The Committee of European Securities Regulators  
11-13 Avenue de Friedland  
75008 Paris  
France  

18 October 2004

Dear Sirs

Recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses 809/2004

We are writing to you as representatives of the PricewaterhouseCoopers firms in Europe in response to your request for comments on your proposed recommendations for the consistent implementation of the European Commission’s Regulation on Prospectuses 809/2004 (the “PD Regulation”).

We welcome the proposed recommendations as an important step towards ensuring consistent implementation of the Prospectus Directive and its accompanying PD Regulation particularly as regards the financial information matters on which we, as auditors, may be expected to report. As we have made clear in our responses to your consultations in connection with the development of the PD Regulation, we believe that the issue of guidance for the preparers of financial information is essential if auditors are to report in the manner required.

We believe that these recommendations can provide an important bridge between the more experienced markets in Europe and the less-well developed markets thereby providing investors across Europe with some confidence that a common basic understanding of the disclosure requirements under the PD Regulation is being applied. The different practical experience across markets inevitably leads to a question as to whether more detail is required in the recommendations. In our view, there are a number of areas, which we have mentioned in our responses to the specific questions, where more detail is desirable or, less detail may be sufficient. The demand for more details is most evident when considering recommendations addressing the profit forecast disclosure requirements.
The Committee of European Securities Regulators  
18 October 2004

It is our view that CESR’s recommendations should not be used to introduce additional disclosure requirements over and above those set out in the PD Regulation but only to provide amplification of the application of the PD Regulation’s requirements.

We would encourage CESR to make it clear as to whether the recommendations as regards specialist issuers apply to all prospectuses to be prepared by such issuers. It is our view that these recommendations are most relevant to the issuers of equity securities and may have some relevance to depository receipt and “retail” debt securities. We do not believe that they should necessarily be considered of relevance to investors in “wholesale” securities.

We note that CESR has not been able to conclude as to the form of recommendations, if any, to be provided in connection with what have been described as “complex financial histories”. Whilst we understand the concerns that have been expressed as to whether such guidance, depending how drafted, might be seen as trying to modify the PD Regulation, we believe that such guidance is essential if issuers, their advisers and regulators are to have a common understanding of how to address situations that not infrequently occur. Our view is that clarifying what is expected in response to the requirement in Annex II to the PD Regulation, “Pro forma financial information building block”, for the financial statements of acquired businesses to be presented would provide an acceptable route to providing the required guidance. We have provided more details on this in response to the questions raised in relation to pro forma financial information.

Our responses to the specific questions you have asked are set out in the Appendix to this letter. We have also addressed other matters arising from your proposed recommendations under the respective section headings.

We would be happy to discuss with you any of the points made in this letter. In the first instance you should contact Kevin Desmond at the above address.

Yours faithfully

PricewaterhouseCoopers LLP
APPENDIX

Financial information issues

1 Selected financial information

30. Q: Do you agree with this proposal? Of not, please state your reasons.

1.1 It is unclear to us as to whether your intention is that selected financial information should be extracted only from the required historical or interim financial information disclosures or as to whether any financial data otherwise disclosed in a prospectus can be included in selected financial data. We would note that it is common practice to provide what are described as “non-GAAP earnings measures such as “EBITDA” in prospectuses and for these to be included in the selected financial data.

1.2 On balance, we believe that the only proviso should be regarding the source of selected financial data being that it is disclosed in the registration document or main body of the prospectus. In addition, we do not believe that there is any need for a list of examples of selected financial data. Accordingly, in our view paragraph 26 is unnecessary.

2 Operating and financial review

37. Q: Do you consider that it is appropriate to include key performance indicators about past performance?

2.1 Whilst disclosure of key performance indicators may well be appropriate in explaining an issuer’s financial performance, we believe that you do not need to say any more than is expressed in paragraph 32. In particular, we believe that paragraph 33 is too specific in this regard and should be deleted.

Other comments

2.2 We do not agree with the assertion made in paragraph 31 that the OFR should set out “a description of the risks and uncertainties that it [the issuer] faces”. Risk factors are explicitly required to be disclosed in prospectuses under, for example, item 4 of Annex I to the PD Regulation.

2.3 We are also concerned that you believe that the OFR should provide a “prospective review of the issuer’s performance and financial condition”. The language of item 9 of Annex I of
the PD Regulation is focussed on historical commentary. Extending the scope of the OFR, in our view, goes beyond the intention of the PD Regulation. Furthermore, disclosure in a prospectus of an issuer’s prospects is required, in any event, under item 12 of Annex I of the PD Regulation, “Trend information”.

3 Capital resources

42. Q: Do you agree with this proposal? If not, please state your reasons and please provide alternative information.

3.1 Overall, we agree with the proposals.

3.2 We would note that the recommendations outlined in paragraph 41 in respect of events expected to take place, such as breaches of covenants, interact with your recommendations concerning working capital statements and, specifically, those regarding whether a working capital statement is “clean” or “qualified”. We would encourage you to provide some text to bridge the respective requirements.

4 Profit forecasts or estimates

50. Q: Do you agree with the above approach in relation to profit forecasts and estimates? If not, please state which particular aspects you do not agree with and give your reasons.

4.1 We broadly support the approach taken in the recommendations in relation to profit forecasts and estimates. In particular, we support the “principles” set out in paragraph 44 as a first step towards assisting issuers in comprehending the standard to which profit forecasts should be prepared.

4.2 We would note that agreement as to the principles to be applied by issuers when preparing profit forecasts that is “properly compiled” is essential if investors are to be able to derive a consistent view as to the quality of statements made in prospectuses. Furthermore, agreed principles are a prerequisite for auditors to be able to report in the manner expected by the PD Regulation.

4.3 In this regard, we would encourage you to expand the text for example to include material equivalent to that provided in the section on working capital statements, such as in paragraph 132, concerning the procedures to be followed by an issuer when preparing a forecast or estimate.
4.4 Whilst we understand that you could be concerned that that an existing profit forecast statement would not be considered to be material as regards the information to be disclosed in a prospectus, we believe that the relevance of a forecast to the type of securities being offered, and the investors to which they are being offered, needs to be taken into account when making such a decision. We would note that the PD Regulation acknowledges this point by providing different profit forecast disclosure requirements in the various registration document annexes. We would suggest that you consider balancing your presumption that a profit forecast is material information to make it clear that this assessment should be made having regard to security type. Further, whilst we would prefer that you did not mandate a presumption as to the materiality of a pre-existing profit forecast statement, should you elect to retain this view, we would strongly encourage you to restrict it to equity securities offerings.

4.5 We are concerned that the recommendations in paragraph 47 concerning profit forecasts made by acquired entities are too onerous and should be reconsidered. Difficulties that can be imagined include that:

- subsequent to its acquisition the acquired entity’s business may well have been integrated into that of the issuer; and
- the issuer may have a different view on the assumptions, external and internal, to be applied than those adopted by the acquired entity’s management.

51. Q: Do you consider that it is appropriate to provide examples of what may or may not constitute a profit forecast or estimate? If so, could you please provide some examples?

4.6 Whilst it may not be essential that examples of what statements may or may not constitute a profit forecast or estimate are provided, it is important that issuers throughout the EU have a common understanding of the distinction. It is particularly important to make it clear that the context of a statement needs to be taken into account. An example would be where an issuer forecasts a dividend payment. Absent other disclosures this would not be a profit forecast. However, if the issuer has a stated policy of dividend cover not being less than a particular multiple of profits then the dividend forecast would have simplified a minimum level of profits.

4.7 On balance, we believe that it would be useful for issuers to have some guidance that amplifies the definitions. In this regard we would draw your attention to the following text published by the UK’s FSA in its publication “List!” which we believe would provide such guidance without the need for specific examples:
“In practice this covers a broad range of statements of future performance. In particular it should be noted that paragraph 12.23 [Article 2(10) of 809/2004] covers statements about “losses” as well as about “profits”, and that neither word needs to be used at all. For example, where the word results” or “earnings” is used, the UKLA may still take the view that there is a forecast or estimate if it is apparent that the market interprets this as profit. It is likely that earnings per share will be viewed as a profit forecast. Revenue figures may be a profit forecast if that allows a calculation of profit. This is most likely to be the case where an issuer has previously published details of its profit margins.

Statements of performance against market expectations may also be forecasts if there is a clear market consensus of expectation that allows a calculation of a floor or ceiling on forecast profits.”

4.8 We would also recommend that you consider making it clear that normally a forecast would be expected to cover the current incomplete financial period. We are aware that market practice in some countries is for issuers to provide outlook statements or information about their targets that might go out for a number of years. It is our view that statements for the financial periods that have not yet commenced normally should not be expected to be prepared to the standard required of a profit forecast and that they should not be considered to fall within the PD Regulation definition of a profit forecast.

Other comments

Profit estimates

4.9 We note that there is no specific guidance regarding profit estimates included in the recommendations. One particular question that arises is as to whether the publication of a preliminary results, or a fourth quarter announcement, would constitute a profit estimate for the purposes of a prospectus. Such announcements are often required by an issuer’s ongoing obligations when traded on a regulated market. Our view is that where a preliminary or fourth quarter announcement is required by an issuer’s ongoing obligations, and therefore is subject to specific disclosure requirements and to regulatory supervision, then it should not be considered to be a profit estimate and we would encourage you to include a recommendation to this effect.
5 Historical financial information

75. Q: Do you agree with the conclusion stated in the previous paragraph? If not, please state your reasons.

5.1 We agree with the approach advocated as regards the situation where the same set of standards will apply in an issuer’s last and next financial statements.

85. Q: Do you agree with this proposal? If not, please state your reasons.

5.2 We agree with the analysis set out in paragraph 84 concerning the accounting principles to be applied when an issuer is required by the PD Regulation to present additional financial information, such as a cash flow statement. However, we would ask that you clarify the form in which you expect that the additional financial information should be presented and the manner in which it should be audited or reported on as to whether or not it shows a true and fair view.

5.3 If, as we understand your proposal to be, the “statements” referred to are the individual financial statements, balance sheet, profit and loss account, cash flow statement etc, and that it is these that should be audited, we do not agree with that element of the proposal as it is not possible under existing audit reporting regimes for individual statements to show a true and fair view.

5.4 For example, under International Standards on Auditing, ISA 700, the auditors’ report should contain a clear written expression of opinion on the financial statements taken as a whole. Accordingly, we believe that if an issuer’s statutory accounts legitimately omit, for example, a cash flow statement then it is necessary for a new audit opinion on the whole accounts, as revised to include the cash flow statement, to be provided if the cash flow statement is to be expected to have been reported on in true and fair terms.

5.5 An alternative approach would be to allow issuers to presenting in a prospectus the additional statements outside their “accounts” and for this to be reported on separately by their auditors albeit not in true and fair terms. In this respect, we would note that the IAASB’s ISA 800 provides a framework for reporting on individual components of financial statements and adopts a “properly prepared in accordance with the stated basis” reporting model. In our view this would provide a lower cost alternative for issuers that meets the spirit of the PD Regulation’s requirements.
5.6 In any event, we believe that you should make clear as to your expectation as to how additional statements should be presented.

5.7 In so doing, we would encourage you to consider the relative costs and benefits of these options when deciding on the appropriate recommendation.

Other comments

Audit of the annual financial information

5.8 We would make the following points in respect of your recommendations as regards the application of the “auditing” provisions of item 20.1.

5.9 When referring to the requirement for accounts to show a true and fair view, set out in paragraph 78, we would note that under IFRS, as adopted pursuant to EU Regulation 1606/2002, issuers are required to prepare accounts that “present fairly” the financial position, financial performance and cash flows of an entity. Whilst it is generally accepted that “present fairly” and “true and fair” are equivalent terms, we believe that you should acknowledge the difference in the recommendations.

5.10 We believe that you should acknowledge in this section and, in particular in paragraph 81, that the requirement in paragraph 20.1 does not explicitly mandate an “audit”. We believe that the issues surrounding the opinion to be provided, particularly, on restated accounts are quite complex. In particular, existing auditing standards do not address the question as to the extent to which the evidence supporting a new opinion can take into account the evidence obtained by the auditor of the underlying statutory financial statements. We are aware that the auditing profession in Europe is giving thought to the way in which the required opinion may be delivered.

5.11 We understand that you might not wish to differentiate the report required by the last paragraph of item 20.1 and an “audit”. However, we believe that the cost and time implications of that position may not necessarily be matched by an appropriate benefit to investors. We believe that, for the time being, you should avoid making an explicit link. We would encourage you to liaise with auditing standards setters in Europe to develop an appropriate reporting solution.
Requirement for restatements pursuant to paragraph 2 of item 20.1

5.12 We agree with the conclusions expressed in the proposed recommendations set out in paragraphs 57 to 67. In particular, we agree with the view that the effect of the second paragraph of item 20.1 should apply when an issuer is applying a different set of standards to its next financial statements such as could arise on an initial admission to trading on a regulated market. We would have been concerned had you concluded that this provision would have applied to any change in the individual policies required to be adopted by an issuer in its’ next annual financial statements.

5.13 One point of detail is that we believe that the last sentence of paragraph 57 should read “The restated financial information must be audited or reported on as to whether or not, for the purposes of the registration document, it gives a true and fair view”. The additional, underlined, text bringing in the additional reporting route provided for by the last paragraph of item 20.1.

Application of restatement requirement to debt and derivative registration documents

5.14 An important omission from the proposed recommendation is addressing item 13.1 of Annex IV, and its equivalent provisions, which require audited historical financial information covering the latest two financial years.

5.15 We would draw you attention to the question of when a debt or derivative issuer is considered a first time adopter of IFRS. The analysis for equity issuers provided in paragraphs 62 to 64 of the proposed recommendations, with which we concur, when applied to a new debt or derivative issuer, highlights the fact that under IFRS 1 such an issuer would need to provide comparatives on an IAS/IFRS basis. This is best illustrated using the same dates as in your examples, where an issuer has published its’ 31 December 2009 statutory financial statements:

<table>
<thead>
<tr>
<th>Items of financial statements</th>
<th>Year 2009 Under IFRS (restated)</th>
<th>Year 2008 Under IFRS (restated as comparatives to Year 2009)</th>
<th>Year 2008 Under previous GAAP</th>
</tr>
</thead>
</table>

5.16 We note that the effect of IFRS is to require issuers to restate both years required to be presented negating the benefit intended in the drafting of the PD Regulation.
5.17 An alternative approach would be to allow issuers to make their next published statutory financial statements their “first annual financial statements in which the entity adopts IFRSs” ie the 2010 year in the above example. Whilst an issuer would still publish the last period, 2009 in the example, in accordance with IFRS, it would not be possible for the issuer to state or their auditors to report that the information showed a true and fair view.

5.18 We would draw your attention to the paper recently published by the International Auditing and Assurance Standards Board (“IAASB”) entitled “Questions and answers: First time adoption of International Financial Reporting Standards – Guidance for auditors on reporting issues”. This agrees with the analysis in the last paragraph and suggests that where auditors are requested to report on the IFRS information that will form the basis of the first time period’s comparatives they could provide an opinion that the information has been prepared in accordance with the stated basis.

5.19 As item 13.1 only requires an opinion as to whether or not the restated accounts show a true and fair view, it could be argued that a qualified opinion is not precluded. However, we note that this would appear to be against the intention of the PD Regulation.

5.20 We strongly advise you to provide recommendations making it clear whether you accept that single period only IFRS information cannot show a true and fair view and, in addition, whether you will accept that issuer’s auditors can provide instead an opinion along the lines suggested by the IAASB. Alternatively, you should make it clear that, notwithstanding the minimum requirement to only restate one year onto IFRS, the true and fair requirement is overarching and that it will be necessary for issuers to restate both of the years required to be shown.

Application of restatement requirements to the transitional provisions of Article 35

5.21 We would also draw your attention to the fact that the above analysis is equally applicable to the transitional provisions for new equity issuers set out in Article 35(1) which disapply the restatement requirement to any period earlier than 1 January 2004.

5.22 Whilst this is only a transitional issue we believe that the recommendations need to address this point which, given that it can leverage on the more general debt and derivative point outlined above, should be straightforward to accomplish.
Complex financial histories

5.23 As indicated in our covering letter, we are disappointed that you have been unable to agree on recommendations addressing, at least, the more common examples of “complex financial histories”. We believe that recommendations in this respect are an essential component of any recommendations providing for consistent implementation of the PD Regulation. We have provided some examples below to illustrate our concerns.

(a) Where the issuer is a new holding company formed, for the purpose of the offering, to acquire a business or entity. Whilst the issuer will have no financial history, the business or entity it is to or has acquired will have a three year financial history. Current practice throughout Europe would be to include the historical financial information of the business or entity to be acquired as if it were itself the issuer. These cases arise where an issuer is restructuring itself for tax or legal reasons or where an existing company traded on a regulated market is a “shell” having sold its previous business and is used as the vehicle to effect the IPO of a new business.

(b) Where two, or more, businesses of equal size are brought together at the time of a securities offering. Internationally accepted practice would be to require financial information for each of the component businesses to be presented in the prospectus separately.

5.24 It is our understanding that many of your members have addressed these issues on specific transactions. We believe that reaching agreement on recommendations, and in sharing these, is an important element of ensuring that issuers, with the support of their advisers, are able to prepare prospectuses on a consistent basis.

5.25 We believe that a solution to the provision of recommendations to ensure that these issues are addressed on a consistent basis throughout the EU can be found by reference to the requirements set out in Annex II concerning pro forma financial information. This is expanded on below.

“Carve out” financial statements

5.26 A further complication arises in many cases where the business to be listed has not been operated as a legal entity throughout the three year period for which historical financial information is required to be presented. This often occurs where a business has been “carved out” or separated from a larger group. Accepted international practice is for the financial history to be presented as if the business had been separately reported.
5.27 Whilst preparing “carve out” financial statements is not an uncommon practice, there are no Generally Accepted Accounting Principles (“GAAP”) in any jurisdiction addressing the reporting considerations. In lieu of GAAP, “carve out” financial statements have been prepared under the direction of the respective capital market regulators.

5.28 The development of internationally agreed GAAP for “carve out” financial statements remains a longer term objective. In the mean time, we would encourage you to consider including some principles concerning carve out accounts in your recommendations.

5.29 The issues that we believe you should address in providing guidance on “carve out” financial statement preparation include:

(a) What criteria should apply in deciding whether it is appropriate to present carve out financial information as against a disclosure based approach highlighting those operations discontinued or not acquired? In essence, what businesses or entities should be included in the perimeter of carve out financial information?

When considering whether it is appropriate to present carve out financial information, we believe that the following factors should be taken into account. However, it should be noted that each carve out situation is unique and requires separate consideration.

(i) The extent to which the businesses or entities to be carved out can be said to have been separately managed and operated from the other businesses and operations from which they are being separated.

(ii) The relative size of the businesses or entities to be carved out when compared with the totality of the businesses and entities from which they are being separated.

(iii) Whether it would be misleading in the context of the circumstances for which the information is to be presented to exclude the results and assets of those operations not the subject of the transaction concerned.

(iv) The practicalities of whether it is possible to identify the historical financial information attributable to the businesses and entities to be carved out.

If the businesses or entities the subject of which is to be reported on do not meet the criteria set out above, we believe it will be necessary to present financial information
on the totality of the businesses and entities with separate disclosure of the operations either previously discontinued or not the subject of the transaction for which purpose the prospectus is being issued.

(b) How should carve out financial information be described?

Existing practice as to how “carve out” financial information is described is quite varied. For example in France, “carve out” information is described as “pro forma financial information”. This contrasts with the UK where “carve out” information is prepared to a true and fair standard and presented in an accountants’ report as historical “financial information”. By way of international reference, the US approach is to describe “carve out” financial information as financial statements and for them to be prepared to a fairly presents standard. Our view is that the term “financial information” should be used, as the information cannot be said to be accounts and that the PD Regulation has a specific meaning for “pro forma financial information”.

When “carve out” financial information is presented, we believe that it should be accompanied by prominent statements as to the basis on which the information has been prepared.

(c) What sorts of assumptions are acceptable when preparing carve out financial information?

The question of assumptions is critical to determining the ability of an issuer to prepare carve out financial statements. In general, we believe that assumptions should not represent arbitrary allocations of financial statement components but should be based on relevant financial and non-financial metrics available within the business to be reported on.

(d) How do you reconcile presenting carve out information as being in accordance with IAS Regulation when IFRS would not permit consolidated accounts to be prepared as for example there was no parent entity or the parent entity had no explicit control over the businesses and entities that it is to become the parent of at the time of separation?

Reconciling preparing carve out financial statements with precise application of IFRS, in our view, can only be accommodated by disclosure that the information is presented on a business which would not otherwise be permitted to prepare
consolidated financial information. In all other respects IFRS, or applicable National GAAP, should be applied.

(e) To what standard should carve out financial information be prepared for example should this be true and fair?

As noted above international practice as to whether carve out financial information is considered as showing a true and fair view varies. This divergence is driven by the views of the different regulators and depends on whether the regulators are prepared to accept either that as GAAP does not allow for carve out financial statements they cannot show a true and fair view and accept a “properly compiled” or “properly prepared” type of opinion from an issuer’s auditors or whether they effectively override GAAP and insist on a true and fair view. We believe that, whilst it is for the regulators to make it clear as to their expectation in this regard and for this to be provided in any PD Regulation requirements, the absence of agreed reporting criteria makes it difficult under IFRS to conclude that carve out financial information shows a true and fair view.

6 Pro forma financial information

92. Q: Do you agree with this proposal? If not, please state your reasons.

6.1 Whilst we agree that it is necessary to provide clarification as to what is meant by “auditor” and “independent accountant”, we believe that this can be simplified to a person or firm qualified to be appointed as the auditor of an issuer’s statutory financial statements. This would avoid the need to have to provide guidance where sufficient material exists in relation to the Company Law provisions concerning the auditors of statutory financial statements.

6.2 We also note that this text should be shown independently of the guidance on pro forma financial information as it applies equally to the reports required on profit forecasts and estimates.

98. Q: Please provide examples of indicators of size which you consider appropriate.

6.3 We believe that it would be useful to provide examples of indicators of size. We believe that comparisons of turnover, profits, gross assets and market values should be given as providing a sensible basis to start from. However, issuers should be encouraged to look at indicators specific to their industry. Issuers should also look at the results of the indicators
taken in the round and not see that exceeding 25% in any one indicator automatically
determines the disclosure requirement.

99. Q: CESR members had a discussion on appropriate definitions of indicators of size.
Should they refer to IAS/IFRS figures, local GAAP figures, other definitions or not defined
at all? If you provided indicators of size in response to the preceding question, please
explain your preferences on definitions of the proposed indicators.

6.4 The question of anomalies in tests should be dealt with by issuers looking to identify
comparable indicators and, where appropriate, seeking agreement from the applicable
competent authority as to the proposed determination.

Other comments

Interaction with IFRS 3

6.5 We would draw your attention to the fact that the pro forma disclosure requirements
overlap the disclosure requirements set out in IFRS 3, paragraph 70, concerning disclosure
of the effect of acquisitions completed during an accounting period. We note that IFRS 3
contains no guidance as regards the basis on which its required disclosure is to be made.
Accordingly, we believe that you should make it clear that in order for financial statements
prospectuses to be compliant with the PD Regulation, issuers should follow the principles
outlined in Annex II and your recommendations when making disclosures in their
accounts.

6.6 We also would note that compliance with IFRS 3 paragraph 70 will inevitably result in
“pro forma financial information” being presented for earlier periods than the most recent
thereby contravening item 5 of Annex II. We would encourage you to liaise with the IASB
in reconciling any potential conflict.

Defining transactions

6.7 We believe that the requirement for pro forma financial information should be taken
against an agreed definition as to which “transactions” it would be expected to apply. At a
minimum, our view is that “transactions” should include business combinations or
dispositions completed in the past financial year, completed since the end of the last
financial year or those in respect of which the prospectus is being prepared.
The Committee of European Securities Regulators  
18 October 2004

Which statements to present

6.8 It would be helpful if the recommendations made it clear as to whether, absent specific considerations, you expect that both a pro forma balance sheet and a pro forma profit and loss account should be prepared. Alternatively, you could make it clear that it is the issuer’s choice as to what to present. Our view is that you should make it clear that it is at the issuer’s choice as to which statements to present.

Financial statements of acquired businesses or entities

6.9 We note that the draft recommendations are silent as to the information you would normally expect issuers to provide in respect of the disclosure of “the financial statements of acquired businesses”, Annex II item 4. As we have stated above, and in our covering letter, we believe that this requirement provides you with scope to address some of the more obvious examples of “complex financial histories”.

6.10 We believe that as a minimum, “financial statements” ought to mean at least the published complete financial statements of an entity, where they exist, and, accordingly, this would entail the disclosure of at least two year’s complete financial information.

6.11 Whilst paragraph (9) to the preamble to the PD Regulation indicates that the test of significance should be measured at 25%, we would encourage you to consider whether the information requirement to be applied to an acquired business should be more comprehensive at, say, 100%. In such circumstances, we believe that the “financial statements” of the acquired business should cover three years thereby matching the requirement on the issuer itself; with two years being required where the tests are between 25% and 100%.

6.12 One related issue you should address is as to how issuers should deal with situations where the GAAP adopted by an entity being acquired is different from that of the issuer. Clearly, some form of reconciliation will be required between the respective accounting policies in order that the pro forma financial information can be said to have been properly compiled on a basis consistent with the accounting policies of the issuer. On balance, we believe that the reconciliation should be presented as part of the notes to the pro forma financial information. We note that this would result in the reconciliation being brought within the scope of the auditor’s opinion.
The Committee of European Securities Regulators
18 October 2004

Factualy supportable

6.13 We would question whether the high standard of support implied by paragraph 93 necessary for an adjustment to be made is necessary. This is particularly pertinent where IFRS requires issuers to make allocations of the purchase price to identifiable intangibles eg customer lists. Whilst issuers may enlist expert support in making such allocations, we do not believe that it is necessary for the expert to be required to provide a valuation for inclusion in the prospectus in order for such an adjustment to be said to be factually supported.

7 Financial data not extracted from the issuer’s audited financial statements

103. Q: Do you agree with this proposal? If not, please state your reasons.

7.1 We agree with the proposals outlined regarding disclosure around financial data not extracted from the issuer’s financial statements. However, we would have expected that the provision in paragraph 102, that the audited historical financial should be given greater prominence, to have been linked to such financial data as is often described as non-GAAP measures, eg EBITDA, rather than its apparent limitation by reference to forecast, estimated or pro forma figures. We would suggest that you should refer instead to “any other financial data”.

8 Interim financial information

112. Q: Do you agree with this proposal? If not, please state your reasons.

8.1 We agree with the proposals as outlined. However, we believe that they should also address the recognition and measurement principles to be applied in preparing interim financial statements where IAS 34 is not directly applicable. We believe that you should allow existing national GAAPs, where promulgated, otherwise you should recommend that issuers should default to the principles outlined in IAS 34.

9 Working capital statements

134. Q: Do you agree with this proposal? If not, please state your reasons.

9.1 Overall, we agree with the approach adopted in relation to profit forecasts and, particularly, with the inclusion of principles for preparing working capital statements. Such
recommendations are important given the fact that such a disclosure requirement is not currently required in many member states’ existing prospectus disclosure rules.

9.2 On a point of detail, we would suggest that you should not state, as is done in paragraph 115, the notion that a “high degree of confidence” means that the disclosure is “reliable”. Our view is that saying a statement is reliable implies too high a standard of expectation to a statement which must inevitably have some element of uncertainty underlying it.

9.3 With reference to paragraph 132, we would note that our experience is that the procedures underlying the assessment of a working capital statement would often be more comprehensive than might be applied when assessing the going concern basis in relation to annual accounts.

9.4 We would draw your attention to the practical difficulties likely to be encountered by financial institutions in assessing whether they have sufficient working capital because their business is in cash. Such entities do not necessarily differentiate their cash between their working capital and their business operation. We would encourage you to consider advising sure issuers that requests to omit this information under Article 8(3) of the Prospectus Directive as being inappropriate.

10 Capitalisation and indebtedness

136. Q: Do you agree with this proposal? If not, please state your reasons.

10.1 We do not agree with the proposal in that it goes beyond the requirements set out in the PD Regulation by recommending that issuers should provide disclosure of net indebtedness in the short term and in the medium term.

10.2 However, we believe that the recommendations should address the question of the measurement of capitalization and indebtedness by reference to GAAP being applied by an issuer. Further, issuers would benefit from guidance as to how they should measure shareholders’ equity at a date not more than 90 days before the date of a prospectus. Our view is that shareholders’ equity can only be measured by reference to an issuer’s last published annual or interim financial statements.

10.3 As with working capital statements, we would wish to draw your attention to the practical difficulties to be encountered by financial institutions, such as banks and insurance companies, in meeting the requirement for a capitalisation and indebtedness statement. We
would encourage you to consider advising sure issuers that requests to omit this information under Article 8(3) of the Prospectus Directive as it is inappropriate.

11 Specialist issuers

142. Q: Recital 22 of the Prospectus Regulation invites CESR to produce recommendations on the adapted information that competent authorities might require to the categories of issuers set out in Annex XIX of the Regulation. Do you think detailed recommendations are needed for specialist issuers or do you think the special features of these issuers could be addressed mainly by the disclosure requirements set out in the schedules and building blocks of the Regulation?

11.1 We agree that the special nature of most of the categories of issuer merit some recommendations as to specific disclosures and, in particular, with those categories where the value of a pool of assets is at least as important as the financial history.

Property companies

150. Q: Do you agree with the usefulness of requesting a valuation report in general? Please state your reasons.

11.2 We believe that a valuation report is useful where the value of an issuer’s asset base is considered an important

151. Q: What rules do you think the report should comply with (such as those of the country of the competent authority that approves the prospectus or other different rules)? Please state your reasons.

11.3 Whilst common international standards should be a medium term objective, we believe the only practical option is to accept an issuer’s home state valuation standards.

152. Q: Do you think that the condensed report should be allowed if the company holds more than 60 properties or would you choose another figure? Please state your reasons.

11.4 We believe the condensed report should be the only one required to be included in a prospectus. To list out in the prospectus individually up to 60 properties would not, in our view, be of any benefit to investors.
153. Q: Do you think a valuation report is needed with respect to each property or do you consider a condensed report as sufficient? Please state your reasons.

11.5 Whilst we believe that a valuation report should describe all of the properties, we do not believe that it is necessary for the valuation of each individual property to be disclosed.

154. Q: Considering the objective of the report, do you think it can be older than 60 days?

11.6 We consider 60 days to be a reasonable time limit.

155. Q: Do you agree with the proposed recommendations. If not, please state your reasons.

11.7 Question not responded to.

Mineral companies

164. Q: Do you agree with the usefulness of requesting a valuation report? If yes, do you agree with the content and scope of the reports proposed above? If not, please state your reasons.

11.8 As with other “asset based” securities, we believe that a valuation report is useful to investors.

165. Q: Do you consider the definitions provided in these recommendations to be adequate? If not, please give your reasons and provide new definitions, explaining the benefits of the change.

11.9 We would encourage you to use definitions consistent with those applied by other capital market regulators around the world.

166. Q: Do you think that issuers that are involved only in exploration of mineral resources and are not undertaking or propose to undertake their extraction on a commercial scale should be classed as mineral companies? Please state your reasons.

11.10 We do not see the need for the distinction to be drawn.
167. Q: Do you agree with the proposed recommendations? If not, please state your reasons.

11.11 Whilst we agree that it is useful for mineral company issuers to affirm their availability of cash resources for a two year period, we do not agree that this statement should be subject to explicit assurance by the issuer’s auditor as is proposed in paragraph 162, 2(b)(iii). We do not believe that the cost of obtaining assurance by an issuer’s auditors would provide sufficient incremental benefit to investors.

Investment companies

171. Q: Do you agree with the proposed recommendations? If not, please state your reasons.

11.12 We broadly agree with the proposed recommendations.

Scientific research based companies

177. Q: Do you agree with the proposed recommendations? If not, please state your reasons.

11.13 We broadly agree with the proposed recommendations.

Start-up companies

187. Q: Do you agree with the specific disclosure requirements set out for start-up companies? If not, please state your reasons and refer to the additional information you think should be required.

11.14 We do not agree that issuers should be required to disclose the “figures” from their business plan although issuers may choose to do so. Furthermore, we do not believe that the disclosure of issuer generated “sensitivity analysis” should be required. It is our view that sensitivity analysis can provide a false degree of confidence to investors as to the likely range of outcomes.
188. Q: Do you agree with the proposed definition of start-up companies? Would you instead prefer that these companies are defined as those that have less than three years of existence? Please state your reasons.

11.15 No, we do not agree with proposed definition of start-up companies. The definition as drafted would include any newly incorporated holding company that has been formed to acquire a business or another entity where such business or entity has itself been operating for more than three years. We believe that a specific exception to the definition for such issuers is essential.

189. Q: CESR may recommend to its members one of the following four options. Please state your preference and reasons for your answer:

(i) the issuer should always provide an expert’s report on the services/products of the issuer;
(ii) the issuer should provide an expert’s report on the services/products when these are unproven;
(iii) the expert’s report on the services/products of the issuer should be provided unless a very good reason is presented to the competent authority that would impede the report being provided;
(iv) the report would not be mandatory but the issuer would be free to include it.

11.16 We believe that you should not mandate an expert’s report and that option (iv) where issuers would be free to choose should be adopted.

190. Q: When considering whether the report should be mandatory or not, CESR also considered its content and, if required, CESR is proposing that the expert assesses and concludes on:

(i) the merit of the issuer’s products and/or services;
(ii) the issuer’s business plan including the critical path and timescale to commercial exploitation and any projections of the market potential for the issuer’s products and/or services;
(iii) the risk factors which might affect the business plan.

The report should be prepared by an individual or organisation independent of the issuer and of demonstrable high standing, repute and expertise in the field concerned and should confine the opinions expressed to matters within such expertises.
Do you agree with the content of the report? If not, please state your reasons and indicate what additional information you would require or delete.

11.17 We would be concerned as to the ability of issuers to find experts able to report in the manner expected. We do not believe experts would be prepared to accept the risk of reporting as to “the merit of the issuer’s products” which would be tantamount to underwriting the issuer’s business plan. We believe that the effect of your recommendations may well be to exclude from the capital markets start-up companies. We would also note that you have not addressed the question of what you mean by the “independence” of the expert.

Shipping companies

200. Q: Do you agree with the additional disclosure requirements in the registration document? If not, please state your reasons.

11.18 We do not see a great market need for specific disclosure rules concerning shipping companies.

201. Q: Do you think the expert valuation report should:

(i) be required for all vessels;
(ii) be required only for material vessels (and if so, what criteria would you choose to define what is material);
(iii) be required only for the vessels to be financed through the securities issue;
(iv) not required at all.

Please state reasons for your answer.

11.19 If you accept the need for a valuation report, presumably it should cover all the existing vessels and, separately, any vessels whose acquisition is to be financed through the securities issue.

204. Q: Considering the objective of the expert valuation report, do you think it can be older than 90 days? Please state your reasons.

11.20 Whilst not having a particular view as to the practicality of a 90 day valuation age, we note that this is a different age to the other valuation reports. However, we would also note the possible difficulties in valuing vessels that may well be at sea at the time.
205. *Q:* Do you think the condensed report should be allowed for if the company holds more than 50 vessels or would you choose another figure? Please state your reasons.

11.21 As with other valuation reports, we believe that it is only necessary for the condensed report to be included in a prospectus.

206. *Q:* Do you agree with the proposed recommendations? If not, please state your reasons.

Clarification of items

210. *Q:* Where there are common information requirements according to the Prospectus Regulation to equity, debt or derivative securities, do you think that the same recommendations are valid?

12.1 Broadly yes, subject to appropriate adaptations.

211. *Q:* Do you think adaptations are necessary with respect to the different needs as regards debts and derivatives registration documents?

12.2 We have noted in our responses to earlier questions where we believe adaptations are necessary to accommodate the different needs of debt and derivative issuers.

Compensation

229. *Q:* Do you agree with the usefulness of the proposed recommendations and with the level of detail provided for? If not, please state your reasons.

12.3 We agree with the proposed recommendations.

Related party transactions

243. *Q:* Do you think recommendations are needed in this matter? If not, please state your reasons.

12.4 We agree that the proposed recommendations are needed.
The Committee of European Securities Regulators
18 October 2004

244. Q: Do you agree with the proposed recommendations? If not, please provide examples of what other definitions of who can be considered related party to an issuer could be followed.

12.5 We agree with using IAS/IFRS as the basis for determining prospectus disclosure. We would suggest that you make it clear that it is not necessary for issuers to duplicate disclosure otherwise made in the explanatory notes to their financial statements.

Statements by experts

280. Q: Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.

12.6 Whilst noting that the disclosures would not be expected to be being made by auditors, we do believe that you should make it clear whether you believe that the auditor is an “expert”.