The Association of Corporate Treasurers

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Comments in response to
Amending the Prospectus Directive
European Securities and Markets Authority, June 2011

July 2011

The Association of Corporate Treasurers (ACT)

The ACT is a professional body for those working in corporate treasury, risk and corporate finance. Further information is provided at the back of these comments and on our website www.treasurers.org.

Contact details are also at the back of these comments.

We canvas the opinion of our members through seminars and conferences, our monthly e-newsletter to members and others, *The Treasurer magazine*, topic-specific working groups and our Policy and Technical Committee.

General

The ACT welcomes the opportunity to comment on this matter.

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ESMA is consulting on technical advice it needs to deliver to the Commission by the end of September. The advice covers:

- format of base prospectus final terms;
- format of summary of the prospectus and detailed form and content of key investor information to be included in it; and
- a proportionate disclosure regime.

Due to the short comment period we have not had sufficient time to seek feedback on all questions. Hence we have responded to selected questions.

Format of the final terms to the base prospectus (Article 5(5))

Q6. Do you agree with the proposed mechanism of combining the summary with the final terms? If not, please provide your reasons and an alternative suggestion.

We do not agree with appending the base prospectus summary to the final terms. This would not only slow the issue process down but also increase the cost as issuers will need to involve lawyers to re-consider whether the summary is still a "good summary".

There is also the argument that appending a summary with the final terms actually discourages investors from reading the Base Prospectus. This runs counter to an objective we believed was the basis of ESMA's approach.

We would instead recommend a simple cross reference to the base prospectus.

Format of the summary of the prospectus and detailed content and specific form of the key information to be included in the summary (Article 5(5))

Q11a. Do you agree that our approach adequately limits the length of summaries?

ESMA has adopted the model of five sections (A. Introduction and warnings; B. Issuer and any guarantor; C. Securities; D. Risks; and E. Offer) and has identified the mandatory key information to be in a summary. Each of the five sections is made up of a number of "Points". The proposed approach to summaries is that they should contain the key information that investors need and should be short.

The above prescriptive approach to summaries may in fact result in greater risk to issuers in deciding what should go in and what is left out. This approach is inconsistent with the basic obligation that the summary should not be misleading when read with the full prospectus. If an important piece of information does not fit into any of the five prescribed sections then where does it go? The argument that a detailed form of presentation for summaries facilitates comparability has little relevance as few wholesale (and relatively few retail) issues are directly comparable.

Q11c. Do you think that there should be a numeric limit on the length of summaries? If so how might that be done?

A summary should not only be comprehensive and comparable but also compact. However imposing actual word limits can work against the stated purpose that summaries should be comprehensive. We believe that a word limit may be unhelpful even for retail investors. However we believe it is wholly unnecessary for wholesale investors. In addition we do not agree with a word limit as it places undue risk onto issuers (see answer above).

Proportionate disclosure regime (Article 7)

Q16: Do you agree with the proposal to consider that "near identical rights" should have the same characteristics than pre-emption rights? Do you agree with the definition given in paragraph 117? Are there any other characteristics which should be taken into account?

We agree with the approach being taken by ESMA to allow companies replacing statutory pre-emption rights with similar pre-emptive provisions (often done for technical or administrative reasons) to be treated as though they were statutory pre-emption issues. Indeed we commend ESMA for taking this pragmatic approach.

Q17: Do you agree that there should be only one single proportionate regime and not two separate regimes, one for regulated markets and one for MTFs?

In your paper you appear to be coming down in favour of one regime but then go on to require additional disclosures on companies traded on an MTF. This is in effect two regimes one for those traded on a regulated market and one for those traded on an MTF in order to bring the disclosures of the latter up to the level of a regulated market. We support this approach.

Q22: Regarding the appropriate rules on market abuse, do you agree that there should be provisions in order to prevent insider trading and market manipulation? Do you consider it necessary to require that the rules of the MTFs fully comply with the provisions of the Market Abuse Directive?

The ACT is a strong supporter of rules or codes of behaviour to prevent market abuse. We therefore agree with ESMA that to qualify for the proportionate regime the MTF should have provisions in order to prevent insider trading and market manipulation.

We would also make the point that in the UK listed companies have to comply with enhanced market abuse standards that prohibit trading when in possession of Relevant Information Not Generally Available (RINGA) rather than the more limited definition of inside information. We encourage ESMA to take any opportunity to move European market regulations toward these higher standards of integrity. (In basic terms inside information requires a degree of precision in the information which RINGA does not. For example knowledge of a board approved decision to bid for another significant company would be inside information. Knowledge that papers were being prepared awaiting a board decision would not be inside information, but would be RINGA.)

Q29: Considering the objective to enhance investor protection, do you agree that information regarding the issuer's activities and markets and historical financial information can not be omitted?

A further objective is to simplify the process and administrative burden for issuers making a pre-emptive issue. Information that has already been published in an issuer's latest report and accounts does not really need to be repeated in full but should be incorporated by reference. Instead the requirement should rather be to disclose any significant changes to the information previously disclosed. This latter approach would appear to be the approach that ESMA is adopting and we welcome that.

Q30: Do you consider that, in order to reduce administrative burden, incorporation by reference could be a solution? Do you have any suggestions to improve the incorporation mechanism?

The ACT regards incorporation by reference as a suitable mechanism to help reduce the administrative burden.

Q31: Do you agree with the proposal to require basic and updated information regarding the issuer's principal activities and markets?

We agree that information regarding the issuer's principal activities and markets should be updated where there are significant changes.

Q32: Do you agree with the proposal to require only the issuer's historical financial information relating to the last financial year?

As part of the simplification objective we would recommend that the issuer's historical financial information is incorporated by reference. Reproducing one year's financial information could be regarded as presenting only part of the picture of the issuer's financial condition, so that referring to a two year statement in the report and accounts provides better information for those interested in this side of things.

Q34: Do you agree with the proposal to include a statement in the proportionate prospectus drawing attention to the specific regime and level of disclosure applicable to rights issues?

We agree.

Q35: Do you agree with the schedule for rights issues presented in Annex 2 of this consultation paper?

We note that the disclosures required in your Appendix 2 are somewhat scaled back. However, since for issuers listed on a regulated market much of this information will have been provided regularly to the market we would ask ESMA to reconsider if the requirements could be further trimmed back. In particular the information specified on operations and principal activities (para 5), information on management (para 9), information on share capital (para 16) and certain financial information noted in paragraph 15.

TREASURY, RISK AND FINANCE PROFESSIONALS

The Association of Corporate Treasurers

The Association of Corporate Treasurers (ACT) is the leading professional body for international treasury providing the widest scope of benchmark qualifications for those working in treasury, risk and corporate finance. Membership is by examination. We define standards, promote best practice and support continuing professional development. We are the professional voice of corporate treasury, representing our members.

Our 4,000 members work widely in companies of all sizes through industry, commerce and professional service firms.

For further information visit www.treasurers.org

Guidelines about our approach to policy and technical matters are available at http://www.treasurers.org/technical/manifesto.

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