

The Committee of European Securities Regulators
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Your Ref: CESR/04-428
sjh/ML.7W 015

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Dear Sir

Consultation Paper on CESR's technical advice to the European Commission on a possible amendment to Regulation (EC) 809/2004 regarding the historical information which must be included in a prospectus

We welcome CESR's consultation document and wish to comment as set out below. Our responses are cross-referenced to the respective paragraph numbers containing CESR's questions.

27.Q Preliminary remark

We agree with the suggested approach; the proposed requirements should be an extension to the basic rules set out in item 20.1 of Annex I and should not detract from these basic rules. We believe that there should be an underlying principle that reliable financial information should be presented which permits investors to understand the financial track record of the business in which they are being asked to invest regardless of the corporate structure and history of the actual entity in which they are investing. The proposed requirements in relation to complex financial histories should be in the form of guidance on the application of this principle in certain circumstances.

32.Q Scope of requirements

Our only comment is that consideration should be given as to whether the scope of the requirements includes those equity securities that could be marketed to 'retail' investors (for example small denomination depository receipts) as we cannot see any grounds for distinguishing these from shares in this regard.

35.Q Possibility of an exemption for small and medium-sized enterprises

We see little merit in a size based exemption because we see no reason to suggest that the historical financial performance of a business is any less relevant to investors in assessing the merits of an investment in a small or medium-sized business as compared to a larger one. Whilst it might be argued that the relative cost burden that might be imposed on smaller businesses would be disproportionately greater we consider that this is outweighed by the need to provide investors with a meaningful analysis of the financial performance of the business underlying the entity in which they are investing.

However, there may be some situations where other information is, regardless of size, potentially more important than the financial record (for example an expert's report in a prospectus issued by a

mineral company which has not entered the production phase) and it would be helpful for there to be some flexibility in such circumstances.

40 Q Cases to be considered

We think that the following scenario should also be considered:

A newly incorporated holding company ('newco') was established to acquire an existing business during the last three years; this is a commonly used structure for "management buy-outs" where the newco is formed and then borrows to fund the acquisition of the underlying business. This scenario differs from Case 1 in terms of the point in time at which the newco acquires the underlying business and the involvement of debt to finance the acquisition and differs from Case 3 in that the acquiring entity does not itself have a trading record prior to the acquisition date. In this situation the substance is that it is the underlying business of the acquired entity that is most relevant (not least because the financing and capital structure of the newco is likely to change significantly as a result of the transaction which is the subject of the prospectus. We believe that the most appropriate financial record is a composite one combining the pre-acquisition results of the underlying business with the consolidated results of the newco and its group on the basis of the accounting policies as they apply under item 20.1 of Annex I.

Additional consideration ought to be given to the impact of very large acquisitions (such as reverse takeovers). Please see our comments below relating to paragraph 77.

45 Q Proposed approach to newly incorporated holding company

We agree with this approach in general although we believe that the way in which 'significant' is applied in paragraph 44 should be revised to require that a financial record should be provided on a certain proportion of the group rather than applying the threshold test to each subsidiary individually. For example, if there were three subsidiaries acquired which each fell short of the 'significant' threshold by a small margin, the financial information required to be presented under the proposed approach would represent less than half of the group.

51 Q Preferred option for newly incorporated holding company

We see no reason why the financial information on the subsidiary companies should not be presented on the basis of the accounting policies that would apply to the issuer in accordance with item 20.1 of Annex I as this is the basis that would have applied had the acquisition taken place at the start of the period being reported on. Option 2 is the closest of the options to what we believe is the most appropriate position.

52 Q Conforming of financial information

We believe that the issuer should perform a restatement of the financial information because this would present the most understandable information. A narrative description of differences would not provide an investor with sufficiently meaningful information in this context (which is presumably why it is not contemplated by item 20.1 of Annex I). The cost differential between a restatement and reconciliation is not likely to be significant because fundamentally the same work needs to be performed in preparing the information – the difference is essentially one of presentation.

57 Q Options for minimum content

Option 1 is the most appropriate option because otherwise it would be possible to avoid making required disclosures in a prospectus by simply inserting a new holding company. We do not believe

that the cost of preparing a cash flow statement or statement showing changes in equity would be significant as these both represent analysis of information which will already exist.

61 Q Audit of financial information

We agree that the financial information should be audited. However, we do not see how auditors will be able to give a “true and fair view” opinion unless a full restatement of the numbers together with the required notes is presented.

63/64 Q Auditor involvement in reconciliation or narrative description

For the reasons stated above we do not believe that reconciliations or narrative descriptions are appropriate. However, were they to be presented we have the following comments on the involvement of auditors:

Reconciliations

It would be appropriate for auditors to be involved and we believe that either a full scope or review (negative assurance) opinion could be given but that, given the purpose of presenting the financial information, a full scope audit would be most appropriate. The degree of assurance provided in this context by a pro forma style report is unlikely to be clear to investors.

Narrative Description

We think it unlikely that auditors would report on narrative descriptions in the forms envisaged unless a reconciliation had been prepared, in which case this should be presented.

68 Q Approach to companies under common control or ownership

We agree with the basic approach adopted, and we presume that the intent would be to present the financial information as if it were a single legal group, but we would question whether this should apply to companies under common “control *or* ownership” as currently drafted or “control *and* ownership”. Whilst it is unlikely that companies could be under common control without being under common ultimate ownership and vice versa we believe that both criteria should be met before aggregated or combined financial information is provided.

70 Q Preferred options

We believe that the only sensible option is a full scope audit. This will provide information equivalent to that which would be required to be presented had the entities formed a legal group. The cost would logically be no greater than that which a similar legal group would have incurred and as such we do not see this as an incremental cost.

77 Q Preferred alternatives

Our preference is for Option 1 subject to two caveats:

- i) We do not understand the references to disposals and do not see how this is relevant unless it addresses the issue where a disposal has occurred subsequent to the last financial period in which case we agree that separate financial information should be disclosed. However, we believe that this should be for all periods covered by the financial information as this information is presumably readily available and is relevant to investors.
- ii) Care needs to be taken when applying the rule; whilst it makes sense where a company has been acquired which forms 25% of the group, if a company was acquired which now forms 60% of the group (ie effectively a reverse takeover) the effect of this is more pervasive.

Further consideration therefore needs to be given to the requirements in these circumstances- such as whether the acquisition changed the nature, management and/or operations of the group to such a degree that in substance it is the acquired company that investors are effectively investing in.

Our preference is for Option 1 as there is little merit in providing information about an entity that was under different control and management save to the extent necessary to allow investors to understand the effect of the transaction and Option 1 should achieve this in a cost effective way.

78 Q Other proposals

We believe that Option 1, subject to the above comments, adequately deals with the situation.

81 Q Approach for commitments or agreements to acquire or dispose of a significant entity

We see no reason to make a distinction as to whether the transaction has occurred as the information is of similar importance to investors.

82 Q Changes in accounting reference date

As a general principle we agree that the financial information should always be presented for at least 36 months where it is available. However, it would be preferable if the competent authority has a degree of discretion where, for example, information covering at least (say) 33 months is available and it is judged that the provision of information for an earlier period is of no discernible benefit to investors – for example due to subsequent acquisitions or disposals.

We trust that our responses are self-explanatory but should you wish to discuss any of these matters please contact either Steve Hextall (+44 20 7951 4636) or Steve Parkinson (+44 20 7951 3976).

Yours faithfully

