

AMF Position 2004-04 Disclosure of profit estimate

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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 deals with financial information for a period that has ended but is not final, an issue that has not yet been addressed in full². In what follows, this type of information is referred to as "profit estimate".

Issuers publish profit estimate to address various concerns. Periodic and ongoing disclosures are made to satisfy market demand concerning the main indicators for the past year's financial results and financial situation, before the accounts are finally closed. This is due to the sometimes lengthy period between when the initial data are available and when the accounts are finalised. In the case of a prospectus, the issuer may decide to present estimated results in addition to last-period information in order to give the fullest possible picture of its assets and liabilities, financial position and performance.

However, this type of disclosure 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 statements³. 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 prospects⁴.

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 five principles that issuers must comply with when publishing estimated financial data. The Annex reviews and comments on usual accounting terminology.

¹ AMF Position 2006-17 on earnings forecasts

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

³ AMF Recommendation 2010-17 on financial disclosures by listed companies when publishing their results.

⁴ This issue was addressed in the Lepetit report op. cit.

Position

1. Financial information concerning a company's assets and liabilities, financial position and profits and losses, aside from sales⁵, that is issued between the end of the year or half-year and before the final accounts for the period are published must always be referred to as "estimate"⁶; 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. In this context, it is also preferable to avoid terms such as "balance sheet" or "income statement" if the documents do not form a complete set of financial statements, as defined in the French Commercial Code or international accounting standards, which include the necessary financial statement notes.

2. Disclosures must clearly state the extent to which the body competent to close the accounts⁷ 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 non-accounting financial concepts or restated accounting totals are used, they must be precisely defined and reconciled with standard accounting totals⁸,
- 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.

⁵ 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.

⁶ The term "estimate" corresponds to "profit estimate", as used in Commission Regulation (EC) No 809/2004 of 29 April 2004.

⁷ 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.

⁸ A similar recommendation is made in AMF recommendation 2010-11 pertaining to corporate communications on financial indicators.

4. Published estimates⁹ 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"¹⁰.

5. When the half-yearly or annual accounts approved by the competent body are subsequently published, 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 of the estimated results and the account date,¹¹ and, on the other hand, differences resulting from the inclusion of new information that became available between the two dates¹².

⁹ Where these estimates are published in a prospectus, Commission Regulation (EC) No 809/2004 of 29 April 2004 sets forth the information to be provided.

¹⁰ 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.

¹¹ 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.

¹² 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.

ANNEX

TERMINOLOGY AND COMMENTARY

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.

¹³ Report of the working group chaired by Olivier Poupart-Lafarge on audit committees

DRAFT ACCOUNTS

Comments

The term "draft" is used in Article 295 of Decree 67-236 of 23 March 1967¹⁴, 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 schedule¹⁵:

¹⁴ 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:

1. The annual accounts;
2. The proposed appropriation of income;
3. The consolidated accounts, if available. [...]"

¹⁵ Similar information is required in the other schedules in the Annexes to the Regulation, except item 13.4 in some cases.

"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. 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 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.

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 estimates¹⁶ 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 98-01¹⁷, 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".

¹⁶ The term "provisional" as used by the COB working group in 2000 should be construed as "estimated" in the context of this position.

¹⁷ This instruction has been repealed and replaced by Annex 1 (item 20.1) of Commission Regulation (EC) No 809/2004 of 29 April 2004.