

AMF Position – Recommendation 2004-04 Disclosure of profit estimate

References: Article 223-1, AMF General Regulation, Commission (EC) Regulation No 809/2004 of 29 April 2004

Listed companies publish financial and accounting information at various times during the year as part of a continuous process. First, the company's senior management determines and announces a set of financial targets, usually for the following year. These targets can then be translated into earnings forecasts. As the year moves forward, the company publishes interim financial data, either partial or complete (quarterly sales, quarterly or half-year results, etc.), followed by annual data that confirm or invalidate the earlier forecasts. The AMF has already published a position¹ on the reporting of earnings objectives, forecasts, and profit warnings intended to rectify market expectations.

This position-recommendation deals with financial information for a period that has ended but that has not yet been dealt with in full². In what follows, this type of information is referred to as "profit estimates," unless stated otherwise.

Issuers publish profit estimates to address various concerns.

- For periodic and ongoing disclosures, publication can satisfy stock market demand for key indicators concerning the financial position and profits for the past year, prior to the date at which the competent bodies close the accounts.
- When an issuer publishes a prospectus, it may also decide to add profit estimates³ to the historical information in order to give the most recent picture possible of its assets and liabilities, financial position and profits and losses. Under the amended Regulation (EU) No 862/2012 of 4 June 2012, a French issuer that decides to include a profit estimate is required to include a report from its statutory auditors. However, this requirement can be waived under certain conditions if the prospectus contains the requisite statements⁴.

Pursuant to this regulatory amendment, ESMA⁵ specified that profit estimates should be considered to prevail until the auditor's report has been published.

Accordingly, the requirement to report on profit estimates can be waived if a prospectus is prepared after the competent body has closed the financial statements and before the statutory auditors have issued their report on the consolidated or individual financial statements, subject to certain statements about the estimate.

The rationale under French law is that only financial statements not yet closed by the competent body can be considered as profit estimates. However, with sole regard to the issuance of a prospectus, ESMA's clarification means that even if financial statements have been closed by the competent body, they can still be defined as "estimated" profits until such time as the audit report is prepared.

For clarity and harmonisation the AMF proposes, as set forth in the recommendation referred to below and solely as regards prospectuses, that issuers choosing to include a profit estimate should:

- supplement the estimate with an auditors' report if it uses data not taken from the financial statements closed by the competent body,
- make the necessary statements⁴ if these data have been ruled by the competent body, in order to benefit from the exemption concerning the auditors' report on the profit estimate.

¹ AMF Position 2006-17 on earnings forecasts

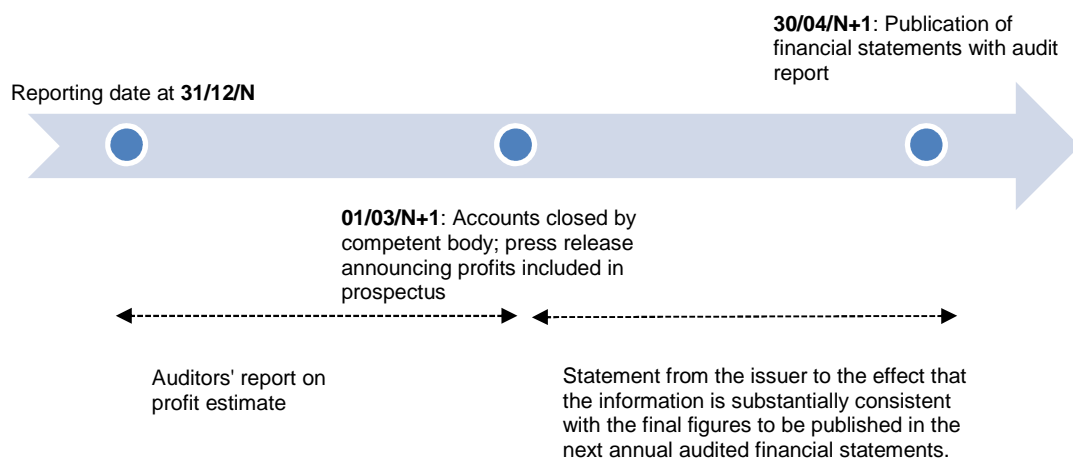
² This issue was partially addressed in the report of the working group chaired by Jean-François Lepetit on profit warnings.

³ Under AMF recommendation 2010-17 on financial disclosures by listed companies when publishing their results, an issuer that has already disclose profit estimates as a periodic disclosure can re-use them in the prospectus.

⁴ Paragraph 13.2 of Annex I of Regulation No. 809/2004, amended by Commission Delegated Regulation (EU) No. 862/2012 of 4 June 2012, for the equity security scheme.

⁵ Questions and Answers- prospectuses- version May 2013- question No 84, Q1/A1 "How should the term "for which results have not yet been published" in Article 2 (11) of the Prospectus Regulation be understood? ESMA considers that the publication of results for an annual financial period which has expired means publication of final figures which have been approved by the person responsible within the issuer and the auditor's report has been published.

The diagram below gives a practical example based on an issuer closing its financial statements on 31 December and carrying out a transaction on 2 March of the following year:



Concerning the statements to be drawn up, the AMF points out that it is necessary to prepare the transaction sufficiently in advance and to ensure the auditors will be able to take all the necessary steps. Accordingly, the information has to be sufficiently reliable for investors and the level of reliability should be assessed in collaboration with the auditors, insofar as they agree that, according to the issuer's management, the profit estimate is substantially consistent with the financial figures to be published in the next annual audited financial statements.

Moreover, periodic or ongoing disclosures or publication of a prospectus containing profit estimates entails risks, which the AMF wants to avert by drawing attention to them. In any case, the disclosures should not compromise efforts to reduce the time taken to publish financial statements⁶. Neither should it be possible for markets to confuse such information with the final accounts – the only statements legally provided for and standardised – or with the disclosure of known trends or other factual data with a material impact on the issuer's prospects⁷.

That said, Article 223-1 of the AMF General Regulation on the obligation to inform the public states that "[i]nformation provided to the public must be accurate, precise and fairly presented". The AMF wishes to establish a number of principles that issuers must comply with when publishing estimated financial data. The Annex reviews and comments on usual accounting terminology.

⁶ AMF recommendation 2010-17 on financial disclosures by listed companies when publishing their results

⁷ This issue was partially addressed in the Lepetit report op. cit.

Concerning periodic or ongoing disclosure with profit estimates concerning consolidated or individual financial statements

• **Position**

1. Financial information concerning a company's assets and liabilities, financial position and profits and losses, aside from sales⁸, that is issued between the end of the year or half-year and before the date on which the competent body closes the financial statements for the period are published must always be referred to as "estimate"⁹; no other terms may be used. Likewise, when disclosing such data or providing the accompanying explanations, it is important to avoid any possible confusion with the final accounts, in terms of either terminology or presentation.

2. Disclosures must clearly state the extent to which the body competent to close the accounts¹⁰ is involved in examining these estimated data or results, as well as the date on which that body is due to officially close the accounts.

3. Concerning the content, the market must be provided with information that is as consistent and comprehensive as possible, bearing in mind the progress on year-end closing operations. In particular the information must:

- **be clear enough to be understood by all investors,**
- **be presented in accordance with the account totals generally used by the issuer; where nonaccounting financial concepts or restated accounting totals are used, they must be precisely defined and reconciled with standard accounting totals¹¹,**
- **be presented in absolute value terms, not solely in terms of relative progress indicators (percentages),**
- **be systematically accompanied by comparable data taken from the prior period accounts, along with a reminder of the latest estimated data if any have been published,**
- **not omit material information known to the issuer and which, if omitted, would affect the relevance and fairness of the disclosure.**

4. Published estimates for results (or financial data) ⁹ must originate from an accounting and/or budgetary process which ensures that the information disclosed to the market is reliable. The issuer must also state that it has not yet received assurance that the auditors can unreservedly certify the accounts. It must conspicuously indicate that the estimate "has not been verified by the auditors" or is "in the process of being audited"¹²

⁸ The sales figure published within 45 days of the end of each quarter (art. L.451-1-2, Monetary and Financial Code) is usually an actual figure, not an estimate.

⁹ The term "estimate" corresponds to "profit estimate", as used in Commission Regulation (EC) No 809/2004 of 29 April 2004

¹⁰ The board of directors or the executive board in a public limited company with a two-tier board system or the managing partner (*gérant*) of a limited partnership with share capital, as well as the accounts committee if one exists

¹¹ A similar recommendation is made in AMF recommendation 2010-11 pertaining to corporate communications on financial indicators

¹² The aforementioned Lepetit report made the following recommendation: "Considerable precaution should be taken when publishing provisional results before the completion of the audit of the financial statements (corporate and consolidated), particularly by ascertaining that sufficient clearance was given by the auditors and that no qualifications were expressed, and, when applicable, the audit committee approved the choices applied". The term "provisional", as used by the working group in 2000, should be construed as "estimated" in the context of this interpretation (see Annex). See also AMF recommendation 2010-17 on financial disclosures by listed companies when publishing their results

5. When the half-yearly or annual accounts approved by the competent body are subsequently published, along with the auditors' report, and if they show material differences with the estimate released previously, these differences must be specifically explained. Where necessary, the issuer can make a distinction between, on the one hand, differences due to refining the estimates between the date on which the estimated results were drawn up and the date the financial statements were closed,¹³ and, on the other hand, differences resulting from the inclusion of new information that became available between the two dates¹⁴.

↳ Concerning publication of a prospectus with profit estimates concerning consolidated or individual financial statements

• **Position**

6. The position set out in points 1 to 5 also applies when publishing a prospectus.

• **Recommendation**

7. If an issuer discloses a profit estimate in connection with a prospectus before the competent body has closed the financial statements, the estimate given in this regard is not stable enough to be treated as near-final. The AMF recommends that issuers instruct their auditors to draw up a report on the profit estimate.

8. If an issuer discloses a profit estimate in connection with a prospectus after the competent body has closed the financial statements, the AMF recommends that issuers make the statements provided for in the European Regulation and obtain a written statement from their auditors¹⁵, compliant with the policy of Compagnie nationale des commissaires aux comptes, acknowledging that, according to the issuer's management, the profit estimate is substantially consistent with the final figures that will be published in the next annual audited financial statements.

9. The AMF recommends that the statements provided for in the European Regulation should be included in the declaration made by the responsible person.

¹³ For example, a difference caused by reworking a statistical provisioning rate between the date at which the results are published and the account closing date

¹⁴ For example, a difference due to a customer dispute that arose before the accounts were closed but that was brought to the attention of senior management after the results were published.

¹⁵ The auditors' statement is not included in the prospectus

ANNEX

TERMINOLOGY AND COMMENTARY

ACCOUNTS

Annual accounts

Article L.123-12 Commercial Code: "All natural or legal persons with the capacity of trader shall [...] prepare annual accounts at the end of the financial year in view of the entries made in the accounts and the stocktake. These annual accounts shall consist of the balance sheet, profit and loss account and an annex which shall form an inseparable whole".

Preparation of annual accounts

Article 130-1 General Chart of Accounts: "**Annual account preparation:** the balance sheet, income statement and notes to the accounts that form an inseparable whole are prepared at the end of the accounting period on the basis of the accounting entries and inventory".

Closure of accounts

Article L. 232-1 I. Commercial Code: "At the end of each financial year, the board of directors, management or managers shall prepare the inventory and annual accounts in accordance with the provisions of Section 2 of Chapter III of Title II of Book I and shall prepare a written annual report". Article L.823-17 Commercial Code: "The auditors are invited to attend all meetings of the board of directors or the executive board and the supervisory board, or the collective body responsible for administration or management, and the supervisory body that examine or close off the annual or interim accounts, and also to all shareholders' meetings [...]".

Article L.233-16 I. Commercial Code: "Each year, the board of directors, the executive board or the chief executive(s) of commercial companies, as applicable, draw up and publish consolidated accounts and a group management report [...]".

Comments

Under ordinary law, traders are required to prepare annual accounts. The account production process comprises several mandatory stages that follow on from the preparatory work done by the various departments, i.e. the accounts are closed off by the company's competent bodies, examined and certified by the auditors, examined and approved by the shareholders, and filed with the clerk of the commercial court. For trading companies, it can be inferred from art. L.823-17 of the Commercial Code that the annual accounts are closed by the board of directors or the executive board. The consolidated accounts are not "closed off" but "drawn up at the behest" of these bodies. The full set of accounts are submitted for approval to the general meeting of shareholders.

The annual and consolidated accounts are not final until they have been approved by the general meeting. In companies whose securities are admitted to trading on a regulated market, the recommendations set out in the working group report on audit committees¹³ suggest that the draft accounts should be submitted to the audit committee (or the accounts committee) for a critical assessment, followed by a report to the board of directors.¹⁶

¹⁶ Report of the working group chaired by Olivier Poupart-Lafarge on audit committees AMF position 2004-04 – Disclosure of profit estimate

DRAFT ACCOUNTS

Comments

The term "draft" is used in Article 295 of Decree 67-236 of 23 March 1967¹⁷, now repealed, apparently to draw public attention to the fact that the accounts have not yet been certified and, where such is the case, that they are to be submitted for shareholder approval. Consequently, the term "draft accounts" should be used only in this specific case.

Under Article L.823-16 of the Commercial Code, the auditors are required to inform, as the case may be, the collegiate body responsible for administration or the body responsible for management and the supervisory body, and, where such is the case, the specialised committee acting under the sole and collective responsibility of these bodies [...], of the conclusions arising from the above observations and corrections [...]. In modern auditing, most of the examination work is complete by the time the company's competent bodies close the accounts, but this type of communication from the auditors does not mean the accounts qualify as duly "audited". That qualification does not apply until the report on the individual accounts or the consolidated accounts, as applicable, has been signed.

ESTIMATED RESULTS

Extracts from Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (published in the Official Journal of the European Union on 30 April 2004).

Applicable since 1 July 2005, the Regulation defines what is meant by "profit forecast" and "profit estimate". The latter term corresponds to "estimated results" as discussed in this AMF position.

Whereas:

"(8) Voluntary disclosure of profit forecasts in a share registration document should be presented in a consistent and comparable manner and accompanied by a statement prepared by independent accountants or auditors. This information should not be confused with the disclosure of known trends or other factual data with material impact on the issuers' prospects. Moreover, they should provide an explanation of any changes in disclosure policy relating to profit forecasts when supplementing a prospectus or drafting a new prospectus."

The Regulation makes a distinction between "profit forecast" and "profit estimate".

"Article 2 - Definitions:

10) 'Profit forecast' means a form of words which expressly states or by implication indicates a figure or a minimum or maximum figure for the likely level of profits or losses for the current financial period and/or financial periods subsequent to that period, or contains data from which a calculation of such a figure for future profits or losses may be made, even if no particular figure is mentioned and the word "profit" is not used;

11) 'Profit estimate' means a profit forecast for a financial period which has expired and for which results have not yet been published."

Share registration document schedule¹⁸:

"13. PROFIT FORECAST OR ESTIMATES

If an issuer chooses to include a profit forecast or a profit estimate the registration document must contain the information set out in items 13.1 and 13.2:

13.1. [Provide] a statement setting out the principal assumptions upon which the issuer has based its forecast or estimate.

There must be a clear distinction between assumptions about factors which the members of the administrative, management or supervisory bodies can influence and assumptions about factors which are exclusively outside

¹⁷ Article 295 of Decree 67-236 of 23 March 1967: " Within four months of the end of the financial year and at least 15 days before the ordinary general meeting of shareholders, the companies referred to in Article 294 shall publish the following documents for the past year in the [official gazette] *Bulletin des Annonces Légales Obligatoires*, using a title clearly indicating that these are draft documents which have not been verified by the auditors:

¹⁸ Similar information is required in the other schedules in the Annexes to the Regulation, except item 13.4 in some cases

the influence of the members of the administrative, management or supervisory bodies; the assumptions must be readily understandable by investors, be specific and precise and not relate to the general accuracy of the estimates underlying the forecast.

13.2. A report prepared by independent accountants or auditors stating that in the opinion of the independent accountants or auditors the forecast or estimate has been properly compiled on the basis stated and that the basis of accounting used for the profit forecast or estimate is consistent with the accounting policies of the issuer.

Where financial information relates to the previous financial year and only contains non-misleading figures substantially consistent with the final figures to be published in the next annual audited financial statements for the previous financial year, and the explanatory information necessary to assess the figures, a report shall not be required provided that the prospectus includes all of the following statements:

(a) the person responsible for this financial information, if different from the one which is responsible for the prospectus in general, approves that information;

(b) independent accountants or auditors have agreed that this information is substantially consistent with the final figures to be published in the next annual audited financial statements;

(c) this financial information has not been audited."

13.3. The profit forecast or estimate must be prepared on a basis comparable with the historical financial information.

13.4. If a profit forecast in a prospectus has been published which is still outstanding, then provide a statement setting out whether or not that forecast is still correct as at the time of the registration document, and an explanation of why such forecast is no longer valid if that is the case".

PROVISIONAL ACCOUNTS

The term provisional accounts is used in two documents only.

The report issued in April 2000 by the Commission des Opérations de Bourse (COB) on profit warnings, which says "Considerable precaution should be taken when publishing provisional estimates¹⁹ before the completion of the audit of the financial statements (corporate and consolidated), particularly by ascertaining that sufficient clearance was given by the auditors and that no qualifications were expressed, and, when applicable, the audit committee approved the choices applied".

The implementing instruction for COB Regulation 98-01²⁰, item 5.1.6. of Schedule A: "when more than three months have elapsed between the close of the financial year or half-year, the prospectus shall contain, in the first case, the certified provisional annual accounts [...]".[Repealed]

Comments

The term "provisional accounts" should be avoided because it is imprecise. In the first example above, the term should be replaced by "estimated results" or "estimated data" and, in the second case, by "accounts".

¹⁹ The term "provisional" as used by the COB working group in 2000 should be construed as "estimated" in the context of this position.

²⁰ This instruction has been repealed and replaced by Annex 1 (item 20.1) of Commission Regulation (EC) No 809/2004 of 29 April 2004.