ADVICE TO ESMA

Response to the Consultation Paper ESMA Guidelines on enforcement of financial information

I. General comments

1. The Securities Markets Stakeholder Group ("SMSG" and" the Group") welcomes the opportunity to reply to the Consultation Paper on ESMA Guidelines on enforcement of financial information ("Guidelines"). The SMSG congratulates ESMA for its initiative to issue guidelines on this topic rather than to rely on CESR standards, as this sends a strong signal. The compliance of issuers and prospective issuers with financial information standards and norms is central to foster investor protection and hence confidence, and as such is vital to the well-functioning of European securities markets. Ensuring that the enforcement of these norms and standards is harmonised in the EU is therefore key to level the playing field in terms of investor protection across European member states and avoid regulatory arbitrage.

2. The SMSG overall agrees with the Guidelines proposed by ESMA. The Group will not respond to each of the questions included in the Consultation paper, but will focus on what we perceive as the main issues raised by the Guidelines. In addition, the SMSG would like to make the following general comments:

3. The SMSG would encourage ESMA to emphasise, in the Guidelines, that enforcers should not only be responsible for monitoring the compliance with reporting and accounting standards of the financial information disclosed by listed companies or willing to be listed ones. Enforcers should also monitor the content of the financial information disclosed, in order to ensure that the information disclosed to investors is not misleading. To this end, and to avoid any type of confusion between enforcers' and auditors' and CRAs' functions, as well as to foster greater supervisory convergence in the European Union, the SMSG encourages ESMA to specify the content requirements that enforcers should control. In addition, the Guidelines should specify that this monitoring of the content of the financial information disclosed should not entail the enforcer's liability for a failure to catch communications that are wrong or misleading.

4. In addition, it is our understanding that the financial information requirements to which the Guidelines refer and which are provided for under the Transparency and Prospectus Directives only apply to those companies that are admitted to trading or willing to be admitted to trading on regulated markets. The companies admitted to trading only on Multilateral Trading Facilities ("MTFs") are therefore not covered, whilst a significant proportion of publicly traded companies in Europe (most of the time small and medium size enterprises) are traded on MTFs. Whilst the SMSG agrees that a proportionate regime should apply to those companies, and that the scope of ESMA's guidelines has been defined at the Level

one of the European Union regulation, some members of the Group also believe that these companies should comply with the same overall requirements as larger companies (although adapted), notably in respect to the Transparency Directive. These members believe that this would contribute to enhance investor protection, and hence increase investor willingness to invest in SMEs that are often perceived as riskier than larger companies. As such, these members of the SMSG would encourage ESMA to further analyse the possibility for the requirements borne by companies admitted to trading (or willing to be so) on regulated markets to be applied by the national regulators on a proportionate basis to companies admitted to trading (or willing to be so) on MTFs, while recognizing that this which may entail a change of the Level 1 instruments. Other members of the Group does not support this view and find that the need to ensure proportionality for SMEs requires a flexible approach to disclosure that would not be served by extending the regime currently applicable to regulated markets to MTFs.

5. Finally, the SMSG would encourage ESMA to bear an even greater role in respect to the enforcement of the norms referred to in the Guidelines, as it would truly contribute to foster a greater level playing field across the European Union.

II. Specific comments

6. The SMSG has the following specific comments on the Guidelines proposed by ESMA:

Q7: Do you agree that enforcers should have adequate independence from each of government, issuers, auditors, other market participants and regulated markets? Are the safeguards discussed in paragraphs 38 to 41 sufficient to ensure that independence? Should other safeguards be included in the guidelines? Do you agree that market operators should not be delegated enforcement responsibilities?

7. Whilst the SMSG fully agrees with the need for enforcers to be independent in order to appropriately conduct their functions, we are concerned by the fact that requiring enforcers to be independent from regulated markets could raise significant issues in certain instances. In fact, some regulated markets in the European Union may have a delegation of power from enforcers to ensure that issuers and prospective issuers comply with the financial information requirements provided under the Transparency and Prospectus Directives. The SMSG therefore encourages ESMA to further clarify this point, in order to avoid any issues in respect to the application of the Guideline.

Q8: Are you in favour of enforcers offering pre-clearance? Do you have any comments on the way the pre-clearance process is described and the pre-conditions set in paragraphs 42 to 45?

8. The SMSG is in favour of pre-clearance as described in paragraph 42 to 45. However it should be stressed that pre-clearance should not be used as a tool to modify rules and guidelines. In addition, pre-clearance should be used with particular caution, since it can sometimes be used in a questionable manner by enforcers and by market participants, and may also lengthen the approval process for prospectuses.

Q9: Do you agree that in order to ensure investor protection, the measures included as part of a prospectus approval should be supplemented by additional measures of ex-ante enforcement in relation to financial information? If yes, could you please specify the exact nature of ex-ante enforcement that you would expect from enforcers?

9. The SMSG believes that ex-ante controls of prospectuses should be allowed but that enforcers should not be bound by nor liable for their opinions on non-published prospectuses. In other words, whilst an enforcer may approve a prospectus prior to its publication, when it controls it after its publication it should not be bound by its initial decision. It is important to clearly differentiate between the role of an auditor or a CRA and that of a regulator, by ensuring that only auditors as well as the board of the company are made responsible for the validation of accounts prior to their publication and only CRAs can be responsible for credit rating opinions. In addition, considering the fact that there is a limited period of time for the enforcer to notify its decision regarding the approval of the prospectus, the enforcement of financial information included in prospectuses may be hampered by the timeframe which is not consistent with the enforcement procedures: this may limit the enforcement activity on the financial information with an increase of the risk for investors. Moreover, while as part of the enforcement of the recurring financial information published by issuers (according to the TD requirements) an enforcer has the possibility to consult also with other enforcer on complex accounting matters (e.g. addressing emerging issue to EECS before taking its own decision), in the case of Prospectuses, such action would be difficult to be realised due to time constraint: consequently, the SMSG believes the approval of a prospectus and the enforcement on issues relating to financial information have different purposes and that the issue of the enforcement of the financial information included in the prospectuses could be dealt with in the context of new guidelines on the Prospectus Directive. In addition, associating enforcement activities with the scrutiny of prospectus may result in unduly delay of the approval procedure, whereby the enforcer will tend to grant approval only after completion of complex enforcement actions.

Q13: What are your views with respect to the best way to take into account the common enforcement priorities established by European enforcers as part of the enforcement process?

10. The SMSG believes that enforcers should be required to control all companies falling under the scope of the Transparency and Prospectus Directives, and not only a sample as currently proposed in the Guidelines. However, if the concept of "selection" is retained in the Guidelines, it would be crucial to ensure that the selection of companies on the basis of a risk-based approach is not done on the ground of their size but rather based on the complexity of their activity or corporate structure. This is because contrary to what is often assumed, the risk of errors is not greater for smaller companies than for larger ones. Rather, this risk is related to the complexity of the activities carried out by companies and of the financial structure of their group. In any case no entity should escape being subject to control over a given period of time.

11. In addition, the Group would recommend the methodology used to select companies falling under the scope of the Transparency Directive to be based on the historical analysis of the conformity of the financial information previously disclosed by the company, in order to identify those with the higher risks of errors based on past experience.

12. Furthermore, when reporting entities significantly change their accounting principles such as rules in respect to depreciation, consolidation or deconsolidation of subsidiaries or parent companies enforcers should pay a particular attention to those companies that will potentially be the most impacted by these changes, as they may be more prone to errors in respect to financial information disclosures.

Q14: Do you agree that the examination procedures listed in paragraph 54 are appropriate for an enforcer to consider using? Are there other procedures which you believe should be included in the list?

13. The SMSG believes that full reviews should always be required from enforcers in order to guarantee the compliance of financial information disclosed under the Transparency and Prospectus Directives, although always taking in consideration that enforcers' role is not the role of an auditor or of a CRA.

Q 16: What are your comments regarding enforcement actions as presented in paragraphs 57 to 67? Do you agree with the criteria proposed?

14. The SMSG believes that it should be made explicit in the Guidelines that enforcers should have the ability to take administrative sanctions and that these sanctions should be made public.

Q 19: Do you have any comments on the transparency, timing and frequency of the reporting done by the enforcers with respect to enforcement actions taken against issuers?

15. The SMSG believes that the communication of enforcement decisions to ESMA is central in fostering greater supervisory convergence in the European Union. The SMSG would recommend ESMA to specify further the purpose of the three-month delay granted to enforcers to communicate their decisions to ESMA. The SMSG believes that during this period of time, enforcers and ESMA should communicate in order for enforcers to receive ESMA's opinion on their decisions prior to enforcing them. This would enhance convergence with respect to enforcement decisions in the European Union.

Q20: What are your views about making public on anonymous basis enforcement actions taken against issuers?

16. The SMSG believes that whilst not all enforcement decisions should be published, all administrative sanctions taken as a result of an enforcement action should be disclosed to the public, along with the a detailed explanation of the reasons behind such sanction and mentioning the company's name. However, the requirements for decisions to be published together with the name of the company in question should be calibrated by ESMA depending on the significance of the errors. Investors should have the ability to be informed of the name of issuers which have committed significant errors and the nature of the error committed. In addition, in order to facilitate a learning process both for other issuers and the auditor community, the publication of such sanctions and decisions should also include the merits of the case.

17. In this regard, the SMSG welcomes the adoption by the EU Parliament on 12 June 2013 of the proposal for a directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC (« Transparency II directive »). Article 29 of the Transparency Directive, as amended by the Transparency II directive, provides that competent authorities, when the directive is implemented in national law by the Member

States at the latest in 2015, shall publish every decision on sanctions and measures imposed for a breach of this Directive without undue delay, including at least information on the type and nature of the breach and the identity of natural persons or legal entities responsible for it. The competent authority may delay publication of a decision, or may publish the decision on an anonymous basis if certain limited circumstances are in place. The SMSG calls for the Prospectus directive to be similarly modified.

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Chair

Securities and Markets Stakeholder Group