The Law Society

Response to the European Securities and Markets Authority Consultation Paper on Draft Regulatory Technical Standards on specific situations that require the publication of a supplement to the prospectus

June 2013

Introduction

This response has been prepared by the Listing Rules Joint Working Party of the Company Law Committees of the Law Society of England and Wales and the City of London Law Society.

The Law Society of England and Wales is the representative body of over 120,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representations to regulators and Government in both the domestic and European arena. This response has been prepared on behalf of the Law Society by members of the Company Law Committee.

The City of London Law Society (**CLLS**) represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees.

The Listing Rules Joint Working Party is made up of senior and specialist corporate lawyers from both the Law Society and the CLLS who have a particular focus on the Listing Rules (LR) and the UK Listing Regime.

We set out below our responses to the questions set out in Annex I of the Consultation Paper regarding the Draft Regulatory Technical Standards (RTS) on specific situations that require the publication of a supplement to the prospectus (the "**Consultation Paper**").

General comments

We have seen a draft response of the International Capital Market Association (ICMA) to the Consultation Paper and endorse its responses in respect of the Annex 1 questions concerning debt securities and its general remarks regarding the distinction between debt and equity securities. The responses set out in this paper set out the views of the Listing Rules Joint Working Party concerning the issues relating to equity securities only.

Annex 1 Questions

Q1: Do you agree that a supplement should include the disclosure requirements of the Prospectus Regulation relating to the triggering event and also any other objective consequences deriving from such an event which are capable of affecting the assessment of the relevant securities? If not, please provide the reasoning behind your position.

Whilst we accept that a supplement should include the disclosure requirements of the Prospectus Regulation relating to the triggering event, the RTS does not appear to provide that a supplement to the prospectus must disclose "*objective consequences*" of a triggering event.

Recital 2, however, does refer to Directive 2003/71/EC, which requires the supplement to the prospectus to mention every significant new factor, material mistake or inaccuracy relating to the information in the prospectus capable of affecting the assessment of the securities – and 'which arises or is noted' between

the time when the prospectus is approved and the later of the times of the final closing of the offer, or when trading on the regulated market commences. An obligation to set out any "objective consequences" would create an additional and unnecessary layer of complexity for issuers. We think that the issuer should only be required to disclose what it is required to under the disclosure requirements of the Prospectus Regulation, as is currently the case.

Q2: Do you agree that the publication of audited annual financial statements systematically triggers the obligation to prepare a supplement? If not, please state your reasons.

Yes.

Q3: Do you agree that issuers of asset-backed securities where claims of the investors against the issuer are limited to the underlying assets and the issuer is a special purpose vehicle only have to prepare a supplement on a case by case basis for audited financial statements? If not, please state your reasons.

Yes.

Q4: Please list other situations where a supplement would not always be required for the publication of annual audited financial statements, if any.

No comments.

Q5: Do you believe that there should be a systematic requirement to prepare a supplement for interim financial information? If yes, please provide reasons.

No. We agree with ESMA's proposal that interim financial information should not be included in the list of situations which systematically require the publication of a supplement. Furthermore, as ESMA sets out in Question 19 of its 19th edition of its Prospectuses: Q&As (the "**Q&As**"), we agree that the requirement to issue a supplement will depend on the circumstances of the case, in particular the relevance of the information included in the interim financial statements (such as any significant deviation in relation to previous financial information) or the type of securities to which the prospectus refers. We acknowledge that issuers should issue a supplement in case of doubt.

Furthermore, it would be helpful if ESMA could clarify what is meant by 'interim financial information'. In accordance with the Q&As and the current proposals to amend the Transparency Directive, we assume that this refers to half yearly reports, rather than interim management statements.

Q6: What do you assess the cost estimate to be to comply with this requirement?

No comments.

Q7: Do you agree that there should be a systematic requirement to produce a supplement in case of publication of a profit forecast? If not, please state your reasons.

Yes.

Q8: Do you agree that the systematic requirement to prepare a supplement for a profit forecast should only apply to equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts? If not, please state your reasons.

Yes. We consider that there should be no systematic requirement to prepare a supplement for a profit forecast in the case of debt securities.

Q9: What do you assess the cost estimate to be to comply with this requirement?

No comments.

Q10: Do you agree that there should be a systematic requirement to prepare a supplement for a profit estimate in relation to the annual financial period? If not, please state your reasons.

Yes.

Q11: Do you agree that the systematic requirement to prepare a supplement for annual profit estimates covered by e.g. Annex I, item 13(2) subparagraph 1 (referring to profit estimates for which a report of an auditor is required) should apply to a prospectus drawn up in accordance with all the schedules referred to in paragraph 54 or should this requirement be limited to equity securities? Please state your reasons.

The requirement should be limited to equity securities only. In respect of prospectuses for debt securities, it should be the issuer who decides whether or not the annual profit estimate is a significant new factor. Profit estimates will not necessarily be significant in relation to an assessment of debt securities.

Q12: Do you agree that the systematic requirement to prepare a supplement for financial information relating to the previous financial year covered by e.g. Annex I, item 13(2) subparagraph 2 (referring to profit estimates for which no report of an auditor is required) should apply to a prospectus drawn up in accordance with all the schedules referred to in paragraph 54 or should this requirement be limited to equity securities? Please state your reasons.

The requirement should be limited to equity securities only for the reasons stated above in response to Q11.

Q13: Do you believe that there should be a systematic requirement to prepare a supplement for interim profit estimates? If yes, please provide reasons.

No. Please see our response to Q5.

Q14: What do you assess the cost estimate to be to comply with this requirement?

No comments.

Q15: Do you agree that there should be a systematic requirement to produce a supplement in case of a change in control of the issuer? If not, please state your reasons.

We have no objections to the principle of producing a supplement in this situation but we query what is meant by "*change in control*" for the purposes of this requirement. In paragraph 58 of its Consultation Paper, ESMA notes that the change in control of an issuer is a '*non-harmonised concept across Europe'* and therefore, '*must be assessed on a national law basis*'. However, in the UK, the definition of a 'change of control' in statute differs across a number of statutes governing different areas of regulation. It is unlikely that even within other members states, the term will have one meaning – as we say, this is certainly not the case in the UK. Consequently, we would be grateful if ESMA would provide further clarity on what is meant by a "change of control", so that all issuers across member states can apply the correct test.

It would be helpful if ESMA could also confirm how change of control would be assessed for non-EU issuers. Would the trigger be assessed in accordance with the laws of the market on which the shares are admitted or in accordance with the laws of the issuer's country of incorporation?

Q16: Do you agree that the systematic requirement to prepare a supplement in case of change in control of the issuer should only apply to equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts? If not, please state your reasons.

Yes, we agree.

Q17: What do you assess the cost estimate to be to comply with this requirement?

No comments.

Q18: Do you agree that there should be a systematic requirement to produce a supplement in case of a public takeover bid? If not, please state your reasons.

Yes, although it is not clear when the requirement to produce a supplement would be triggered. In paragraph 67 of the Consultation Paper, ESMA notes that the requirement would be triggered at the launch of the takeover bid and when '*the outcome thereof is clear*'. We suggest that the requirement to produce a supplement is triggered when a takeover bid is announced and when the offer becomes, or is declared, wholly unconditional in accordance with the laws governing the terms and conditions of the bid.

Q19: Do you agree that the systematic requirement to prepare a supplement in case of a public takeover bid should only apply to equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts? If not, please state your reasons.

Yes, we agree.

Q20: What do you assess the cost estimate to be to comply with this requirement?

No comments.

Q21: Do you agree that there should be a systematic requirement to draw up a supplement in case of a positive and a negative change to the issuer’s working capital statement? If not, please indicate your reasons.

Yes. However, we suggest the following slight change to Article 2(1)(f) for the purposes of clarity:

'(f) where the working capital statement ceases to be correct…..'

Q22: Do you agree that the systematic requirement to prepare a supplement in case of a positive and a negative change to the issuer's working capital statement should apply to equity securities covered by 4(2)(1) and convertible/exchangeable debt securities in accordance with Article 17(2) of the Prospectus Regulation? If not, please state your reasons.

Yes, we agree.

Q23: What do you assess the cost estimate to be to comply with this requirement?

No comments.

Q24: Do you agree that a supplement should always be required where an issuer is seeking admission to trading on (an) additional EU regulated market(s) or intending to make an offer to the public in (an) additional EU Member State(s) than the one(s) foreseen in the prospectus? If *not, please state your reasons.*

No. The decision to seek admission to trading on an additional market or to make an offer in an additional member state might not affect the assessment of the securities, and, if it does not, an announcement by the issuer of its intention and the 'passporting' of the prospectus should suffice for the purposes of disclosure to the markets. It should be for the issuer to decide whether or not the test in Article 16 of the Prospectus Directive (the "**Article 16 test**") is met.

Q25: What do you assess the cost estimate to be to comply with this requirement?

No comments.

Q26: Do you agree that there should be a systematic requirement to draw up a supplement in case of a new significant financial commitment which is likely to give rise to a significant gross change? If not, please indicate your reasons.

Yes.

Q27: Do you agree that the systematic requirement to produce a supplement for a significant financial commitment should apply to issuers covered by Article 4(2)(1) and Article 17(2) of the Prospectus Regulation? If not, please indicate your reasons.

Yes, we agree.

Q28: What do you assess the cost estimate to be to comply with this requirement?

No comments.

Q29: Do you agree that issuers should always prepare a supplement for any judgment or concluding event, even if subject to appeal, in governmental, legal or arbitration proceedings already disclosed in the prospectus? If not, please indicate your reasons.

No. It should be for the issuer to decide whether or not any developments since the prospectus meet the Article 16 test. When considering the test, the issuer should have regard to its original disclosure. For example, if the outcome of the relevant proceedings were consistent with the issuer's projected outcome disclosed in the prospectus, a supplement would not necessarily be required where there was no significant new matter which had arisen.

Q30: Do you agree with the triggering elements as set out in Paragraph 87? If not, please indicate your reasons.

No. Please see response to Q29.

Q31: ESMA does not make a distinction between equity and debt securities. Do you believe such a distinction should be made? If yes, please state your reasons.

No comments.

Q32: What do you assess the cost estimate to be to comply with this requirement?

No comments.

Q33: Do you agree that a supplement should always be required in case of an increase of the aggregate nominal amount of the programme? If not, please state your reasons.

An increase in the amount of the programme may not always be significant and, consequently, there should be no systematic requirement to publish a supplement. Rather, the issuer should assess whether the increase in the amount of the programme meets the Article 16 test.

Q34: What do you assess the cost estimate to be to comply with this requirement?

No comments.

Q35: Which additional elements should be included in the list above that systematically trigger the need to produce a supplement? Please indicate any arguments which support the inclusion of such elements.

No comments.