
September 8, 2020

ESMA Publishes New Guidelines on Disclosure Requirements under the Prospectus Regulation

The European Securities and Markets Authority (“ESMA”) has published new guidelines on disclosure requirements under the Prospectus Regulation (the “Guidelines”) (available [here](#)) that update and replace the recommendations¹ of the Committee of European Securities Regulators (“CESR”). The CESR recommendations had been in place since January 2005. The Guidelines are intended to assist issuers in assessing the information required to be disclosed under certain items of Annexes to the EU Commission Delegated Regulation² (the “Delegated Regulation”). The Annexes serve as the building blocks for preparing prospectuses used for offers to the public and/or admissions to trading of securities on EU regulated markets. Competent authorities in EU member states are directed to use the Guidelines to establish consistent, efficient and effective supervisory practices for assessing the completeness and consistency of information in prospectuses and to ensure the common and uniform application of the prospectus disclosure requirements.

The Guidelines are similar in content to the CESR recommendations. The explanatory text following each Guideline closely replicates the content of the CESR recommendations, with several new guidelines and explanatory notes added. Each Guideline is addressed to persons responsible for preparing a prospectus. In line with Recital 27 to the Prospectus Regulation, ESMA expects that persons responsible for the prospectus will not include information that is not material in the context of the issuer or the securities and will refrain from the duplication of information in the prospectus.

Selected ESMA Guidelines

Below is a summary of the Guidelines relating to disclosure of financial information.³

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- ¹ ESMA update of the CESR recommendations on the consistent implementation of Commission Regulation (EC) No 809/2004 implementing the Prospectus Directive, March 20, 2013 (available [here](#)).
 - ² 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 (available [here](#)).
 - ³ The Guidelines also include guidance on non-financial items, such as: remuneration; related party transactions; acquisition rights and undertakings to increase capital; options agreements; history of share capital; description of rights attaching to issuer’s shares; statements by experts; information on holdings; interest of natural and legal persons involved in the

Operating and financial review (“OFR”)

The OFR should:

- assist investors in assessing the issuer’s business, financial condition and performance and inform them of any material changes in the issuer’s results;
- be tailored to the target audience, cover a relevant time frame and be reliable and comparable; and
- provide information on returns to shareholders, including information on distributions and share repurchases, and facilitate investors’ assessments of the future sustainability of earnings and cash flows. This would include disclosure of the material components of earnings and cash flow and material business assets and liabilities, as well as the extent to which such elements are recurring or are likely to be impacted by financial and non-financial objectives and strategy (*e.g.*, disclosure on ESG matters).

To the extent that the issuer uses a management report in place of the OFR, the management report should be consistent with the prospectus, covering the same financial information over the same period of time as required in the OFR. If non-financial information is included in a separate report, the information may also need to be included in the prospectus if material and necessary to an assessment of the issuer’s financial condition.

Capital resources

A prospectus should:

- address cash inflows and outflows during the latest financial period and any subsequent interim period, material changes to cash inflows thereafter and material unused sources of liquidity;
- address the issuer’s objectives in terms of control of treasury activities, the currencies in which cash is held and the extent to which borrowings are at fixed rates;
- describe the nature and extent of any material legal or economic restrictions on the ability of subsidiaries to transfer funds to the issuer as well as the impact such restrictions have had or are expected to have on the issuer’s ability to meet its cash obligations;
- describe covenants that could materially restrict the use of credit facilities; and
- provide information on the issuer’s level of borrowings and anticipated sources of funds needed to fulfil the issuer’s commitments.

issue/offer; and collective investment undertakings. These non-financial guidelines have remained largely unchanged, closely tracking the CESR recommendations.

Profit forecasts and estimates

Due care and diligence should be exercised when compiling profit forecasts and estimates to ensure that they are not misleading. The Guidelines provide a list of factors to consider when preparing profit forecasts.⁴

Profit forecasts and estimates should be understandable, reliable (*i.e.*, supported by a thorough analysis of the issuer's business), comparable (with the historical and interim financial information in the prospectus) and relevant. Profit forecasts based on pro forma financial information should be marked as such and should be compared with pro forma information (*e.g.*, this would be the case when a profit forecast illustrates future profit resulting from a significant gross change).

A prospectus should include a statement on the comparability and consistency of a profit forecast or estimate, without any qualifying caveats.

Where there is an outstanding profit forecast or estimate related to a material undertaking that 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.

Historical financial information

In the case of an issuer that will adopt a new accounting framework in its next published financial statements, the accounting framework that will be adopted should be applied to the restated historical financial information, with the restatement applying to all parts and aspects of the financial information.

Where a prospectus is required to include historical financial information for three financial years, and not all of those years are restated, the middle period should be prepared and presented under both the current and the new accounting framework and the last period should be prepared and presented under the new accounting framework only. ESMA expects issuers to include the comparative restated financial information in the prospectus where it is required by the issuer's accounting framework and has been prepared by the issuer.

⁴ The factors to be taken into consideration when preparing profit forecasts include:

- past results, market analysis, strategic evaluations, market share and market position of the issuer;
- financial position and possible changes therein;
- the impact of an acquisition or disposal, change in strategy or any major change in environmental matters and technology;
- changes in legal and tax environment; and
- commitments to third parties.

Where restated financial statements are required, the audit report should cover the restated historical information, including any comparative information in accordance with the new accounting framework presented in the prospectus.

If the applicable accounting standards do not require the inclusion in the annual financial information of some components of the historical financial information required under the relevant Annexes of the Delegated Regulation (*i.e.*, cash flow information), any such missing information should be prepared specifically for the purpose of the prospectus. This should be done in accordance with the principles of the applicable accounting framework or, if none are available, with the principles set out in IFRS to the extent possible.

Pro forma financial information

The persons responsible for the prospectus should consider the size of the transaction relative to the size of the issuer's business when assessing whether a transaction constitutes a significant gross change or a significant financial commitment requiring preparation of pro forma financial information. This assessment should be based on figures that reflect the issuer's business before the transaction took place, using indicators of size such as total assets, revenue or profit/loss.

If an issuer undertakes several transactions that individually do not constitute more than a 25% variation to one or more indicators of size but in aggregate constitute more than a 25% variation or if there is one transaction that constitutes more than a 25% variation, pro forma financial information covering *all* transactions *should be prepared* unless it is disproportionately burdensome to do so. The Guidelines discuss situations where it could be disproportionately burdensome to prepare such disclosure.

Pro forma profit and loss accounts should be drawn up as if the transaction had been undertaken on the first day of the financial period being referenced; whereas, the pro forma balance sheet should be drawn up as if the transaction had been undertaken on the last day of the period. The time period covered by the pro forma profit/loss account and balance sheet should correspond to the time period covered by the financial information in the prospectus.

Pro forma financial information is not required to be provided if the transaction is already fully reflected in the profit/loss account and the balance sheet contained in the historical annual or interim financial information in the prospectus.

Issuers can use information other than pro forma financial information to describe the effects of a transaction that constitutes a significant gross change, provided the competent authority permits it.

The transaction triggering the need for pro forma financial information should be reflected regardless of whether it has already occurred or has yet to occur. Only matters that are an integral part of the transaction and capable of a reasonable degree of objective determination should be described.

Pro forma financial information should be compiled in such manner that will allow independent auditors to state in their report that in their opinion the information has been properly compiled and the basis stated is consistent with the accounting policies of the issuer. The statement discussing how the pro forma financial information is prepared is to be clean and qualifications or “emphases of matter” should not be included. Qualifications or “emphases of matter” can be included but only to highlight issues with the underlying figures used to prepare the pro forma financial information (e.g., if the underlying historical financial information was qualified).

If pro forma financial information is included in the prospectus voluntarily, it should comply with all applicable requirements.

Interim financial information

Where the most recent financial information published by an issuer is a half-yearly or quarterly financial report, at least the condensed set of financial information included in such published interim financial information should be included in the registration document and such information should be prepared according to the issuer’s accounting framework.

Working capital statements

Where an issuer can state without qualification 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 qualification that it has sufficient working capital to meet its present capital requirements, it should provide a qualified working capital statement.

A working capital statement should be based on robust procedures to ensure that there is little risk for the statement to be challenged, and it should not be open to more than one interpretation.

A qualified working capital statement should state that the issuer does not have sufficient working capital to meet its present requirements and should describe the timing and the magnitude of the working capital shortfall, the action plan for rectifying the shortfall and the shortfall implications.

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 working capital. The issuer should not reflect 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.

All amounts reasonably expected to be received or paid during a period of at least 12 months after the date of approval of the prospectus should be taken into account when calculating present working capital requirements. Where a firm commitment to acquire another entity within the 12 months following the date of approval of the prospectus has been made, the impact of the acquisition should be included in calculating the issuer's present requirements.

Working capital should be determined on a consolidated basis for purposes of preparing the working capital statement.

An issuer that is a credit institution should use its liquidity metrics and relevant applicable prudential requirements as the starting point when preparing its working capital statement. The issuer should take into account all available information that may have a material impact on its liquidity risk and its projected capital adequacy ratios. When determining its working capital, an issuer that is an insurance/reinsurance undertaking should start with its liquidity metrics (as agreed with its supervisory authority), its capital adequacy ratios and its minimum regulatory capital requirements.

Capitalization and indebtedness

The statement of capitalization should include information on:

- the total current debt (including current portion of non-current debt);
- the total non-current debt (excluding current portion of non-current debt); shareholder equity (share capital, legal reserves and other reserves); and
- the types of guarantees if the issuer has current or non-current debt guaranteed by another entity, and types of assets used to secure any current or non-current debt backed by collateral.

The Guidelines note that when the issuer's business has recently undergone a change or a change is forthcoming in the future, the persons responsible for the prospectus may want to illustrate the change by including an additional column in the statement of capitalization. This should not normally trigger the requirement to include pro forma financial information in the prospectus.

The statement of indebtedness should include information on:

- cash and cash equivalents;
- other current financial assets;

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- current financial debt;
 - current portion of non-current financial debt;
 - non-current financial debt;
 - debt instruments; and
 - non-current trade and other payables.

Indebtedness should be calculated on a consolidated basis if the issuer is required to prepare consolidated financial statements.

Credit institutions and insurance/reinsurance undertakings should adapt their statements of capitalization and their statements of indebtedness to their business model by focusing on their prudential requirements.

Summary of Differences between CESR Recommendations and the New ESMA Guidelines

- ***“Comply or explain” principle*** – the principle will now apply to the Guidelines, while it did not apply to the CESR recommendations because they were not adopted as guidelines under Article 16 of the Regulation establishing ESMA.⁵
- ***Omitted CESR recommendations*** – the Guidelines cover disclosure requirements in the Delegated Regulation and not the Prospectus Regulation. As a result, several CESR recommendations, which relate more closely to the Prospectus Regulation, were not addressed in the Guidelines, including, among others:
 - Selected financial information – this information is not required under the Prospectus Regulation, so no Guidelines were prepared in this area.
 - Non-financial information items for specialist issuers – ESMA is currently considering how to approach the topic of specialist issuers and plans to address these recommendations in the future; meantime, ESMA advises specialist issuers to continue to use the CESR recommendations in this area.

⁵ Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC, as amended by Regulation (EU) 2019/2175 (available [here](#)).

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- Recommendation for prospectuses on mergers, divisions or takeovers – ESMA noted that it has already published technical advice in this area, eliminating the need for a separate Guideline.⁶
 - **OFR** – the Guidelines reference disclosure on ESG matters that was not covered in the CESR recommendations. ESMA encourages issuers to consider ESG disclosures in the context of the OFR, as ESG factors could be useful examples of what could influence sustainability.
 - **Pro forma finance information** – as noted above, the Guidelines introduce a significant policy shift in relation to the aggregation of transactions for purposes of preparing pro forma financial information.
 - **Working capital statement** – the Guidelines provide new guidance on how the proceeds of an offering should be treated when calculating an issuer’s working capital, as well as on the determination of working capital by credit institutions/reinsurance undertakings.

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⁶ See ESMA Final Report – Technical advice on Minimum Information Content for Prospectus Exemption, March 29, 2019 (available [here](#)).

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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