 5.1.6) of the Commission Delegated Regulation.*

- 155. Guideline 35: In line with the requirement to include consolidated financial statements in the prospectus where such statements are prepared, when an issuer prepares its working capital statement, it should determine the working capital and the present requirements on a consolidated basis.**
156. For an issuer which is the parent company of a group, the investor is in substance investing in the business of the whole group and this is the basis on which information in the prospectus is presented. As such, financial information in the prospectus is presented on a consolidated basis, and this principle should also apply to the working capital statement. When determining its working capital and present requirements, the issuer should consider, among other things, the nature of group arrangements and any restrictions on the transfer of funds between subsidiaries (for example, where overseas subsidiaries are involved).

#### **Credit institutions**

*Article 12 (Annex 11, Item 3.1), Article 13 (Annex 12, Item 3.3), Article 14 (Annex 13, Item 1.1) and Article 30 (Annex 26, Section 2 and Item 2.1) of the Commission Delegated Regulation.*

- 157. Guideline 36: When determining its working capital, an issuer which is a credit institution<sup>76</sup> should take its liquidity metrics and relevant applicable prudential requirements as the starting point. The issuer should take into account all available information which may have a material impact on its liquidity risk and its projected capital adequacy ratios.**
158. Issuers which are credit institutions should provide a working capital statement in line with the general rules set out in Guidelines 29-35 when issuing equity securities. However, this statement should be drawn up on a basis that reflects the specificities of their business model by relying on the relevant applicable prudential requirements, except where relying on such requirements would render the working capital statement misleading. EU credit institutions should use the applicable ratios required by EU

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<sup>76</sup> As defined in Article 2(g) of the Prospectus Regulation.

legislation<sup>77</sup> to calculate liquidity. In particular, these institutions should consider the use of the Liquidity Coverage Ratio and Net Stable Funding Ratio (or any applicable national stable funding provisions before the Net Stable Funding Ratio is required by EU legislation) to calculate liquidity. The same applies to third country credit institutions which calculate those ratios. Third country credit institutions which do not calculate those ratios should instead use ratios consistent with the applicable legal framework within their jurisdictions to calculate liquidity.

159. Additionally, EU credit institutions should consider their projected capital adequacy ratios. In particular, these institutions should consider their projected ratios at the CET 1 and TCR levels and projected leverage ratios under a base case and reasonable worst-case scenario. The same applies to third country credit institutions which calculate those ratios. Third country credit institutions which do not calculate those ratios should instead use ratios consistent with the applicable legal framework within their jurisdictions.
160. When taking its metrics as the starting point for determining its working capital, the issuer should make use of the most recently calculated ratio(s). Where a ratio is calculated several months before the date of approval of the prospectus, the issuer should take into account all events since the date of calculation which could have affected its liquidity and its regulatory capital requirements.
161. The requirement to use applicable prudential ratios for preparing the working capital statement does not in and of itself mean that credit institutions are required to disclose these ratios in the prospectus.

### **Insurance and reinsurance undertakings**

*Article 12 (Annex 11, Item 3.1), Article 13 (Annex 12, Item 3.3), Article 14 (Annex 13, Item 1.1) and Article 30 (Annex 26, Section 2 and Item 2.1) of the Commission Delegated Regulation.*

162. **Guideline 37: When determining its working capital, an issuer which is an insurance or reinsurance undertaking<sup>78</sup> should take the liquidity metrics which were agreed with the supervisory authority and regulatory capital requirements as the starting point.**
163. Issuers which are insurance or reinsurance undertakings should provide a working capital statement in line with the general rules set out in Guidelines 29-35 when issuing equity securities. However, this statement should be drawn up on a basis that reflects the specificities of their business model by relying on the relevant applicable prudential requirements, except where relying on such requirements would render the working capital statement misleading. EU insurance or reinsurance undertakings should use the metrics which they have adopted and submitted to the supervisory authority for monitoring their liquidity risk pursuant to the Solvency II regime,<sup>79</sup> including Minimum

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<sup>77</sup> Regulation (EU) No 575/2013; Commission Delegated Regulation (EU) 2015/61; Commission Implementing Regulation (EU) No 680/2014.

<sup>78</sup> As defined in Article 13(1) and (4) of the Solvency II Directive.

<sup>79</sup> Solvency II Directive; Commission Delegated Regulation (EU) 2015/35 and related implementing measures.

Capital Requirement, as well as its capital adequacy ratios. Third country insurance and reinsurance undertakings should use metrics consistent with the applicable legal framework on prudential supervision within their jurisdictions.

164. The issuer should make use of the most recently calculated metrics when determining its working capital. Where a metric is calculated several months before the date of approval of the prospectus, the issuer should take into account all events since the date of calculation which could have affected its liquidity risk and regulatory capital requirements.
165. The requirement to use applicable prudential metrics for preparing the working capital statement does not in and of itself mean that insurance and reinsurance undertakings are required to disclose these metrics in the prospectus.

## V.9. Capitalisation and indebtedness

### Statement of capitalisation

*Article 12 (Annex 11, Item 3.2), Article 13 (Annex 12, Item 3.4), Article 14 (Annex 13, Item 1.2) and Article 30 (Annex 26, Item 2.2) of the Commission Delegated Regulation.*

166. **Guideline 38: The persons responsible for the prospectus should include the content set out below when preparing the statement of capitalisation:**

<b>Total current debt</b> (including current portion of non-current debt).....
- Guaranteed .....
- Secured.....
- Unguaranteed / unsecured .....
<b>Total non-current debt</b> (excluding current portion of non-current debt).....
- Guaranteed .....
- Secured.....
- Unguaranteed / unsecured .....
<b>Shareholder equity</b> .....
- Share capital .....
- Legal reserve(s) .....
- Other reserves .....
<b>Total</b> .....

167. If a line item in the above table is not applicable in the Member State where the issuer has drawn up its financial information, for instance because the issuer's legal framework does not require it, the persons responsible for the prospectus should adapt the statement of capitalisation upon discussion with the competent authority.
168. When the issuer has *current or non-current debt which is guaranteed by another entity*, i.e. the debt obligation is assumed by a third party in the event the issuer defaults, the persons responsible for the prospectus should describe which types of guarantees

apply. When the issuer has *secured current* or *secured non-current debt*, i.e. the debt is backed by collateral, the persons responsible for the prospectus should describe the types of assets used to secure the debt.

169. *Legal reserve(s)* and *Other reserves* should not include the profit and loss of the reporting period. The persons responsible for the prospectus are therefore not expected to calculate the profit and loss of the reporting period for the purpose of the capitalisation statement.
170. Credit institutions and insurance and reinsurance undertakings should adapt the table provided above to their business model by focusing on their prudential requirements related to regulatory capital. This does not mean that credit institutions and insurance and reinsurance undertakings are required to disclose prudential information which they are not already required to disclose according to Pillar 3 requirements.
171. When the issuer's business has recently undergone a change, the persons responsible for the prospectus may wish to illustrate this change by presenting an additional column in the capitalisation statement. When determining whether this is permissible, they should apply the following rules:
  - a. when the change has triggered the requirement to include pro forma financial information in the prospectus, the persons responsible for the prospectus may present an additional column in the capitalisation statement. The additional column should be consistent with the pro forma financial information presented elsewhere in the prospectus and adjustments may be explained by referring to that information;
  - b. when the change has not triggered the requirement to include pro forma financial information in the prospectus:
    - (1) when the change was complex (e.g. an acquisition which does not constitute a significant gross change):
      - (a) if the persons responsible for the prospectus include pro forma financial information in the prospectus on a voluntary basis in accordance with Guideline 26, they may present an additional column accordingly;
      - (b) if the persons responsible for the prospectus do not include pro forma financial information in the prospectus, they may only present an additional column if it is comprehensible and easily analysable;
    - (2) when the change was straightforward (e.g. conversion of debt into equity), the persons responsible for the prospectus may normally present an additional column. If the additional column consists of illustrative figures, e.g. figures covering the first six months of a year adjusted by a capital conversion which was undertaken in July, the persons responsible for the prospectus should pay special attention to the comprehensibility of the figures and explain adjustments in detail.



172. Recent changes may also be presented through the inclusion of the actual figures in the statements of capitalisation.
173. Similarly, when the issuer stands before a future change, the persons responsible for the prospectus may wish to illustrate this change by presenting an additional column in the capitalisation statement. When determining whether this is permissible, they should apply the following rules:
- a. when the change has triggered the requirement to include pro forma financial information in the prospectus, the persons responsible for the prospectus may present an additional column in the capitalisation statement. The additional column should be consistent with the pro forma financial information presented elsewhere in the prospectus and adjustments may be explained by referring to that information;
  - b. when the change has not triggered the requirement to include pro forma financial information in the prospectus (e.g. a binding agreement to undertake an acquisition which does not constitute a significant financial commitment, financed by a capital increase):
    - (1) the persons responsible for the prospectus may present an additional column to illustrate the possible outcome of the capital increase, provided that they ensure that the column does not give the impression that the outcome is certain, unless it truly is. The persons responsible for the prospectus should describe the adjustments made and their underlying assumptions. If shares are offered at a price range, the persons responsible for the prospectus should use the minimum price when calculating the possible offer proceeds, unless there are special grounds for using a different price. They should also take transaction costs into account;
    - (2) the persons responsible for the prospectus should only present other potential future changes than the outcome of the capital increase if they are factually supportable. If the future outcome is uncertain, such as where an issuer wishes to present a future change in its debt structure even though negotiations with the credit institution(s) are incomplete, presenting an additional column reflecting the potential outcome may endanger the comprehensibility and analysability of the prospectus and is therefore normally not allowed.
174. Due to its limited effects, the mere inclusion of an additional column in the capitalisation statement to present recent or future changes does not normally trigger the requirement to include pro forma financial information in the prospectus according to Annex 20 of the Commission Delegated Regulation.

### Statement of indebtedness

Article 12 (Annex 11, Item 3.2), Article 13 (Annex 12, Item 3.4), Article 14 (Annex 13, Item 1.2) and Article 30 (Annex 26, Item 2.2) of the Commission Delegated Regulation.

**175. Guideline 39: The persons responsible for the prospectus should include the content set out below when preparing the statement of indebtedness.**

A	Cash.....
B	Cash equivalents .....
C	Other current financial assets .....
<b>D</b>	<b>Liquidity (A + B + C).....</b>
E	Current financial debt (including debt instruments, but excluding current portion of non-current financial debt) .....
F	Current portion of non-current financial debt.....
<b>G</b>	<b>Current financial indebtedness (E + F ).....</b>
<b>H</b>	<b>Net current financial indebtedness (G - D).....</b>
I	Non-current financial debt (excluding current portion and debt instruments).....
J	Debt instruments.....
K	Non-current trade and other payables.....
<b>L</b>	<b>Non-current financial indebtedness (I + J + K) .....</b>
<b>M</b>	<b>Total financial indebtedness (H + L) .....</b>

176. If a line item in the above table is not applicable in the Member State where the issuer has drawn up its financial information, for instance because the issuer’s legal framework does not require it, the persons responsible for the prospectus should adapt the statement of indebtedness upon discussion with the competent authority.
177. Where the issuer is required to prepare consolidated financial statements, the persons responsible for the prospectus should calculate indebtedness on a consolidated basis.
178. Where the issuer has *cash equivalents*, the persons responsible for the prospectus should provide detail on what they consist of. The persons responsible for the prospectus should disclose any restrictions on the availability of cash and cash equivalents.
179. *Other current financial assets* should cover financial assets (for example securities held for trading) that are not (i) cash, (ii) cash equivalent or (iii) derivatives used for hedging purposes.

180. *Financial debt* should cover debt which is remunerated (i.e. interest-bearing debt) which comprises, amongst others, financial liabilities related to short- and / or long-term leases. The persons responsible for the prospectus should clarify in a paragraph after the indebtedness statement whether *financial debt* includes any liabilities related to leases, and when it does, they should provide the amount of short- and / or long-term lease liabilities.
181. *Current financial debt* should include debt instruments which are redeemable within the coming 12 months.
182. *Current portion of non-current financial debt* means the portion of the non-current financial debt which is to be repaid within 12 months of the date of approval of the prospectus.
183. *Non-current trade and other payables* should include non-remunerated debt for which there is a significant financing component, either implicitly or explicitly, for example debt to *suppliers beyond a period of 12 months*. Any non-interest bearing loans should also be included in this line item.
184. When assessing whether non-current trade payables have a significant financing component, the persons responsible for the prospectus should consider (by analogy) the guidance provided in paragraphs 59 to 62 of IFRS 15 *Revenue from Contracts with Customers* as endorsed by the EU.
185. Indirect and contingent indebtedness is intended to provide investors with an overview of any material indebtedness that is not reflected in the statement of indebtedness. As such, unless already included in the statement of indebtedness (because it is recognised in the financial statement as a financial liability), indirect and contingent indebtedness should not be included in the indebtedness statement itself, but as a narrative in a separate paragraph after the statement. The narrative should contain information on the amount of indirect and contingent indebtedness and analyse the nature of these items.
186. The persons responsible for the prospectus should consider any material obligation that has not been directly recognised by the issuer considered on a consolidated basis, but which the issuer may have to meet in certain circumstances, as indirect or contingent indebtedness. Furthermore, indirect indebtedness also includes the maximum total amount payable in relation to any obligation which has been incurred by the issuer, but which has yet to have its final amount assessed with certainty, irrespective of the likely actual amount payable under that obligation at any one moment in time. Examples of material indirect or contingent indebtedness include:
- (i) provisions recognised in the financial statements (such as provisions for pension liabilities or for onerous contracts);
  - (ii) a guarantee to honour a bank loan to an entity which is not in the issuer's group, if this entity defaults on repayments on the loan;

- (iii) a firm commitment to acquire or to build an asset in the next 12 months. For example, the entity signed a contract on which it commits to acquire a tangible asset;
- (iv) break-up fees or any compensations that must be paid by the issuer in the following 12 months if the issuer expects to fail any contractual commitments;
- (v) lease commitments which are not recognised as liabilities in the issuer's financial statements and thus included in the statement of indebtedness;
- (vi) amounts related to reverse factoring to the extent that such amounts are not already included in the statement of indebtedness.

187. The examples above of what qualifies as indirect or contingent indebtedness is not exhaustive. The persons responsible for the prospectus should assess whether additional disclosure should be included in the prospectus relating to firm commitments that will result in material outflows from the issuer .
188. Credit institutions and insurance and reinsurance undertakings should adapt the table provided above to their business model by focusing on their prudential requirements. This does not mean that credit institutions and insurance and reinsurance undertakings are required to disclose prudential information which they are not already required to disclose according to Pillar 3 requirements.
189. The recommendations set out in paragraphs 171-174 of Guideline 38 apply *mutatis mutandis* to inclusion of an additional column in the indebtedness statement.

## V.10. Remuneration

### Types of remuneration

*Article 2 (Annex 1, Item 13.1) and Article 28 (Annex 24, Item 4.2.1) of the Commission Delegated Regulation. Please also note that when applying Annex 2 (Universal Registration Document) or Annex 5 (Depository Receipts) of the Commission Delegated Regulation, Article 2 (Annex 1, Item 13.1) is also relevant.*

- 190. Guideline 40: The persons responsible for the prospectus should disclose in the prospectus whether the issuer paid any remuneration pursuant to a bonus or profit-sharing plan, via share-based payments or any other benefit in kind.**
191. Where remuneration has been provided pursuant to a bonus or profit-sharing plan, the persons responsible for the prospectus should provide a description of the plan and the basis upon which any persons participated in the plan. For the purpose of this Guideline a plan includes any type of arrangement for remuneration, even if the terms of the plan are not contained in a formal document.
192. Where remuneration has been provided using share-based payments (e.g. stock options, phantom shares, share warrants, share appreciation rights) the persons responsible for the prospectus should provide details concerning:

- (i) the total amount of securities covered;
  - (ii) the exercise price;
  - (iii) the consideration for which the share-based payments were or will be created (if any);
  - (iv) the period during which they can be exercised; and
  - (v) the date on which they expire.
193. If any other benefits in kind were granted, such as medical healthcare or transportation, the persons responsible for the prospectus should provide details in this regard. In the case of non-cash benefits, the total estimated value should be mentioned.
194. Where available, the persons responsible for the prospectus may include or cross-refer to the remuneration report, as required by the Shareholder Rights Directive, in the prospectus.

## V.11. Related party transactions

### Issuers not applying IAS 24

*Article 2 (Annex 1, Item 17.1), Article 4 (Annex 3, Item 10.1) and Article 28 (Annex 24, Item 6.4.1) of the Commission Delegated Regulation.*

- 195. Guideline 41: If the issuer does not apply IAS 24 and has entered into related party transactions during (i) the period covered by the historical financial information which is included in the prospectus and (ii) the period up to the date of the registration document, the persons responsible for the prospectus should provide information on the nature and extent of any such transactions which are material to the issuer - either as a single transaction or in their entirety.<sup>80</sup>**
- 196. Where a registration document is prepared for a secondary issuance of equity securities, the same information as set out above should be provided. For secondary issuances of equity securities, the period concerned is from the date of the last financial statements.<sup>81</sup>**

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<sup>80</sup> For a registration document concerning equity securities or an EU Growth registration document concerning equity securities, the Annex Item refers to "the period covered by the historical financial information included in the prospectus" and "the period up to the date of the registration document".

<sup>81</sup> In the case of a registration document for a secondary issuance of equity securities, the Annex Item refers to the period "since the date of the last financial statements".

- 197. In both cases the disclosure should include, but not be limited to, the amount or the percentage to which related party transactions form part of the turnover of the issuer and the amount or the percentage to which related party transactions form part of the assets and liabilities of the issuer.**
198. A related party transaction has the same meaning as in IAS 24. If an issuer does not apply IAS 24, it should consult IAS 24 to understand the meaning of a related party transaction.
199. For issuers who use an equivalent third country accounting framework to IAS / IFRS,<sup>82</sup> if their accounting framework provides details on related party transactions, they should consult the definition of related party transactions therein. The use of this equivalent accounting standard to IAS 24 should be sufficient.
200. Where relevant, an issuer should state if it has followed the approval process for related party transactions and should provide disclosure as per Article 9(c) of the Shareholder Rights Directive.

## **V.12. Acquisition rights and undertakings to increase capital**

### **Acquisition rights and undertakings to increase capital**

*Article 2 (Annex 1, Item 19.1.5), Article 4 (Annex 3, Item 12.1.2) and Article 28 (Annex 24, Item 6.5.6) of the Commission Delegated Regulation.*

- 201. Guideline 42: If there is either authorised but unissued capital or an undertaking to increase the capital of the issuer, the persons responsible for the prospectus should provide the following information in the prospectus:**
- (i) the amount of all outstanding securities giving access to share capital and the amount of the authorised capital / capital increase and, where appropriate, the duration of the authorisation;**
  - (ii) the categories of persons having preferential subscription rights for the additional portions of capital; and**
  - (iii) the terms, arrangements and procedures for the share issue corresponding to those portions.**
202. The following are examples of where there could be authorised but unissued capital or an undertaking to increase the capital: warrants, convertible bonds or other outstanding equity-linked securities, or subscription rights granted.

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<sup>82</sup> Where equivalence has been granted in accordance with the Commission Decision 2008/961/EC and any amendments thereto.

## V.13. Options agreements

### Compiling information on options agreements

*Article 2 (Annex 1, Item 19.1 and 19.1.6) and Article 28 (Annex 24, Item 6.5.1 and 6.5.7) of the Commission Delegated Regulation.*

**203. Guideline 43: Where any entity of the issuer's group has capital which is under option, or which is agreed conditionally or unconditionally to be put under option, the persons responsible for the prospectus should include the following information:**

- (i) title and amount of the securities covered by the options;**
- (ii) the exercise price;**
- (iii) the consideration for which the options were / will be created;**
- (iv) the period during which the options can be exercised and the expiry date; and**
- (v) the potential dilution connected to the exercise of the options, unless the effect is immaterial.<sup>83</sup>**

204. Where options have been granted, or have been agreed to be granted, to all the holders of shares or non-equity securities or of any class thereof, or to employees under an employee share scheme, the persons responsible for the prospectus may:

- i. disclose that fact in the prospectus without giving the names of the persons to whom the options relate; and
- ii. provide a range of exercise prices, exercise periods and expiry dates.

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<sup>83</sup> Materiality in this context should be assessed by reference to Article 6 of the Prospectus Regulation. Furthermore, persons responsible for the prospectus should consider reporting standards such as IAS 33 (or similar requirements in the applicable accounting framework) as an aid when complying with this guideline.

## V.14. History of share capital

### Changes related to share capital

*Article 2 (Annex 1, Items 19.1 and 19.1.7) of the Commission Delegated Regulation.*

**205. Guideline 44: For the period covered by historical financial information included in the prospectus, the persons responsible for the prospectus should provide the following information:**

- (i) changes related to issued share capital; and**
- (ii) the price of the shares and other material details relating to the shares.**

206. Changes related to issued share capital: This should include information on the events which have changed the amount of issued share capital, and the number and classes of shares of which it is composed should be described. Additionally, there should be a description of changes in voting rights attached to the various classes of shares during that time.

207. Price of the shares and other material details relating to the shares: Price relates to the price of shares which have been issued, whereas material details could be information on consideration where this is other than in cash (e.g. information regarding discounts, special terms or instalment payments).

208. Where there is a reduction of the amount of share capital, for instance due to share repurchases or share cancellations, the persons responsible for the prospectus should disclose the reasons for such a reduction and the ratio of capital reduction.

## V.15. Description of the rights attaching to the issuer's shares

### Rights attached to the issuer's shares

*Article 2 (Annex 1, Item 19.2 and Item 19.2.2) of the Commission Delegated Regulation.*

**209. Guideline 45: The persons responsible for the prospectus should, where relevant, provide a description of at least the following:**

- (i) dividend rights, including the time limit after which dividend entitlement lapses and an indication of the party in whose favour this entitlement operates;**
- (ii) voting rights;**
- (iii) rights to a share in the issuer's profit;**
- (iv) rights to a share in any surplus in the event of liquidation;**
- (v) redemption provisions;**



- (vi) reserves or sinking fund provisions;
- (vii) liability to further capital calls by the issuer; and
- (viii) any provisions discriminating against, or favouring, existing or prospective holders of such securities, as a result of the shareholder owning a substantial number of shares.

## V.16. Statements by experts

### Material interest

*Article 2 (Annex 1, Item 1.3(d), Article 4 (Annex 3, Item 1.3(d), Article 7 (Annex 6, Item 1.3(d), Article 8 (Annex 7, Item 1.3(d), Article 9 (Annex 8, Item 1.3(d), Article 10 (Annex 9, Item 1.3(d), Article 11 (Annex 10, Item 1.3(d), Article 12 (Annex 11, Item 1.3(d), Article 13 (Annex 12, Item 1.3(d), Article 15 (Annex 14, Item 1.3(d), Article 16 (Annex 15, Item 1.3(d), Article 17 (Annex 16, Item 1.3(d), Article 28 (Annex 24, Item 1.3(d), Article 29 (Annex 25, Item 1.3(d), Article 30 (Annex 26, Item 1.3(d) and Article 31 (Annex 27, Item 1.3(d) of the Commission Delegated Regulation.*

**210. Guideline 46: Where a statement or report is included in the registration document or securities note and is attributed to an expert, the persons responsible for the prospectus should determine whether that expert has a material interest in the issuer by considering the following factors:**

- (i) ownership of securities;
- (ii) former employment or compensation;
- (iii) membership; and
- (iv) connections to financial intermediaries involved in the offering or listing of the securities.

**211. If one or more of these criteria are fulfilled, the persons responsible for the prospectus should consider if this will result in a material interest taking into account the type of securities being offered.**

**212. The persons responsible for the prospectus should clarify in the prospectus that, to the best of their knowledge, these criteria (or, if any, other relevant criteria) have been taken into account in order to fully describe the material interest of the expert, if any.**

**213. Ownership of securities:** This should relate to securities issued by the issuer, or by any company belonging to the same group, or options to acquire or subscribe for securities of the issuer.

**214. Former employment or compensation:** This should relate to any previous employment with the issuer or any form of compensation previously received from the issuer.

215. Membership: This should relate to any past or current membership in any of the issuer's bodies.
216. Connections to financial intermediaries involved in the offering or listing of the securities: This should relate to connections with any financial intermediaries involved in the offering or listing of the securities of the issuer.
217. An 'expert' may be a natural or legal person.

## V.17. Information on holdings

### Compiling information on holdings

*Article 2 (Annex 1, Item 5.7.3) of the Commission Delegated Regulation.*

218. **Guideline 47: The persons responsible for the prospectus should ensure that the information in the prospectus enables investors to evaluate the nature, extent and financial effects of holdings. For each joint venture, or undertaking, in which the issuer holds a proportion of the capital, which is likely to have a significant effect on the assessment of the issuer's assets, liabilities, financial position and / or profits and losses, the following information should be provided:**
- (i) name, registered office, field of activity and, if available, an LEI;**
  - (ii) proportion of capital – and voting power if different – held by the issuer;**
  - (iii) reserves;**
  - (iv) issued capital;**
  - (v) net profit or loss for the last financial year;**
  - (vi) value at which the issuer shows shares held in its accounts;**
  - (vii) amount still to be paid on shares held;**
  - (viii) amount of dividends received during the last financial year for shares held; and**
  - (ix) amount of debt owed to the issuer by the joint venture or undertaking and amount of debt owed to the joint venture or undertaking by the issuer.**
219. If the issuer has provided the information required by this Guideline in its consolidated or separate financial statements (which are prepared either in accordance with IFRS, equivalent third country accounting standards or a Member State's national accounting standards) the disclosure requirements under this Guideline are complied with.
220. An undertaking, in which the issuer holds a proportion of the capital, which is likely to have a significant effect on the assessment of the issuer's assets, liabilities, financial

position and/or profits and losses can be, for example, an associate (i.e. undertaking in which the issuer has a significant influence), an unconsolidated subsidiary (i.e. the issuer is an investment entity) or a holding in which the issuer holds less than 20% of capital accounted as a financial investment.

221. The persons responsible for the prospectus should consider that a joint venture or undertaking is likely to have a significant effect on the issuer's assessment of its own assets, liabilities, financial position and / or profits and losses in the following cases:
- (i) the issuer has a direct or indirect holding in the joint venture or undertaking, and the book value (or purchase value in case of a recent acquisition whose book value is not yet reflected in the most recent historical financial information) of that holding represents at least 10% of the issuer's net assets, or the interest generates at least 10% of the issuer's net profit or loss at the end of the most recent reporting period; or
  - (ii) where the issuer is the parent of a group and the issuer has a direct or indirect holding in the joint venture or undertaking, and the book value of that holding represents at least 10% of the group's consolidated net assets, or the holding generates at least 10% of the group's consolidated net profit or loss.
222. In relation to holdings in which the issuer holds at least 10% of the capital points (i) and (ii) of paragraph 218 should be disclosed. Unless the omission of that information is unlikely to mislead investors in making an informed assessment of the assets, liabilities, financial position, profits and losses and prospects of the issuer or its group or of the rights attaching to the securities.
223. The persons responsible for the prospectus may omit points (iii) and (v) of paragraph 218 if the joint venture or undertaking does not publish its annual accounts.

## **V.18. Interest of natural and legal persons involved in the issue / offer**

### **Interests**

*Article 12 (Annex 11, Item 3.3), Article 13 (Annex 12, Item 3.1), Article 14 (Annex 13, Item 5.2), Article 15 (Annex 14, Item 3.1), Article 16 (Annex 15, Item 3.1), Article 17 (Annex 16, Item 3.1), Article 30 (Annex 26, Item 1.6) and Article 31 (Annex 27, Item 1.6) of the Commission Delegated Regulation.*

224. **Guideline 48: For the disclosure of interests in the prospectus, the persons responsible for the prospectus should consider the parties involved in the issue or offer and the nature of their interests, and in particular any conflicts of interests.**
225. For example, when including disclosure on interests, the persons responsible for the prospectus should consider parties such as advisors, financial intermediaries and experts (even if no statement produced by an expert(s) is included in the prospectus).

226. When considering the nature of the interests, the persons responsible for the prospectus should consider whether the parties involved in the issue or offer hold equity securities of the issuer, or equity securities of any subsidiaries of the issuer, or have a direct or indirect economic interest that depends on the success of the issue, or have any understanding or arrangement with major shareholders of the issuer.

## **V.19. Collective investment undertakings**

### **Investment strategy**

*Article 5 (Annex 4, Item 1.1 (a) of the Commission Delegated Regulation.*

227. **Guideline 49: Where the persons responsible for the prospectus include a description of the investment strategy in the prospectus, they should provide information on the methodology to be employed in pursuing that strategy and indicate whether the investment manager intends to apply an active or a passive strategy.**
228. The information should specify, for example, whether the investment strategy will be focusing on growth opportunities or whether the intention is to target mature companies paying out regular dividends.

### **Description of the assets**

*Article 5 (Annex 4, Item 1.1(c) of the Commission Delegated Regulation.*

229. **Guideline 50: When the persons responsible for the prospectus include a description of the types of assets in which the collective investment undertaking may invest, they should provide at least the following information regarding the investment portfolio:**
- (i) geographical areas of investment;**
  - (ii) industry sectors;**
  - (iii) market capitalisation;**
  - (iv) credit ratings / investment grades; and**
  - (v) whether the assets are admitted to trading on a regulated market.**

## Securities financing transactions (SFTs)

*Article 5 (Annex 4, Item 2.8) of the Commission Delegated Regulation.*

- 230. Guideline 51: When a collective investment undertaking uses SFTs and total return swaps, other than for the purposes of efficient portfolio management, the persons responsible for the prospectus should provide the following information in the prospectus:**
- (i) general description;**
  - (ii) the criteria used to select counterparties;**
  - (iii) acceptable collateral;**
  - (iv) risks; and**
  - (v) custody and safe keeping.**
231. The above information items are aligned with information requirements in the Annex (Section B) to the SFT Regulation. Accordingly, the terms ‘securities financing transactions’ and ‘total return swap’ should be understood to have the meanings set out in Articles 3(11) and 3(18) of that Regulation.
232. General description: This should provide a general description of the SFTs and total return swaps, including the rationale for their use. For each type of SFT and total return swap, this information should cover:
- (i) the types of assets that can be subject to them; and
  - (ii) the maximum proportion of assets under management that can be subject to them, and the expected proportion of assets under management that will be subject to each of them.
233. Criteria used to select counterparties: This should include information on the criteria applied by the issuer to select counterparties, including legal status, country of origin and minimum credit rating.
234. Acceptable collateral: This information should cover asset types, issuer, maturity, liquidity as well as the collateral diversification and correlation policies.
235. Risks: This should comprise of a description of the risks linked to SFTs and total return swaps as well as risks linked to collateral management and, where applicable, arising from its reuse. The disclosure may relate to operational, liquidity, counterparty, custody and / or legal risks.
236. Custody and safe keeping: This should include a specification of how assets subject to SFTs and total return swaps and collateral received are safe-kept (e.g. with a fund custodian).

### **Broadly based index**

*Article 5 (Annex 4, Item 2.10) of the Commission Delegated Regulation.*

**237. Guideline 52:** The persons responsible for the prospectus should consider a broadly based and recognised published index as one which possesses the following characteristics:

- (i) adequately diversified and representative of the market it refers to;
- (ii) calculated with sufficient frequency to ensure appropriate and timely pricing and information on the constituents of the index;
- (iii) published widely to ensure its dissemination to the relevant user / investor base; and
- (iv) compiled and calculated by a party independent of the collective investment undertaking and available for purposes other than the calculation of the return of the collective investment undertaking.

### **Fees**

*Article 5 (Annex 4, Item 3.2) of the Commission Delegated Regulation.*

**238. Guideline 53:** When referring to fees, in addition to fees paid to service providers the persons responsible for the prospectus should consider the following non-exhaustive items:

- (i) subscription fees;
- (ii) redemption fees;
- (iii) distribution fees;
- (iv) placement fees;
- (v) variable management fees;
- (vi) fees associated with changes in the composition of the portfolio:
  - (1) transaction fees;
  - (2) brokerage service fees;
  - (3) advertising fees; and
  - (4) compliance and reporting fees.

239. Subscription fees and redemption fees: These items relate to both fees that are guaranteed by the collective investments undertaking or negotiable.

240. Variable management fees: These items could for example relate to performance fees.

241. Fees associated with changes in the composition of the portfolio: These are fees which may seem immaterial individually but can be material when grouped together.

#### **Regulatory status of the investment manager**

*Article 5 (Annex 4, Item 4.1) of the Commission Delegated Regulation.*

242. **Guideline 54: When providing a description of the investment manager's regulatory status, the persons responsible for the prospectus should provide the name of the regulatory authority by which the investment manager is regulated or, if the investment manager is not regulated, a negative statement.**
243. The reference to the regulatory authority should not create the impression that the investment is in any way endorsed, approved or guaranteed by such authority.

#### **Experience of the investment manager**

*Article 5 (Annex 4, Item 4.1) of the Commission Delegated Regulation.*

244. **Guideline 55: When providing a description of the investment manager's experience, the persons responsible for the prospectus should provide the following information in the prospectus:**
- (i) an indication of the number of funds (including sub-funds) which the investment manager is managing under delegation;
  - (ii) the relevance of the investment manager's experience to the investment objective of the collective investment undertaking; and
  - (iii) if material to investors' assessment of the investment manager, the experience of the specific personnel who will be involved in the investment management of the collective investment undertaking.

#### **Description of the entity responsible for advice**

*Article 5 (Annex 4, Item 4.2) of the Commission Delegated Regulation.*

245. **Guideline 56: When providing a brief description of the entity providing investment advice, the persons responsible for the prospectus should include the following information in the prospectus:**
- (i) address;
  - (ii) country of incorporation;
  - (iii) legal form;
  - (iv) regulatory status;
  - (v) the nature of the entity's business; and

**(vi) information on the entity's experience.**

246. Information on the entity's experience: In relation to this item, the persons responsible for the prospectus should provide information on the number of funds in relation to which advice is currently being, or has previously been, given. They should also explain the relevance of the experience to the investment objective of the collective investment undertaking.

**Portfolio analysis**

*Article 5 (Annex 4, Item 8.2) of the Commission Delegated Regulation.*

247. **Guideline 57: When providing a comprehensive and meaningful analysis, in line with Item 8.2 of the Commission Delegated Regulation, the persons responsible for the prospectus should include the following information in the prospectus where material to the assessment of the investment portfolio:**

- (i) details of the main instruments in which the collective investment undertaking is trading, including a breakdown of financial instruments, and its geographical and sectoral focus;**
- (ii) an analysis between equity shares, convertible securities, fixed income securities, types or categories of derivative products, currencies and other investments, distinguishing between securities which are listed and unlisted and traded on or off a regulated market in the case of derivatives; and**
- (iii) an analysis by currency type stating the market value of each section of the portfolio.**