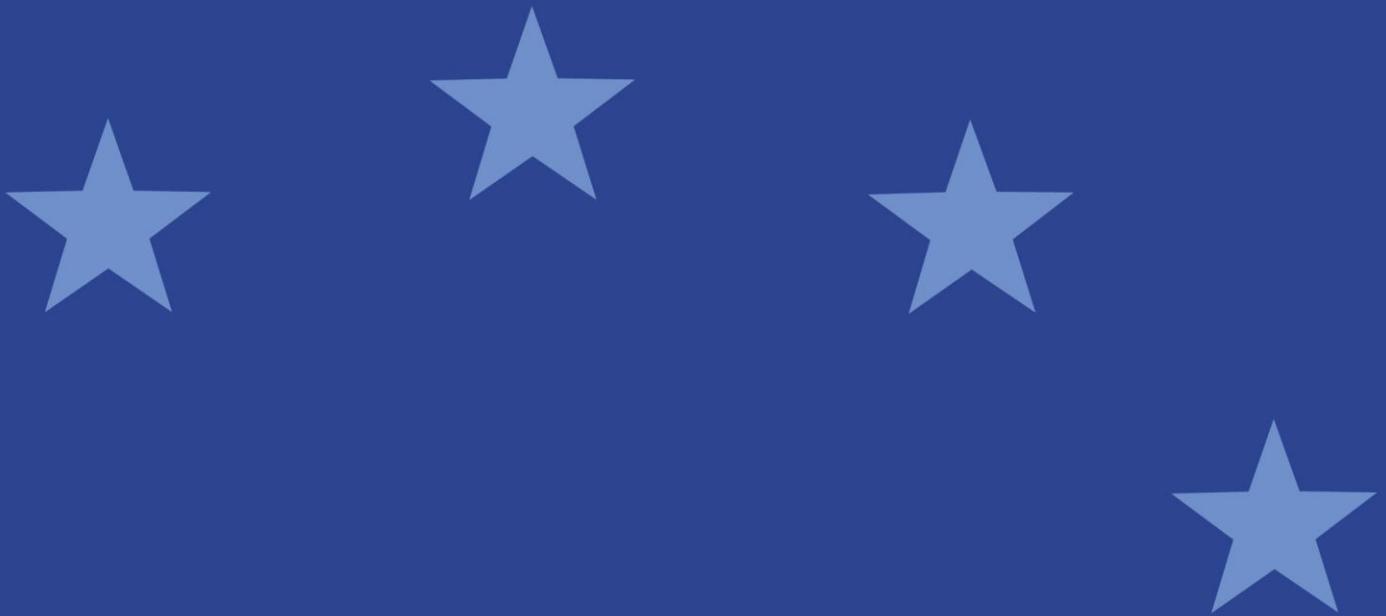




European Securities and
Markets Authority

Response form to Consultation Paper

Draft Guidelines on disclosure requirements under the Prospectus Regulation



Responding to this paper

ESMA invites responses to the questions set out throughout its Consultation Paper on Draft Guidelines on disclosure requirements under the Prospectus Regulation (ESMA31-62-1239). Responses are most helpful if they:

- respond to the question stated;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all responses received by **4 October 2019**.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

- Insert your responses to the questions in the Consultation Paper in the present response form.
- Please do not remove tags of the type <ESMA_QUESTION_CPG_1>. Your response to each question has to be framed by the two tags corresponding to the question.
- If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
- When you have drafted your response, name your response form according to the following convention: ESMA_CPG_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_CPG_ABCD_RESPONSEFORM.
- Upload the form containing your responses, **in Word format**, to ESMA’s website (www.esma.europa.eu under the heading “Your input – Open consultations” → “Consultation on Draft Guidelines on disclosure requirements under the Prospectus Regulation”).

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. **Please clearly indicate by ticking the appropriate checkbox on the website submission page if you do not wish for your contribution to be publicly disclosed.** A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request.

Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading "Data protection".

Who should read the Consultation Paper

The Consultation Paper may be of particular interest to investors, issuers, including issuers already admitted to trading on a regulated market or on a multilateral trading facility, offerors or persons asking for admission to trading on a regulated market as well as to any market participant who is affected by the new Prospectus Regulation.

General information about respondent

Name of the company / organisation	Eumedion
Activity	Other Financial service providers
Are you representing an association?	<input checked="" type="checkbox"/>
Country / region	Netherlands

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CPG_1>

TYPE YOUR TEXT HERE

<ESMA_COMMENT_CPG_1>

Questions

Operating and financial review

Q1 Do you agree with the choice to largely carry over the CESR recommendations on OFR? If not, could you please indicate what further guidance should be provided and the legal basis for such?

<ESMA_QUESTION_CPG_1>

Yes, we agree.

<ESMA_QUESTION_CPG_1>

Q2 Do you agree with the introduction of draft guideline 4 in order to provide further guidance on the use of the management report? Do you believe the inclusion of any separate non-financial report (when applicable) could materially increase the length of equity prospectuses? If so, please provide your reasoning and an alternative proposal.

<ESMA_QUESTION_CPG_2>

Yes, we agree. Management has degrees of freedom to choose how to comply with the OFR requirements. We agree that the resulting prospectus could materially increase the length of an equity prospectus, but we see no alternative requirement that could counter that.

<ESMA_QUESTION_CPG_2>

Q3 Do you believe the application of draft guidelines 1, 2, 3 and 4 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_3>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_3>

Capital resources

Q4 Do you agree with the choice to largely carry over the CESR recommendations on capital resources? If not, could you please indicate what further guidance should be provided and the legal basis for such?

<ESMA_QUESTION_CPG_4>

We do not agree. The phrase in the CESR recommendation ‘and the impact such restrictions have had or are expected to have on the ability of the issuer to meet its cash obligations’ wrongly narrows the relevance of disclosures down to those that affect the ability to meet its cash obligations only. Investors are interested in what the total cash balance is after the issuer upstreams (either by dividends, or inter-company loans) all the cash it practically can from its controlled subsidiaries, taking into account all restrictions. Irrespective of whether there is any cash obligations in the issuing entity. There could be no material cash obligations at all and still investors need to know this information. The difference between this near term potential issuer cash balance and the reported consolidated cash balance should be qualitatively and quantitatively explained. The mentioned examples ‘Examples of

restrictions include exchange controls and taxation consequences of transfers' should be expanded with explicitly mentioning (bank) covenants, and dividend leakage to non-controlling shareholders.

<ESMA_QUESTION_CPG_4>

Q5 Do you consider that the clarifications in these draft guidelines on how text provided elsewhere should be cross-referred to are useful?

<ESMA_QUESTION_CPG_5>

We agree with 'referencing in' text provided elsewhere. Semantically 'cross referencing' seems to imply that two references are made: to and fro, whereas there is only one reference made.

<ESMA_QUESTION_CPG_5>

Q6 Do you believe the application of draft guidelines 5, 6, 7 and 8 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_6>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers. We would like to note that ESMA would explicitly mention in the definition of credit facilities (as used in guideline 7) that '(reverse) factoring' should be considered to be a credit facility.

<ESMA_QUESTION_CPG_6>

Profit forecasts and estimates

Q7 Do you agree with the choice to largely carry over the CESR recommendation on profit forecasts and estimates? If not, could you please indicate what further guidance should be provided and the legal basis for such?

<ESMA_QUESTION_CPG_7>

Yes, we agree. However guideline 47 could be expanded with explicitly mentioning 'competitive position'. Market shares tend to lag changes in competitive position, therefore information on foreseeable changes in the competitive position will be of interest for investors.

<ESMA_QUESTION_CPG_7>

Q8 Do you believe the application of draft guidelines 9, 10, 11 and 12 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_8>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_8>

Historical financial information

Q9 In relation to draft guideline 14, do you consider that it is beneficial to clarify the application of the bridge approach for prospectuses that include less than three years of

financial information? If not, please elaborate on your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_9>

Yes, we consider such bridge to be quite beneficial for the insight. This is a significant improvement in the guidelines for investors.

<ESMA_QUESTION_CPG_9>

Q10 Do you agree with the guidance set out in draft guidelines 13, 14, 15, 16 and 17? If not, please explain your reasons and provide alternative suggestions.

<ESMA_QUESTION_CPG_10>

Yes, we agree.

<ESMA_QUESTION_CPG_10>

Q11 Do you consider that additional guidance is necessary as regards the restatement of historical financial information in the case of prospectuses that include less than three years of financial information? If so, please explain your view.

<ESMA_QUESTION_CPG_11>

We find it difficult to foresee whether more guidance is needed. We suggest that ESMA actively monitors whether the proposed guidance results in appropriate disclosures.

<ESMA_QUESTION_CPG_11>

Q12 Do you believe the application of any of the draft guidelines 13, 14, 15, 16 and 17 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_12>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_12>

Pro forma information

Q13 Should draft guideline 18 include any other standard indicators of size? Have you ever used other indicators because the three indicators included in draft guideline 18 would produce anomalous results?

<ESMA_QUESTION_CPG_13>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CPG_13>

Q14 In draft guideline 18, do you agree that when an issuer is involved in several transactions which individually do not, but which collectively do, constitute a 25% variation to the issuer's size, pro forma information should be required unless it is disproportionately burdensome to produce it?

<ESMA_QUESTION_CPG_14>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CPG_14>

Q15 In draft guideline 18, do you agree that when an issuer is involved in several transactions of which only one constitutes a 25% variation to the issuer's size, pro forma information should be required for all the transactions unless it is disproportionately burdensome to produce it?

<ESMA_QUESTION_CPG_15>

We do not agree. Pro forma information is of major importance to investors. Investors base their assessments for valuation of the company on pro forma statements, which is of particular importance in case of a company writing a prospectus to attract capital at a certain price. We consider the threshold of 25% to be too high; given the importance of this information a threshold of 15% would be appropriate. A company that foregoes on pro forma calculations puts the burden of making them on each individual investor, which is much more burdensome in aggregate.

<ESMA_QUESTION_CPG_15>

Q16 In draft guideline 25, do you agree that the accountant / auditor report should not be permitted to include an emphasis of matter?

<ESMA_QUESTION_CPG_16>

We disagree. We agree that an emphasis of matter without also mentioning a conclusion can leave investors more confused. However, banning emphasis of matters may deprive investors from material information, that is likely to emerge a few months later anyway when the annual report is published. Instead of banning auditors to mention an emphasis of matter, the guidelines could require auditors to include conclusions per individual emphasis of matter.

<ESMA_QUESTION_CPG_16>

Q17 In relation to draft guidelines 19, 20, 21, 22, 23, 24 and 26 which largely carry over existing material, do you agree that this material should be carried over? If you do not, please specify which material is no longer relevant and explain why.

<ESMA_QUESTION_CPG_17>

Yes, we agree.

<ESMA_QUESTION_CPG_17>

Q18 Do you believe the application of any of the draft guidelines 18, 19, 20, 21, 22, 23, 24, 25 and 26 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_18>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_18>

Interim financial information

Q19 Do you agree with the proposal to carry over only part of the CESR recommendations on interim financial information since some of the contents appear to be obsolete under the current legislative framework? If not, could you please indicate which CESR recommendations should have been retained and the legal basis for including them in these draft guidelines?

<ESMA_QUESTION_CPG_19>

Yes, we agree.

<ESMA_QUESTION_CPG_19>

Q20 Do you believe the application of draft guidelines 27 and 28 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_20>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_20>

Working capital statements

Q21 Do you agree with the rules for calculation of working capital in draft guideline 31? If you do not agree, please explain why and propose an alternative approach.

<ESMA_QUESTION_CPG_21>

No, we disagree. Investors relate to the term 'Working Capital' fundamentally different than the guidelines and most of the Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 does. The only section in the CDR that seems to make a correct reference to working capital is on page 138 where it reads 'The disclosure under this section is provided only by issuers of equity securities with market capitalisation above EUR 200 000 000. It provides information on the issuer's working capital requirements and its capitalisation and indebtedness.'

For investors, the term Working Capital is defacto short for 'Working Capital Requirements': how much liquidity is provided by the operating liabilities less how much liquidity is taken by operating assets (by definition excluding existing cash balances). The in the guidelines frequently mentioned phrase whether a company has 'sufficient working capital' reads to investors 'Does a company have sufficient working capital requirements', which makes no sense. Eumedion suggests that the question is rephrased to 'Does the company have sufficient financing in place to meet expected changes in working capital requirements within the next 12 months', which is a very usefull assessment of how the working capital requirements are expected to affect the liquidity of the company. If working capital requirements don't change, they by definition do not need extra financing.

Further, we would like the guidelines to explicitly exclude (reverse) factoring agreements from the working capital (requirements) definition.

<ESMA_QUESTION_CPG_21>

Q22 Do you agree with the rules for calculation of present requirements in draft guideline 32? If you do not agree, please explain why and propose an alternative approach.

<ESMA_QUESTION_CPG_22>

No, we disagree. We refer to our response to question 21.

<ESMA_QUESTION_CPG_22>

Q23 Do you agree that it is useful to require credit institutions to take their liquidity risk into account when they determine their working capital? Do you agree with the requirements of draft guideline 34?

<ESMA_QUESTION_CPG_23>

No, we disagree. We refer to our response to question 21.

<ESMA_QUESTION_CPG_23>

Q24 Do you agree that it is useful to require (re)insurance undertakings to take their liquidity metrics and their regulatory capital requirements into account when they determine their working capital? Do you agree with the requirements of draft guideline 35?

<ESMA_QUESTION_CPG_24>

No, we disagree. We refer to our response to question 21.

<ESMA_QUESTION_CPG_24>

Q25 In relation to draft guidelines 29, 30, 33, 36 and 37, which largely carry over existing material, do you agree that this material should be carried over? If you do not, please specify which material is no longer relevant and explain why.

<ESMA_QUESTION_CPG_25>

No, we disagree. We refer to our response to question 21.

<ESMA_QUESTION_CPG_25>

Q26 Do you believe the application of any of the draft guidelines 29, 30, 31, 32, 33, 34, 35, 36, and 37 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_26>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_26>

Capitalisation and indebtedness statements

Q27 Would you like more specific guidance on what to disclose concerning the type of guarantee according to draft guideline 38? If so, please explain which type of further guidance would be helpful.

<ESMA_QUESTION_CPG_27>

The guidelines should require that guarantees of material amounts are properly described in the prospectus.

<ESMA_QUESTION_CPG_27>

Q28 Would you like more specific guidance on how credit institutions and (re)insurance undertakings should adapt the capitalisation statement according to draft guideline 38? If so, please explain which type of further guidance would be helpful.

<ESMA_QUESTION_CPG_28>

No.

<ESMA_QUESTION_CPG_28>

Q29 Do you agree that trade receivables and trade payables should be included in the indebtedness statement, as proposed in draft guideline 39?

<ESMA_QUESTION_CPG_29>

We do not agree. Trade payables and receivables are typically part of working capital and not considered to be part of financial indebtedness; except for (reverse) factoring agreements which are part of financial indebtedness.

<ESMA_QUESTION_CPG_29>

Q30 In the indebtedness statement, do you agree that financial liabilities from leases should be included under financial debt and described further in a paragraph after the statement of indebtedness?

<ESMA_QUESTION_CPG_30>

Yes, we agree.

<ESMA_QUESTION_CPG_30>

Q31 Do you consider that any line items in either the capitalisation or the indebtedness statement are not useful to investors? Please explain your answer.

<ESMA_QUESTION_CPG_31>

No.

<ESMA_QUESTION_CPG_31>

Q32 Do you have any other comments on draft guidelines 38 and 39?

<ESMA_QUESTION_CPG_32>

No.

<ESMA_QUESTION_CPG_32>

Q33 Do you believe the application of draft guidelines 38 and 39 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_33>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_33>

Remuneration

Q34 Do you agree with the approach taken for this draft guideline, i.e. to almost entirely replicate the existing CESR recommendations? If not, please provide your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_34>

No, we prefer to change the words 'via stock options' into 'any share-based remuneration'. Stock options are not the only regular instrument that is used for longer-term bonus programmes. Also shares, phantom stock, warrants and stock appreciation rights are regularly used. 'TYPE YOUR TEXT HERE

<ESMA_QUESTION_CPG_34>

Q35 Do you believe the application of draft guideline 40 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_35>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_35>

Related party transactions

Q36 Do you agree with the content of this draft guideline? Do you think it provides further clarity to the market? If not, please explain.

<ESMA_QUESTION_CPG_36>

No, we also would like to see a confirmation that the company has followed the approval process of related party transactions as required by Article 9c of the EU Shareholder Rights Directive and the implementation of that articles into national legislation.

<ESMA_QUESTION_CPG_36>

Q37 Do you believe that the application of draft guideline 41 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_37>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_37>

Acquisition rights and undertakings to increase capital

Q38 Do you agree with the general approach taken for this draft guideline, i.e. to almost entirely replicate the existing CESR recommendations? If not, please provide your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_38>

Yes, we agree.

<ESMA_QUESTION_CPG_38>

Q39 Do you believe the application of draft guideline 42 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_39>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_39>

Options agreements

Q40 Do you agree with the general approach taken for this draft guideline, i.e. to almost entirely replicate the existing CESR recommendations? If not, please provide your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_40>

Yes, we agree. However, if there are option agreements with other parties than employees and management, such counterparties should be identified in the prospectus.

<ESMA_QUESTION_CPG_40>

Q41 Do you agree with the introduction of a specific disclosure point on the potential dilution effects connected to the exercise of option agreements?

<ESMA_QUESTION_CPG_41>

No, we disagree. Potential sources of dilution are defacto potential sources of reduction in ownership of existing shareholders. The proposed guideline seems voluntary given the use of the word 'may'. This guideline should be binding.

<ESMA_QUESTION_CPG_41>

Q42 Do you believe the application of draft guideline 43 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_42>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_42>

History of share capital

Q43 Do you agree with the guidance set out in draft guideline 44 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_43>

Yes, we agree.

<ESMA_QUESTION_CPG_43>

Q44 Do you believe the application of draft guideline 44 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_44>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_44>

Description of the rights attaching to shares of the issuer

Q45 Do you agree with the guidance set out in draft guideline 45 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_45>

No, we would like to add 'shareholder rights' (e.g. threshold for shareholders to submit a shareholder resolution, shareholders' procedure to nominate 'own' candidates for the Board, procedure to initiate a shareholder procedure to dismiss one or more Board members, etc.)<ESMA_QUESTION_CPG_45>

Q46 Do you believe the application of draft guideline 45 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_46>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_46>

Statements by experts

Q47 Do you agree with the guidance set out in draft guideline 46 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_47>

Yes, we agree.

<ESMA_QUESTION_CPG_47>

Q48 Do you believe the application of draft guideline 46 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_48>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_48>

Information on holdings

Q49 Do you agree with the proposal to carry over only part of the CESR recommendations on information on holdings? If not, please indicate what further CESR recommendations should be retained and the legal basis for their inclusion in these draft guidelines.

<ESMA_QUESTION_CPG_49>

Yes, we agree.

<ESMA_QUESTION_CPG_49>

Q50 Do you consider the clarification on the general principle whereby this draft guideline does not apply when the required information is provided in the issuer's consolidated / separate financial statements prepared in accordance with IFRS to be useful?

<ESMA_QUESTION_CPG_50>

Yes, we agree.

<ESMA_QUESTION_CPG_50>

Q51 Do you believe the application of draft guideline 47 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_51>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_51>

Interests of natural and legal persons involved in the issue / offer

Q52 Do you agree with the guidance set out in draft guideline 48 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_52>

Yes, we agree.

<ESMA_QUESTION_CPG_52>

Q53 Do you believe the application of draft guideline 48 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_53>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_53>

Collective investment undertakings

Q54 Do you agree with the guidance set out in the draft guidelines which have been subject only to minor revision, i.e. draft guidelines 49, 50, 52, 53, 54, 55 and 57? If not, please elaborate on your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_54>

Yes, we agree. However, guideline 50 should also include what type of claim is invested in (equity or debt).

<ESMA_QUESTION_CPG_54>

Q55 Do you agree with the inclusion of new draft guideline 51? If not, please explain and indicate an alternative approach that would provide sufficient investor protection.

<ESMA_QUESTION_CPG_55>

Yes, we agree

<ESMA_QUESTION_CPG_55>

Q56 Do you agree with the inclusion of new draft guideline 56? If not, please explain and indicate an alternative approach that would provide sufficient investor protection.

<ESMA_QUESTION_CPG_56>

Yes, we agree.

<ESMA_QUESTION_CPG_56>

Q57 Do you believe the application of any of the draft guidelines 49, 50, 51, 52, 53, 54, 55, 56 and 57 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_57>

As Eumedion represents investors, it is difficult for us to assess extra costs for preparers.

<ESMA_QUESTION_CPG_57>