



European Securities and  
Markets Authority

# Final Report

**Draft RTS on prospectus related issues under the Omnibus II Directive**



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## Acronyms and definitions used

Amending Directive	Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market
CARD	Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities
CESR	Committee of European Securities Regulators
Commission	European Commission
Directive 97/7/EC	Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts
ESMA	European Securities and Markets Authority
ESMA Regulation	Regulation (EU) No 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 No 716/2009/EC and repealing Commission Decision 2009/77/EC
IPO	Initial Public Offer
Market Abuse Directive	Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)
Market Abuse Regulation	Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC
NCA	National Competent Authority
Omnibus I Directive	Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC,

2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority)

Omnibus II Directive	Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) No 1060/2009, (EU) No 1094/2010 and (EU) No 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority)
PD/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
PR/Prospectus Regulation	Regulation (EC) No 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
RTS	Regulatory Technical Standard
SMEs	Small and Medium-sized Enterprises
SPV	Special Purpose Vehicle
TD/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 (as amended by Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013)
Timmel case	Judgment of the European Court of Justice of 15 May 2014 in case C-359/12 (Michael Timmel v Aviso Zeta AG)

# 1 Executive Summary

## Reasons for publication

Directive 2014/51/EU requires ESMA to develop draft regulatory technical standards on a number of prospectus related matters. While developing the draft RTS, ESMA consulted stakeholders by way of a consultation paper.

## Contents

This final report contains a summary of the feedback received to the consultation paper and presents the changes to the draft regulatory technical standards which ESMA proposes based on this feedback. To a large extent, the structure of the final report follows that of the consultation paper with four sections dealing with each of the mandates given to ESMA to develop draft regulatory technical standards; approval (section 3.1), incorporation by reference (section 3.2), publication (section 3.3) and advertisements (section 3.4).

The annexes of the final report consist of the questions asked in the consultation paper (Annex I), the legislative mandate for ESMA to develop draft regulatory technical standards (Annex II), a revised cost-benefit analysis (Annex III), the opinion submitted by the Securities and Markets Stakeholder Group (Annex IV) and the revised draft regulatory technical standards (Annex V).

## Next Steps

The final report will be submitted to the European Commission by 1 July 2015. The Commission has three months to decide whether to endorse ESMA's draft regulatory technical standards.

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## 2 Background

### 2.1 Mandates and consultation process

1. Directive 2014/51/EU (the 'Omnibus II Directive') requires ESMA to draw up draft regulatory technical standards ('RTS') in relation to four topics in Directive 2003/71/EC (the 'Prospectus Directive' or 'PD'); prospectus approval, incorporation of information by reference, prospectus publication and dissemination of advertisements. ESMA's general mandate to draw up draft RTS as well as the specific mandates from the Omnibus II Directive are set out in Annex II of this report.
2. As required by Article 10 of Regulation (EU) No 1095/2010 (the 'ESMA Regulation'), during the phase of developing the draft RTS ESMA consulted stakeholders by way of a consultation paper<sup>1</sup> ('CP'). The consultation closed on 19 December 2014 and ESMA received 25 responses, including one from the Securities and Markets Stakeholder Group ('SMSG'). 22 of the responses are public and can be found on ESMA's website.

### 2.2 Elements of the Final Report

3. The final report is structured in the same four main sections as the CP:
  - Section 3.1 addresses the draft RTS on procedures for approval of prospectuses;
  - Section 3.2 covers the draft RTS on the information to be incorporated by reference;
  - Section 3.3 deals with the draft RTS on the provisions relating to publication of the prospectus in Article 14(1)-(4) of the Prospectus Directive;
  - Section 3.4 addresses the draft RTS on dissemination of advertisements and the provisions laid down in Article 15(4) of the Prospectus Directive.
4. Within each of the sections, ESMA has summarised the responses received to the corresponding questions raised in the CP. These summaries are a presentation of the results of the consultation and should be distinguished from ESMA's responses to the views of respondents which are placed at the end of each question or set of questions under the heading "ESMA's response". ESMA's response sets out ESMA's understanding of the input provided by stakeholders and explains the reasoning behind ESMA's decision to either maintain or amend the draft RTS.
5. Some interpretation of the responses received was necessary as some respondents did not reply directly to the questions set out in the CP but provided general statements

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<sup>1</sup> "Consultation Paper. Draft Regulatory Technical Standards on prospectus related issues under the Omnibus II Directive", ESMA/2014/1186

on the issues covered. ESMA has interpreted such responses to the best of its abilities in order to allocate the views expressed to the relevant questions.

6. In deciding how the final draft RTS should look, ESMA included the costs and benefits that the proposed measures might entail as an essential element of the analysis. Annex III of the report contains an amended version of the cost-benefit analysis included in the CP based on input received to the consultation.

### 3 Summary of feedback and amendments to the draft RTS

#### 3.1 Draft RTS on approval

7. In the following section, responses to questions 1-3 on approval are summarised and ESMA's feedback provided.

##### 3.1.1 Procedures for approval

**Question 1: Is there any information that should be added or removed from the list in the proposed Article 2(2)?**

**Question 2: Do you believe that the requirement to submit all versions of the prospectus at a minimum in searchable electronic format will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

**Question 3: Do you consider that there are any other aspects of the approval process that should be dealt with by the RTS?**

8. ESMA received 16 responses to the question regarding the information contained in the list in Article 2(2), of which 12 did not consider that any information should be added to or removed from the list while four suggested changes.
9. Two respondents proposed the deletion of Article 2(2)(6) of the draft RTS as they considered that it would render the approval process unpredictable for issuers if National Competent Authorities ('NCAs') were allowed to require 'any other information necessary for the review', and furthermore because they believed the list of information in Article 2(2)(1)-(5) to be sufficiently clear and complete. Another respondent suggested adding to the draft Article 2(2)(6) that the issuer, offeror or person asking for admission to trading must submit any information which NCAs expressly require on reasonable grounds to align this provision with PD Article 13(4). On the other hand, one respondent questioned whether the list in draft Article 2(2) was necessary at all, suggesting that only 2(2)(6) be retained, while another respondent advised that the draft RTS was too detailed and that Article 2(2)(4)-(7) should be replaced with a more

generic wording requiring submission of the prospectus in searchable electronic format showing changes made to the previous draft and explaining how comments raised by the NCA were addressed. On a different topic, three respondents considered that all versions of the prospectus except for the final version should only be required to be submitted in searchable electronic format with a view to reducing compliance costs. One respondent who agreed with the list suggested that NCAs should be allowed some flexibility to adapt the requirements when approving prospectuses of SMEs.

10. As was the case for the previous question, ESMA received responses from 16 stakeholders to questions 2 and 3. In terms of question 2, 13 respondents did not consider that the requirement to submit all versions of the prospectus at a minimum in searchable electronic format would impose costs on issuers, offerors and persons asking for admission to trading, of which several noted that it is already market practice to submit all versions of the prospectus electronically. The remaining three respondents to the question did not address the cost issue.
11. Respondents to question 3 provided a number of suggestions as to further aspects of approval which should be dealt with by the RTS. These are set out below along with similar proposals included in the responses to questions 1 and 2.
12. Seven respondents indicated that the cross reference list mentioned in Article 2(2)(1) should only be submitted once as the NCA only needs this list for the initial prospectus review. It should therefore be clarified that the cross reference list does not need to be submitted in an updated version with subsequent drafts or with the final version of the prospectus. Furthermore, six respondents commented that the requirement in Article 2(4) of the draft RTS to provide a written statement confirming that all changes to a previously submitted draft of the prospectus are identified in the new draft seemed disproportionately burdensome and that it must be sufficient to use IT software to perform a 'blackline' against the previous submission. Additionally concerning the requirement to provide a blackline version of the draft prospectus, three respondents commented that in some cases towards the end of the review process, it would be preferable if the issuer, offeror or person asking for admission to trading was allowed to submit only the elements of the prospectus which had undergone changes, blacklined against the previous version submitted. It was suggested that it be made clear in Article 2(4) of the draft RTS that submission of "page pulls" would be permissible.
13. Five respondents commented that the requirement in Article 2(7) of the draft RTS to provide a confirmation that information contained in prior submissions remains correct could cause significant burden to issuers, offerors and persons asking for admission to trading if it was to be understood as a requirement that e.g. financial statements were correct at the time of submission of the final prospectus for approval. Furthermore on the topic of the written confirmation, three respondents considered that the wording of Article 2(7), second paragraph of the draft RTS should be changed from "Where information submitted along with the initial draft of the prospectus has not changed" to "Where information submitted previously has not changed" to reflect that there is a level



of flexibility as to when the information required in Article 2(2) of the draft RTS has to be submitted.

14. Seven other respondents advocated that NCAs should be obliged to notify the issuer, offeror or person asking for admission to trading of their decision regarding approval on the day of the decision. These respondents commented that a number of other aspects of an offer/admission to trading depend on the date of approval of the prospectus and the decision regarding approval must therefore be notified on the same day. On the other hand, two respondents noted that it should be clarified in Article 3(3) of the draft RTS that if the NCA notifies the issuer, offeror or person asking for admission to trading of its decision on the day after it was made, this must still be done within the normal 10 or 20 day time frame for approval. Furthermore, one respondent highlighted that the acknowledgement of receipt of an application for prospectus approval, required by Article 3(1) of the draft RTS, does not affect when the ten day deadline for approval starts as this should always be on the day on which the NCA received the complete application.
15. Three respondents requested that the distinction between draft and final versions of the prospectus in the Consultation Paper ('CP') be clarified in the draft RTS, specifically that it be made clearer that the final version of the prospectus shall not contain annotation in the margin. Three other respondents made the observation that prospectus approval was a significant contributor to costs and delay in connection with offers and admissions to trading and on that basis expressed their support for the requirement in Article 3(2) of the draft RTS that NCAs, as a rule, submit their comments on the draft prospectus electronically.
16. Two respondents asked for a clarification of the term 'searchable electronic format' and one respondent of the concept of 'at a minimum' while three respondents considered that 'at a minimum' should be deleted entirely from Article 2 as it was not clear whether other formats were considered above or below this minimum.
17. Concerning the review process as such, two respondents suggested that it would be helpful if NCAs could explain which provisions of the PR they considered that the draft prospectus did not comply with and why. It was also proposed that NCAs must make all requests for information and additional documentation in writing. Three respondents suggested that there was no need to have a provision specifically setting out the NCA's right to terminate the review process as this right had never been drawn into question and therefore recommended that Article 3(4) of the draft RTS be deleted. Lastly, two respondents commented that NCAs should be free to decide whether their comments on draft prospectuses should be provided in writing or orally.

### ***ESMA's response***

18. Regarding the responses to question 1, ESMA acknowledges that a wide consensus exists around the suggested list of information to be submitted along with the prospectus. As for the comments concerning draft Article 2(2)(6) (now Article 2(2)(e)),

ESMA considers it important to maintain this provision to allow NCAs to request additional information which is not contained in the standard documents mentioned in the list. The power of NCAs to ask for supplementary information is recognised in Article 21(3)(b) of the PD. However, ESMA agrees that a clarification of the boundaries of such requests could remove unnecessary uncertainty regarding the approval process and will therefore specify in the draft RTS that issuers, offerors and persons asking for admission to trading must submit any other information which the NCA considers necessary on reasonable grounds. This will also ensure better alignment with Article 13(4) PD as suggested by one of the respondents. In response to the comments that only Article 2(2)(6) of the list is necessary or that Article 2(2)(4)-(7) should be replaced with more generic wording, ESMA considers that it is preferable to maintain the detailed list to ensure the highest possible level of transparency and harmonisation around the approval process. As regards requests for omissions of information, ESMA has clarified in Article 2(2)(3) (now Article 2(2)(b)) that such requests should be accompanied by appropriate reasoning. Regarding the distinction between draft and final versions of the prospectus in the RTS, ESMA has also amended Article 2 to reflect its view that prior to approval by the NCA, all “prospectuses” are draft. Finally, regarding the suggestion of greater flexibility, ESMA is of the view that the proposed list guarantees a level of clarity and harmonisation which is beneficial to market participants and do not impose any additional burdens, including on SMEs.

19. As regards question 2, responses were uniformly of the view that it would not cause additional costs to require that all versions of the prospectus be submitted in searchable electronic format. On that basis, ESMA will maintain this proposal.
20. Concerning the first suggestion summarised under question 3, namely that the cross-reference list should only be submitted with the first draft of the prospectus, ESMA acknowledges the argument that this list is instrumental only to the initial phase of the prospectus review process. As such, the requirement to submit the cross reference list in an updated version along with the prospectus in its final format will not be maintained and this has been clarified in the new Article 4 of the draft RTS. However, where a prospectus has undergone significant and/or fundamental changes (particularly as regards structure) between subsequent drafts, ESMA considers that NCAs should not be prohibited from requiring an amended cross reference list to facilitate their review.
21. ESMA recognises the argument that requiring a written statement confirming that blacklined versions of the draft prospectus show all changes made could be burdensome to issuers, offerors and persons asking for admission to trading compared to the benefit it will bring. However, ESMA also considers that it is inappropriate to shift the burden from issuers (who bear responsibility for the document) to NCAs, where documents are not correctly marked up (including against the incorrect draft). NCAs would need to re-scrutinise the entire document ab initio which could cause significant delays to the prospectus approval process. In order to balance the above burdens, ESMA has deleted the requirement for a written confirmation from Article 2(4) (now Article 3(1)) of the draft RTS but has amended the first sentence of the paragraph to clarify that “all” changes should be marked in subsequent drafts. Where not all changes

are marked in a blacklined version of the draft prospectus (e.g. for technical reasons), the blacklined version shall be accompanied by an identification of each unmarked change made to the preceding draft of the prospectus in writing (cf. the second paragraph of new Article 3(1) of the draft RTS). Lastly, regarding the proposal that submission of only extracts of the draft prospectus be permitted, ESMA acknowledges that such already happens in practice. Therefore, in order to reduce the administrative burden, ESMA has decided to facilitate this by express recognition in the RTS that “page pulls” are allowed in cases where only a small number of changes have been made to the prospectus. Such “page pulls” should, however, be in searchable electronic format. ESMA clarifies that where only a “page pull” is submitted, this constitutes an implicit confirmation on the part of the issuer, offeror or person asking for admission to trading that no other parts of the prospectus have changed. Furthermore, the facilitation of “page pulls” is without prejudice to the ability of the NCA to additionally ask for a full marked up version of the draft prospectus. A change has also been made in the recitals to clarify what is meant by “marked”.

22. In response to the proposal reflected in paragraph 13 above, ESMA acknowledges the argument that requiring a confirmation of previously submitted information still being correct could cause difficulties. On the other hand, it is important to maintain the requirement of confirming that previously submitted information, when not resubmitted with the final draft of the prospectus, has not changed. New Article 4 of the draft RTS now provides for this and acknowledges that the information may have been submitted at any point during the review process, not only along with the initial draft prospectus.
23. Turning to the request that NCAs be required to notify the issuer, offeror or person asking for admission to trading of their decision regarding approval on the day of the decision, ESMA acknowledges the importance of a swift communication of such decisions. As it appears to already be market practice for NCAs to notify issuers on the same day, it should not cause issues to codify this practice and new Article 5(3) now provides for this. This furthermore addresses the point highlighted by two respondents that the notification must be done within the normal 10 or 20 day time frame for approval. Where approval decisions are taken outside normal business hours, NCAs should still inform issuers on the day of approval, notwithstanding that the official notification may only arrive on the following day.
24. As regards the comment in paragraph 14 regarding acknowledgement of receipt, ESMA wishes to clarify that the 10/20 day time frame for NCAs to make a decision regarding approval commences on the day of submission of the complete application for prospectus approval. This is already clear from PD Article 13(2), first paragraph which defines the normal time frame for approval as “within 10 working days of the submission of the draft prospectus” but has additionally been clarified in new Article 5(1).
25. In response to the further comments raised regarding time frames in paragraph 14 above, ESMA observes that the definition of approval in Article 2(1)(q) of the PD requires NCAs to scrutinise “the completeness of the prospectus [...] including the

consistency of the information given and its comprehensibility”. Any limitation of NCAs’ obligation to scrutinise the comprehensibility of the prospectus would therefore contradict Level 1. Furthermore, while ESMA appreciates the argument made as regards NCAs raising comments in subsequent review rounds on parts of the prospectus that have not changed, it would run contrary to the general PD objective of investor protection to outlaw such comments as this could effectively result in NCAs being prohibited from commenting on significant matters in the prospectus where such are discovered in a subsequent round of review. As it is highlighted in paragraph 48 of the CP, NCAs should always endeavour to raise comments on the draft prospectus at the earliest possible opportunity. With a view to aligning the wording of the draft RTS more closely with that of Level 1, ESMA has removed the word ‘comments’ from new Articles 3 and 5 which now instead refer to explanations for the draft prospectus not being complete, including consistent and comprehensible and the need for supplementary information.

26. Regarding the comments summarised in paragraphs 15 and 16 above, ESMA firstly agrees that it should be clarified in the draft RTS that the final draft of the prospectus should not be annotated in the margin. New Article 4, first paragraph effectuates this clarification. Secondly, as concerns the uncertainty surrounding the term ‘searchable electronic format’, ESMA wishes to clarify that this covers electronic text files in which it is possible to use a search function to find specific letters and words, for example searchable portable document format (PDF). A clarification of the term has also been inserted in recital 3.
27. ESMA, in light of comments received, has decided to remove the term ‘at a minimum’ from Article 2 (now Articles 2 and 4) of the draft RTS. As noted in paragraph 38 of the CP, document submission should be through means acceptable to the relevant NCA (e.g. email or a specific electronic filing system). With the exception of the final draft of the prospectus, NCAs should not require paper versions of the draft prospectus. Where NCAs require a paper version of the final draft of the prospectus, ESMA wishes to clarify that this is without prejudice to the requirement that the prospectus be submitted in searchable electronic format.
28. In response to the comments reflected in paragraph 17 above, ESMA expressed in paragraph 47 of the CP that comments provided by the NCA should be clear. By way of elaboration, ESMA considers that the NCA should notify the reasons for which it considers that the draft prospectus is not complete, including issues of consistency and comprehensibility. While NCAs will in many instances include a reference to the relevant legal provision when providing such notifications on a draft prospectus, early prospectus drafts are in some cases far from complete and missing important sections or items. In such situations, requiring NCAs to explain in detail how all issues should be resolved would be overly burdensome and to some extent equal to transferring the obligation of the issuer, offeror or person asking for admission to trading to compile a PD- and PR-compliant prospectus to the NCA. This suggestion has therefore not been taken on board.

29. Regarding the argument that it is not necessary to specify that an NCA may refuse approval and terminate the review process where an issuer, offeror or person asking for admission to trading is unable or unwilling to comply with the PD and PR as this possibility has never been unclear, ESMA notes that if it is already widely acknowledged that NCAs may terminate the review process on the abovementioned grounds, it should not constitute a problem specifying this in the draft RTS. On the other hand, such a specification provides NCAs with a firm legal basis for terminating the review in those rare cases in which the issuer, offeror or person asking for admission to trading is not proving able or willing to submit a compliant prospectus. While some respondents were concerned that Article 3(4) (new Article 5(4)) of the draft RTS gives NCAs too much discretion to terminate the review process, ESMA believes that NCAs have no interest in refusing approval without having first exhausted all means of clarifying to the issuer, offeror or person asking for admission to trading which steps need to be taken to have the prospectus approved. As such, the refusal of approval and termination of the review process is seen only as an action of last resort. Furthermore, ESMA notes that, in cases where the approval of a prospectus is refused, nothing prevents the issuer, offeror or person asking for admission to trading from applying for approval anew and thereby commence a new review process. However, to allow NCAs to utilise their resources most efficiently, it is important that they be allowed to terminate a review which is leading nowhere.
30. Lastly, regarding the comment that NCAs should be given full discretion to decide when to provide the reasons for which they consider a draft prospectus incomplete, including inconsistent and incomprehensible, orally and, conversely, that NCAs should always request additional information and documentation in writing, ESMA is of the view that new Article 5(2) provides issuers, offerors and persons asking for admission to trading with a level of certainty that they will be notified of all reasons for the draft prospectus being considered incomplete in writing which should be helpful to them when amending the draft. At the same time, Article 5(3) ensures a degree of flexibility as it provides that, where in the view of the NCA only minor changes to the draft prospectus are required, these can be notified orally. Furthermore, ESMA wishes to clarify that, while NCAs are as a rule required to provide their reasons in writing, they are not prohibited from subsequently offering explanations of such reasons orally, e.g. over the phone.
31. In line with the above considerations, the proposed Article 2 has been divided into new Articles 2, 3 and 4 while the proposed Article 3 has become new Article 5. The substance of the articles is amended as follows:

*Article 2*

*“1. The issuer, offeror or person asking for admission to trading on a regulated market shall submit all drafts of the prospectus in searchable electronic format via electronic means to the competent authority. A contact point to which the competent authority can submit all notifications in writing via electronic means shall be specified when the first draft of the prospectus is submitted.*

2. Along with the first draft of the prospectus, or during the prospectus review process, the issuer, offeror or person asking for admission to trading on a regulated market shall also submit to the competent authority in searchable electronic format:

(a) if required by the competent authority of the home Member State according to Article 25(4) of Regulation (EC) No 809/2004 or on their own initiative, a cross reference list which shall also identify any items from Annexes I to XXX to Regulation (EC) No 809/2004 that have not been included in the prospectus because, given the nature of the issuer, offeror or person asking for admission to trading or the securities being offered to the public or admitted to trading, they were not applicable.

Where the cross reference list is not submitted, and where the order of the items in the draft prospectus does not coincide with the order of the information provided for in the annexes to Regulation (EC) No 809/2004, the draft prospectus shall be annotated in the margin to identify which sections of the prospectus correspond to the relevant disclosure requirements. A prospectus which is annotated in the margin shall be accompanied by a document identifying any items contained in the relevant annexes to Regulation (EC) No 809/2004 that have not been included in the prospectus because they were not applicable, given the nature of the issuer, offeror or person asking for admission to trading or the securities being offered to the public or admitted to trading ;

(b) if the issuer, offeror or person asking for admission to trading on a regulated market is requesting the competent authority of the home Member State to authorise the omission of information from the prospectus according to Article 8(2) of Directive 2003/71/EC, a reasoned request to that effect;

(c) if the issuer, offeror or person asking for admission to trading on a regulated market wishes the competent authority of the home Member State to notify the competent authority of a host Member State, upon approval of the prospectus, with a certificate of approval according to Article 18(1) of Directive 2003/71/EC, a request to this effect;

(d) any information which is incorporated by reference into the prospectus, unless such information has already been approved by or filed with the same competent authority in accordance with Article 11 of Directive 2003/71/EC;

(e) any other information considered necessary, on reasonable grounds, for the review by the competent authority of the home Member State and expressly required by the competent authority for that purpose.”

### Article 3

“1. Following submission of the first draft of the prospectus to the competent authority of the home Member State, where the issuer, offeror or person asking for admission to trading on a regulated market submits subsequent drafts of the prospectus, the subsequent drafts shall be marked to highlight all changes made to the preceding unmarked draft of the prospectus as submitted to the competent authority. Where only

*limited changes are made, marked extracts of the draft prospectus, showing all changes from the preceding draft, shall be acceptable. An unmarked draft of the prospectus shall always be submitted along with the draft highlighting all changes made.*

*Where the issuer, offeror or person asking for admission to trading on a regulated market is unable to comply with the requirement set out in the first subparagraph due to technical difficulties related to the marking of the prospectus, each change made to the preceding draft of the prospectus shall be identified to the competent authority of the home Member State in writing.*

*2. Where the competent authority of the home Member State has, in accordance with Article 5(2) of this Regulation, notified the issuer, offeror or person asking for admission to trading on a regulated market that it considers that the draft prospectus does not meet the requirement of completeness, including consistency of the information given and its comprehensibility, the subsequently submitted draft of the prospectus shall be accompanied by an explanation as to how the incompleteness notified by the competent authority has been addressed.*

*Where changes made to a previously submitted draft prospectus are self-explanatory or clearly address the incompleteness notified by the competent authority, an indication of where the incompleteness has been addressed shall be considered sufficient.”*

#### *Article 4*

*“With the exception of the cross reference list mentioned in Article 2(2)(a), submission of the final draft of the prospectus for approval shall be accompanied by any information mentioned in Article 2(2) which has changed since a previous submission. The final draft of the prospectus shall not be annotated in the margin.*

*Where no changes have been made to the previously submitted information mentioned in Article 2(2), the issuer, offeror or person asking for admission to trading on a regulated market shall not be required to resubmit such information. In those cases, the issuer, offeror or person asking for admission to trading on a regulated market shall confirm in writing that no changes have been made to the previously submitted information.”*

#### *Article 5*

*“1. The competent authority of the home Member State shall acknowledge receipt of the initial application for approval of a prospectus in writing via electronic means as soon as possible and no later than by close of business on the second working day following the receipt. The acknowledgement shall inform the issuer, offeror or person asking for admission to trading on a regulated market of any reference number of the application for approval and of the contact point within the competent authority to which queries regarding the application may be addressed. The date of acknowledgement*

*shall not affect the date of submission of the draft prospectus, within the meaning of Article 13(2) of Directive 2003/71/EC, from which the time limits for notifications commence.*

*2. Where the competent authority of the home Member State considers, on reasonable grounds, that the documents submitted to it are incomplete or that supplementary information is needed, for instance due to inconsistencies or incomprehensibility of certain information provided, it shall notify the issuer, offeror or person asking for admission to trading of the need for supplementary information and the reasons therefor, in writing, via electronic means.*

*3. Where the competent authority of the home Member State considers the incompleteness to be of a minor nature or timing to be of utmost importance, the competent authority may notify the issuer, offeror or person asking for admission to trading orally, in which case there will be no interruption of the time limits for approval of the prospectus as referred to in Article 13(4) of Directive 2003/71/EC.*

*4. Where the issuer, offeror or person asking for admission to trading on a regulated market is unable or unwilling to provide the supplementary information requested in accordance with paragraph 2, the competent authority of the home Member State shall be entitled to refuse the approval of the prospectus and terminate the review process.*

*5. At the outcome of the scrutiny process, the competent authority of the home Member State shall notify the issuer, offeror or person asking for admission to trading on a regulated market of its decision regarding the approval of the prospectus in writing, via electronic means, on the day of the decision. In the case of a refusal to approve the prospectus, the decision of the competent authority shall contain the reasons for such refusal.*

### 3.1.2 Adjustment of time limits

32. While no questions were included in the CP regarding ESMA's decision not to provide a response to the part of the approval mandate concerning adjustment of time limits, four respondents provided comments on this approach which ESMA addresses in the following section.

33. Respondents considered that the time taken by NCAs to approve prospectuses greatly adds to the time, and expense, of the prospectus approval process. Two respondents suggested that NCAs should focus on checking the completeness of the prospectus while the matter of its comprehensibility should be the responsibility of the issuer, offeror or person asking for admission to trading. In addition, these respondents proposed that NCAs should be restricted from raising new comments on the parts of the draft prospectus which they had already seen save for situations in which new information was submitted. One respondent suggested that the extension from 10 to 20 days should only be permitted once.



### **ESMA's response**

34. ESMA maintains its view as set out in the CP regarding the difficulties connected with responding to the mandate, particularly regarding potential clashes with the Level 1 text. ESMA is not aware of any substantial problems with the current time limits and consider that as these upper limits are set out in Level 1 that there is significant harmonisation as regards the time taken across NCAs when it comes to providing comments and processing approvals. Specifically regarding the comment that the extension from 10 to 20 days should only be permitted once, ESMA considers that the conditions for extension of the period from 10 to 20 days are set out clearly in Level 1 and that ESMA would be exceeding its mandate if it were to attempt to limit these situations. Should a more nuanced approach to the time periods be considered desirable, ESMA considers that this is something that could be examined as part of the European Commission's review of the operation of the Prospectus Directive which is currently underway. Regarding raising comments on subsequent drafts, ESMA maintains its view, set out in paragraph 48 of the CP, that while it is best practice to raise comments at the earliest possible opportunity, NCAs should not be prevented from issuing comments on subsequent drafts of prospectuses as this would conflict with the requirement to ensure the contents of a prospectus are complete, consistent and comprehensible.

## **3.2 Draft RTS on incorporation by reference**

35. The following section sets out a summary of the responses which ESMA received to questions 4-8 on incorporation by reference and provides ESMA's views on these responses.

### **3.2.1 Condition i: "filed or approved in accordance with the Prospectus Directive"**

**Question 4: Do you agree that the three abovementioned documents constitute the documents which comply with the requirement of being approved or filed in accordance with the Prospectus Directive and from which information can be incorporated by reference? If not, please provide your reasoning.**

**Question 5: Do you believe that specifying the documents which are considered approved or filed in accordance with the Prospectus Directive as proposed in paragraph 87 will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

36. A significant number of respondents, notably from the investor community, agreed with the ESMA proposition that the documents referred to are the only documents which comply with the requirement and which consequently may be incorporated by reference. However, these respondents also noted that that in practice, the final offer price and the amount of securities will not be subject of incorporation by reference. In

addition, these respondents pointed out that, in their view, an exhaustive list did not make sense either from an investor protection perspective or for reasons of effectiveness.

37. Regarding “filed or approved in accordance with the Prospectus Directive” many of the respondents considered ESMA’s interpretation of this condition to be overly strict. The interpretation presented in the CP was considered overly rigid in that it would only facilitate the incorporation of information which is specifically required to be published to be incorporated by reference. Respondents considered that this would result in the inclusion of a large number of appendices in prospectuses containing information which is already publicly available.
38. Respondents opposed to the proposal considered that incorporation of documents by reference aids comprehensibility of the prospectus, and reduces costs and approval time. They considered that a more flexible approach and purposive interpretation by ESMA would be in line with the intention of the co-legislators - that incorporation by reference should be facilitated, with the only caveat being that investor protection not be endangered. They also point to use of the word “shall” in Article 11 of the PD, considering this to be a direction to NCAs rather than a delimitation of the ability of issuers to use incorporation by reference. Respondents suggested that the RTS is changed to allow incorporation by reference of all information required to be published by law in order to reduce redundancy and increase the focus of prospectuses. Certain respondents point out that incorporation by reference of documents is not inconsistent with the goal of investor protection and the requirements set out in Article 5 PD.
39. In addition, respondents disagreed with ESMA that the amendments of Article 11 PD brought about by the repeal of Directive 2001/34/EC (‘CARD’) and by changes introduced by the Amending Directive indicated a reduction of documents which could be incorporated by reference. In particular, these respondents pointed to recital 4 of the Amending Directive which provides that the directive aims to simplify and improve the application of PD, increase its efficiency and enhance the international competitiveness of the Union, thereby contributing to the reduction of administrative burdens. In their view, an exhaustive list runs counter to the intention and policy objective of the Amending Directive. Furthermore, respondents suggested that if the co-legislators had intended that the deletion of PD Article 10 and the replacement of the reference to CARD with the Transparency Directive should severely restrict the scope of the type of documents from which information may be incorporated by reference, they would have explicitly signalled such change in the legislation.
40. In terms of practical consequences, respondents considered that information that is made available pursuant to local securities laws in the issuer's home jurisdiction and which, although not required to be included in the prospectus, may still be helpful to investors. In particular, respondents pointed to issues regarding filings made under Article 23(3) of the TD and the effects the proposal would have on wholesale issuers. Placing higher burdens on issuers of securities with high denominations that are sold to

institutional investors is an odd result that is not in line with the general principles of the PD regime.

41. The view was expressed that requiring information to be set out in a prospectus rather than incorporated by reference, will not necessarily result in prospectuses that are more easily analysable and comprehensible by investors. Some respondents considered that restricting incorporation by reference actually facilitated greater scope for information being presented inaccurately because mistakes could be made when information is copied into the prospectus
42. In terms of the costs associated with ESMA's proposal, a variety of responses were received. Of these, a number considered that it was difficult to quantify costs at this time. Of those who considered that the costs would not be significant, respondents pointed to the ready availability of information referred to in the proposal and electronic publication of prospectuses.
43. The majority of respondents to this question however pointed to the costs that would be associated not with the ability to incorporate the documents listed but with a reduction in the ability of issuers to incorporate by reference information. These respondents pointed to significant on-going additional costs (including the cost of lawyers, auditors and printers) in comparison to any benefits that may accrue to investors. Reference was made to the fact that incorporation by reference actually reduces costs to companies and reduces the time taken to produce a prospectus and have it approved. Respondents considered this particularly important in the context of secondary issues where considerably more information is already available to investors.

#### ***ESMA's response***

44. ESMA provides a joint response to all questions regarding incorporation by reference in paragraphs 55-59.

#### 3.2.2 Condition ii: "filed in accordance with the Transparency Directive"

**Question 6: Do you agree that the abovementioned information constitutes the information which complies with the requirement of being filed in accordance with the TD? If not, please provide your reasoning.**

**Question 7: Do you believe that specifying the information which is considered filed in accordance with the TD as proposed in paragraph 92 will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

45. While ESMA's interpretation was supported by a number of those who responded to this question, as with the condition "filed or approved in accordance with the Prospectus Directive" many of the respondents considered ESMA's interpretation of "Filed in accordance with the Transparency Directive" to be overly restrictive. Again,

while agreeing with the items contained in the list, respondents considered that the list should not be exhaustive and that there should be flexibility regarding the incorporation by reference of information required to be disclosed according to the laws, regulations and administrative provisions of Member States. Little value was seen in having an exhaustive list, if clarification was required, guidance through ESMA Q&A was suggested as an appropriate mechanism by which to deliver this.

46. Respondents considered that incorporation by reference was a valuable tool and that issuers not subject to TD filing requirements (and in particular issuers of debt securities denominated over €100,000) should be allowed to make filings on a voluntary basis as if they were subject to the filing requirement. In particular, these considered that an issuer should not face additional burdens under the PD regime because it benefits from an exemption under the TD regime
47. A number of respondents also considered that voluntary filings should also be permitted by unlisted issuers, and in particular banks who are subject to prudential regulation and supervision. Some respondents considered that it was possible to make TD filings on a voluntary basis and that this was not reflected in the proposal. Concerns were also expressed as regards the ability of third country issuers to incorporate by reference information disclosed in third countries and then disclosed under Article 23(3) of the TD. As a corollary of this, some respondents considered that the ESMA proposal cut across Level 1 principles requiring disclosure of information even if such is not “regulated information”. One respondent considered that the proposal results in a strange result where institutional investors in debt securities of at least €100,000, who can be expected to be able to find information more easily than retail investors, are afforded greater protection” (by having financials set out in the prospectus itself rather than incorporated by reference) than investors in debt securities of less than €100,000, who may be retail investors.
48. Some respondents commented that the proposal was disproportionate and contrary to the principle of proportionality, contradicting the basic premise of permitting incorporation by reference i.e. to simplify and reduce the costs associated with the drafting of prospectuses.
49. A number of respondents considered that the removal of references to CARD was not accompanied by a legislative intention to reduce the ability of companies to incorporate information by reference.
50. The ability to incorporate quarterly reports was also highlighted by some respondents, with a number recommending that disclosures filed under the new Article 3(1)(a) of the TD should be added to the list.
51. ESMA was encouraged to clarify that the list of information which can be incorporated by reference is an indicative, rather than exhaustive, and that all regulatory filings made, voluntarily or otherwise, in accordance with the PD or the TD would be acceptable.

52. Of those who responded to the question on costs, again a number considered that it was difficult to quantify costs at this time. A number of other respondents considered that no additional costs would be incurred as a result of the specifying information that can be incorporated in accordance with the TD. For those who considered that the proposal would incur costs, the case of wholesale issuers that only issues debt securities with a denomination of €100,000 was highlighted. These respondents considered that such issuers are currently able to incorporate their financial statements by reference into their prospectuses but going forward would need to set those out in the prospectus in full and would likely incur significant additional costs (lawyers, auditors, printers).

***ESMA's response***

53. ESMA provides a joint response to all questions regarding incorporation by reference in paragraphs 55-59.

3.2.3 Condition iii: “previously or simultaneously published documents”

**Question 8: Do you consider that there are any other documents that could meet the criteria of being “simultaneously published” from which information could be incorporated by reference?**

54. Respondents considered ESMA's interpretation of this term to be overly strict and suggested that “simultaneously published” be given its ordinary meaning and that this provision excludes incorporation by reference of documents published after the approval/publication of the prospectus. Some respondents considered that in particular, information disclosed according to Article 6 of the Market Abuse Directive and financial statements that are simultaneously published meet the requirements of the third condition. One respondent pointed to the incorporation by reference of financial information into a supplement where it is published on the same day.

***ESMA's response***

55. ESMA considers that its original analysis underpinning the conditions specified in the above questions, and set out in paragraphs 75-100 of the CP, is still correct.
56. In terms of issuers not admitted to trading on a regulated market, ESMA considers that, as they are not subject to the TD, their ability to incorporate by reference has always been limited to documents that had previously been approved under the PD (or documents filed or approved under the PD or TD by other entities).
57. However, having considered the responses received to questions 4 to 8, and in light of the Commission's plans for a Capital Markets Union and the facilitation of access to capital, ESMA has reconsidered its proposal regarding incorporation by reference. ESMA recognises that to adopt the provisions of the RTS in their current form would not be in line with the intention of the co-legislators to reduce administrative burden.

ESMA also acknowledges that the proposal would be a departure from current market practice that would not have any significant benefits in terms of investor protection. ESMA has also taken on board the concerns of respondents that issuers who benefit from exemptions under the TD should not be subject to a more onerous regime under the PD as this would also defeat the intention of the co-legislators. To adopt the proposal would result in a situation where wholesale issuers (those issuing in denominations of over €100,000) would be subject to stricter requirements than those applying to retail issuers.

58. ESMA considers, however, that through the legislative changes that have been made since the introduction of the PD, and which affect Article 11 thereof, there is a disconnect between the provisions of the Prospectus Directive and Article 28(1) of the Prospectus Regulation. ESMA would encourage the Commission to address this issue in the forthcoming review of the prospectus regime.
59. Article 4 of the draft RTS as set out in the CP has therefore been deleted and no proposal in this regard is included in the draft RTS to be submitted to the Commission.

### 3.3 Draft RTS on publication

#### 3.3.1 Responsibility for electronic publication when such is delegated under PD Article 14(2)(c)

60. In the following section, ESMA summarises the responses which it received to questions 9-21 on publication and provides its response to those responses.

**Question 9: Do you agree that it is sufficiently clear from PD Article 14 that the issuer, offeror or person asking for admission to trading can delegate the task of publication but not the responsibility? If not, please state your reasoning.**

61. ESMA received 15 responses to question 9, all agreeing that it is sufficiently clear from PD Article 14 that while the practical task of publishing the prospectus can be delegated to the financial intermediaries placing or selling the securities, including paying agents, the responsibility for publishing the prospectus cannot be delegated.

#### ***ESMA's response***

62. As no respondents questioned the clarity of PD Article 14(2)(c), ESMA will maintain its decision to not further address this issue in the draft RTS.

#### 3.3.2 Publication of final terms

**Question 10: Do you agree that the obligation to publish the prospectus electronically should also apply to the publication of final terms? If not, please provide your**

reasoning.

**Question 11: Do you agree that the method for publishing final terms should be the same as the method used for publication of the base prospectus? If not, please state your reasoning.**

**Question 12: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provisions were to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

63. 15 responses were received to question 10, of which 13 explicitly agreed that final terms should be included under the obligation to publish the prospectus electronically. One respondent disagreed with this proposal, specifically in cases of private placements. Another respondent requested that the reasoning presented in the CP for including final terms under this obligation be included in the draft RTS or in its recitals so as to avoid inconsistencies due to 'the multitude of European legislative texts'.
64. On a more general note, it was suggested by three respondents that a centralised European system for filing information related to securities subject to the PD, the TD or the Market Abuse Directive ('MAD', Directive 2003/6/EC) should be considered (a so called 'European EDGAR') as this could mitigate the issues arising from the currently fragmented approach. In a general remark to all questions relating to publication, one respondent commented that the draft RTS should acknowledge that in case of dual-tranche offers with a tranche being offered in a third (non-EU) country, it might not be possible for the issuer to comply with all the RTS's requirements regarding publication due to conflicting third country legislation.
65. The 14 responses provided to question 11 were slightly more mixed though a large majority of the respondents were in agreement with ESMA's proposal to require that final terms be published by the same method as the one used for the corresponding base prospectus. The comments and proposals in relation to this question were the following:
- It should be clarified that the obligation is not to publish the final terms on e.g. the exact same website but simply to publish the final terms according to the same category of publication under PD Article 14(2) (five respondents).
  - ESMA should clarify in its Final Report that the argument that final terms constitute part of the prospectus does not mean that final terms have to be approved according to PD Article 13 (three respondents).
  - The proposal to require that final terms be published according to the same method as the base prospectus is a reversal of the existing PR Article 33. ESMA should consider whether it falls within its mandate to change existing provisions of the PR as this could be seen to imply a policy choice which would be in breach of the Meroni

doctrine and Article 10 of the ESMA Regulation (Regulation (EU) No 1095/2010) (three respondents).

- The obligation should not apply to private placements (two respondents).

66. As regards the question on costs, six respondents commented that requiring electronic publication using at least one of the methods used for the base prospectus would not impose any significant additional costs while a small number of respondents were of the view that additional costs were to be expected. While no quantitative cost estimates were provided the respondents suggested that the draft RTS could cause administrative and external costs and that the draft RTS should be made less detailed as they were otherwise likely to increase IT and human resources costs which would be particularly harmful for SMEs. In relation to the last observation, it was commented that in case the level of detail could not be decreased, the draft RTS should instead be amended to avoid any compliance problems in third country jurisdictions.

#### **ESMA's response**

67. ESMA notes the wide support for the proposal to require final terms to be electronically published. As regards the concerns expressed about private placements, only prospectuses for securities which are approved for admission to trading on regulated markets, and final terms issued under those prospectuses and which seek admission to trading, are caught by the obligation. With reference to the proposal that the reasoning behind this requirement be included in the draft RTS or the recitals, ESMA considers that recital 7 of the draft RTS already addresses this matter as it contains the statement that *“Electronic publication provides investors with fast and easy access to the information contained in a prospectus”*.
68. Turning to the proposal that a ‘European EDGAR’ be established, ESMA notes that this question goes far beyond ESMA’s mandate to draw up draft RTS to specify the provisions relating to publication of the prospectus in PD Article 14(1)-(4). Any decision to consider a centralised system for filing PD, TD and MAD information would change existing provisions in Level 1 legislation and therefore, the question can only be addressed by the co-legislators. ESMA will therefore not discuss this matter further. In relation to dual tranche offers, only the tranches which are to be offered in the EU or admitted to trading in the EU would be caught by the obligation.
69. As regards the publication requirement, ESMA clarifies that the intention was not to require that final terms be published in the exact same location, e.g. the same webpage, as the related base prospectus. However, based on the responses received to question 11, ESMA has decided to amend what is now Article 7 of the draft RTS to realign it with the language and current level of flexibility that is contained in Article 33 PR. Recital 7 has also been amended to note the fact that final terms should be published electronically. However, the electronic publication does not have to be by the same method as for the base prospectus.



70. In response to the comment summarised in paragraph 65, second bullet above, ESMA clarifies that the draft RTS in no way changes the fact that final terms according to PD Article 5(4) are not subject to approval but shall be filed with the NCA. The reasoning provided in paragraphs 115-119 of the CP is not intended to change the general regime applicable to final terms but simply to substantiate that it is in line with the prospectus regime to extend certain publication requirements applicable to prospectuses also to final terms.
71. Turning to the comment that changing an existing provision of the PR possibly falls outside the scope of ESMA's mandate, ESMA does not believe that this is the case. Firstly, PD Article 14(1)-(4) was specified by the European Commission in 2004 by way of the current Articles 29 to 33 of the PR. Seeing as ESMA has subsequently been given a comparable mandate to specify these provisions, ESMA by extension is in a position to consider whether the existing specifications should be maintained, deleted or amended. Secondly, the argument that reversing existing legislation would imply a policy choice in and of itself does not seem consistent as this must depend on the level of the legislation (cf. the Lamfalussy process) and the subject of the provision at hand. In this specific instance, ESMA is proposing to change PR Article 33; a Level 2 provision which has been adopted by the European Commission in accordance with Article 290(1) of the Treaty of the Functioning of the European Union, meaning that it relates to a non-essential element of the PD. As such, it cannot be concluded that ESMA is making a policy choice simply by proposing to change this provision. In any event, the changes being proposed merely adapt the existing provision to reflect the requirement of electronic publication.
72. Regarding the comments that the proposed draft Article 10 (now Article 7) will impose additional costs on issuers, offerors and persons asking for admission to trading, ESMA considers that any additional costs are likely to be negligible given that the information will have already been drawn up and that electronic publication is generally more cost effective than publication in printed form or in newspapers.
73. Lastly, ESMA has decided to delete the proposed Article 10(2) requiring that electronically published final terms comply with what is now Article 6 of the draft RTS as it is considered that this requirement already exists by way of Article 14(5) of the PD.
74. On that basis, Article 10 of the draft RTS (now Article 7) has been amended as follows:
- “The publication method for final terms related to a base prospectus does not have to be the same as the one used for the base prospectus as long as the publication method used is one of the methods indicated in Article 14 of Directive 2003/71/EC.”*

### 3.3.3 Clarification of the term “available to the public” in PD Article 14(2)

<b>Question 13: Do you consider there are any other impediments to a prospectus being considered available to the public?</b>
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75. ESMA received 20 responses to question 13. The majority of these did not relate specifically to whether respondents saw any further impediments to prospectuses being available to the public but rather commented on ESMA's proposal to prohibit access to a prospectus from being made contingent on acceptance of a disclaimer. These comments are summarised below together with a number of comments received on the same topic under question 16.
76. While one respondent explicitly supported ESMA's proposal that access to the prospectus should not depend on the acceptance of a disclaimer, other respondents observed that:
- ESMA's proposal goes further than the Timmel ruling which only outlaws comprehensive legal disclaimers limiting the liability for the content of the prospectus, not disclaimers highlighting to investors which jurisdiction the offer is being made in, including filters asking investors to provide their country of residence. Going further than the Timmel ruling in this regard will not enhance investor protection as it will expose investors to prospectuses regarding securities which are not actually being offered in their jurisdiction. Additionally, one respondent considered that according to the Timmel ruling the combination of a registration process, acceptance of a disclaimer and the requirement to provide an email address would be in contradiction with the Prospectus Regulation while according to ESMA's Article 5(3), either a registration process or acceptance of a disclaimer would be impermissible. Lastly, there is no actual need to codify the ruling as it is legally viable in its own right as case law.
  - There is a contradiction between Article 5(2) and 5(3) of the draft RTS in that 5(2) explicitly mentions the obligation to avoid targeting residents in countries where an offer is not being made, e.g. by way of a disclaimer, while 5(3) outlaws the use of disclaimers. This contradiction could be addressed by clarifying that the word 'disclaimer' in Article 5(2) and 5(3) actually covers two different understandings of the term.
  - Prohibiting issuers from requiring investors to provide their country of residence to access the prospectus would make it impossible for issuers to comply with securities rules of other countries, including the US. This could mean that the issuer would either have to comply with the legislation applicable to public offers in any given country, though the offer was not being made there, or refrain from making a public offer altogether.
  - The use of disclaimers should not be generally prohibited, instead ESMA should recommend that disclaimers only be used to state that no offer is made outside the jurisdiction(s) in which the prospectus is approved or passported.

- Based on experience, it would not be sufficient in terms of investor protection to simply insert a disclaimer regarding which jurisdictions an offer is being made in without also requiring investors to confirm this disclaimer.
77. Based on these comments, respondents suggested that Article 5(3) of the draft RTS be deleted altogether, that points (1) and (2) be removed or that point (3) be reworded to clarify that access to the prospectus may not be made contingent on acceptance of a disclaimer limiting prospectus liability for the person responsible for the prospectus. Additionally, it was proposed that Article 5(2) be amended to include the wording “measures, such as screening systems requesting from potential investors information as to their place of residence or the insertion of a disclaimer as to who are the addressees of the offer shall not be considered as an unlawful impediment to the prospectus being considered available to the public” or that the word ‘disclaimer’ be replaced by ‘addressee instructions’ or ‘notice’.
78. Additionally, a number of respondents commented on the proposal in Article 5(1)(3) of the draft RTS that the prospectus should not contain hyperlinks with the exception of links to the electronic addressed where information incorporated by reference is published. These respondents were of the opinion that this prohibition was problematic because the prospectus would need to contain hyperlinks in a number of different situations, e.g. i) where NCAs require the prospectus to contain a hyperlink to the list of registered and certified Credit Rating Agencies available on ESMA’s website, ii) where information about financial intermediaries unknown at the time of approval is located on a website, iii) where the issuer needs to refer to its website to describe its business and iv) where an issuer wishes to include a hyperlink for the purpose of providing post-issuance information. Furthermore, these respondents highlighted that computer software used by market participants to create searchable electronic documents automatically turn URL references into hyperlinks. On this basis, it was suggested that Article 5(1)(3) be deleted.

### ***ESMA’s response***

79. ESMA maintains the view that the judgment in the Timmel case confirms that neither a comprehensive registration process, requirement to provide an email address or the acceptance of a disclaimer which seeks to limit the rights of an investor are permissible. The requirements are not cumulative. ESMA has, however, amended the draft RTS (new Article 6) to clarify that the prohibition on disclaimers only applies where such seek to limit the liability of the person(s) responsible for the prospectus<sup>2</sup> or the legal remedies available to the investor. Filters warning in which jurisdictions an offer is being made and requiring investors to disclose their country of residence or indicate that they are not resident in a particular country or jurisdiction are not caught by this provision. Recital 6 (now recital 7) has similarly been amended to clarify this.

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<sup>2</sup> Article 6(1) Directive 2003/71/EC

80. As regards the concerns summarised in paragraph 78, while ESMA acknowledges the arguments presented, it considers that it is important to delineate which information forms part of the prospectus and which does not. Information contained on any websites mentioned in a prospectus is not approved by NCAs (with the exception of information incorporated by reference) and issuers should refrain from giving any impression that such information has been reviewed or approved. The prohibition is in relation to hyperlinks and not website addresses. Where document(s) contain hyperlinks, the issuer, offeror or person asking for admission to trading should make it clear that such hyperlinks do not form part of the prospectus which has been approved by the NCA.
81. Lastly as regards the prospectus being made available to the public, upon further consideration ESMA has decided to remove the proposed Article 5(4) requiring that access to all documents comprising the prospectus be provided at the same time. This is because ESMA considers that this requirement already exists by way of Article 14(5) of the PD and does not, as such, need to be included in the draft RTS.

#### 3.3.4 “Free of charge”

**Question 14: Do you agree that the obligation to make the prospectus available to the public free of charge also applies to prospectuses that are published electronically? If not, please provide your reasoning.**

**Question 15: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provision was to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

82. All the 13 responses provided to question 14 support ESMA’s proposal that the obligation to make the prospectus available free of charge should also apply to electronically published prospectuses.
83. As regards costs, seven respondents commented that the above mentioned requirement was likely to cause no or insignificant additional costs while six respondents believed it might impose additional costs. Of these last six, three commented that, if the websites of the regulated market or NCA allowed access to the published prospectus free of charge, the new requirement would not cause new costs, however, if regulated markets or NCAs charged for the access to the published prospectus, issuers, offerors and persons asking for admission to trading would have to use their own websites, which might impose costs on them. Two other respondents observed that they would incur one-off costs stemming from the printing of the prospectus.

### **ESMA's response**

84. ESMA acknowledges the broad support for requiring that access to electronically published prospectuses be provided free of charge. In comment to the cost observations, ESMA considers the cost of electronic publication to be lower than that of having to make printed copies of the prospectus available free of charge.

#### 3.3.5 Provisions regarding websites used for the purpose of electronic publication

**Question 16: Do you believe the proposed measures will enhance the accessibility of electronically published prospectuses? If not, please provide reasoning and/or alternative measures.**

**Question 17: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provisions were to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

85. As regards the proposal that publication of the prospectus may be undertaken at an existing website of the issuer, financial intermediary or regulated market or on the website of the group, in the latter case provided that investors are informed of this, ESMA received 15 responses. While 11 respondents explicitly stated that these measures will enhance the accessibility of electronically published prospectuses, a number of comments and suggestions were provided.

86. Firstly, several respondents provided comments concerning the use of the group website, advising that

- as investors were aware that prospectuses were generally published in the investor relations section of the group website, requiring that they be informed when the prospectus was published on the group website was unnecessary,
- if there was a place where investors were expected to look, and where the issuer, offeror or person asking for admission would consequently publish a notice stating that the prospectus was published on the website of the group, the prospectus might as well be published in that place,
- it was unclear how one might comply with the requirement of informing investors of publication on the group website, and
- it would be helpful to have a clarification of which entities in a group were allowed to publish their prospectus on the group website (holding company, operating company, special purpose vehicle), and particularly, in the case of an originator or seller with a prospectus covering asset backed securities and the issuer being an orphan SPV, whether the issuer would be viewed as part of the

group of the originator/seller. In this last case, it was suggested that while the orphan SPV would not technically be part of the “group”, the “group” website would be the most logical location for investors to look for the prospectus.

87. Secondly, a respondent observed that the requirements regarding publication of the prospectus appeared to have been prepared on the basis that issuers, offerors and persons asking for admission to trading were attempting to hinder access to the prospectus while the exact opposite was in fact the case. On that background, the draft RTS seemed unnecessarily detailed. Thirdly, one respondent suggested that the proposed Article 5(5) of the draft RTS should be amended to include paying agents in the list of entities entitled to use an existing website for the electronic publication of the prospectus as paying agents are mentioned in PD Article 14(2)(c).
88. Additionally, it was suggested that the prospectus should be required to be published in searchable electronic format as the quality of scanned documents was sometimes too low to be legible and that the prospectus should always be published on a website made available by the NCA. Lastly, one respondent suggested that accessibility to the electronically published prospectus could be further enhanced by way of a pan-European centralised filing platform for PD, TD and MAD (‘European EDGAR’).
89. As regards the costs connected with the above mentioned proposal, ESMA received 14 responses. While five respondents advised that no costs were expected to follow from the proposal, eight respondents were of the opposite view. A number of comments and suggestions were provided on the topic. On a general note, two respondents advised that the proposal was likely to increase IT and human resources costs which would be particularly harmful to SMEs. Additionally, six respondents observed that the obligation to inform investors of using the group website was likely to impose costs on issuers, offerors and persons asking for admission to trading while three other respondents believed that the requirement to establish a website for the purpose of complying with the prospectus regime would create new costs, of which one, however, noted that this would only rarely be necessary.
90. Without addressing the cost issue, another respondent commented that requiring issuers, offerors and persons asking for admission to trading to establish a new website could have significant practical consequences for entities without a website. It was further observed by one respondent that SPVs which as a rule do not generate any income of their own would not be able to bear the cost of establishing and running a website with a view to publishing the prospectus. On that basis, it was suggested that Article 5(5) of the draft RTS be changed to not only allow members of a group, but also SPVs established by a group for the purpose of one or more securities issues to use the group website. Furthermore, this respondent noted that a website would more often exist for the parent of a group rather than for the group as such and that Article 5(5) should take this into account.

### ***ESMA's response***

91. Regarding the comments set out under the first three bullets of paragraph 86 and the cost concerns summarised in paragraph 89 above, ESMA acknowledges the practical limitations to the proposal that investors must be informed when the prospectus is published on the group website. To avoid introducing a new requirement which could increase administrative burdens, ESMA will therefore not retain the obligation to inform investors when the prospectus is published on the website of the group.
92. Furthermore, the consultation has shown that stakeholders are unsure of how to understand the 'group' concept to which the original Article 5(5) referred. ESMA is of the view that it is up to the issuer, offeror or person asking for admission to trading to determine whether they are part of a group (notwithstanding the ability of the NCA to challenge this). In coming to this determination, issuers should consider the disclosure in their registration document on organisational structure. These considerations should apply *mutatis mutandis* to special purpose vehicles (SPVs).
93. As concerns the proposal in paragraph 87 above that the originally proposed Article 5(5) should also allow existing websites of paying agents to be used for prospectus publication, ESMA agrees that this is the case as PD Article 14(2)(c) does mention such.
94. Turning to the suggestions summarised in paragraph 88, ESMA observes that i) seeing as the prospectus will be required to be submitted for approval to the NCA in searchable electronic format, it should not pose difficulties to maintain this format when the prospectus is published, ii) as PD Article 14(2)(e) and 14(4) explicitly leave NCAs the choice as to whether they wish to offer to publish prospectuses on their websites, ESMA cannot create an obligation for all prospectuses to be published on NCAs' websites, and iii) the suggestion to establish a centralised European system for filing of information according to PD, TD and MAD falls outside of ESMA's current mandate, as described further in paragraph 68. New Article 6(1) now accommodates point i) (see paragraph 109).
95. As regards concerns about the requirement to establish a website for the purpose of prospectus publication if no such website exists, ESMA wishes to clarify that PD Article 14(2)(c)-(e) has already established that electronic publication can be undertaken on the website of the issuer, the financial intermediary, including the paying agent, the regulated market or the NCA (a provision that applies equally to SPVs). As such, any proposal from ESMA would not create a new obligation as issuers, offerors or persons asking for admission to trading are already required to publish the prospectus electronically and consequently to ensure that a website exists for this purpose. As the ability to use an existing website for the purpose of publication in electronic form is already clear, and considering the arguments put forward by respondents as to the added value of this provision, ESMA has decided to delete the proposed Article 5(5). However, ESMA maintains its view set out in the CP that in the case of an issuer that is part of a group, the issuer should be entitled to use the website of the group for the

purpose of electronic publication of the prospectus provided such does not hinder access to the prospectus by investors. For SPVs, consideration should be given as to whether they can legitimately be considered as part of the group. If this is not the case, consideration should be given to whether the sponsor of the SPV or the originator could meet the criteria of being financial intermediaries or paying agents in the context of the transaction, should this be the case then publication on their websites would meet the requirement.

### 3.3.6 Publication of a list of approved prospectuses by the home NCA under PD Article 14(4)

**Question 18: Do you agree that the issuer, offeror or person asking for admission to trading should be required to ensure that the hyperlink is active for a minimum period of 12 months?**

**Question 19: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provision was to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

96. ESMA received 16 responses to question 18, the majority of which did not agree that the issuer, offeror or person asking for admission to trading should be required to provide an active hyperlink for 12 months. Additionally, a few comments on the matter were provided in response to question 16 which are summarised below.
97. General: A number of respondents observed that the requirement for NCAs to publish hyperlinks to the published prospectuses (in cases where the NCA does not itself publish the prospectus) should not result in an obligation on issuers, offerors and persons asking for admission to trading as this could not have been the intention of the co-legislators. ESMA should consider whether the proposal is within its mandate to “ensure consistent harmonisation” in relation to publication. Three respondents commented that when a prospectus is published on the website of the regulated market, the issuer, offeror or person asking for admission to trading has no control over whether the hyperlink remains active for the required period and will therefore have to publish it elsewhere to comply with ESMA’s proposal. This would be unsatisfactory since it would render useless the possibility to have the prospectus published on the website of the regulated market and because it would be burdensome for entities without their own website (e.g. SPVs). Lastly, one respondent observed that ESMA should ensure that hyperlinks to information incorporated by reference continuously refer to the original information, even when the information in question is updated (e.g. financial statements). If possible, the original information incorporated by reference could state that a newer version exists.
98. Time period: Some respondents considered that the hyperlink should not be kept active for 12 months but for the duration of the offer/until the admission of the securities to



trading. Maintaining a hyperlink to the prospectus on an NCA website when the prospectus was no longer being updated would give investors the incorrect impression that the prospectus was still active. On the other hand, one respondent believed that the issuer, offeror or person asking for admission to trading should be required to keep the hyperlink active for a period of at least five years to ensure consistency with Regulation (EU) No 596/2014 (the 'Market Abuse Regulation').

99. Direct hyperlinks: Several respondents stated that it would hinder investor protection to require direct hyperlinks into the prospectus as this would impede the use of the disclaimer referred to in the original Article 5(2) of the draft RTS and that hyperlinks to websites should instead be allowed. One respondent suggested making all prospectuses available on the website of the NCA. Furthermore, it was observed that since final terms are viewed as part of the prospectus, hyperlinks to final terms would also have to be provided and since hyperlinks have to be direct, no disclaimer could be inserted whereby a public offer would likely be triggered. Lastly, one respondent suggested that NCAs should publish a disclaimer together with the hyperlinks to clarify that technical problems might arise and to grant the issuer, offeror or person asking for admission to trading the right to amend or update the hyperlink. Another respondent asked ESMA to clarify that the issuer, offeror or person asking for admission to trading is only liable to keep the target of the hyperlink active and not liable for the hyperlink as such.
100. Turning to the assessments of costs related to the proposed Article 9 of the draft RTS, ESMA received 13 responses to question 19, evenly distributed among respondents believing the proposal would create additional costs (five) and respondents believing this would not, or only to a negligible extent, be the case (six)<sup>3</sup>. Respondents observed that i) costs would increase unless hyperlinks to a website (instead of direct hyperlinks) were permitted, ii) costs would only increase if the issuer did not already have a website or where the issuer decided to develop a specific section of an existing website for the purpose of prospectus publication, and iii) issuers might incur costs if the financial intermediary or the regulated market charged a fee for publishing the prospectus for an extended period of time, however, this was unlikely to happen.

### ***ESMA's response***

101. Concerning the general observations summarised in paragraph 97, ESMA observes that there is no requirement for NCAs to publish all prospectuses approved. ESMA considers it important to distinguish between the obligations of issuers, offerors and persons asking for admission to trading and the obligations of NCAs in this regard. According to PD Article 14(4), NCAs may choose between publishing all prospectuses approved or a list of such together with hyperlinks. As the obligation for issuers, offerors and persons asking for admission to trading to publish the prospectus is a stand-alone obligation that exists independently of the obligation on NCAs, ESMA considers that it is not unreasonable to require that issuers, offerors and persons asking for admission

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<sup>3</sup> The remaining two respondents to the question did not assess whether costs would or would not rise.

to trading provide a hyperlink to the prospectus published according to one of the general methods set out in PD Article 14(2).

102. Taking into account the arguments put forward by market participants concerning the effective neutralisation of the options contained in PD Article 14(2)(d) and (e), and taking into account the changes made to new Article 6(4) of the draft RTS to facilitate the use of filters, ESMA has decided to withdraw the proposal that issuers be obliged to maintain a hyperlink to the published prospectus for a period of 12 months. The proposed Article 9 of the draft RTS is therefore deleted.

### 3.3.7 Publication of information incorporated by reference

**Question 20: Do you agree that all information incorporated by reference in a prospectus should be published electronically? If not, please state your reasoning.**

**Question 21: Would issuers, offerors or persons asking for admission to trading incur costs if required to publish all information incorporated by reference electronically? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

103. 16 responses were provided to this question of which 13 were in full support of ESMA's proposal while three provided comments on the proposed Article 11(2) of the draft RTS.
104. Firstly, it was observed that the wording of this provision needed amending as there was a small, but significant difference between the phrase "the webpage on which each document containing information incorporated by reference is published" from the draft RTS and the phrase "to each webpage on which documents containing information incorporated by reference are published" in paragraph 149 of the CP. According to the former, all documents containing information incorporated by reference should be published on one and the same webpage while according to the latter, such documents could be published on different webpages. However, it was remarked that neither of these interpretations should be followed as simply allowing a reference to a webpage would not sufficiently protect investors as such a webpage could include hundreds of publications and as such be confusing to investors. Instead it was suggested that the prospectus should be required to contain hyperlinks directly to all documents containing information incorporated by reference. Conversely, another respondent opined that no hyperlinks whatsoever should be required as this would make issuers, offerors and persons asking for admission to trading liable for their functioning. Thirdly, one respondent observed that the draft RTS were in general overly detailed and should not require the inclusion of hyperlinks.
105. Providing their views on whether the proposed Article 11 of the draft RTS would impose additional costs on issuers, offerors and persons asking for admission to trading, nine respondents observed that this would not or to a very small extent be the case while three respondents observed that additional costs could be expected. One of these

commented that the level of additional costs would depend on whether the obligation to provide hyperlinks was abolished while two others observed that it would depend on whether the RTS was going to allow general hyperlinks to a webpage as opposed to requiring hyperlinks directly into the document containing information incorporated by reference.

### **ESMA's response**

106. ESMA welcomes the broad support for the requirement to electronically publish information incorporated by reference and acknowledges that there is a small but important difference between the wording provided in the CP and that of the draft RTS. ESMA's intention was not to require that all information incorporated into a prospectus by reference be published on the same website but simply that all such information be electronically published. It is considered, however, that the requirement to publish documents incorporated by reference already exists on the basis of Article 14(5) PD. The original Article 11(1) has therefore been deleted and the text of Article 11(2) has been inserted as new Article 6(2) regarding publication in electronic form.
107. As concerns the argument that only direct hyperlinks to electronically published information should be allowed, ESMA considers that the webpage on which information incorporated by reference is electronically published should contain a limited number of documents such that the information is easily identifiable and accessible, thereby preserving investor protection.
108. In terms of costs, ESMA observes that respondents seem to agree that the proposal should not impose significant new burdens on issuers, offerors or persons asking for admission to trading.
109. On the basis of these considerations and the ones presented in the previous sections, the proposed Article 5 and the proposed Article 11(2) of the draft RTS have been amalgamated into new Article 6 in the following manner:

*"1. When published in electronic form pursuant to points (c), (d) or (e) of Article 14(2) of Directive 2003/71/EC, the prospectus, whether a single document or comprising several documents, shall:*

*(a) be easily accessible when entering the website;*

*(b) be in searchable electronic format that cannot be modified;*

*(c) not contain hyperlinks with the exception of links to the electronic addresses where information incorporated by reference is available;;*

*(d) be downloadable and printable.*

2. *Where a prospectus containing information incorporated by reference is published in electronic form, it shall include hyperlinks to each document containing information incorporated by reference or to each webpage on which that document is published.*

3. *If a prospectus for offer of securities to the public is made available on the websites of issuers or financial intermediaries or of regulated markets, these shall take measures to avoid targeting residents in Member States or third countries where the offer of securities to the public does not take place, such as the insertion of a disclaimer as to who are the addressees of the offer.*

4. *Access to the prospectus published in electronic form shall not be subject to:*

*(a) completion of a registration process;*

*(b) acceptance of a disclaimer limiting legal liability;*

*(c) payment of a fee.”*

### 3.4 Draft RTS on advertisements

110. The following section summarises responses received to questions 22-28 regarding advertisements and provides ESMA’s feedback to such responses.

#### 3.4.1 Provisions concerning dissemination of advertisements

**Question 22: Do you consider that there are additional means of dissemination of advertisements not covered by the four categories above? If yes, please specify.**

**Question 23: Do you agree that advertisements which contain inaccurate or misleading information should be amended in the manner proposed? If not, please provide your reasoning.**

**Question 24: Will the suggested rule impose costs on the issuer, offeror or person asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

111. Thirteen responses were received to question 22. While five respondents considered that all forms of advertising were captured by the categories, others suggested that the list of categories should be as open and flexible as possible. Certain respondents questioned the need for the categories at all and suggested that if they were to be kept in the final draft, their purpose should be clarified.

112. Of those who responded to question 23, a number pointed out that the proposed approach was not consistent with Article 16(1) of the PD which required a supplement only in the case of a “*material* mistake or inaccuracy ...which is capable of affecting the assessment of the securities”. Respondents considered that the requirements for

advertisements should not be stricter than those requirements which apply to the prospectus. Other respondents supporting the proposal considered that it was correct that the amended advertisement should make reference to the original advertisement and specify the differences between the two.

113. Regarding the obligation to publish an amended advertisement, one respondent pointed out that it is not possible to ensure that those clients who took note of the first advertisement will also see the amended advertisement. The respondent considered that it was a matter of coincidence whether the new advertisement actually fulfils the purpose of the proposal.
114. Some respondents considered that an advertisement that is correct at the time of publication but later becomes incorrect due to the passage of time should not need to be amended in the manner proposed if it is clear that the advertisement is prepared as of a certain date. It was further suggested by a number of respondents that the timeframe within which there is an obligation to amend, and the time within which the amendment must be made, should be specified. Correlating with the offer period was suggested as an appropriate time in which the obligation should apply. Being obliged to amend an advertisement after the period for being obliged to supplement the prospectus has expired was considered illogical.
115. All those who responded to question 24 considered that the proposal would result in some costs to the issuer. While some of those acknowledged that monitoring of the accuracy of advertisements is good practice, it was observed that the implementation of a mechanism to ensure the preparation and dissemination of an amendment would result in further costs. The costs for dissemination of an amended advertisement were described as the same costs incurred for the dissemination of the initial advertisement.
116. A number of respondents considered that incurring such costs would only be justifiable where the original advertisement was materially misleading or inaccurate to the extent that it would have affected an investor's investment decision. The cost of amending and circulating an advertisement was estimated at between €300 and several thousand euros.

### ***ESMA's response***

117. Regarding the high level categorisation of advertisements contained in the proposed Article 12(1) of the draft RTS, ESMA has taken note of the responses to the consultation which questioned the necessity to classify advertisements into one of the four categories. The categories were identified in order to future proof the replacement of the provisions currently set out in Article 34 of the PR. In addition, it was considered necessary to distinguish between advertisements of an oral nature, which characteristically are more fleeting, and those which can be reduced to a more permanent or durable form. In light of the comments received regarding the lack of added value of this provision, and in particular the concerns expressed regarding orally disseminated advertisements, ESMA has decided to delete the proposed Article 12(1).

118. ESMA has taken on board the comments regarding the proposed requirement in Article 12(2) (new Article 11(1)-(3)) of the draft RTS to amend advertisements which are misleading or inaccurate by revising the requirement to amend an advertisement and bringing it in line with that contained in Article 16(1) of the PD. It was not the intention of the original proposal to set a higher benchmark for advertisements than the one that exists for prospectuses, nor to elevate advertisements to the level of prospectuses as regards their centrality to the investment decision. ESMA does, however, consider that where a prospectus has been supplemented due to the fact that a significant new factor, material mistake or inaccuracy has arisen or been noted, and this significant new factor, material mistake or inaccuracy renders the contents of an advertisement inaccurate or misleading, the advertisement should be amended. ESMA has therefore amended its proposal along these lines.
119. While there is no guarantee that persons who saw the original advertisement will necessarily see the amended advertisement, ESMA considers that the subsequent advertisement should make reference to the fact that the original advertisement has been the subject of an amendment and the nature of that amendment should be specified. Furthermore, ESMA considers that mandating dissemination of the amended advertisement by at least the same means as the original advertisement was disseminated offers the best possibility of reaching the original audience.
120. In terms of the timing concerns summarised in paragraph 114, ESMA considers that such are resolved by the linking of the requirement to amend an advertisement to the publication of a supplement. An amended advertisement, specifying the amendment and outlining the changes, should be disseminated as soon as practicable following the discovery of the inaccuracy or misleading nature of the original advertisement. The obligation to amend should not apply after the closing of the offer or the admission to trading, whichever occurs later.
121. As regards the potential cost implications of having to amend an advertisement, and in line with the responses received, ESMA considers that the proposal is proportionate to the extent that, given the changes made to the prospectus, the original advertisement has become misleading or inaccurate such that it could affect an investor's investment decision.
122. On that basis, Article 12 (now Article 11) has been amended as follows:
- “1. Where an advertisement relating to an offer to the public or an admission to trading on a regulated market has been disseminated, and a supplement to the prospectus is subsequently published, due to the arising or noting of a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus, an amended advertisement shall be disseminated if the significant new factor, material mistake or inaccuracy relating to the information included in the prospectus renders the contents of the previously disseminated advertisement inaccurate or misleading.*”

2. An amended advertisement shall make reference to the previous advertisement, specify that the previous advertisement has been amended due to it containing inaccurate or misleading information and specify the differences between the two versions of the advertisement.

3. An amended advertisement shall be disseminated without undue delay following the publication of the supplement. With the exception of orally disseminated advertisements, an amended advertisement shall be disseminated, at a minimum, through the same means as the original advertisement

The obligation to amend an advertisement shall not apply after the final closing of the offer to the public or after the time when trading on a regulated market begins, whichever occurs later.

4. Where no prospectus is required in accordance with Directive 2003/71/EC, any advertisement shall include a warning to that effect unless the issuer, offeror or person asking for admission to trading on a regulated market chooses to publish a prospectus which complies with Directive 2003/71/EC, Regulation (EC) No 809/2004 and this Regulation.”

#### 3.4.2 Provisions laid down in Article 15(4)

**Question 25: Do you agree with the requirements suggested for Article 13(1) of the draft RTS? If not, please provide your reasoning.**

**Question 26: Do you believe that the inclusion of numerical performance measures in information disclosed about the offer or admission to trading, which are not contained in the prospectus, should be prohibited?**

**Question 27: Do you agree that the issuer, offeror or person asking for admission to trading should be obliged to provide the investor with the information disclosed in durable format, free of charge, upon his request? If not, please provide your reasoning.**

**Question 28: Will the proposed provision impose costs on the issuer, offeror or person asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

123. Sixteen responses were received to the question concerning the requirements of Article 13(1) of the draft RTS, the majority of whom were opposed to the proposal in the form presented. Many of those responding highlighted that advertisements are designed to direct investors to the prospectus, the contents of which should form the basis of the investment decision. Furthermore, they expressed the view that it is not the purpose of an advertisement to provide all, or even a material part of, the information an investor needs to assess the investment opportunity.

124. Respondents opposed to the proposal pointed out that Article 15 PD already sets out the principle that advertisements should not be misleading or inaccurate and considered that advertisements should not be required to include all the information that might be included in a prospectus.
125. In particular, respondents considered that the provision regarding the omission should be deleted due to practical impossibility. In their opinion, issuers should be free to omit information from advertisements so long as the advertisement still complies with the principle that it not be inaccurate or misleading. It was further suggested that an omission should only be prohibited if it would cause the information disclosed in the advertisement to mislead in a material respect and if read together with the prospectus. In the opinion of one respondent, omitting in advertising material information that is contained in the prospectus should only be prohibited if it involves material facts or circumstances that could affect the assessment of the securities and thus the investor's decision to invest and endanger investor protection.
126. One respondent considered that the proposed Article 13(1)(3), stating that an advertisement must not "omit information contained in the prospectus, if such omission could cause the information disclosed about the offer to the public or admission to trading to be misleading" could be dangerous and unnecessary. The danger, in their view, centred on the fact that advertisements, by their nature, are designed merely to encourage others to consider the full information relating to the offer (the prospectus).
127. As regards numerical performance measures, there was support from a number of respondents that these should be prohibited outside of the prospectus if they are likely to give an impression of the investment which differs from that resulting from the information contained in the prospectus.
128. The blanket restriction on the use of numerical performance measures was considered too burdensome by many respondents, citing examples of roadshows and analyst presentations as being particularly problematic (particularly where the information was over three years old and therefore not included in the prospectus). Others considered that if the numerical performance measure disclosed was central to the investment decision, it would be required to be included in the prospectus anyway.
129. Issues regarding timing were also raised in this context. One respondent commented that certain numerical data that may be regarded as useful for an advertisement may only have arisen after the prospectus has been prepared, and it would have been effectively impossible to include it when the prospectus was being prepared. The practical difficulties for issuers were also highlighted, especially where there is a significant time gap between the date of the advertisement and the date of the prospectus (e.g. where information in an advertisement is superseded by more relevant information, the issuer would be obliged to include the out of date information in the prospectus). This could result in investors being bombarded by information that is unnecessary for their investment decision and could potentially be confusing.



130. One respondent added that, in its opinion, ESMA cannot prohibit the disclosure of any numerical performance measure which is not contained in the prospectus because its mandate is limited to developing standards which avoid inconsistent and contradictory information. In its opinion, ESMA's mandate is to ensure consistent harmonisation in relation to PD Article 15 on advertisements, and does not include information disclosed for other purposes.
131. ESMA was also asked to clarify whether the provision on numerical performance measures related solely to the issuer or the financial instrument being offered or for which admission to trading is being sought.
132. As regards the proposed retention requirements for advertisements, the responses to this question were mixed, with some respondents strongly opposed to the proposal particularly as regards its application to information disseminated in oral form. Respondents supporting the proposal, notably those from the investor community, suggested that the duration for which there is an obligation to keep and provide the information should be extended to five years.
133. From those opposed to the proposal, a number of respondents pointed out the inherent incompleteness of advertisements. In their view, an advertisement should only serve as a means to initially raise investor awareness of the offer and is not suitable and not meant to form the basis for an investment decision. Respondents cautioned that requiring that advertisements be made available in a durable format raises investors' attention to an inappropriate level and gives the impression that they are meant to work as an actual information document and quasi prospectus. They added that the prospectus should be the basis for any investment decision and having to record and retain everything else that has been said about the offer is unduly burdensome and derogates from that principle. Encouraging investors to rely on advertisements could foster a misconception as to their purpose and detract emphasis that should be placed on the prospectus. This would be of no added value and would not relieve investors of their duty to familiarise themselves with the prospectus.
134. The information obligations for issuers and offerors listed were considered by some respondents to be extremely comprehensive and to not in any way be connected to advertisements, possibly going beyond the scope of the requirements set out in the PD.
135. One respondent suggested that if Article 13(3) were to be maintained, a more proportionate approach would be to limit the time period during which issuers are required to maintain a copy of the information and during which investors have the right to request a copy of it to the period up to the time that the public offer ends.
136. It was also suggested that while the information should be maintained by the issuer, offeror or person asking for admission to trading in a way specified in the first sentence of Article 13(3), and in Article 13(4)-(5) of the draft RTS, so NCAs could effectively perform their monitoring tasks, the second sentence in Article 13(3) is superfluous and unnecessary. The respondent considered that execution of the obligation to provide

copies of advertisements in durable format to investors would be too burdensome and costly for issuers, as in practice every investor would be authorised to require the issuer to send him a durable copy of all the information disclosed in all the advertisements specified in Article 12(1) of the draft RTS, including all the amendments specified in Article 12(2). The benefit to investors was seen to be minimal as, if the information was required for an informed investment decision, it would have been included in the prospectus.

137. As regards costs, most respondents to this question considered that it was difficult to quantify the costs associated with complying with the obligations contained in Article 13. Some respondents considered that the proposals would result in increased administrative burdens and high on-going compliance costs due to documentation of every discussion and conversation linked to the offer or admission to trading of securities. Costs may also be incurred by having to ensure that information would have to be presented with the same prominence. The relative costs to SMEs were also highlighted by a number of respondents. Should issuers choose to outsource the retention of information and processing of requests this would also incur costs on behalf of the issuer.

#### ***ESMA's response***

138. While acknowledging that the principle that advertisements shall not be misleading or inaccurate is already set out in Article 15(4), ESMA must also acknowledge that the co-legislators have seen fit to mandate ESMA to develop regulatory technical standards to specify the provisions of that article.
139. ESMA agrees that the purpose of an advertisement is not to provide all, or a material part of, the information that an investor needs to assess an investment opportunity and that the prominence of advertisements should not be elevated to a level commensurate with that of the prospectus. This was acknowledged in paragraph 185 of the CP.
140. ESMA considers that its mandate extends beyond simply advertisements. The rationale for this is that Article 15(4) PD specifically mentions the disclosure of information concerning the offer to the public or the admission to trading even if not for advertising purposes.
141. In drafting Article 13(1) (now Article 12, first paragraph) of the draft RTS, ESMA's intention was to elaborate on what can be considered inconsistent with the information contained in the prospectus ESMA reiterates its position set out in paragraphs 177-178 of the CP which stated that information circulated about an offer to the public or an admission to trading outside of the prospectus should not contradict information contained in the prospectus or refer to information which contradicts information included in the prospectus.
142. It was not ESMA's intention, through the inclusion of the proposal regarding omissions in Article 13(1)(3) of the draft RTS, to suggest that advertisements should include all information that is included in a prospectus. Furthermore, ESMA acknowledges the

practical difficulties in complying with the requirement as proposed in the draft RTS. The original proposal, as mentioned in paragraph 179 of the CP, was designed to prevent a distorted or biased image of the investment being circulated. This proposal, together with the provision contained in Article 13(2) of the draft RTS, was drafted to ensure a level of balance in the information being circulated outside of the prospectus. ESMA considers that the proposal ensures consistency with the prospectus but, in light of the concerns raised, has simplified the proposal. Both provisions have now been combined in the first paragraph of Article 12 and the language amended to clarify the requirement for balance in advertisements.

143. In terms of the proposal regarding numerical performance measures, ESMA has taken on board both the positive responses received and the concerns expressed by some market participants regarding its proposal. ESMA has therefore narrowed its proposal to only cover performance measures which are financial measures of historical or future financial performance, financial position, or cash flows, other than financial measures defined in the applicable financial reporting framework. These have been redefined as “alternative performance measures” and an explanation of such is now included in Article 12 for the purposes of that article. ESMA considers it important to state that these relate to the performance of the issuer and not the securities which are the subject of the offer or the admission to trading.
144. Regarding concerns raised about having to include non-relevant information in the prospectus as a result of previous disclosures outside of the prospectus document, ESMA considers that issuers can update advertisements, or other information disclosed outside of the prospectus, to ensure consistency with the prospectus. As regards the use of alternative performance measures in analyst presentations and roadshows, ESMA considers that for the most part, the performance measures highlighted in these fora concern the period that is covered by the prospectus. Where updated performance measures arise following the publication of the prospectus and prior to the closing of the offer or admission to trading, and these are considered material, the general principles contained in Article 16 of the PD apply regarding the obligation to supplement. Only in cases where it is necessary to publish a supplement will consideration have to be given to aligning other information disclosed outside of the prospectus to ensure consistency.
145. As regards investor access to information disclosed outside of the prospectus, ESMA takes note of the concerns expressed by respondents regarding the essentially incomplete nature of advertisements and that such should not be relied upon in terms of the investment decision. As such, ESMA considers that given the retention costs to issuers (in particular SMEs), and that prospectuses are publicly available documents, it would be inappropriate to maintain the retention provision. ESMA also acknowledges that the requirement to maintain copies of scripts used for orally disseminated information could be problematic. Given the more onerous obligations proposed for information disclosed in written form, ESMA furthermore considers that an unintended consequence of the differing requirements contained in the proposal could result in a move to increased oral dissemination of information which was not the intention when

the proposal was drafted. ESMA has therefore decided to delete Article 13(3)-(5) of its original proposal.

146. On the basis of the considerations in this section, ESMA has amended Article 13 (now Article 12) of the draft RTS which now has the following wording:

*“Information disclosed in an oral or written form about the offer to the public or admission to trading on a regulated market, whether for advertisement or other purposes, shall not:*

*(a) contradict the information contained in the prospectus;*

*(b) refer to information which contradicts that contained in the prospectus;*

*(c) present a materially unbalanced view of the information contained in the prospectus, including by way of omission or presentation of negative aspects of such information with less prominence than the positive aspects;*

*(d) contain alternative performance measures concerning the issuer, unless such are contained in the prospectus.*

*For the purposes of points (a)-(d), information contained in the prospectus shall consist of information included in the prospectus, if already published, or information to be included in the prospectus, if the prospectus is published at a later date.*

*For the purposes of point (d), alternative performance measures shall consist of performance measures which are financial measures of historical or future financial performance, financial position, or cash flows, other than financial measures defined in the applicable financial reporting framework.”*

## Annex I: List of questions

- Question 1: Is there any information that should be added or removed from the list in the proposed Article 2(2)?
- Question 2: Do you believe that the requirement to submit all versions of the prospectus at a minimum in searchable electronic format will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 3: Do you consider that there are any other aspects of the approval process that should be dealt with by the RTS?
- Question 4: Do you agree that the three abovementioned documents constitute the documents which comply with the requirement of being approved or filed in accordance with the Prospectus Directive and from which information can be incorporated by reference? If not, please provide your reasoning.
- Question 5: Do you believe that specifying the documents which are considered approved or filed in accordance with the Prospectus Directive as proposed in paragraph 87 will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 6: Do you agree that the abovementioned information constitutes the information which complies with the requirement of being filed in accordance with the TD? If not, please provide your reasoning.
- Question 7: Do you believe that specifying the information which is considered filed in accordance with the TD as proposed in paragraph 92 will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 8: Do you consider that there are any other documents that could meet the criteria of being “simultaneously published” from which information could be incorporated by reference?
- Question 9: Do you agree that it is sufficiently clear from PD Article 14 that the issuer, offeror or person asking for admission to trading can delegate the task of publication but not the responsibility? If not, please state your reasoning.
- Question 10: Do you agree that the obligation to publish the prospectus electronically should also apply to the publication of final terms? If not, please provide your reasoning.
- Question 11: Do you agree that the method for publishing final terms should be the same as the method used for publication of the base prospectus? If not, please state your reasoning.

- Question 12: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provisions were to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 13: Do you consider there are any other impediments to a prospectus being considered available to the public?
- Question 14: Do you agree that the obligation to make the prospectus available to the public free of charge also applies to prospectuses that are published electronically? If not, please provide your reasoning.
- Question 15: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provision was to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 16: Do you believe the proposed measures will enhance the accessibility of electronically published prospectuses? If not, please provide reasoning and/or alternative measures.
- Question 17: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provision was to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 18: Do you agree that the issuer, offeror or person asking for admission to trading should be required to ensure that the hyperlink is active for a minimum period of 12 months?
- Question 19: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provision was to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 20: Do you agree that all information incorporated by reference in a prospectus should be electronically published? If not, please state your reasoning.
- Question 21: Would issuers, offerors or persons asking for admission to trading incur costs if required to publish all information incorporated by reference electronically? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 22: Do you consider that there are additional means of dissemination of advertisements not covered by the four categories above? If yes, please specify.
- Question 23: Do you agree that advertisements which contain inaccurate or misleading information should be amended in the manner proposed? If not, please provide your reasoning.

- Question 24: Will the suggested rule impose costs on the issuer, offeror or person asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.
- Question 25: Do you agree with the requirements suggested for Article 13(1) of the RTS? If not, please provide your reasoning.
- Question 26: Do you believe that the inclusion of numerical performance measures in information disclosed about the offer or admission to trading, which are not contained in the prospectus, should be prohibited?
- Question 27: Do you agree that the issuer, offeror or person asking for admission to trading should be obliged to provide the investor with the information disclosed in durable format, free of charge, upon his request? If not, please provide your reasoning.
- Question 28: Will the proposed provision impose costs on the issuer, offeror or person asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.

## **Annex II: Legislative mandate to develop draft RTS**

### *Mandate for ESMA to develop draft RTS in general*

Article 10(1) of Regulation (EU) No 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 No 716/2009/EC and repealing Commission Decision 2009/77/EC:

“Where the European Parliament and the Council delegate power to the Commission to adopt regulatory technical standards by means of delegated acts under Article 290 TFEU in order to ensure consistent harmonisation in the areas specifically set out in the legislative acts referred to in Article 1(2), the Authority may develop draft regulatory technical standards.”

### *Mandate for ESMA to develop draft RTS on approval*

Article 1(3) of Directive 2014/51/EU:

“In order to ensure consistent harmonisation in relation to the approval of prospectuses, ESMA shall develop draft regulatory technical standards to specify the procedures for the approval of the prospectus and the conditions in accordance with which time limits may be adjusted.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 July 2015.”

### *Mandate for ESMA to develop draft RTS on incorporation by reference*

Article 1(2) of Directive 2014/51/EU:

“In order to ensure consistent harmonisation in relation to this Article, ESMA shall develop draft regulatory technical standards to specify the information to be incorporated by reference.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 July 2015.”

### *Mandate for ESMA to develop draft RTS on publication*

Article 1(4) of Directive 2014/51/EU:

“In order to ensure consistent harmonisation in relation to this Article, ESMA shall develop draft regulatory technical standards to specify the provisions relating to the publication of the prospectus in paragraphs 1 to 4.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 July 2015.”



*Mandate for ESMA to develop draft RTS on advertisements*

Article 1(5) of Directive 2014/51/EU:

“In order to ensure consistent harmonisation in relation to this Article, ESMA shall develop draft regulatory technical standards to specify the provisions concerning the dissemination of advertisements announcing the intention to offer securities to the public or the admission to trading on a regulated market, in particular before the prospectus has been made available to the public or before the opening of the subscription, and specify the provisions laid down in paragraph 4.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 July 2015.”

## Annex III: Cost-benefit analysis

### I. Introduction

#### *Background*

1. This CBA has been developed in order to assist in the drafting of the RTS which the Omnibus II Directive mandates ESMA to submit to the Commission. The Omnibus II Directive empowers ESMA to draw up draft RTS specifying:
  - i. the procedures for the approval of the prospectus and the conditions in accordance with which time limits may be adjusted;
  - ii. the information to be incorporated by reference;
  - iii. the provisions relating to the publication of the prospectus in PD Article 14, paragraphs 1 to 4; and,
  - iv. the provisions concerning the dissemination of advertisements announcing the intention to offer securities to the public or admission to trading on a regulated market, in particular before the prospectus has been made available to the public or before the opening of the subscription, and the provisions laid down in PD Article 15, paragraph 4.
2. The objective of the mandates given to ESMA is to ensure harmonisation in relation to the four abovementioned topics. This fits into the larger purpose of the PD to harmonise requirements for the drawing up, approval and distribution of prospectuses (PD Article 1(1)). Harmonisation of such requirements ensures investor protection by guaranteeing that all prospectuses, wherever in the EU they are issued, provide information that allows investors to make an informed assessment of the investment they are contemplating, thereby making it easier for companies to raise capital throughout the EU. Additionally, harmonised requirements relieve companies from having to know and comply with different rules in the different EU Member States they operate in.

#### *Nature of the CBA*

3. ESMA has drawn up the CBA internally with contributions from NCAs in order to benefit from their experience in the four areas covered by the draft RTS. Compared to the CBA included in the Consultation Paper (ref. ESMA/2014/1186), the present version of the CBA has been updated in light of responses received by the end of the consultation period.
4. The CBA includes all provisions which ESMA consulted upon, even where such have not been kept in the final draft RTS. Where ESMA has changed or removed provisions proposed in the Consultation Paper, this is clarified following the assessment of costs and benefits associated with such provisions.
5. In the Consultation Paper, ESMA asked respondents to quantify the impact of its proposals, however, very little quantitative feedback was received and therefore the

CBA is largely qualitative in nature. The qualitative nature of the CBA is also due to the fact that ESMA is of the belief that the suggested draft RTS will not impose substantial costs on either NCAs, issuers, offerors or persons asking for admission to trading or other stakeholders (mainly investors). The reasons are explained in the sections below.

6. The provisions which are directly transferred from the Prospectus Regulation – Article 6(1) and (3), Articles 8, 9 and 10 and Article 11(4) of the draft RTS – are not addressed in the CBA. As equivalent provisions are already in force, these draft RTS will not lead to incremental costs or benefits.

*Contents*

7. The CBA is structured as follows:
  - Section II analyses the proposed measures in response to the mandates on approval of the prospectus and adjustment of time limits;
  - Section III analyses the approach taken to the mandate on incorporation by reference;
  - Section IV analyses the suggested provisions relating to the mandate on publication of the prospectus; and
  - Section V analyses the proposed measures in relation to the mandate on dissemination of advertisements and consistency between the prospectus and information disclosed outside the prospectus.

**II. Analysis of proposed measures regarding approval**

**II.i Articles 2-5 on specification of the iterative review process**

8. These articles of the draft RTS have been drawn up in response to the first part of the mandate on approval which empowers ESMA to specify procedures for prospectus approval. According to the mandate, the goal of the draft RTS is to ensure consistent harmonisation in relation to the approval of prospectuses. With this in mind, Articles 2 to 4 lay down the requirements which, in the different stages of the iterative review process, should apply to issuers, offerors and persons asking for admission to trading on a regulated market whereas Article 5 sets out requirements to NCAs during the course of the prospectus review process.

Policy objective	Clarifying the various stages of the iterative review process to ensure a harmonised procedure across Member States
Option 1	Specifying obligations on the part of the issuer, offeror or person asking for admission to trading, on the one hand, and the NCA reviewing the prospectus, on the other.

<b>Articles 2-5 on specification of the iterative review process</b>	
	Qualitative description
<i>Benefits</i>	<p>A harmonisation of supporting documents required by NCAs ensures not only clarity for market participants but also minimises unnecessary delays in the prospectus approval process.</p> <p>Requiring NCAs to acknowledge receipt of the initial application for prospectus approval and to provide a reference number and the relevant contact point assures the issuer, offeror or person asking for admission to trading that their application is being processed and eases their further contact with the NCA.</p> <p>The possibility for the NCA to provide the reasons for which it considers the prospectus to be incomplete, including inconsistent or incomprehensible, orally in exceptional circumstances facilitates a rapid turn-around of the prospectus when timing is crucial.</p> <p>Submission of draft prospectuses in searchable electronic format which show changes made since the previous submission and which provide explanations as to how the incompleteness notified by the NCA has been addressed can ensure a smoother and faster approval process and can reduce the need for subsequent submissions of prospectuses due to such incompleteness being addressed in an unclear or inadequate manner.</p> <p>Respondents to the consultation highlighted that facilitation of “page pulls” would ensure a flexible and less costly review process.</p> <p>Allowing NCAs to terminate the review process in cases where drafting of the prospectus is clearly not progressing enables NCAs to put their resources to efficient use. Requiring NCAs to provide reasoning for any such decision ensures protection of the interests of the issuer, offeror or person asking for admission to trading.</p>
<i>Costs to regulator</i>	<p><i>On-going</i></p> <p>NCAs may experience very small on-going costs from the obligation to acknowledge receipt of the application for approval.</p>
<i>Compliance costs</i>	<p><i>One-off</i></p> <p>Issuers, offerors and persons asking for admission to trading may incur very small one-off costs if they are unfamiliar with the procedure of marking changes made to documents.</p> <p><i>On-going</i></p> <p>Furthermore, the right of NCAs to terminate the review process in certain situations may impose costs on issuers, offerors and persons asking for admission to trading should they decide to resubmit their application for</p>

	<p>approval as they may have to pay associated fees.</p> <p>Respondents to the consultation indicated that the requirement to submit all versions of the draft prospectus in searchable electronic format would incur little or no additional costs. It was also commented that the requirement to provide a written confirmation that all changes made to previous submissions of the draft prospectus were visible would be burdensome for issuers, offerors and persons asking for admission to trading to comply with. Respondents furthermore observed that it would imply an unnecessary effort to require that the cross reference list be updated and submitted along with the final draft prospectus.</p>
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9. Based on feedback from respondents to the consultation, ESMA has decided not to retain the requirement that a written confirmation that all changes made to a previously submitted draft prospectuses are shown be provided. Furthermore, the cross reference list is not required to be submitted along with the final draft of the prospectus. To facilitate a flexible review process and avoid incurring unnecessary burdens on issuers, offerors and persons asking for admission to trading, ESMA has additionally allowed for the submission of “page pulls” in its final draft RTS.

**II.ii Specification of conditions in accordance with which time limits may be adjusted**

10. The second part of the mandate on approval empowers ESMA to specify the conditions in accordance with which time limits may be adjusted. “Time limits” is a reference to the deadlines within which an NCA must notify the issuer, offeror or person asking for admission to trading of its decision regarding approval; these deadlines are set out in PD Article 13(2), (3) and (4).
11. The general purpose of the mandate on approval is to ensure harmonisation in relation to prospectus approval. The specific objective of specifying conditions for adjusting time limits would seem to be 1) to clarify that in certain situations, NCAs are entitled to extend/obliged to reduce time limits, and 2) to make sure that such extensions/reductions are carried out in a uniform way across Member States.
12. ESMA has considered how to fulfil this objective and has come to the conclusion that it is preferable to refrain from responding to this part of the approval mandate. The reasoning for this decision is set out in the sections below where two options (Option 1: responding to the mandate, Option 2: refraining from responding to the mandate) are described and the costs and benefits of each analysed.

<b>Policy objective</b>	1) Clarifying that NCAs are entitled to extend/obliged to reduce time limits for approval in certain situations, and 2) ensuring that such extensions/reductions are harmonised across the EU.
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<b>Option 1</b>	Specifying conditions in accordance with which time limits may be extended/reduced.
<b>Option 2</b>	Refraining from responding to the mandate.
<b>Preferred option</b>	<p>Option 2</p> <p>Refraining from responding to the mandate is the preferred way forward due to substantial difficulties connected with specifying the conditions under which time limits may be adjusted. First of all, the time limits would remain set at Level 1 while at the same time being specified in Level 2 which would create a situation of legal uncertainty as regards which time limits were authoritative. Secondly, and even more importantly, ESMA is only empowered to specify the conditions under which time limits may be adjusted but not the actually adjusted time limits. Drawing up draft RTS on this basis would thus not enhance harmonisation because each NCA would be able to define the time limit to be applied in the situations specified by ESMA. The provisions would therefore be more or less empty as they would not enhance harmonisation and furthermore provide nothing by way of clarification to market participants regarding the time frame within which they could expect prospectuses to be approved.</p> <p>As such, the main reason for selecting Option 2 is not the benefits connected with this option but rather the practical/legal difficulties connected with Option 1. The below analysis of each of the two options therefore cannot in itself explain ESMA's choice as this is primarily related to the practical/legal shortcomings of Option 1 and not simply based on the costs and benefits connected with it.</p>

<b>Option 1: Specifying conditions in accordance with which time limits shall be extended/reduced</b>	
	Qualitative description
<i>Benefits</i>	<p>An extension of time limits in certain situations could be useful to NCAs, allowing them more time to sufficiently review prospectuses of a particularly complex nature.</p> <p>A reduction of time limits in certain situations could benefit issuers, offerors and persons asking for admission to trading as prospectuses would be approved faster, thereby easing access to capital markets.</p> <p>One respondent suggested that costs and predictability could be improved if the draft RTS provided that time limits may be adjusted (prolonged) only once at the beginning of the approval process, when the NCA may ask for</p>

	missing documents or supplementary information.
<i>Costs to regulator</i>	<p><i>On-going</i></p> <p>If conditions for reducing time limits were to be specified, this could put NCAs under excessive time pressure and necessitate them to assign additional resources to prospectus review. The assignment of additional resources to the prospectus review function may entail additional costs to regulators.</p>
<i>Compliance costs</i>	<p><i>On-going</i></p> <p>If conditions for extending time limits were to be specified, this could impose costs on issuers, offerors and persons asking for admission to trading on a regulated market, given that they would have to wait longer for prospectuses to be approved in some situations.</p>
<i>Costs to other stakeholders</i>	<p>If conditions for reducing time limits were to be specified, this could put NCAs under excessive time pressure which could result in less comprehensive scrutiny and lapses in the approval process, thereby endangering investor protection.</p> <p>Should NCAs have to increase resources to facilitate shorter time limits, this may impact on any prospectus approval fees that are levied on market participants.</p>
<i>Indirect costs</i>	<p>Possible legal uncertainty because of a contradiction between time limits set in Level 1 (PD Article 13) and in the RTS.</p> <p>Promotion of non-harmonised application of time limits because it is not possible within the mandate to specify the actual new time limits, only the conditions under which time limits may be extended/reduced; it would therefore be up to the individual NCA to decide on the 'size' of the extension/reduction.</p>

<b>Option 2: Refraining from responding to the mandate</b>	
	Qualitative description
<i>Benefits</i>	By refraining from responding to the mandate, ESMA effectively preserves the status quo so this option would not provide any new benefits compared to the current situation. As clarified above, ESMA has chosen this option because it avoids the problems connected with Option 1 rather than because it provides distinct benefits.
<i>Costs to</i>	<i>One-off</i>

<i>regulator</i>	No change from current situation. <i>On-going</i> No change from current situation.
<i>Compliance costs</i>	<i>One-off</i> No change from current situation. <i>On-going</i> No change from current situation.

13. Following the consultation, ESMA has maintained its decision not to respond to the part of the approval mandate that concerns adjustment of time limits.

### III. Analysis of proposed measures regarding incorporation by reference

14. The Consultation Paper proposed to respond to the mandate on incorporation by reference with the objective of ensuring consistent application of rules regarding incorporation by reference, thereby providing a level playing field for issuers, offerors and persons asking for admission to trading and mitigating the risk of regulatory arbitrage.

Policy objective	Clarifying the information which can be incorporated into a prospectus by reference so as to ensure a level playing field across Member States and removing the risk of regulatory arbitrage
Option 1	Establishing an exhaustive list of information which can be incorporated by reference

Article 4 on information which may be incorporated by reference		
	Qualitative description	Quantitative description
<i>Benefits</i>	Specifying an exhaustive list of information which may be incorporated by reference would create clarity for market participants and mitigate the possibility of regulatory arbitrage.	
<i>Costs to regulator</i>	<i>One-off</i> As some NCAs have practices that facilitate incorporation by reference of a wider collection of information,	



	these may incur small one-off costs if required to change their practices (training staff in applying new rules, informing market participants etc.).	
<i>Compliance costs</i>	<p><i>On-going</i></p> <p>Issuers, offerors and persons asking for admission to trading applying for approval of a prospectus in a Member State which previously permitted wider incorporation by reference may experience on-going costs stemming from the reduced access to incorporation by reference according to the new rules.</p> <p>Respondents to the consultation advised that restrictions on the issuer's ability to incorporate documents by reference could cause significant additional costs (e.g. to auditors, lawyers and legal counsel as well as costs of printing longer prospectuses).</p>	<p><i>On-going</i></p> <p>One respondent commented that an inability to incorporate a filed, but not approved, registration document by reference could incur additional legal costs of €20.000-40.000 plus taxes for each new prospectus as well as additional €3.000-15.000 plus taxes for each new supplement.</p>

15. Respondents were largely opposed to ESMA's proposed Article 4. On this basis, and in light of the European Commission's plans of a Capital Markets Union and the objective to facilitate access to capital markets, ESMA has decided not to include provisions regarding specifying information to be incorporated by reference in the draft RTS. ESMA has, however, encouraged the European Commission to revisit the issue of incorporation by reference in its response to the consultation on the review of the Prospectus Directive.

#### **IV. Analysis of proposed measures regarding publication**

##### **IV.i Article 6(2) on publication of information incorporated by reference, Article 6(4) on access to the published prospectus and Article 7 on publication of final terms**

16. These provisions are drawn up in response to the mandate for ESMA to specify the provisions relating to the publication of the prospectus set out in Article 14(1), (2), (3) and (4) of the PD. As with the other mandates, the objective is harmonisation and ESMA has pursued this goal by detailing which measures issuers, offerors and persons asking for admission to trading may use when publishing the prospectus.

Policy objective	Specifying the ways in which the prospectus can be published in accordance with PD Article 14(1)-(4)
Option 1	Laying down rules for publication of all constituent parts of the prospectus and specifying the boundaries for limiting access to an electronically published prospectus

<b>Article 6(2) on publication of information incorporated by reference, Article 6(4) on access to the published prospectus and Article 7 on publication of final terms</b>	
	Qualitative description
<i>Benefits</i>	<p>The obligation to include hyperlinks in the prospectus to information incorporated by reference ensures that investors are able to find such information as easily as possible.</p> <p>A prohibition from requiring investors to go through a registration process, accepting a disclaimer or paying a fee to gain access to the prospectus ensures that prospectuses are easily available. The prohibition from requiring investors to accept a disclaimer furthermore ensures investor protection as investors should not be obliged to waive legal rights to gain access to the prospectus.</p> <p>Allowing the issuer, financial intermediary or regulated market to use an existing website, including the website of the group, to publish the prospectus minimises the administrative burden on such entities.</p> <p>Electronic publication provides investors with fast and easy access to the information contained in a prospectus and final terms. Therefore, in line with provisions in Level 1, all constituent parts of the prospectus should be electronically published. Continuing to allow publication of final terms by a method other than that used for the corresponding base prospectus ensures flexibility for issuers, offerors and persons asking for admission to trading in terms of the methods provided for in PD Article 14(2)(c)-(e).</p>
<i>Costs to regulator</i>	<p><i>On-going</i></p> <p>Possible enforcement costs from prohibition of registration processes which restrict access to the prospectus published in electronic form.</p>
<i>Compliance costs</i>	<p><i>On-going</i></p> <p>Compliance costs may vary depending on the medium of publication used by the issuer, offeror or person asking for admission to trading.</p> <p>Most respondents confirmed that the obligation to publish final terms electronically should result in negligible or no additional costs.</p>

	A small number of respondents believed that there would be an increase in IT related costs, however, they were unable to quantify these.
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17. Based on responses to its Consultation Paper, ESMA has clarified in new Article 6(4) that only disclaimers limiting legal liability should be prohibited. Furthermore, the proposed Article 5(5) allowing for the prospectus to be published on the website of the group has not been retained in the final draft RTS as respondents raised a number of concerns with this provision and were not clear how it would function in practice. While ESMA originally proposed requiring final terms to be published by the same method as that used for the corresponding base prospectus, this was changed based on responses to the consultation. The draft RTS now reiterates the current wording of Article 33 of the Prospectus Regulation and captures the requirement to publish final terms electronically in Recital 7.

#### IV.ii Article 9 on the provision of a hyperlink to the published prospectus

18. ESMA drew up Article 9 specifically to elaborate on PD Article 14(4) which obliges NCAs to publish either all prospectuses approved or a list of such along with hyperlinks to the actually published prospectus. Currently, it is unclear how NCAs are to comply with the obligation to publish hyperlinks to approved prospectuses when they decide to publish a list of prospectuses. To address this lack of clarity, ESMA proposed that, when the NCA selects to publish a list of approved prospectuses, the issuer, offeror or person asking for admission to trading should be obliged to provide the NCA with a hyperlink to the published prospectus. The general practice is already for issuers, offerors or persons asking for admission to trading to provide such hyperlinks, but ESMA considered it useful to establish this as an explicit obligation. This would also permit a specification of the time period in which the hyperlink must be functional.

Policy objective	Creating clarity around the obligation for NCAs to publish a list of all approved prospectuses along with hyperlinks to such
Option 1	Requiring the issuer, offeror or person asking for admission to trading to provide the NCA with a hyperlink to the published prospectuses when the NCA selects not to publish the entirety of approved prospectuses as such

<b>Article 9 on the provision of a hyperlink to the published prospectus</b>	
	Qualitative description
<i>Benefits</i>	As prospectuses are generally valid for a period of 12 months, it is important to clarify that electronic access via the website of the NCA should be provided for the same period of time.

<p><i>Costs to regulator</i></p>	<p><i>On-going</i></p> <p>NCA's may experience on-going costs arising from their obligation to ensure that the issuer or the regulated market adheres to their obligation of keeping the hyperlink functional for at least 12 months. However, the requirement for NCA's to publish a hyperlink to the published prospectus when a list of prospectuses is published under PD Article 14(4) is already in force, so in principle such costs should not be new to NCA's.</p>
<p><i>Compliance costs</i></p>	<p><i>On-going</i></p> <p>Given that all prospectuses must be published electronically, it should not imply additional costs for the issuer or the regulated market to provide the NCA with a hyperlink to the published prospectus. On the other hand, it may not be customary to publish the prospectus for at least 12 months and, as such, this requirement may impose on-going costs on issuers and regulated markets. However, such costs should be negligible as the resources required to extend the publication period for a document which has already been drawn up and published are likely to be minimal.</p>

19. Based on feedback to the consultation which did not mainly relate to costs (see paragraphs 93-99 of the Final Report), ESMA has decided not to retain the proposed Article 9 of the draft RTS.

## V. Analysis of proposed measures regarding advertisements

### V.i Article 11(1), 11(2) and 11(3) on dissemination of advertisements

20. These provisions have been proposed in response to the first part of the mandate on advertisements which empowers ESMA to specify the provisions concerning dissemination of advertisements. ESMA has responded to this part of the mandate by drawing up provisions preventing the circulation of inaccurate or misleading information in cases where a supplement to the prospectus has been published.

<p>Policy objective</p>	<p>Clarifying the rules regarding dissemination of advertisements to prevent such from being inaccurate or misleading</p>
<p>Option 1</p>	<p>Requiring that an amended advertisement be disseminated where a previously disseminated advertisement has become inaccurate or misleading</p>

### Article 12(1), 12(2) and 12(3) on dissemination of advertisements

	Qualitative description	Quantitative description
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<p><i>Benefits</i></p>	<p>Where a new factor, material mistake or inaccuracy has necessitated that a supplement to the prospectus be published, the requirement that it be assessed whether it is necessary to amend a previously disseminated advertisement ensures that investors are not presented with a wrongful picture of a given investment through an advertisement.</p>	
<p><i>Costs to regulator</i></p>	<p><i>On-going</i> Likely to be of minimal significance.</p>	
<p><i>Compliance costs</i></p>	<p><i>On-going</i> It is possible that costs will be connected with amending advertisements containing inaccurate or misleading information. Such costs would however indicate that persons responsible for advertisements at the moment do not amend advertisements when discovering inaccurate or misleading information which would be a direct breach of PD Article 15(3). Therefore, the incremental cost arising from this RTS is negligible.</p> <p>Two respondents commented that disseminating an amended advertisement would incur the same costs that were connected with disseminating the original advertisement.</p>	<p>One respondent observed that it was difficult to quantify costs connected with disseminating an amended advertisement, however, publishing an advertisement in a financial newspaper could cost from €300 to tens of thousands of euros.</p>

21. Based on reasoning not primarily linked to costs, ESMA has changed the wording of Article 11 in the final draft RTS so that it is now linked to the situation where a supplement to the prospectus has been published (see paragraphs 117-122 of the Final Report).

**V.ii Article 12 on consistency between the prospectus and information disclosed about the offer to the public or admission to trading on a regulated market**

22. Article 12 is drafted to fulfil the second part of the mandate on advertisements which requires ESMA to specify the provisions laid down in PD Article 15(4). PD Article 15(4) requires that all information concerning an offer to the public or admission to trading on a regulated market disclosed outside of the prospectus, whether in oral or written form, shall be consistent with the information in the prospectus. ESMA has pursued this objective by drawing up provisions which clarify how the consistency between information in the prospectus and information circulated outside the prospectus can be ensured.

Policy objective	Ensuring that no information is disclosed about an offer to the public or admission to trading on a regulated market outside the prospectus which conflicts with the information in the prospectus to ensure that investors are not presented with diverging information
Option 1	Setting out detailed provisions regulating information about the offer to the public or admission to trading being disclosed outside the prospectus

<b>Article 12 on consistency between the prospectus and information disclosed about the offer to the public or admission to trading on a regulated market</b>	
	Qualitative description
<i>Benefits</i>	<p>It is important to specify that information circulated about an offer to the public or an admission to trading outside of the prospectus should not contradict information in the prospectus, refer to information which contradicts information in the prospectus or omit information contained in the prospectus if such an omission causes a misleading picture of the offer/admission to trading at hand because the prospectus is the authoritative source of information concerning such offer or admission to trading.</p> <p>Dissemination of alternative performance measures which are not contained in the prospectus should be avoided because such measures are a powerful means to create a certain impression of an offer/admission to trading, and therefore only measures reviewed and approved by the NCA should be allowed.</p> <p>When information disclosed about an offer to the public or admission to trading contains statements regarding the negative aspects of that offer or admission to trading, such statements should be presented with the same prominence as other parts of the information. This prevents the person responsible for the information from concealing statements on the negative aspects of the offer/admission to trading from the attention of investors.</p> <p>The requirement that information disclosed be retained and a copy provided</p>

	<p>on request to investors addressed by the information in question facilitates a thorough examination of the consistency of the information with the content of the prospectus by investors.</p>
<p><i>Compliance costs</i></p>	<p><i>One-off</i></p> <p>Persons responsible for the disclosure of information may incur a cost from establishing a system for retaining such information if such a system is not already in place. However, these costs are likely to be small.</p> <p><i>On-going</i></p> <p>Such persons may additionally sustain costs from the operation of such a retention system. Again, these costs are likely to be very small.</p> <p>Minor costs may also be incurred in responding to requests for copies of the information retained.</p> <p>Respondents to the consultation observed that the requirement to ensure that negative elements of information disclosed outside the prospectus are presented with the same prominence as positive elements could incur costs. Furthermore, it could cause administrative burdens and high on-going compliance costs to make sure that all information disclosed about an offer or admission to trading is documented.</p>

23. Based on consultation responses related both to costs and practical considerations (see paragraphs 123-146 of the Final Report), ESMA has decided to remove the provisions regarding retention of advertisements and the right of investors to request such advertisements from the final draft RTS. Furthermore, the prohibition to omit information from information disclosed outside the prospectus has been reworded.



## **Annex IV: SMSG opinion**





## ADVICE TO ESMA

### Response to ESMA's Consultation Paper on Draft Regulatory Technical Standards on prospectus related issues under the Omnibus II Directive

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#### I. Executive summary

*The Omnibus II Directive introduced some important changes to the Prospectus Directive with the aim of further harmonisation in relation to prospectuses, their approval and publication, and to dissemination of advertisements. To achieve those goals, ESMA has been mandated to draft Regulatory Technical Standards (RTS) as part of assisting the European Commission with its advice. To this end ESMA has published a Consultation Paper on Draft Regulatory Technical Standards on prospectus related issues under the Omnibus II Directive.*

*One of the main tasks of the Securities Markets Stakeholder Group (SMSG) is to provide high level advice to ESMA, facilitating the preparation of all standards and proposals of delegated acts. The SMSG therefore has focused on ESMA's approach of building a harmonised rulebook on prospectuses. In addition the SMSG has prepared answers for a few selected questions which can influence high-level matters.*

*While preparing answers for the questions selected under the above conditions, the SMSG took special care to ensure appropriate regulation with the aim of achieving an efficient and orderly functioning of the financial markets, with equilibrium sought between investor protection and more stringent requirements levied on issuers.*

*Although the SMSG in principle supports almost all of ESMA's proposals, the SMSG has tried to highlight those areas where different interpretations could result from the current wording of such proposals, with the aim of helping to achieve better clarity of wording. In some cases the SMSG proposes smaller modifications and/or alternative wordings with the aim of building a strong and unified market across the EU, with the highest possible level of protection of both issuers and investors.*

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#### II. Explanatory remarks

1. Directive 2014/51/EU (the 'Omnibus II Directive') was published in the Official Journal of the European Union on 22 May 2014 and entered into force on 23 May 2014. The Omnibus II Directive requires ESMA to submit draft Regulatory Technical Standards ('RTS') in relation to four topics in Directive 2003/71/EC (the 'Prospectus Directive' or 'PD'): prospectus approval, incorporation by reference, prospectus publication and dissemination of advertisements.
2. On 25 September 2014, ESMA published its Consultation Paper on Draft Regulatory Technical Standards on prospectus related issues under the Omnibus II Directive, with four topics specified:



- Approval of the prospectus
    - Incorporation by reference
    - Publication of the prospectus
    - Dissemination of advertisements
3. Generally all the questions to the above topics may be split into two categories: (i) high-level/principles-based questions and (ii) technical questions. The main task of the Securities and Markets Stakeholder Group (SMSG) is to provide advice on high-level topics, leaving more technical and detailed questions to be dealt with by other, more technically oriented consultative groups. Taking this into account, the SMSG has concentrated its work on the first category, i.e. the principles-based questions, and has addressed only those technical questions which could influence high-level issues.

### III. Draft RTS on approval

#### Procedures for approval (CP, Section III.ii.i)

**Q1. Is there any information that should be added or removed from the list in the proposed Article 2(2)?**

4. The SMSG is of the opinion that nothing should be changed in the list proposed in Article 2(2). Indeed, generally ESMA's mandate is to develop draft RTS to specify procedures for the approval of prospectuses, which would appear to call for harmonisation of different NCA's approval practices, rather than requiring additional obligations to be placed on issuers, which could be rather costly for them and should thus be avoided if they are not considered necessary for investor protection. The proposed list is already quite extensive and complete, so there is no need to add or remove anything from there.
5. Nevertheless, one improvement is proposed by the SMSG which would render Article 2(2)(6) of the draft RTS to be more in line with Article 13(4) of the Prospectus Directive, which provides the competent authority with a possibility of asking for supplementary information, when it is based on reasonable grounds. The improved Article 2(2)(6) should go as follows: "(6) any other information necessary for the review by the competent authority of the home Member State and expressly required **on reasonable grounds** by the competent authority for that purpose."

**Q2. Do you believe that the requirement to submit all versions of the prospectus at a minimum in searchable electronic format will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

6. The SMSG cannot find any reason why submitting all versions of the prospectus at a minimum in searchable electronic format would impose any additional cost on issuers, offerors or other persons. Nowadays we are all using computers and the internet and there is no problem with producing a pdf file in such a format, at no cost at all. On the contrary, submitting prospectus in a searchable electronic format only could even result in lowering the costs, if the NCA would decide not to require also the printed version, but only require the electronic version, as costs of printing and delivering the paper version would then disappear.

**Q3. Do you consider that there are any other aspects of the approval process that should be dealt with by the RTS?**

7. The SMSG expresses some concern on requiring issuers to provide written statements confirming that they have complied with their obligations under the RTS (see RTS Article 2(4) and 2(7)), as it imposes an additional and unnecessary administrative as well as cost burden. This is particularly so if an NCA requires a signed written statement from the issuer, as any senior person representing the issuer is likely to need to obtain legal advice before signing such written statement.

**Adjustment of time limits (CP, Section III.ii.ii)**

8. ESMA explained in details (and as summarised in paragraph 68, p. 19 of the CP) why no draft RTS is proposed regarding the conditions in accordance with which time limits may be adjusted. However Article 13(7) of the Prospectus Directive (PD) amended by the Omnibus II Directive requires ESMA to specify such conditions in the draft RTS.
9. The SMSG recognises and states the importance, also for the issuer, of a transparent and predictable process in getting the prospectus approved within an envisaged time-frame (and cost). We do note with satisfaction that this is how it currently works in a number of Member States, so the further consolidation of these best practices within the EU is welcome.
10. Nevertheless, the SMSG would also like to point out that there are cases where after receiving a draft prospectus, questions are sent to the issuer to submit some missing documents or to provide some supplementary information, according to Article 13(4) of PD. In fact, this often results in an adjustment of time limits, as these are then counted only from the date on which such requested information is provided by the issuer. Sometimes such a procedure is repeated (even several times) and in practice time limits are adjusted (prolonged) again. This may create an uncertainty about the real time limits.
11. Therefore a draft RTS could be prepared on a time adjustment, which would state that time limits may be adjusted (prolonged) only once, at the beginning of the approval process, when the NCA may ask for missing documents or supplementary information. Such a list of missing documents or information specified by the NCA should be complete enough to allow the issuer to supplement the draft prospectus in one step, and no additional request for missing documents or information should be forwarded to the issuer after the first reply. If, after such additional submission of documents, some documents or information would still be missing, NCA could notify the issuer that the draft prospectus could not be approved as it remains incomplete. Such a statement in a draft RTS would result in a more disciplined procedure of applying time limits specified in the PD.

**IV. Draft RTS on incorporation by reference**

**Content of draft RTS (CP, Section IV.ii)**

**Condition i: “filed or approved in accordance with the Prospectus Directive” (CP, Section IV.ii.i)**

- Q4. Do you agree that the three abovementioned documents constitute the documents which comply with the requirement of being approved or filed in accordance with**

**the Prospectus Directive and from which information can be incorporated by reference? If not, please provide your reasoning.**

12. The SMSG agrees with ESMA's interpretation of which documents could be defined as being filed or approved in accordance with the Prospectus Directive. The key point is that the prospectus must be set out in an easily analysable and comprehensible form (PD, Article 5(1)). On the other hand setting out all the information in full in a prospectus is burdensome for issuers. Therefore incorporation of information by reference is a reasonable solution, but such documents should be **readily** available to investors, and not only "available" (but not filed), as it is stressed in CP, para 80. The list specified in CP, para 87, is consistent with that principle.

**Q5. Do you believe that specifying the documents which are considered approved or filed in accordance with the Prospectus Directive as proposed in paragraph 87 will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

13. The SMSG does not see any reason why incorporation by reference of documents specified above could impose any cost on issuers, offerors or persons asking for admission to trading. If those documents are already published or approved and/or filed in accordance with the PD, they are easily accessible to the public and as such may be incorporated by reference at no cost.

**Condition ii: "filed in accordance with the Transparency Directive" (CP, Section IV.ii.ii)**

**Q6. Do you agree that the abovementioned information constitutes the information which complies with the requirement of being filed in accordance with the TD? If not, please provide your reasoning.**

14. The SMSG generally agrees that the information specified in Article 4(5) of the draft RTS constitutes the information which complies with the requirement of being filed in accordance with the TD. However the list is closed and does not for example allow for incorporating by reference annual and half-yearly reports of an issuer of debt securities with a denomination of €100,000 or more, as specified in para 92 bullet points 2-3 of the CP. The SMSG is of the opinion that the approach explained in para 88-91 of the CP is much too restrictive and, as a consequence, an indirect distinction is made between issuers of debt securities with a high denomination and those with a low denomination, as the RTS as currently worded will place more onerous obligations on issuers of debt securities with a minimum denomination of €100,000.
15. This is because the proposed regime would require issuers who issue only debt securities with high denominations to set out their financial statements in the prospectus, whereas issuers of securities with low denominations would be able to incorporate them by reference. Incorporation by reference is a useful tool for issuers as this alleviates the heavy administrative and cost burdens associated with having to set out information in full in the prospectus document as such. Placing heavier burdens on issuers that issue high denomination debt securities only is an unexpected, and undesirable, result. Even more so as buyers of such high denomination securities would typically be sophisticated investors fully capable of tracing information incorporated by reference.
16. The exhaustive list of documents proposed by ESMA in RTS Article 4 does not allow enough flexibility for NCAs and issuers to be able to determine how best to meet the requirement that a prospectus be in an easily analysable and comprehensible form under PD Article 5.1, in light of the specific circumstances of the offer. Therefore this might not result in prospectuses that are more easily analysable and comprehensible by investors. The restrictive approach also cuts across

other fundamental aspects of the Level 1 regime by imposing significant burdens on issuers, and in particular on issuers who make filings in third countries and under domestic legislation which might also be relevant to investors elsewhere in the EEA.

17. Another explanation is necessary in relation to Article 4(7) of the draft RTS, as in the list some documents (such as by-laws and minutes of shareholder meetings) are not mentioned directly, however the text does include a reference to information provided under the laws, regulations and administrative provisions of a Member State adopted in accordance with Article 3(1) of Directive 2004/109/EC (TD – Transparency Directive). According to the regulations of some Member States, issuers must publish on their website their by-laws and all the amendments to them, and also the minutes of shareholder meetings. The SMSG would like to be sure that the wording of Article 4(7) is clear enough to allow a listed issuer to incorporate by reference these company documents among the ones that can be so incorporated.
  18. By way of derogation from Article 3(1) of the TD, Article 3(1a) of the TD allows Member States to require issuers to publish additional periodic financial information on a more frequent basis than the annual financial reports and the half-yearly financial reports, where specific conditions are met. If a given Member State has used such a derogation, such additional reports have to be filed in accordance with the TD, and as such they should be allowed to be incorporated by reference. Therefore the SMSG is of the opinion that in Article 4(5) of the draft RTS, after point (iii) a new point (iiia) should be added: “(iiia) additional periodic financial information disclosed in accordance with Article 3(1a) of Directive 2004/109/EC”.
  19. A clarification is also needed with regard to the possibility of incorporating by reference documents that are regarded by the competent authority as being equivalent to the prospectus itself, and which thus have to be available according to art. 4(2)(c)-(d) of the PD.
- Q7. Do you believe that specifying the information which is considered filed in accordance with the TD as proposed in paragraph 92 will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**
20. The restrictive approach taken by ESMA (in para 88-91 of the CP) to incorporation by reference will impose significant cost and administrative burdens on issuers that are no longer able to incorporate financial or other information into their prospectuses by reference (like issuers that issue high denomination debt securities only). This is because a team of lawyers and auditors will be required to check that the information set out in the prospectus exactly matches the original document. For financial information running to several hundred pages, that will be a very time consuming and expensive exercise.

## V. Draft RTS on publication

### Content of draft RTS (CP, Section V.ii)

#### Provisions regarding websites used for the purpose of electronic publication

**Q16. Do you believe the proposed measures will enhance the accessibility of electronically published prospectuses? If not, please provide reasoning and/or alternative measures.**

21. The SMSG believes the proposed measures will enhance the accessibility of electronically published prospectuses, however one additional condition has to be fulfilled. A prospectus should be accessible on the website at a minimum in searchable electronic format, rather than as a scanned version of a previously printed document. Sometimes the quality and legibility of scanned versions are very weak, so while accessible in theory, these are not readable in practice.

**Q17. Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provisions were to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

22. It should be noted that the draft RTS might require some issuers to establish a new website in order to comply with their obligations under the RTS (for example, if the relevant regulated market or NCA website ceases to make prospectuses “easily available” in accordance with the RTS). This could have significant and practical consequences, particularly for issuers that do not have their own websites.

#### Publication of a list of approved prospectuses by the home NCA under PD Article 14(4)

**Q18. Do you agree that the issuer, offeror or person asking for admission to trading should be required to ensure that the hyperlink is active for a minimum period of 12 months?**

23. A practical matter/question arises as a consequence of ESMA's advice on both having documents included in the prospectus via reference and hyperlinks (which procedure the SMSG is generally supportive of) and of the fact that the prospectus should remain available for 12 months. If documents are included by reference and thus by link, care should be taken, in the case of subsequent update of the referenced document, that the link still goes to the version existing at the time the prospectus was published and not to the latest version (of e.g. financial statements, articles of association etc.) published on the website. If possible, and where relevant, the referenced “static” document could note that a more updated version of the document in question now exists and is available under another section on the issuer's website.

#### Publication of information incorporated by reference

**Q20. Do you agree that all information incorporated by reference in a prospectus should be published electronically? If not, please state your reasoning.**

24. The SMSG agrees with that requirement. However wording of Article 11(2) of the draft RTS should be improved as it is not precise enough. As it is written in the draft it means that a prospectus containing information incorporated by reference shall include either:

- \* a) hyperlinks to each document containing information incorporated by reference

or:

- b) hyperlinks to the webpage on which each document containing information incorporated by reference is published.

25. There is a small difference between the wording of the sentence above (*to the webpage on which each document is published*) and the wording in para 149 of the CP (*to each webpage on which documents are published*). The meaning of both versions is not the same, so there is doubt how it should be interpreted exactly.
26. But this is not the only problem with that second condition specified in Article 11(2) of the draft RTS, because it means that it would be enough to include a hyperlink to the webpage, on which several other documents could also be published. As it often happens, on one webpage hundreds of documents may be published and it may be very difficult to spot that one document that contains information incorporated by reference. It would be not enough to include a general hyperlink to such a webpage, but a direct link should be included to each document containing such information.
27. Therefore the SMSG is of the opinion that Article 11(2) should be limited to the first part only and should be worded as follows: **“2. A prospectus containing information incorporated by reference shall include hyperlinks to each document containing information incorporated by reference.”**
28. Such a wording is consistent with the deliberations contained in para 144-149 of the CP, whether all such documents would be accessible on the same website or on different webpages, as it does not specify the number or location of those websites/webpages. If it is still not clear enough, another sentence may be added specifying that the documents containing information incorporated by reference may be accessible on the same website or on different webpages. But each and every hyperlink should lead directly to each respective document, and not indirectly to the specific website/webpage only.

## VI. Draft RTS on advertisements

### Content of draft RTS (CP, Section VI.ii)

#### Provisions concerning dissemination of advertisements (CP, Section VI.ii.i)

**Q23. Do you agree that advertisements which contain inaccurate or misleading information should be amended in the manner proposed? If not, please provide your reasoning.**

29. The answer to this question should be based on requirement set on supplements to the prospectus, specified in Article 16(1) of the PD. Not every mistake or inaccuracy, but only **material** mistakes or inaccuracies should be mentioned in a supplement to the prospectus. The same should be applied to advertisements – only a material inaccuracy in an advertisement should be under such a requirement. A requirement for amending any and all advertisements which comprise inaccurate or misleading information (even if only a small and unimportant inaccuracy) would go beyond the provisions of Article 16 of the PD. Being required to update all advertisements that comprise inaccurate or misleading information would impose high cost on

issuers without assuring that the respective update comes to the attention of the entitled addressees. Therefore Article 12(2) of the draft RTS should be amended appropriately.

### **Provisions laid down in Article 15(4) (CP, Section VI.ii.ii)**

#### **Q25. Do you agree with the requirements suggested for Article 13(1) of the draft RTS? If not, please provide your reasoning.**

30. While generally in agreement with what is being suggested the SMSG would, for the avoidance of doubt, just like to point out that the wording “whether for advertisement or **other purposes**” in Article 13(1) of the draft RTS should not be interpreted as including the analyst presentations typically made to institutional investors in advance of the actual publication of the prospectus as an introduction to the issuer. The unintended consequence could otherwise be that also these analyst presentations, which could run to several hundred pages, would need to be published as being deemed to be included in the prospectus due to the fact that the prospectus is published afterwards (Article 13(6) of the draft RTS).
31. Similarly, in relation to Article 7 of the draft RTS, and while acknowledging the fact that Article 14(3) of the PD does state that a home Member State may require publication of a notice stating how the prospectus has been made available and where it can be obtained by the public, this should not be interpreted as also requiring what are commonly referred to as “Tombstones” to be published at the expense of the issuer.

### **Investor access to information disclosed outside of the prospectus**

#### **Q27. Do you agree that the issuer, offeror or person asking for admission to trading should be obliged to provide the investor with the information disclosed in durable format, free of charge, upon his request? If not, please provide your reasoning.**

#### **Q28. Will the proposed provision impose costs on the issuer, offeror or person asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.**

32. According to Article 15(5) of the PD, only material information provided by an issuer or an offeror and addressed to qualified investors or special categories of investors, including information disclosed in the context of meetings relating to offers of securities, shall be disclosed to all qualified investors or special categories of investors to whom the offer is exclusively addressed – when no prospectus is required, or, where a prospectus is required to be published such information shall be included in the prospectus or in a supplement to the prospectus.
33. There is no other requirement in Article 15 of the PD to make information disseminated in advertisements accessible to all investors, so there is no ground for ESMA to put such an obligation on issuers. Moreover it is the task of NCAs, and not of investors, to monitor whether issuers are fulfilling all the requirements specified in law, and there is no ground in the PD to delegate such a task to investors.
34. Of course some investors might be interested in thoroughly examining and comparing the consistency of such information with the more complete information contained in the prospectus, as it is specified in para 185 of the CP, but the SMSG is of the opinion that requiring issuers, offerors or persons asking for admission to trading to facilitate this would be much too far-



reaching and going out of the scope of the requirements set in the PD. Such information should be maintained by the issuer, offeror or other person in a way specified in the first sentence of Article 13(3), and in Article 13(4)-(5) of the draft RTS, so NCAs could effectively perform their monitoring tasks, but the second sentence in Article 13(3) is superfluous and unnecessary.

35. Its execution would be too burdensome and costly for issuers, as in practice every investor would be authorised to require issuer to send him a durable copy of all the information disclosed in all the advertisements specified in Article 12(1) of the draft RTS, including all the amendments specified in Article 12(2). In addition there would be no additional benefit to investors as such information anyway needs to be consistent with the information contained in the prospectus, which – according to Article 5(1) of the PD – shall contain all the necessary information. It should also be noticed that according to Article 5(2)(b), the summary of the prospectus shall contain a warning that any decision to invest in the securities should be based on consideration of the prospectus as a whole by the investor.

Adopted on 16 January 2015

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Jesper Lau Hansen

Chair

Securities and Markets Stakeholder Group

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

## **Annex V: Draft Regulatory Technical Standards**

**Draft**

**COMMISSION DELEGATED REGULATION (EU) No .../..**

**of [...]**

**supplementing Directive 2003/71/EC of the European Parliament and of the Council with regard to regulatory technical standards for approval and publication of the prospectus and dissemination of advertisements and amending Commission Regulation (EC) No 809/2004**

**(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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>4</sup>, and in particular the third subparagraph of Article 13(7), the third subparagraph of Article 14(8) and the third subparagraph of Article 15(7) thereof,

Whereas:

- (1) Directive 2003/71/EC harmonised requirements for the drawing up, approval and distribution of prospectuses. In order to ensure consistent harmonisation and to take account of technical developments on financial markets, it is necessary to specify those requirements, in particular those regarding the approval process, the publication and the information disseminated about the offer or admission to trading besides the prospectus, including advertisements.
- (2) The process of prospectus review and approval is an iterative one, where the decision of the national competent authority to approve the prospectus involves repeated rounds of analysis and development of the draft prospectus on the part of the issuer, offeror or person asking for admission to trading on a regulated market to ensure that the prospectus meets the requirement of completeness, including the

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<sup>4</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).

consistency of the information given and its comprehensibility. In order to provide greater certainty about the approval process to issuers, offerors or persons asking for admission to trading, it is necessary to specify which documents should be provided to national competent authorities at different moments in the prospectus approval cycle.

- (3) A draft prospectus should always be submitted to the national competent authority in searchable electronic format and through electronic means acceptable to that authority. As searchable electronic format allows national competent authorities to search for specific terms or words in the prospectus, it facilitates faster scrutiny and contributes to an efficient and timely review process.
- (4) With the exception of the first draft prospectus, it is imperative that each draft of the prospectus submitted to the national competent authority clearly show changes made to the previously submitted draft and explain how such changes address any incompleteness notified by the national competent authority. Each submission of a draft prospectus to the national competent authority should include both a marked version, highlighting all changes to the previously submitted draft, and an unmarked version, where such changes are not highlighted.
- (5) Where disclosure items contained in the relevant annexes to Commission Regulation (EC) No 809/2004<sup>5</sup> are not applicable or, given the nature of the issue or issuer, are not relevant in the case of a specific prospectus, those disclosure items should be identified to the national competent authority in order to minimise any delays in the review process.
- (6) To ensure an efficient use of resources, where it becomes evident to the national competent authority that the issuer, offeror or person asking for admission to trading is not in a position to comply with the requirements of the prospectus regime, the national competent authority should have the right to terminate the review process without approving the prospectus.
- (7) Electronic publication of prospectuses, including final terms, ensures that investors are provided with fast and easy access to the information contained therein. Requiring investors to agree to a disclaimer limiting legal liability, pay a fee or go through a registration process to gain access to the prospectus impedes easy accessibility and should not be permitted. Filters warning in which jurisdictions an offer is being made and requiring investors to disclose their country of residence or indicate that they are not resident in a particular country or jurisdiction should not be considered as disclaimers limiting legal liability.
- (8) Advertisements relating to an offer to the public or an admission to trading can become inaccurate or misleading where a significant new factor, material mistake or inaccuracy relating to the information in the corresponding prospectus arises or is noted. Requirements should be established to ensure that when advertisements

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<sup>5</sup> Commission Regulation (EC) No 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 (OJ L 149, 30.4.2004, p. 1).

become inaccurate or misleading due to such a new factor, material mistake or inaccuracy, such advertisements are amended.

- (9) As the prospectus is the authoritative source of information about an offer to the public or an admission to trading, all information circulated about such offers and admissions to trading, whether for advertising or other purposes and whether in oral or written form, should be consistent with the information contained in the prospectus. This should be ensured by requiring that any information circulated does not contradict, or refer to information which contradicts, the contents of the prospectus. Moreover, the information circulated should be prohibited from presenting a materially unbalanced view of the information contained in the prospectus. Furthermore, as alternative performance measures can disproportionately influence the investment decision, information about an offer to the public or an admission to trading circulated outside the prospectus should not be permitted to contain such measures, if they are not contained in the prospectus.
- (10) Regulation (EC) No 809/2004 contains provisions regarding publication of the prospectus and dissemination of advertisements. To avoid duplication of requirements, certain provisions of Regulation (EC) No 809/2004 should be deleted.
- (11) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (12) In accordance with Article 10 of Regulation (EU) No 1095/2010<sup>6</sup> of the European Parliament and of the Council, ESMA has conducted open public consultations on such draft regulatory technical standards, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of that Regulation.

HAS ADOPTED THIS REGULATION:

## CHAPTER I GENERAL PROVISIONS AND APPROVAL OF THE PROSPECTUS

### *Article 1* *Subject matter*

This Regulation establishes regulatory technical standards that further specify:

- (1) the arrangements for approval of the prospectus as referred to in Article 13 of Directive 2003/71/EC;

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<sup>6</sup> Regulation (EU) No 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 No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- (2) the arrangements for publication of the prospectus laid down in Article 14(1) to (4) of Directive 2003/71/EC;
- (3) the dissemination of advertisements referred to in Article 15 of Directive 2003/71/EC;
- (4) the consistency between information disclosed about an offer to the public or admission to trading on a regulated market, on the one hand, and the information contained in the prospectus, on the other, as laid down in Article 15(4) of Directive 2003/71/EC.

## *Article 2*

### *Submission of an application for approval*

1. The issuer, offeror or person asking for admission to trading on a regulated market shall submit all drafts of the prospectus in searchable electronic format via electronic means to the competent authority. A contact point to which the competent authority can submit all notifications in writing, via electronic means, shall be specified when the first draft of the prospectus is submitted.

2. Along with the first draft of the prospectus submitted to the competent authority, or during the prospectus review process, the issuer, offeror or person asking for admission to trading on a regulated market shall also submit in searchable electronic format:

- (a) if required by the competent authority of the home Member State according to Article 25(4) of Regulation (EC) No 809/2004 or on their own initiative, a cross reference list which shall also identify any items from Annexes I to XXX to Regulation (EC) No 809/2004 that have not been included in the prospectus because, given the nature of the issuer, offeror or person asking for admission to trading or the securities being offered to the public or admitted to trading, they were not applicable.

Where the cross reference list is not submitted, and where the order of the items in the draft prospectus does not coincide with the order of the information provided for in the annexes to Regulation (EC) No 809/2004, the draft prospectus shall be annotated in the margin to identify which sections of the prospectus correspond to the relevant disclosure requirements. A prospectus which is annotated in the margin shall be accompanied by a document identifying any items contained in the relevant annexes to Regulation (EC) No 809/2004 that have not been included in the prospectus because they were not applicable, given the nature of the issuer, offeror or person asking for admission to trading or the securities being offered to the public or admitted to trading;

- (b) if the issuer, offeror or person asking for admission to trading on a regulated market is requesting the competent authority of the home Member State to authorise the

omission of information from the prospectus according to Article 8(2) of Directive 2003/71/EC, a reasoned request to that effect;

- (c) if the issuer, offeror or person asking for admission to trading on a regulated market wishes the competent authority of the home Member State to notify the competent authority of a host Member State, upon approval of the prospectus, with a certificate of approval according to Article 18(1) of Directive 2003/71/EC, a request to this effect;
- (d) any information which is incorporated by reference into the prospectus, unless such information has already been approved by or filed with the same competent authority in accordance with Article 11 of Directive 2003/71/EC;
- (e) any other information considered necessary, on reasonable grounds, for the review by the competent authority of the home Member State and expressly required by the competent authority for that purpose.

### *Article 3*

#### *Changes to the draft prospectus*

1. Following submission of the first draft of the prospectus to the competent authority of the home Member State, where the issuer, offeror or person asking for admission to trading on a regulated market submits subsequent drafts of the prospectus, the subsequent drafts shall be marked to highlight all changes made to the preceding unmarked draft of the prospectus as submitted to the competent authority. Where only limited changes are made, marked extracts of the draft prospectus, showing all changes from the preceding draft, shall be acceptable. An unmarked draft of the prospectus shall always be submitted along with the draft highlighting all changes made.

Where the issuer, offeror or person asking for admission to trading on a regulated market is unable to comply with the requirement set out in the first subparagraph due to technical difficulties related to the marking of the prospectus, each change made to the preceding draft of the prospectus shall be identified to the competent authority of the home Member State in writing.

2. Where the competent authority of the home Member State has, in accordance with Article 5(2) of this Regulation, notified the issuer, offeror or person asking for admission to trading on a regulated market that it considers that the draft prospectus does not meet the requirement of completeness, including consistency of the information given and its comprehensibility, the subsequently submitted draft of the prospectus shall be accompanied by an explanation as to how the incompleteness notified by the competent authority has been addressed.

Where changes made to a previously submitted draft prospectus are self-explanatory or clearly address the incompleteness notified by the competent authority, an indication of where the incompleteness has been addressed shall be considered sufficient.

#### *Article 4*

##### *Final submission*

With the exception of the cross reference list mentioned in Article 2(2)(a), submission of the final draft of the prospectus for approval shall be accompanied by any information mentioned in Article 2(2) which has changed since a previous submission. The final draft of the prospectus shall not be annotated in the margin.

Where no changes have been made to the previously submitted information mentioned in Article 2(2), the issuer, offeror or person asking for admission to trading on a regulated market shall not be required to resubmit such information. In those cases, the issuer, offeror or person asking for admission to trading on a regulated market shall confirm in writing that no changes have been made to the previously submitted information.

#### *Article 5*

##### *Receipt and processing of the application*

1. The competent authority of the home Member State shall acknowledge receipt of the initial application for approval of a prospectus in writing via electronic means as soon as possible and no later than by close of business on the second working day following the receipt. The acknowledgement shall inform the issuer, offeror or person asking for admission to trading on a regulated market of any reference number of the application for approval and of the contact point within the competent authority to which queries regarding the application may be addressed. The date of acknowledgement shall not affect the date of submission of the draft prospectus, within the meaning of Article 13(2) of Directive 2003/71/EC, from which the time limits for notifications commence.

2. Where the competent authority of the home Member State considers, on reasonable grounds, that the documents submitted to it are incomplete or that supplementary information is needed, for instance due to inconsistencies or incomprehensibility of certain information provided, it shall notify the issuer, offeror or person asking for admission to trading of the need for supplementary information and the reasons therefor, in writing, via electronic means.

3. Where the competent authority of the home Member State considers the incompleteness to be of a minor nature or timing to be of utmost importance, the competent authority may notify the issuer, offeror or person asking for admission to trading orally, in which case there will be no interruption of the time limits for approval of the prospectus as referred to in Article 13(4) of Directive 2003/71/EC..

4. Where the issuer, offeror or person asking for admission to trading on a regulated market is unable or unwilling to provide the supplementary information requested in accordance with paragraph 2, the competent authority of the home Member State shall be entitled to refuse the approval of the prospectus and terminate the review process.

5. At the outcome of the scrutiny process, the competent authority of the home Member State shall notify the issuer, offeror or person asking for admission to trading on a regulated market of its decision regarding the approval of the prospectus in writing, via electronic means, on the day of the decision. In the case of a refusal to approve the prospectus, the decision of the competent authority shall contain the reasons for such refusal.

## CHAPTER II PUBLICATION OF THE PROSPECTUS

### *Article 6*

#### *Publication of the prospectus in electronic form*

1. When published in electronic form pursuant to points (c), (d) or (e) of Article 14(2) of Directive 2003/71/EC, the prospectus, whether a single document or comprising several documents, shall:

- (a) be easily accessible when entering the website;
- (b) be in searchable electronic format that cannot be modified;
- (c) not contain hyperlinks with the exception of links to the electronic addresses where information incorporated by reference is available;
- (d) be downloadable and printable.

2. Where a prospectus containing information incorporated by reference is published in electronic form, it shall include hyperlinks to each document containing information incorporated by reference or to each webpage on which that document is published.

3. If a prospectus for offer of securities to the public is made available on the websites of issuers or financial intermediaries or of regulated markets, these shall take measures to avoid targeting residents in Member States or third countries where the offer of securities to the public does not take place, such as the insertion of a disclaimer as to who are the addressees of the offer.

4. Access to the prospectus published in electronic form shall not be subject to:



- (a) completion of a registration process;
- (b) acceptance of a disclaimer limiting legal liability;
- (c) payment of a fee.

#### *Article 7*

##### *Publication of final terms*

The publication method for final terms related to a base prospectus does not have to be the same as the one used for the base prospectus as long as the publication method used is one of the methods indicated in Article 14 of Directive 2003/71/EC.

#### *Article 8*

##### *Publication in newspapers*

1. In order to comply with point (a) of Article 14(2) of Directive 2003/71/EC the publication of a prospectus shall be made in a general or financial information newspaper having national or supra-regional scope.
2. If the competent authority is of the opinion that the newspaper chosen for publication does not comply with the requirements set out in paragraph 1, it shall determine a newspaper whose circulation is deemed appropriate for this purpose taking into account, in particular, the geographic area, number of inhabitants and reading habits in each Member State.

#### *Article 9*

##### *Publication of the notice*

1. If a Member State makes use of the option, referred to in Article 14(3) of Directive 2003/71/EC, to require the publication of a notice stating how the prospectus has been made available and where it can be obtained by the public, that notice shall be published in a newspaper that fulfils the requirements for publication of prospectuses according to Article 8 of this Regulation.

If the notice relates to a prospectus published only for the purpose of admission of securities to trading on a regulated market where securities of the same class are already admitted, it may alternatively be inserted in the gazette of that regulated market, irrespective of whether that gazette is in paper copy or electronic form.

2. The notice shall be published no later than the next working day following the date of publication of the prospectus pursuant to Article 14(1) of Directive 2003/71/EC.
3. The notice shall contain the following information:

- (a) the identification of the issuer;
- (b) the type, class and amount of the securities to be offered and/or in respect of which admission to trading is sought, provided that these elements are known at the time of the publication of the notice;
- (c) the intended time schedule of the offer/admission to trading;
- (d) a statement that a prospectus has been published and where it can be obtained;
- (e) the addresses where and the period of time during which a paper copy is available to the public;
- (f) its date.

#### *Article 10*

##### *List of approved prospectuses*

The list of the approved prospectuses published on the website of the competent authority, in accordance with Article 14(4) of Directive 2003/71/EC, shall mention how such prospectuses have been made available and where they can be obtained.

### CHAPTER III ADVERTISEMENTS

#### *Article 11*

##### *Dissemination of advertisements*

1. Where an advertisement relating to an offer to the public or an admission to trading on a regulated market has been disseminated, and a supplement to the prospectus is subsequently published, due to the arising or noting of a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus, an amended advertisement shall be disseminated if the significant new factor, material mistake or inaccuracy relating to the information included in the prospectus renders the contents of the previously disseminated advertisement inaccurate or misleading.

2. An amended advertisement shall make reference to the previous advertisement, specify that the previous advertisement has been amended due to it containing inaccurate or misleading information and specify the differences between the two versions of the advertisement.

3. An amended advertisement shall be disseminated without undue delay following the publication of the supplement. With the exception of orally disseminated advertisements, an amended advertisement shall be disseminated, at a minimum, through the same means as the original advertisement

The obligation to amend an advertisement shall not apply after the final closing of the offer to the public or after the time when trading on a regulated market begins, whichever occurs later.

4. Where no prospectus is required in accordance with Directive 2003/71/EC, any advertisement shall include a warning to that effect unless the issuer, offeror or person asking for admission to trading on a regulated market chooses to publish a prospectus which complies with Directive 2003/71/EC, Regulation (EC) No 809/2004 and this Regulation.

#### *Article 12*

#### *Consistency for the purposes of Article 15(4) of Directive 2003/71/EC*

Information disclosed in an oral or written form about the offer to the public or admission to trading on a regulated market, whether for advertisement or other purposes, shall not:

- (a) contradict the information contained in the prospectus;
- (b) refer to information which contradicts that contained in the prospectus;
- (c) present a materially unbalanced view of the information contained in the prospectus, including by way of omission or presentation of negative aspects of such information with less prominence than the positive aspects;
- (d) contain alternative performance measures concerning the issuer, unless such are contained in the prospectus.

For the purposes of points (a)-(d), information contained in the prospectus shall consist of information included in the prospectus, if already published, or information to be included in the prospectus, if the prospectus is published at a later date.

For the purposes of point (d), alternative performance measures shall consist of performance measures which are financial measures of historical or future financial performance, financial position, or cash flows, other than financial measures defined in the applicable financial reporting framework.

## CHAPTER IV FINAL PROVISIONS



*Article 13*

*Amendments to Regulation (EC) No 809/2004*

Regulation (EC) No 809/2004 is amended as follows:

- (1) In Article 1, paragraphs (5) and (6) are deleted;
- (2) Articles 29 to 34 are deleted.



*Article 14*

*Entry into force*

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [date]

*For the Commission*

*The President*

[name]