

ESMA's July 2016 Updated Q&A on Prospectuses

Alternative Performance Measures – A Call for Caution

July 26, 2016

In its July 2016 updated questions and answers on prospectuses (“[Q&A](#)”), the European Securities and Markets Authority (“ESMA”) expressed the view that the oral communication of alternative performance measures (“APMs”) by an issuer or offeror at a roadshow or other live presentation is only permissible if such information is also included in the draft prospectus or, should the prospectus already have been published, in a supplement to the prospectus. Issuers should take into account this broad interpretation of the consistency requirement regarding prospectuses and other offering-related communications when disclosing APMs.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or:

FRANKFURT

Gabriele Apfelbacher
+49 69 97103 216
gapfelbacher@cgsh.com

Manuel Metzner
+49 69 97103 111
mmetzner@cgsh.com

Valentin Pfisterer
+49 69 97103 274
vpfisterer@cgsh.com

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199



Consistency of Prospectus and Other Offering-related Communications

General Consistency Requirement

The [Prospectus Directive](#) provides that all oral or written information disclosed by an issuer with respect to an offer to the public or the admission to trading on a regulated market outside a prospectus shall be consistent with the information contained in the prospectus (Art. 15(4) of the Prospectus Directive). This consistency requirement has been implemented into German law in Sec. 15(4) of the [German Securities Prospectus Act](#). In its Delegated Regulation 2016/301 of November 30, 2015 (“[Delegated Regulation](#)”), which is directly applicable European law, the European Commission has further clarified the consistency requirement set forth in Art. 15(4) of the Prospectus Directive. Pursuant to Art. 12 of the Delegated Regulation, among other things, information about the offer to the public or admission to trading on a regulated market shall not contradict the information contained in the prospectus, not refer to information contradicting the information contained in the prospectus and not present a materially unbalanced view of the information contained in the prospectus. Art. 12 of the Delegated Regulation suggests that the consistency requirement set forth in Art. 15(4) of the Prospectus Directive (and Sec. 15(4) of the German Securities Prospectus Act) should be interpreted fairly broadly which is not in line with the generally narrow approach adopted by German commentators.

APM-related Consistency Requirement

Art. 12 of the Delegated Regulation also deals with consistency regarding APMs. Offering- or listing-related information shall not contain APMs concerning the issuer which are not also contained in the prospectus.

The Delegated Regulation defines APMs as “performance measures which are financial measures of historical or future financial performance, financial position, or cash flows, other than financial measures defined in the applicable financial reporting framework” (Art. 12(3) of the Delegated Regulation). Not infrequently, APMs are also referred to as “non-GAAP financial measures”, including in recent publications of IOSCO

([Statement on Non-GAAP Financial Measures – Final Report](#)) and the SEC ([Non-GAAP Financial Measures – Compliance and Disclosure Interpretations](#)). APMs are generally derived from or calculated based upon GAAP financial measures such as, *inter alia*, EBITDA, net debt, earnings and other financial statement line items adjusted for one-time charges, etc. Issuers make ample use of APMs in communications with investors and other stakeholders, both in and outside the context of an offering or listing.

The APM-related consistency requirement applies to both communications in oral and written form and irrespective of whether APMs are used for advertisement or other purposes. The reasoning underlying the prohibition to use APMs in offering-related communications unless they are also contained in the prospectus is their potentially disproportionate influence on the investment decision of prospective investors.

ESMA Interpretive Guidance

In its Q&A, ESMA responds to the question of how an issuer should proceed in cases where a participant at a live presentation (e.g. roadshow or interview) requests information about an APM which is not included in the prospectus. In its response, ESMA distinguishes between a scenario where the prospectus has not yet been approved and published and a scenario where the prospectus approval and publication have occurred.

— Disclosure of an APM prior to the approval and publication of the prospectus

Prior to the approval and publication of the prospectus, an issuer is free to provide information on an APM that is not included in the draft prospectus submitted to the relevant national competent authority (“NCA”) at an investor presentation. Should the issuer decide to provide such information, the draft prospectus should be amended to include the relevant APM before the prospectus is approved and published.

— Disclosure of an APM following the approval and publication of the prospectus

Following the approval and publication of the prospectus, an issuer may either provide

information on an APM that is not included in the prospectus or decline to provide such information at an investor presentation. Should the issuer provide such information, the issuer is obliged to publish a prospectus supplement containing the relevant APM.

ESMA's guidance shows that the APM-related consistency requirement is interpreted very broadly. Any APM disclosed in the context of an offering or listing must be included in the prospectus or a supplement thereto, and issuers disclosing APMs are expected to comply with the [2015 ESMA Guidelines on Alternative Performance Measures](#). ESMA's interpretation of the APM-related consistency requirement seems to be based on the notion that APMs constitute *per se* significant information and, as such, must be included in the prospectus. This is in line with the view of the Commission expressed in the Delegated Regulation according to which APMs may have a disproportionate effect on the investment decision.

Further Impact of the APM-related Consistency Requirement and its Interpretation by ESMA

Prospectus Liability and Comfort Letter

The issuer's, offerors' and/or listing agents' liability for the prospectus will extend to APMs included in the prospectus. Therefore, issuers should expect the syndicate banks acting as underwriters and/or listing agents in connection with a public offering and/or listing of securities to request that any APMs included in the prospectus be covered by the auditors' comfort letter to be issued in connection with the prospectus or, should that not be possible, to perform alternative in-depth due diligence procedures with respect to such APMs. Any APMs intended to be used in offering-related communications should, therefore, be discussed with the issuer's auditors ahead of time and suitable back-up materials should be prepared and made available to the issuer's auditors and the syndicate banks.

Scope of the APM-related Consistency Requirement

The general consistency requirement, as well as the specific APM-related consistency requirement as set forth in the Delegated Regulation and its

interpretation by ESMA directly apply only to "information ... about/concerning the offer to the public or admission to trading". However, the Q&A should not be read as to mean that only APMs used after a draft prospectus has been filed with the NCA will fall under the consistency requirement and, thus, have to be included in the prospectus. Rather, all communications of APMs made with a view to or in the context of a public offering or listing on a regulated market should be covered, including at the occasion of a pilot fishing exercise or a general pre-offering investor presentation.

The analysis is more difficult with respect to APMs communicated as part of an issuer's regular financial reporting, regular communications with research analysts, etc. Whether or not the APM-specific consistency requirement as interpreted by ESMA applies, should very much depend on the circumstances of the individual case. If, for example, very general plans of an issuer to conduct a public offering are known, although the timing and details of the offering are unclear, and APMs are communicated as part of the most recent regular financial reporting of an issuer prior to the offering, e.g., in the management report (*Lagebericht*) which is not generally included in the prospectus, there is at least a risk that the NCA would take the view that such APMs have to be included in the prospectus. It is unclear, whether and how such APMs could be effectively "recalled" prior to the approval and publication of the prospectus to avoid a disclosure requirement. Even if APMs previously included in the regular financial reporting of the issuer are not repeated in the regular financial reporting preceding the offering, investors may have an expectation to get updated APMs during investor presentations preceding the public offering which would bring the issuer directly in the realm of the ESMA guidance. Rejecting a prospective investor's quest for information may have negative effects on the marketing of the offering more generally. All this shows that (prospective) issuers should act with caution when disclosing APMs.

...

CLEARY GOTTlieb