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European Securities and Markets Authority
103, rue de Grenelle
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19 December 2014

Dear Sirs,

ESMA Consultation on draft RTS on prospectus related issues under the Omnibus II Directive

Introduction

We are the Quoted Companies Alliance, the independent membership organisation that champions the interests of small to mid-size quoted companies. Their individual market capitalisations tend to be below £500m.

The Quoted Companies Alliance is a founder member of European**Issuers**, which represents over 9,000 quoted companies in fourteen European countries.

The Quoted Companies Alliance Legal Expert Group has examined your proposals and advised on this response. A list of members of the Expert Group is at Appendix A.

Response

We welcome the opportunity to respond to this consultation. Throughout our response, we emphasise that the review process by the Competent Authority is one of the most significant contributors to the expense of producing a prospectus and to delay when funds are needed on a relatively short timescale. This disproportionately affects small and mid-size quoted companies seeking to raise smaller amounts of money on public equity markets. As such, we ask that ESMA considers this when setting out its draft RTS.

On some of the specific technical points in the consultation, we do not believe that there should be an exhaustive list of what can be incorporated by reference. This would be more burdensome for small and mid-size quoted companies and not in the spirit of the Directive. We believe that a more principles based approach should be adopted.

Furthermore, we do not agree with ESMA's draft of paragraph 3 of proposed Article 5 (at paragraph 138), which would effectively prevent issuers from having disclaimers or a simple registration process in order to access the prospectus. Issuers should be able to use disclaimers or simple registration processes to ensure that the offer is only available within the appropriate jurisdictions or only by those individuals within the jurisdiction who qualify to receive the offer. This provision is far more restrictive than the CJEU's judgement on this point in the Timmel case (Michael Timmel v Aviso Zeta AG (C-359/12)), as well as potentially making it impossible to deal with difficulties under securities laws in other jurisdictions.

Finally, we believe that only material inaccuracies that are likely to affect investors' decision whether to invest should have to be corrected in a specific additional communication when advertisements which contain inaccurate or misleading information.

We discuss these views below and have responded to the individual questions.

Responses to specific questions

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

We believe that the information included in the list of the proposed Article 2(2) is adequate. However, it should be made clear that cross-reference lists should not be updated and provided with subsequent drafts or the final draft, but should be used by the Competent Authority for its initial review only.

In addition, we do not believe that the requirement to include a written statement confirming that all changes to the previous draft are highlighted is reasonable or proportionate. It is usual practice to provide a "blackline" comparison document showing changes (prepared using computer software designed for this purpose). However, requiring a written statement to this effect would require additional checking in order for the relevant individual to make the statement. This would lead to additional time and costs and we cannot see that there is a corresponding benefit. Reliance on computer comparison software for these purposes is common practice and is felt adequate by market participants.

Further, the requirement at proposed Article 2(7) of the RTS that information in prior submissions, where it has not changed, remains "correct" may cause a significant additional burden if it is interpreted as meaning such information must be confirmed as being correct as at the date of final submission. For example, historical financial information will be prepared as at a particular date and to relevant accounting standards. In this regard, such an obligation would seem inappropriate. We would suggest that this requirement is removed or clarified.

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.

No, we do not believe that this requirement will add any particular costs additional to the ones already normally incurred. However, it would be helpful to clarify what constitutes "at a minimum" in this context. We would suggest that the requirement should simply be to submit all versions electronically in addition to any other method(s) used.

As explained further in our answer to Q3, the approval process is a significant contributor to expense and delay and so should be made as efficient and timely as possible. We are, therefore, supportive of the requirement in proposed Article 3(2) of the RTS that, in addition to the company (i.e. the issuer, offeror or person asking for admission to trading) being required to submit documents electronically, the Competent Authority should be required to submit all of its comments electronically (to the extent that that these are written rather than oral).

However, we do not agree that oral comments should only be provided orally in exceptional circumstances. The Competent Authority should be free to decide if discussing an issue is more efficient that providing comments in writing.

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

The review process by a Competent Authority is one of the most significant contributors to the expense of producing a prospectus and to delay when funds are needed on a relatively short timescale. This disproportionately affects small and mid-size quoted companies seeking to raise smaller amounts of money on public equity markets.

We believe that it is important to address the complexity and delay caused by the Competent Authority checking the information included in the prospectus for comprehensibility, rather than just for completeness (i.e. has each item required to be included in the document been included) and to make the checks as efficient as possible. The company is generally better placed to understand its business and, together with its advisers, to explain its business to potential investors. Conversely, the scope of the Competent Authority should be to check that the relevant required elements have been included as applicable.

While we understand that some of these issues fall outside of the scope of the RTS, we believe that ESMA should contribute to requiring Competent Authorities to deal with the approval process in a quick and efficient manner as this is key to ensuring an efficient offer for companies. For example, in addition to reducing the extent to which the Competent Authority acts as the arbiter for comprehensibility, it would be helpful to restrict Competent Authorities from raising new queries later in the process (unless new information is submitted by the company), thus avoiding adding more delays and costs to the process.

In addition, we do not believe that Competent Authorities should be able to wait until the end of the working day following the day the decision to approve or refuse approval was taken to inform the company. This causes unnecessary delays in the transaction process.

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.

Each of the types of documents noted would comply with requirement of being approved or filed in accordance with the Prospectus Directive and from which information can be incorporated by reference. However, we do not agree that the list should be exhaustive and do not believe that seeking to set out an exhaustive list of documents that may be incorporated by reference is within the principles or spirit of the Prospectus Directive.

As noted in our answer to Q5, incorporation by reference is of crucial importance to companies, especially to small and mid-size quoted companies (which have limited resources). We firmly believe that such a restrictive interpretation of its application would be disproportionately burdensome on such companies and restrict their ability to access capital markets.

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.

Incorporation by reference both:

(i) aids comprehensibility of the prospectus by removing information that can be readily accessed elsewhere and is not specific to the particular issue, offer or admission; and

(ii) reduces costs to companies and the time taken to prepare and obtain approval by decreasing the length of the prospectus and by consequently reducing the related time and costs in producing, checking and cross referencing the document within itself and as against the various Annexes to the Prospectus Regulation.

Provided all such information is referred to and easily accessible to investors, we cannot see that there is any loss of investor protection by using incorporation by reference. Investors are still able to access and review the information, but are presented with a shorter and more easily understandable prospectus dealing with the specific factors relevant to the issue.

This is particularly important for secondary issues, where even more information is already available to investors and much of the information required to be included is repetitive and not specific to the offer. Therefore, including all the information in the Annexes could detract from the key information that an investor needs to assess whether to invest. Again, provided such information is referred to and available should an investor wish to review it, we cannot see any argument that repeating it in the prospectus itself adds materially (if at all) to investor protection so as to justify the additional costs to companies.

Anything which might reduce the availability of incorporation by reference will increase the costs to companies. We cannot see a need to have an exhaustive list of documents that can be incorporated by reference as it is unecessary, will add costs and indeed confusion is likely if such a list is not clear and/or seems to be comprehensive but is not in fact so.

With reference to the proposed draft Article 4 at paragraph 100, we note that some but not all relevant documents that can be incorporated by reference have been referenced. We would suggest that ESMA adopts a consistent approach of referring to the principle of incorporating documents filed or approved under the various directives in order for this reference to be less likely to cause confusion or to lead to issues when the Directives themselves are amended in the future; moreover, the ability to incorporate by reference should not be interpreted in such a restrictive way.

The particular costs that will be increased if the use of incorporation by reference is restricted include those for lawyers and accountants to check that the information has been correctly extracted and incorporated into the prospectus and additional costs for printers to process longer documents and draw in information from the various documents that could otherwise simply be referred to. This additional preparation and scrutiny time will also add delay to the process and may indeed make fundraisings required under a short timetable impracticable within the Prospectus Directive regime. Thus, small and mid-size quoted companies' ability to raise finance and grow will be restricted, which may slow economic growth throughout Europe.

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.

As noted above, any restriction on the ability for companies to use incorporation by reference will increase costs and the time taken to raise funds for companies. We do not agree that removal of references to CARD necessarily indicates an intention to reduce the ability of companies to be able to incorporate information

by reference. Indeed, we believe that it would be very valuable to, for example, be able to incorporate constitutional documents by reference rather than having to include lengthy sections repeating standard provisions which simply increase the length of, as well as associated costs and time taken to produce and approve, prospectuses.

All information disclosed according to the laws, regulations or administrative provisions of Member States adopted under the Transparency Directive Article 3(1) should be capable of being incorporated by reference. We cannot see that an exhaustive list of information disclosed under national requirements in each Member State would add any real value, but note again that it may lead to additional costs and delays for companies to the extent that it reduces their ability to use incorporation by reference or leads to confusion should it not be updated to reflect amendments to the Directives. To the extent clarification is needed as to what information may be incorporated by reference, we feel that this would be better done through guidance in ESMA's Q&As rather than through the RTS.

The proposed Article 4 of the RTS, if retained, should be amended so that it is not exhaustive, but is indicative only.

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.

Yes, as explained in our answer to Q5, to the extent that the effect of the list is to restrict the information that is capable of being incorporated by reference, this will impose significant additional costs.

Q8 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?

We believe that the correct interpretation of "simultaneously published" is its ordinary meaning, i.e. being any document filed/submitted at the same time as the prospectus. In other words, any documents that have been filed/submitted at any time that is not *after* the prospectus is published should be capable of being incorporated by reference (for example, if financial information is being filed at the same time as the prospectus is published).

As explained in our answer to Q5, any restriction in the ability to incorporate by reference will impose significant additional costs and timing delays.

Q9 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.

Yes, we agree that it is sufficiently clear and we welcome that ESMA did not address this issue in the draft RTS.

Q10 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.

Yes, we do not see any significant issues with this obligation.

Q11 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.

We do not understand why this additional obligation is required. However, if such an obligation is retained by ESMA, it should be made clear that the publication does not need to be exactly the same (e.g. on the same website), but that it relates to use of one of the generic methods of publication (e.g. electronic as opposed to hard copy distribution).

Q12 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.

Whilst requiring electronic publication may not of itself be unduly burdensome, the detailed requirements proposed in the RTS are likely to lead to an increase in ongoing IT related costs, as well as costs associated with human resources, which are usually limited in the case of small and mid-size quoted companies. In particular, we would suggest that a principles based approach is less likely to lead to unintended consequences. If the RTS is to specify the requirements in the level of detail proposed, it should be amended to ensure that compliance is not unduly onerous or likely to lead to issues with compliance with securities laws in other jurisdictions (see our answer to Q13).

Q13 Do you consider there are any other impediments to a prospectus being considered available to the public?

We consider that compliance with securities laws in other jurisdictions should be considered. For example, some jurisdictions may require disclaimers and registration requirements (especially in cases where the offer cannot be made under local laws). If such restrictions are not facilitated by the RTS, then companies would potentially either have to comply with all securities laws, which would be impracticable and prohibitively expensive in most cases (especially for small and mid-size quoted companies), or to avoid an offer to the public entirely. See also our answer to Q16.

Q14 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.

Yes, we agree.

Q15 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.

We believe that this provision would not add any particular costs other than the ones already normally incurred.

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

Yes, we believe that the proposed measures will enhance the accessibility of electronically published prospectuses provided that the practicalities of compliance and the provisions requiring companies to inform investors of group websites are not unduly burdensome.

We believe that it is important to allow any hyperlinks to be compliant if they are linking to a page from which an investor can click through to all relevant documents. A separate individual hyperlink directly to each document should not have to be provided.

We believe that, so long as investors can access the information easily via the link, there will be no detriment to investor protection and further problems can be avoided, such as where documents are hosted on websites not maintained by the company. Links to a webpage, rather than hyperlinks directly to documents, also facilitate use of disclaimers and restrictions on access by residents of jurisdictions in which an offer is not able to be made due to local security laws, who should not be targeted as envisaged in proposed Article 5(2).

It is unclear from either the explanation or the text of proposed Article 5 how the obligation to inform investors of the use of group websites would be complied with in practice. We would ask that ESMA to clarify what it is proposed that companies do in practice to comply with this obligation.

As noted in our answer to Q13, it is important that companies are able to avoid breaching securities laws in other jurisdictions where the offer cannot be made under local laws. As drafted, paragraph 3 of proposed Article 5 (at paragraph 138) will restrict the ability of companies to avoid breaching such laws and conflicts with paragraph 2 which specifically states that residents of such jurisdictions should not be targeted.

Whilst we agree that no fee should be required, accepting a disclaimer or a simple registration process should be able to be used to ensure that the offer is only available within the appropriate jurisdictions, or only by those individuals within the jurisdiction who qualify to receive the offer. We do not think that Article 5(3) is necessary.

However, if it is retained, it should be amended so that it only refers to payment of a fee. As drafted, it is contrary to and far more restrictive than the CJEU's judgement on this point in the Timmel case (Michael Timmel v Aviso Zeta AG (C-359/12)), as well as potentially making it impossible to deal with difficulties under securities laws in other jurisdictions as noted.

Q17 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.

We believe that this provision will increase in ongoing IT related costs, as well as costs associated with human resources, which could be very limited in the case of small and mid-size quoted companies. Additional costs would be incurred if some kind of additional notification is required where a group website is used, though the quantum of such costs is hard to estimate without understanding what is envisaged should be done by companies to comply with that obligation.

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?

No, we do not agree that this something that should be dealt with in the RTS, and we cannot see that it is required under the Directive. It may add increased costs and burdens depending upon who is hosting the website and the nature of the company making the offer. In addition, as noted in our answer to Q16, it should be made clear that links can be to a single page from which all relevant information can then be

accessed by clicking on links to other pages, so long as such information is easily accessible and meets the other requirements, and do not have to be hyperlinks to the documents themselves.

Q19 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.

We believe that, unless the links are permitted to be to a single page from which the information can then be accessed via further links (as explained in Q16), this provision will increase ongoing IT related costs, as well as costs associated with human resources, which could be very limited in the case of small and mid-size quoted companies.

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

Yes, we agree. We believe that ESMA's approach is sensible.

Q21 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.

We believe that this provision could increase ongoing IT related costs as noted above in our answers to questions 16 to 20.

Q22 Do you consider that there are additional means of dissemination of advertisements not covered by the four categories above? If yes, please specify.

We agree that the list should be as open and flexible as possible to better be able to "absorb new means of dissemination of advertisements brought about by technological developments". However, we do not see why all information must fall within one of the categories or why the categories need to be set out in the RTS. We would suggest that the categories are removed, made non-exhaustive and/or their purpose clarified. Unless they are intended to limit the available means of dissemination (which we assume is not the case) or relate to additional obligations by reference to the categories (which is not clear), we cannot see what purpose they serve.

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.

We feel that the provisions suggested are unduly burdensome, especially for small and mid-size issuers, and are likely to increase costs and administration time. It should be made clear that **only material inaccuracies** that are likely to affect investors' decision whether to invest should have to be corrected in a specific additional communication. For example, if an advertisement is "inaccurate" because there is a minor typographical error, the issuer of such advertisement should not have to be required to prepare and disseminate a second communication purely to correct that error.

We also believe that it should be made clear that there is no obligation to update information in advertisements which are prepared to a certain date. This should not impact on investor protection as investors should invest on the basis of the information in the prospectus, not in a preceding advertisement for it.

Q24 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.

Yes, it will impose costs identical to those incurred with the initial dissemination of the advertisement, depending on the initial means of dissemination. We can only see a justification for incurring such costs where the such inaccuracies are **material** (as noted in our response to Q23), or where such advertisements are **materially misleading**, in each case to the extent that they would have affected an investor's investment decision. In all other cases, significant costs may be incurred preparing multiple additional advertisements to updated information or correct minor typographical errors without any corresponding benefit. The precise costs will depend upon the nature of the advertisement, but in broad terms are likely to multiply the original costs by the number of times that new advertisements are required.

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

No. There is already the principle that advertisements should not be misleading (see for example Article 15 of the Prospectus Directive), but advertisements should not be required to include all the information that might be included in a prospectus. Companies should be free to omit information so long as the advertisement still complies with such principles. 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, but to direct them to the prospectus, which contains the full information (or references thereto). It is the prospectus (not the advertisement) that is the document that an investor should use to make his or her investment decision.

To the extent that Article 13 is retained in some amended form, we also suggest that, for clarity, the words "oral and written" are removed, as these are unnecessary.

Q26 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?

No. As noted above, it is the prospectus that should be used by investors to make their investment decision. In addition, there are sufficient requirements already that the prospectus contains all the information an investor needs to make his or her investment decision. So, either the information would be required anyway, or would not be included because it has either become out of date or more relevant data has been included, in which case we do not see that it is helpful to require the out of date or less relevant information that was included in the advertisement to be included in 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.

As noted in our answers to Q25 and Q26, 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. In addition, the requirements in respect of record-keeping where information was in oral form are unclear as drafted.

We suggest that these provisions are deleted from the RTS. However, if they are retained, they should be clarified and a full impact assessment be undertaken as to the costs that would be incurred by the various parties involved, the practicalities of compliance and the perceived benefits of introducing such procedures.

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.

We believe that this provision will increase costs and resources required. Such resources are limited in the case of small and mid-size quoted companies and so will unduly affect such companies and hinder their ability to raise finance. It is unlikely that small and mid-size companies will have the resources to comply internally and so would be required to outsource the collation and retention of such information, which could mean such additional costs are significant.

In addition, the requirement at proposed Article 13(2) to give all negative statements (no matter how material) the same prominence as positive statements may lead to confusion and documents that are unclear to investors. It should be made clear that statements can be given prominence depending upon how material the risk or the benefit is, not simply because they are positive or negative, so that a minor risk need not be given the same prominence as a major benefit.

If you would like to discuss any of the responses in more detail, we would be happy to attend a meeting.

Yours faithfully,

Tim Ward
Chief Executive

APPENDIX A

Quoted Companies Alliance Legal Expert Group

Gary Thorpe (Chairman)	**Clyde & Co LLP**
Maegen Morrison (Deputy Chairman)	Hogan Lovells International LLP
David Davies	Bates Wells & Braithwaite LLP
Martin Kay	Blake Morgan
Richard Beavan	Boodle Hatfield LLP
Paul Arathoon Andrew Collins David Hicks Tom Shaw	Charles Russell Speechlys LLP
David Fuller	CLS Holdings PLC
Mark Taylor	Dorsey & Whitney
Nick Jennings	Faegre Baker Daniels LLP
Anthony Turner	Farrer & Co
June Paddock	Fasken Martineau LLP
Ian Binnie	Hamlins LLP
Danette Antao	Hogan Lovells International LLP
Nicola Green Eleanor Kelly Jane Mayfield	LexisNexis
Mebs Dossa Gabriella Olson-Welsh	McguireWoods
Stephen Hamilton	Mills & Reeve LLP
Ross Bryson	Mishcon De Reya
Philippa Chatterton	Nabarro LLP
Jo Chattle Simon Cox Julie Keefe	Norton Rose Fulbright LLP
Naomi Bellingham Sarah Hassan Hilary Owens	Practical Law Company Limited
Ben Warth	PricewaterhouseCoopers LLP
Donald Stewart	Progility plc