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ESMA Guidelines on Alternative Performance Measures – Response to the Consultation

Dear Sir or Madam,

Deutsches Aktieninstitut appreciates the opportunity to respond to ESMA's Consultation on the presentation of Alternative Performance Measures (APMs).

APMs surely play an important role for both the capital market communication of listed companies and the investment decision of investors. A common understanding on how APMs are used and presented may therefore help to improve the efficiency of the process of capital allocation. However, we believe that the market by itself has already created well respected standards, so that neither investors nor other market participants have complained about the status quo of the presentation of APMs by issuers.

Against this background, Deutsches Aktieninstitut believes that ESMA's proposal reaches too far with respect to both the general scope and the material aspects of the guidelines. We are thus concerned that the capital market regulation affecting issuers could become more complex and inflexible which will result in higher compliance costs and additional risks for listed companies. This concern relates to both the unregulated capital market communication (such as press releases, analyst presentations) and regulated information provided by issuers (such as financial statement or the duty to publish inside information). Therefore, the scope should generally be limited to financial reports.

In addition, we would like to express our strong concern on two aspects of the proposal:

Prominence of APMs (question 9)

We strongly disagree with ESMA's approach to give APMs less prominence, emphasis or authority compared to measures defined by IFRS. APMs are calculated and used by issuers in order to provide investors with additional and meaningful information which is not or not directly displayed by measures of the IFRS framework (or another applicable reporting framework). Thus, APMs generally help investors to understand

better the financial and/or operative performance of a respective issuer. Giving APMs less prominence would therefore rather confuse investors than help them with their investment decisions.

Even worse, the “less prominence”-rule may create conflicts with regulatory duties of issuers. The following example illustrates the problem: At the beginning of the fiscal year, an issuer may provide markets with guidance on a non-IFRS-measure (e.g. EBITDA). Later it turns out that the forecast will not be met so that the issuer is obliged to publish this fact immediately according to the Market Abuse Regulation. We are concerned that ESMA’s guidance on APMs will make it impossible that the most important information for market participants (i.e. failing to meet to EBITDA forecast) is presented most prominently in this disclosure statement. This happens although competent authorities (e.g. the BaFin) explicitly point to commonly accepted non-IFRS - measures in their guidance on the regime of the disclosure duties regarding inside information (see BaFin, *Emittentenleitfaden*, p. 56f.). In addition, competent authorities generally demand rather short disclosure statements for inside information for reasons of materiality and clarity (see BaFin, *Emittentenleitfaden*, p. 63). As ESMA demands that APMs should only be presented together with measures stemming directly from the applicable IFRS reporting framework another inconsistency and legal uncertainty will likely be created? Against this background, Deutsches Aktieninstitut believes that the proposed guideline will create unintended compliance problems for issues as well unintended supervisory problems for competent authorities.

In addition, we would like to draw ESMA’s attention to the fact that the comparable SEC rule on the publication of Non-GAAP measures is less strict than ESMA’s proposal. In the case of information to be filed with the SEC it is sufficient if non-GAAP measures are displayed with equal prominence to the most directly comparable financial measure calculated and presented in accordance with GAAP. For any other information there is only the general rule that the non-GAAP measure has to be presented together with most comparable GAAP measure. The SEC thus takes a more flexible approach than ESMA appears to have in mind. Accordingly, ESMA’s proposal would set European listed companies in a competitive disadvantage compared to their US peers.

Appendix to the publication (question 6)

According to item 25 of ESMA’s proposal issuers should disclose all APMs used as well as their definition in an appendix to the publication (item 25.). We are concerned that this obligation will make capital market communication more complex and expensive without adding benefits for investors. ESMA appears to understand that compliance with the guidelines can be burdensome in any case, inflexible and disproportionate in some cases. In press releases a reference to another document that is readily and easily accessible to users is accepted as compliance with the guidelines (item 14).

However, we do not understand why this kind of flexibility is only granted to press releases. We therefore suggest a flexible approach for all kind of publications: compliance with the guidelines should generally be possible by cross-referencing to another document that contains the definitions of APMs as well as other obligations. This would reduce compliance costs for issuers and would not overload investors with standard information.

Overall, we believe that the potential advantages of the proposal are negligible while being linked to serious obstacles and negative consequences for listed companies and other market participants. We therefore kindly request ESMA to take our arguments into account and to reconsider the proposal on APMs.

Please do not hesitate to contact Dr. Gerrit Fey (+49 69 92915-41; fey@dai.de), Head of Capital Market Affairs at Deutsches Aktieninstitut or myself in case of questions or for further discussion.

Yours faithfully

A handwritten signature in blue ink, appearing to read "Christine B", with a large, sweeping flourish extending to the right.

Dr. Christine Bortenlänger
Chief Executive