European Commission

(Submitted via the European Commission website)

21 December 2018

Dear Sirs,

Feedback on draft Commission delegated regulation and annexes supplementing the new Prospectus Regulation

The International Capital Market Association (ICMA) is providing feedback on the draft delegated regulation and associated annexes supplementing the Prospectus Regulation as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

ICMA is a membership association, headquartered in Switzerland, committed to serving the needs of its wide range of members. These include private and public sector issuers, financial intermediaries, asset managers and other investors, capital market infrastructure providers, central banks, law firms and others worldwide. ICMA currently has 540 members located in over 60 countries. See: www.icmagroup.org. ICMA's transparency register number is 0223480577-59.

This feedback is given by the ICMA primary market constituency comprised of borrowers and banks that lead-manage syndicated debt securities issues throughout Europe. This constituency deliberates principally through:

- the ICMA Corporate Issuer Forum, which gathers senior representatives of a number of major corporate issuers;
- the ICMA Financial Institution Forum, which gathers the heads or senior members of the capital raising, funding and treasury departments of a number of ICMA member banks active in capital markets issuance in Europe;
- the ICMA Primary Market Practices Committee, which gathers the heads and senior members of the syndicate desks of a number of ICMA member banks active in lead-managing syndicated debt securities issues in Europe; and
- the ICMA Legal and Documentation Committee, which gathers the heads and senior members of the legal transaction management teams of a number of ICMA member banks active in lead-managing syndicated debt securities issues in Europe.

We set out our feedback below and would be pleased to discuss it with you at your convenience.

Yours faithfully,

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FEEDBACK

GENERAL COMMENTS

1. The opportunity to review the Commission's proposed draft delegated regulation and annexes is welcome and we appreciate the Commission's efforts in relation to its "Better Regulation" approach.

2. The time allowed to provide feedback (incorporating the festive holiday period), combined with the significant drafting changes that have been made to the proposed provisions in ESMA's Final Report on Technical Advice under the Prospectus Regulation, (the **ESMA Final Report**) have presented some challenges for market participants in formulating fulsome feedback on the draft delegated regulation and annexes.

3. As a general point, we note that debt capital market participants have previously highlighted to the Commission and ESMA that they, and NCAs, are familiar with the existing Prospectus Directive Level 2 provisions contained in Delegated Regulation 809/2004, as amended or superseded (**PD II Level 2**). It was therefore considered to be helpful that ESMA had not departed significantly from the language of the existing regime in the ESMA Final Report. Market participants have expressed surprise at the Commission's approach of amending much of the precise drafting contained in the draft delegated regulation and draft annexes.

4. **It appears that in most cases there was no intention to change the approach set out in ESMA's Final Report substantively. However, in some cases the drafting changes have resulted in substantive differences and/or unclear disclosure requirements that are likely to be problematic for NCAs and market participants to apply in practice.**

5. We have highlighted below the areas where this appears to be the case, dividing our feedback into:
   a. areas in which it appears that the Commission's drafting has departed from the approach set out in the ESMA Final Report in a manner that appears to be problematic; and
   b. areas where the Commission has adopted the approach set out in the ESMA Final Report, but which are nevertheless considered to be problematic by debt capital market participants.

6. Given the timing and other challenges noted above, we may not have covered every relevant point in this feedback, but we have sought to cover as many relevant points as possible in the circumstances. If it would be useful, we would be happy to share any further thoughts with the Commission and/or discuss the points below in due course. We would also be happy to provide drafting suggestions for those areas where we have not already done so, if that would be useful.

KEY POINTS

7. Of the points set out below, the ones that seem likely to present the most significant practical challenges for debt capital market participants are:

   a. *Application of certain non-equity securities annexes:* Articles 7, 8, 18, 19 and 20 of the delegated regulation are difficult to interpret and, in some cases, could be read as being substantively out of line with the Level 1 position. See further paragraphs 9 - 16 below.

b. *Final terms:* There are various concerns related to the provisions (or missing provisions) regarding final terms under base prospectuses. See further paragraph 18 below.

c. *Issuer responsibility statements:* The drafting changes in the annexes appear to have resulted in an unclear disclosure requirement. See paragraph 21 below.

d. *KIDs and summaries:* Disclosing information from the PRIIPs KID elsewhere in the prospectus where the PRIIPs KID is used as part of the summary is concerning. See further paragraphs 42 - 45 below.

e. *Risk factors:* There is likely to be continued uncertainty in relation to the precise approach that will need to be taken in relation to the new risk factor disclosure requirements. See further paragraph 33 below.

f. *Credit linked securities – disclosure of information on the reference entity being Category A:* The effect of making the disclosure of information relating to the reference entity (or the issuer of the reference obligation) as if it were the issuer in accordance with the wholesale non-equity registration document (i.e. item 2.2.2(a)(i) of Annex 16) Category A is that it will effectively prevent issuers making such issuances under final terms, unless they have supplemented their base prospectus with the relevant information, which will add cost and time to the issuance process. See further paragraph 46 below.

8. We welcome:

a. the Commission's decision not to take forward the suggestion in the ESMA Final Report that a length limit on prospectus cover notes should be imposed;

b. the Commission's efforts to address the detailed comments that ICMA submitted to ESMA on the simplified disclosure regime for secondary issuances to ensure that such regime is not more onerous than the disclosure regime for primary issuances;

c. the Commission's change to the tax disclosure requirement so that it now refers to the issuer's "country of incorporation" rather than the issuer's "Member State" of incorporation (see further paragraph 32 below); and

d. the deletion of the definition of "debt securities" because the reference in that definition to the obligation to pay the investor 100% of the nominal value had led to certain securities such as zero coupon notes[1] falling outside the definition of "debt securities" under PDII Level 2, which was problematic and confusing in practice.

[1] An investor in a zero coupon note agrees to receive no interest but (in a positive interest rate environment) more than 100% of the nominal value upon redemption.

CONCERNS IN RELATION TO AREAS WHERE THE COMMISSION'S APPROACH DIFFERS FROM THE ESMA FINAL REPORT

Comments applicable to the draft delegated regulation

9. **Application of retail and wholesale non-equity registration document annexes:** Article 7 and Article 8 of the delegated regulation, as currently drafted, appear to be out of line with the intention of the Level 1 regime.

10. Article 13(1) of the Prospectus Regulation states that the Commission shall set out specific information requirements for prospectuses that relate to the admission to trading on a regulated market of non-equity securities which (a) are to be traded only on a "qualified investor only" regulated market **OR** (b) have a denomination per unit of at least EUR 100,000. We understand that the intention behind the use of the word "or" in this provision was designed to ensure that prospectuses relating to the admission to trading on a regulated market of non-equity securities which fulfilled *one or other* of those criteria would benefit from a specific ("wholesale") disclosure regime. For example:

    a. a prospectus related to the admission to trading of *low* denomination securities to a "qualified investor only" segment of a regulated market; and

    b. a prospectus related to admission to trading of *high* denomination securities to a regulated market that is *not* restricted to qualified investors only,

would both benefit from a specific ("wholesale") disclosure regime, because such securities would meet one (but not both) of the criteria in Article 13(1).

11. However, the current draft delegated Regulation does not appear to reflect this position. At the moment, Article 8 states that, for the "wholesale" disclosure regime to apply, the securities need not to fall within Article 7(2). Article 7(2) describes two types of securities: (broadly) those that are not to be admitted to trading on a "qualified investor only" regulated market; and those that have a denomination of less than EUR 100,000. However, the introductory language to Article 7(2) suggests that only one of those limbs must be satisfied in order for the retail disclosure annex to apply.

12. Interpreting these provisions is challenging, but they could be read as requiring:

    a. a prospectus related to the admission to trading of *low* denomination securities to a "qualified investor only" segment of a regulated market; and

    b. a prospectus related to the admission to trading of *high* denomination securities to a regulated market that is *not* restricted to qualified investors only,

    to use the retail non-equity registration document annex. This is the opposite of what appears to be envisaged at Level 1, as described above. It would also be more onerous than the position under the current Prospectus Directive regime.

13. We strongly suggest that the Commission re-visits the drafting of Article 7 and Article 8 in the light of the above. One option might be to change Article 7(2) so that sub-paragraphs (a) and (b) are applied cumulatively (i.e. the retail annex applies to non-equity securities that comply with *both* of the conditions set out in sub-paragraphs (a) and (b)). An alternative would be to follow more

closely the drafting approach taken in Level 1, which would involve stating the circumstances in which the wholesale annex is to apply (i.e. where the securities are to be admitted to a "qualified investor only" market ***OR*** have a denomination of EUR 100,000 or more) and then state that the retail annex shall apply in circumstances in which the wholesale annex does not apply.

14. **Application of derivative securities and underlying share annexes:** There are currently concerns that Articles 18, 19 and 20 of the draft delegated regulation relating to the application of Annex 16 (additional information for derivative securities) and Annex 17 (additional information for underlying shares) and specific items within those annexes are difficult to understand; and it may not always be clear in practice which annex, or which part of an annex, should or should not apply in which circumstances. We suggest some consideration is given to simplifying these provisions.

15. **Table of combinations for annexes:** Some of the concerns noted above could be ameliorated by the inclusion of a table indicating which combination of annexes should be used in which circumstances. Such a table is currently included in PD II Level 2 and was also included in the ESMA Final Report. It is not clear why the Commission chose not to include such a table in the draft delegated regulation or annexes.

16. However, as discussed above, we strongly suggest that the Commission re-visits the drafting of Articles 7 and 8 of the delegated regulation in particular, *in addition* to considering a table of combinations for the different annexes.

17. **Terminology / definitions:** We note that certain defined terms have not been carried forward from the ESMA Final Report. While this does not appear to be problematic in most cases, the Commission may wish to check that the chosen terminology is used consistently throughout the delegated regulation and annexes. For example, we suggest that the Commission changes remaining "schedule" references to "annex" and remaining "debt securities" references to "non-equity securities". Similarly, the Commission may wish to consider whether the title "Derivative securities" is the most appropriate title for Annex 16 when this term is no longer defined.

18. **Final terms:** There are several points relating to the provisions on final terms in the delegated regulation.

    a. Certain elements of Article F (Minimum information to be included in the base prospectus) of the ESMA Final Report appear not to have been carried forward to the draft delegated regulation. In particular, Article F(3) (which reflects Article 22(2) of PDII Level 2 and stated that information items that are not known at the time the base prospectus is approved and which can only be determined at the time of the individual issue may be omitted from the base prospectus and then included in the final terms) is useful, and should be carried forward to the delegated regulation.

    b. We also note that Article I of the ESMA Final Report (which reflects elements of Article 22(4) of PDII Level 2) does not appear to have been carried forward into the draft delegated regulation. This provision is useful in practice because it clearly sets out the limits and parameters for what information can be included in final terms, which supplements the description of the categories A, B or C (now contained in Article 26 of the draft delegated regulation).

        i. In particular, the very clear reference in Article I(2)(b) of the ESMA Final Report (reflecting Article 22(4)(b) of PDII Level 2) to the additional information items for final terms set out in Annex 21 of the ESMA Final Report (Annex 27 of the Commission's draft delegated

regulation) being "voluntary" is useful. This seems to have been lost in the draft delegated regulation. Currently, Article 26(4) of the delegated regulation states that the final terms "shall" also contain any information referred to in Annex 27. We suggest that this word is changed to "may" to ensure it is clear that the disclosure items in Annex 27 may be included in final terms on a voluntary basis (in line with the approach under PD II Level 2, from which we understand there is no intention to depart).

ii. The provision in Article I(2)(c) of the ESMA Final Report (reflecting Article 22(4)(c) of PDII Level 2), which stated that the final terms can include a replication of, or reference to, options already provided for in the base prospectus which are applicable to the individual issue is also useful and supports the Level 1 provision on this point (Article 8(3) of the Prospectus Regulation). For example, disclosure relating to seniority in the issuer's capital structure (item 4.6 of Annex 13, item 4.6 of Annex 14 and item 4.7 Annex 15) is Category A. There is a similar provision in PD II Level 2 annexes which is also Category A (see, for example, Annex V item 4.5). In a base prospectus context, an issuer is likely to set out the different options for securities that could have different levels of seniority in its capital structure in the base prospectus. It will then specify in the final terms which option is applicable to that particular issuance of securities. Article I of the ESMA Final Report explicitly envisaged that flexibility. This was helpful because such flexibility is crucial in practice because it allows issuers to issue different types of securities with different seniority in the issuer's capital structure under a base prospectus. There are other similar examples (e.g. "legislation under which the securities have been created", which is Category A information).

c. The drafting of Article 26(3) of the draft delegated regulation, relating to Category C information and Category B information that is not known at the time of approval of the base prospectus, appears to be problematic. Currently, the provision states that such information "shall" be inserted in the final terms. It would seem more appropriate to say that Category C information "may" be inserted in the final terms, noting that issuers should have the flexibility to include such information in the base prospectus, if that is possible.

19. **Comments related to other specific provisions of the delegated regulation**

Article reference	**Issue**	**Comment**
Article 36	Criteria for scrutiny and approval – omission of non-pertinent information	Article G(4) of the ESMA Final Report stated that information items required by an annex that are not pertinent to the issuer could be omitted from the prospectus. This does not appear to have been taken forward in the Commission's draft delegated regulation. The explicit confirmation that non-pertinent information can be omitted from the prospectus may be useful in practice. The Commission may wish to consider including a provision on this point, perhaps in Article 36 (Criteria for the scrutiny of the completeness of the information contained in the prospectus).

Article 37(2)	NCAs' ability to require additional information in the summary	We note the proposal that NCAs would be able to require additional information in the summary. This seems to be a new provision that was not envisaged in the ESMA Final Report. It also does not appear to be envisaged at Level 1, and so it is unclear whether this provision can be included at Level 2. This provision could lead to different forms of summary needing to be prepared depending on the NCA that is approving the prospectus, which does not seemed to be aligned with the spirit of the Prospectus Regulation. We also note that this could be problematic in practice given the page limit for the summary.
Article 38(b)	Reference to material "or" specific risks	Article 16(1) of the Prospectus Regulation requires risk factors to be both material **and** specific. In the light of this, we suggest that the reference to "material or specific risks disclosed elsewhere…" is changed to "material and specific risks disclosed elsewhere…"
Article 39	Typo in title	Should the title of Article 39 be "specialist" issuers, rather than "special" issuers?
Article 42(2)(f) and (g)	Key information appendix for notification of registration documents or URDs	Articles P(2)(d) and (e) of the ESMA Final Report stated that these requirements would not apply in the case of notification exclusively for the purpose of admission to trading of non-equity securities for which no summary is required. These qualifications were a helpful confirmation that the carve-out from the obligation to prepare a summary in certain circumstances (described in Article 7(1)) would also be applicable in the context of the Article 7(6) information to be provided under Article 26(4) of the Prospectus Regulation. These qualifications have been removed in the draft delegated regulation. It is not clear whether this was intended to be a substantive change or not. We note that the

		position set out in the ESMA Final Report could help to alleviate burdens for certain issuers. It would be helpful if the express qualifications set out in the ESMA Final Report could be carried across to the delegated regulation.
Article 44(1)	Submission for approval of final draft prospectus	It appears that the cross-reference to Article 42(2)(g) may be incorrect. We believe this should be a cross-reference to Article 42(2)(h) relating to the confirmation required where an issuer is submitting a URD and wishes to obtain the status of frequent issuer. This would be aligned with the ESMA Final Report.
Article 45(2)	NCA comments on a prospectus	The new drafting is problematic because the conditionality has been removed. The NCA should only be obliged to inform the issuer that a prospectus requires amendment if it deems that to be the case. The current drafting appears to indicate that the NCA must inform the issuer that the draft prospectus does not meet the relevant standards in ALL cases.

Comments applicable to the draft non-equity registration document and securities note annexes (Annexes 6, 7, 8, 13, 14 and 15)

Comments applicable to all non-equity registration document and securities note annexes (i.e. Annexes 6, 7, 8, 13, 14 and 15)

20. **Item 1.1 (Persons responsible):** This disclosure item now includes the words "Details of" in front of "All persons responsible for the information given in the prospectus…".

    It is not clear why these words have been added. Current practice for non-equity securities is to disclose the name of the issuer and any guarantor(s) and for those entities to give the required responsibility statement. It does not appear that there is any intention to change the substantive position on this point (which is also envisaged in Article 11(1) of the Prospectus Regulation).

21. **Item 1.2 (Responsibility statement):** This disclosure item has been re-drafted from the ESMA Final Report in slightly different ways for different annexes. Generally, the changes include the following:

> "A declaration by those responsible for the [securities note/registration document] that, having taken all reasonable care to ensure that ~~such is the case,~~ the information contained in the securities note is, to the best of their knowledge, in accordance with the facts and contains no omission likely to affect its import.
>
> ~~As the case may be,~~ A declaration by those responsible for certain parts of the [securities note/registration document] that having taken all reasonable care to ensure that ~~such is the case,~~

the information contained in the part of the securities note for which they are responsible is, to the best of their knowledge, in accordance with the facts and contains no omission likely to affect its import."

It is not clear why the words "such is the case" have been deleted. The requirement no longer seems to make sense grammatically and it is not clear what the declaration needs to say. We note that in Annexes 13 and 14, the words "having taken all reasonable case to ensure that" do not appear in the second paragraph. Those paragraphs make more sense.

Overall, we suggest that the drafting is returned to the position set out in the ESMA Final Report and there is a thorough check of this provision across all relevant annexes before they are finalised.

22. **Item 1.3 (Expert reports)**: This disclosure item has been re-drafted from the ESMA Final Report in slightly different ways for different annexes. Generally, the changes include the following:

"If the report has been produced at the issuer's request a statement to that effect [must be included *(Annex 8 only)*] ~~the effect that such statement or report is included, in the form and context in which it is included,~~ with the consent of the person who has authorised the contents of that part of the [securities note/registration document] for the purpose of the [securities note/prospectus]."

It is now not clear exactly what disclosure is required and whether the position has been changed substantively from the current PDII Level 2 position and the ESMA Final Report.

We suggest that the drafting is returned to the position set out in the ESMA Final Report and there is a thorough check of this provision across all relevant annexes before they are finalised.

Comments applicable to two or more of the non-equity registration document annexes (i.e. Annexes 6, 7 and 8)

23. **Item 2.1 of Annexes 6, 7 and 8 (Auditors):** It is not clear why the words "details of" (their membership of a professional body) have been included. Those words do not appear in the PDII Level 2 annexes or in the ESMA Final Report. We assume that there was no intention to change this disclosure requirement substantively by requiring additional information to that which would be disclosed without the words "details of".

We suggest that the drafting is returned to the position set out in the ESMA Final Report and there is a thorough check of this provision across all relevant annexes before they are finalised.

24. **Item 4.1.3 of Annexes 6 and 7 (Information about the issuer):** This has been re-drafted from the ESMA Final Report and PD II Level 2 annexes:

"The date of incorporation and the length ~~of life of the issuer~~ of time the issuer has been in existence, except where the period is indefinite."

The reason for this amendment is unclear. It seems unlikely that an issuer will have been in existence for an indefinite period of time. We assume that the previous reference to "length of life" referred to any future limit on the length of the life of the issuer.

We suggest that the drafting is returned to the position set out in the ESMA Final Report and there is a thorough check of this provision across all relevant annexes before they are finalised.

25. **Item 8.1 of Annex 6, item 8.1 of Annex 7 and item 7.1 of Annex 8 (Profit forecasts or estimates):** It is not clear why the words "chooses to" in the provision "Where an issuer **chooses to** include a profit forecast or a profit estimate…" are only included in Annex 8 and not also included in Annexes 6 or 7.

    We suggest including these words in Annexes 6, 7 and 8 to ensure there is no confusion as to the optionality for an issuer to include a profit forecast or estimate in a prospectus related to non-equity securities.

Comments applicable to Annex 6 (retail non-equity registration document) only

26. **Item 7.1 (Trend information):** We would suggest considering "… to **the** effect that no such changes exist", rather than "to **that** effect that no such changes exist".

27. **Item 11.2.1 (Financial information):** We would suggest returning the drafting of this disclosure requirement to the drafting contained in the ESMA Final Report, as set out below, to ensure it is clear that there could be situations in which interim financial information may be audited.

"If the registration document is dated more than nine months after the date of the last audited financial statements, it must contain interim financial information, which may ~~not~~ be unaudited (in which case that fact must be stated) covering at least the first six months of the financial year"

Comments applicable to Annex 7 (wholesale non-equity registration document) only

28. **Item 9.2 (Administrative, management and supervisory bodies conflicts of interests):**

    a. It is not clear why the following change was made to the ESMA Final Report drafting:

Potential conflicts of interests between any duties ~~to the issuer of~~ carried out on behalf of the issuer by the persons referred to in item 9.1, and their private interests and or other duties must be clearly stated.

    We suggest reversing this drafting change as the previous drafting seemed to be clearer.

    b. It is not clear why the words "that no such persons exist" have been inserted in "In the event that there are no such conflicts, a statement to that effect that no such persons exist must be made". The insertion of these words does not appear to make sense. We also note that the words do not appear in the equivalent disclosure item in Annex 6 (retail non-equity registration document).

29. **Item 11.4.1 (Significant change in the issuer's financial position):** It is not clear why the words "an appropriate negative statement" have been changed to "an appropriate statement that no such proceedings exist". This does not seem to make sense in the context of a disclosure requirement relating to significant change in the issuer's financial position, and it seems likely that these words were intended to be included in the disclosure requirement relating to legal and arbitration proceedings (item 11.3.1).

We suggest that the drafting is returned to the position set out in the ESMA Final Report. See also our general comment on this disclosure requirement at paragraph 36.

Comments applicable to Annex 8 (secondary issuances non-equity registration document) only

30. **Item 10.4 (Significant change in the issuer's financial position):** The drafting change at the end of the disclosure requirement means that the final part of the requirement is now difficult to understand. We would suggest considering returning the drafting to the drafting used in the ESMA Final Report and in Annex 6, item 11.5.1 as follows:

> A description of any significant change in the financial position of the group which has occurred since the end of the last financial period for which either audited financial statements or interim financial information have been published, or provide an appropriate negative statement ~~to that effect~~.

Comment applicable to Annex 13, 14 and 15 (non-equity securities notes)

31. **Item 4.6 of Annex 13, item 4.6 of Annex 14, item 4.7 Annex 15 (Seniority in the issuer's capital structure):** These disclosure items appear to replace the provisions currently contained in the PD II Level 2 annexes which referred to "Ranking of the securities…". It is not clear whether the new wording is intended to change current disclosure practice. Perhaps this is an area in which ESMA could usefully provide a Q&A.

    More generally, please see paragraph 18(b)(ii) above in relation to the categorisation of this disclosure requirement as Category A and the need to ensure that different options can be included in the base prospectus, with the relevant option being referenced or replicated in the final terms, as envisaged in Article 8(3) of the Prospectus Regulation.

Comments applicable to Annex 13 (retail non-equity securities note) and Annex 15 (secondary issuances non-equity securities note)

32. **Item 4.15 of Annex 13, item 4.5 of Annex 15 (Tax disclosure):** It is helpful that this now refers to the issuer's "country of incorporation", rather than the issuer's "Member State". We assume that the same change has not been made in relation to investors because the purpose of the Prospectus Regulation is to protect investors in the EU, rather than elsewhere.

CONCERNS IN RELATION TO AREAS WHERE THE COMMISSION'S APPROACH DOES *NOT* DIFFER FROM THE ESMA FINAL REPORT

General comment

33. **Risk factors:** As a general comment, we note that this is one of the more significant changes to the current Prospectus Directive regime. As such, there may be a degree of uncertainty in relation to the expectations surrounding the application of the new provisions when the Prospectus Regulation regime is implemented in full in July 2019. We welcome ESMA's efforts in relation to its guidelines for NCAs, on which we have engaged with ESMA. There was no expectation that further clarity on this point would or should be given in the delegated regulation and annexes. Two minor observations on the annexes are:

a. We note that the annexes appear to re-state concepts and language contained in Article 16 of the Level 1 Prospectus Regulation (see, for example, item 3.1 of Annex 6 and similar disclosure requirements in other annexes); and

b. The level of detail that will be required in risk factors relating to the level of subordination (see, for example, item 2.1(a) of Annexes 13, 14 and 15) is not currently clear. This may be an area on which an ESMA Q&A would be useful.

Comment applicable to the draft delegated regulation

34. **Additional criteria for the scrutiny of the information contained in the prospectus (Article 40):** We note that Article 40 of the draft delegated regulation reflects Article O(1) of the ESMA Final Report, which envisages that NCAs can apply criteria in addition to those laid down in the delegated regulation for the purpose of scrutinising the prospectus. In practice, this could lead to different approaches being taken by NCAs, which seems out of line with the intention and spirit of the Prospectus Regulation regime and could be problematic for issuers in practice because it could mean that the prospectus approval process is not predictable. We suggest consideration is given to deleting this provision.

Comment applicable to the draft non-equity registration document and securities note annexes (Annexes 6, 7, 8, 13, 14, 15) and derivative securities annex (Annex 16)[2]

Comments applicable to one or more of the non-equity registration document annexes (i.e. Annexes 6, 7 and 8)

35. **Item 1.5(c) of Annexes 6, 7 and 8 (Disclosure of approval statement):** There appears to be a typo in sub-paragraph (c) that has been carried over from the ESMA Final Report, namely "such approval should not be considered an endorsement of the issuer that **it** the subject of this registration document." (emphasis added). "It" should be "is".

36. **Items 7.1 and 11.5.1 of Annex 6, items 7.1 and 11.4.1 of Annex 7 and items 6.1 and 10.4 of Annex 8 (Trend information and significant change in the issuer's financial position):**

    We note that ESMA considers the terms "financial performance" and "financial position" to be well known to the market (see paragraph 267 of the ESMA Final Report). However, we query whether there is a need for two separate disclosure requirements. It may be clearer if these disclosure requirements were to be combined into one disclosure requirement.

37. **Item 11.1.6 of Annex 6 and item 11.1.5 of Annex 7 (Consolidated financial information in certain non-equity registration document annexes):** The term "stand-alone" accounts is used rather than "own accounts" (which is the term used under the PDII Level 2 annexes). It is not clear why this change was made.

38. **Item 4.1.7 of Annex 6 (Expected financing of issuer's activities):** The words "description of" are not needed in sub-paragraph (b) as they follow the words "Information on".

39. **Annex 8 (Simplified disclosure regime for non-equity issuances):**

[2] This response is primarily focused on vanilla non-equity securities, as this is ICMA's core area of focus. However, we have included one important comment on Annex 16 (Derivative securities) below.

a. **Item 10.1 of Annex 8 (Financial statements)**: The requirement for half-yearly financial statements is required for the secondary issuance regime at Level 1 (Article 14(3)(a) of the Prospectus Regulation) but we note that it is not required in the wholesale non-equity registration document annex (Annex 7). As highlighted in our previous comments to ESMA and informally communicated to the Commission when the ESMA Final Report was published, this leads to the strange outcome of a more onerous position under the "simplified" prospectus regime for non-equity securities than applies in the context of the usual (non-simplified) prospectus regime for wholesale non-equity securities.

b. **Item 12.1 of Annex 8 (Material contracts):** As highlighted in the ICMA response to the ESMA consultation on format and content of the prospectus (see page 31, paragraph (e) under Q.74), it is not clear what is meant by "not previously disclosed elsewhere" at the start of this disclosure item. Does this mean that the issuer is not required to disclose material contracts as long as they are mentioned somewhere in the public domain? If the requirement is by reference to information disclosed elsewhere in the prospectus, it seems that the requirement is, potentially, more onerous than the requirements of the retail or wholesale annexes, which relate to disclosure about material contracts resulting in obligations material to the issuer's ability to meet obligations under the securities. For clarity, we would suggest that the requirement should simply track the primary disclosure annexes.

c. **Item 6.5 of Annex 15 (Paying agents and depositary agents):** This is stated to be a requirement for wholesale securities only. It is not clear why this is the case. The equivalent requirement appears in Annex 13 (at item 5.4.2) as well as Annex 14 (at item 5.2).

Comments applicable to one or more of the non-equity securities note annexes (i.e. Annexes 13, 14 and 15)

40. **Item 3.2 of Annex 13 and Annex 15 (Reasons for the offer and use of proceeds):** It is not clear why the words "or for the admission to trading" have been inserted. The PDII Level 2 wording that referred only to the offer to the public seemed more appropriate in a retail context.

41. **Item 5.3.1(a) of Annex 13 and 15, item 6.4 of Annex 13 and item 6.3 of Annex 15 (Price in certain non-equity securities notes):**

    In practice, the following disclosure requirements would usually be satisfied by the same disclosure. We assume that this will still be possible under the new Prospectus Regulation.

"An indication of the expected price at which the securities will be offered."

    and

"The issue price of the securities."

42. **Item 7.4 of Annex 13 (PRIIPs KID information in the prospectus):** As highlighted in our previous comments to ESMA and informally communicated to the Commission when the ESMA Final Report was published, there are concerns that the requirement to disclose any information from the PRIIPs KID that is included in the summary elsewhere in the prospectus could lead to unexpected results in practice.

43. For example, we query whether final terms for non-equity securities are an appropriate place to disclose the various detailed disclosure requirements required by the PRIIPs KID, such as the summary risk indicator.

44. In addition, because the PRIIPs KID is only relevant where securities are being offered to retail investors in the EEA, there will be a differentiation between prospectuses and/or final terms for low denomination non-equity securities offered to retail investors in the EEA and those that are not offered to retail investors in the EEA, which might look odd in practice.

45. The approach also seems to be based on a consideration of the Prospectus Regulation in isolation from the PRIIPs Regulation. If a PRIIPs KID is available to retail investors as part of a package of regulated information required under the various EU legislative regimes, it is not clear why that information must also be repeated in the prospectus. One of the underlying themes of the Prospectus Regulation is to reduce burdens on issuers by considering the package of regulated information available to retail investors under other regimes, and how they work together. It is not clear why that general policy approach would not be carried through to the Level 2 measures.

Comment applicable to the derivate securities annex (Annex 16)[3]

46. **Item 2.2.2(a)(i) of Annex 16 (Credit linked securities - disclosure of information on reference entity or issuer of reference obligation):** As highlighted in the ICMA response to the ESMA consultation on format and content of the prospectus (see pages 24 – 25, paragraph (vi) under Q.49), the effect of making the disclosure of information relating to the reference entity (or the issuer of the reference obligation) as if it were the issuer in accordance with the wholesale non-equity registration document "Category A" is that it will effectively prevent issuers making such issuances under final terms, unless they have supplemented their base prospectus with the relevant information. This will add cost and time to the issuance process. We note that ESMA states in its Final Report at paragraph 388 that they believe the categorisation of this item as category A is warranted on the basis of investor protection. However, we would highlight again that this will result in significant additional burdens on issuers of this type of product in needing to produce a drawdown prospectus and/or a supplement before any issuance of this type of product. We therefore query whether the calibration between investor protection and the burdens on issuers in this context has been struck appropriately. The concerns of issuers of this type of security would be addressed if this information were to be re-categorised as "Category C", so that issuers of credit-linked securities can continue to use final terms to issue those securities.

Comments applicable to Annex 21 (Consent)

47. **Section 1 title:** There appears to be a typo. Consider "Prospectus" not "Prosectus".

48. **Item 1.1 (Express consent):** There appears to be a typo. Consider "any financial intermediary" not "an financial intermediary".

Comments applicable to Annex 27 (Other categories of information)

49. **Item 2 of Annex 27 (Additional provisions related to the underlying):** The word "note" (and possibly "annex") appears to be missing ("Additional provisions, not required by the relevant securities note [annex] which relate to the underlying").

[3] This response is primarily focused on vanilla non-equity securities, as this is ICMA's core area of focus. However, we have included one important comment on Annex 16 (Derivative securities).

50. **Item 6 of Annex 27 (ECB Eligibility)**: This is a helpful addition.

51. **Green/social/sustainability bonds (Annex 27):** We note that there is no flexibility to include additional information in final terms that may be relevant to any green, social or sustainability bond issued under a base prospectus. It would be helpful if the Commission could consider including this flexibility in Annex 27.