SUMMARY

Firstly, as set out in our comments on the first Consultation Paper, it seems to us that the appropriate level of disclosure for debt securities and derivatives has not been determined before the respective disclosure standards have been drafted. For the mentioned securities, the assessment of the investor which the prospectus information is meant to allow is that of the risks that the issuer becomes unable to fulfil its obligations. Regarding the RD for wholesale debt, derivatives and securities issued by banks, the disclosure standard should then even be lowered further, due to special circumstances for these types of securities.

Furthermore, also as set out in our comments on the first Consultation Paper, we regard it as highly important to limit the number of different disclosure standards, especially that of Registration Documents (RDs) and Securities Notes (SN), as much as possible. This approach naturally requires a certain degree of abstraction from the particulars of each type of security, issuer etc.; however, it cannot be the intention to create rules specifically tailored to cover each possible feature and case.

Against this background, it would seem advisable to us that a single RD is created for wholesale debt, all kinds of derivatives and securities issued by banks. For the latter two, the creation of a single RD would also be justified by the fact that derivatives are almost always issued by banks. In so far, it is somewhat surprising that the Consultation Paper proposes a separate RD for derivatives, which, when compared to the proposed RD for banks, contains additional disclosure requirements (such as the obligation to disclose Major Shareholders), whilst conceding at the same time that derivatives are exclusively issued by banks (under no. 62). The general idea behind the special regime for derivatives is that these securities should be subject to lower disclosure requirements than debt securities; otherwise there would be no need for a special RD for derivatives. This might point to a lack of co-ordination and system in the preparation of the different disclosure standards.

The creation of such RD for all cases in which lower disclosure requirements seem justified should, on the basis of the RDs proposed in this Consultation Paper, be relatively easy, given that the three RDs only differ in a relatively small number of points.

Regarding the disclosure requirements proposed now in the three RDs, it also seems to us that the underlying level of disclosure is far too high. This is mainly due to the excessive disclosure requirements proposed in the RD for retail debt, which has been used as the basis for drafting the three new RDs, by deleting certain items from it. The resulting level of disclosure in the three RDs is, in our view, maybe just about the appropriate one for retail debt securities; it is far too high for the cases in which lower disclosure requirements are justified. For these cases, disclosure should mainly be based on the issuer's financials; regarding all other items (most notably the issuer's business situation), only a very brief description should be required.

Further, we believe it should be clarified that there is a clear ranking among the various requirements for RDs. It should expressly be stated that the more comprehensive RD includes a less far-reaching one. In other words: the RD for equity comprises the contents of a RD for retails debt and so on. This would mean that an issuer who had already prepared a RD for equity would not be required to prepare another RD for debt or derivatives as long as the RD for equity is still valid. This approach would help to limit the costs for capital markets issues and increase an issuer's flexibility. Further, it might also lead to a higher level of disclosure as issuers will consider to prepare a RD for equity even if they only want to issue debt just to have the flexibility to also place new shares while the RD is valid without the need to prepare another RD before.

DETAILED DISCUSSION

- **15, 16**: There should not be a requirement to disclose information about the issuer's principal future investments. For debt securities generally, the assessment of the investor which the prospectus information is meant to allow is that of the risks that the issuer becomes unable to fulfil its obligations to pay interest and to repay the capital. Only information which directly contributes to this assessment should be required for the prospectus. Information on the issuer's investments does under normal conditions not enable investors to make an assessment about the issuer's insolvency risk.

- **18**: Capital expenditure generally does not affect investors in debt securities. As set out in our comments on the first Consultation Paper, this requirement should already be deleted for the retail debt RD.

- **22**: As set out in our initial response to the Consultation Paper, we generally believe it is extremely problematic to require a concrete profit forecast. Although it may at first sight be desirable from an investor's perspective to have concrete information about the issuer's prospects rather than only a general statement, it is not realistic to expect that a forecast that would serve this purpose can actually be reliable. Such a forecast is highly speculative by its nature and thus potentially misleading as it might be neglected by the investors that in reality the results of a company may develop in a significantly different manner, even if the respective company has prepared the forecast diligently. Inserting a forecast may also create a liability risk for persons responsible for the prospectus that cannot be justified. Furthermore, it appears questionable whether an expert would be willing to give any statement to this effect. If an expert was willing to issue such a statement at all, it cannot be expected that such statement will give sufficient comfort as to the reliability of the forecast. Rather, such an expert statement might appear more substantive than it actually is and thus contribute to the ”expectation gap” that is currently being discussed in connection with experts' statements.

  Further, as regards debt securities, such requirement seems even more unjustified already for the retail debt RD. The issuer risk for debt securities, as set out above for no 15, 16, is not related to the issuer's business success as such in the same way as it is the case with equity securities. The issuer related risk of debt securities basically is the risk of the insolvency of the issuer. This can under normal conditions not be assessed on the basis of a profit forecast. Thus, if the issuer – voluntarily – decides to include profit forecasts, there is no reason why investors in debt securities needed to be ”protected” by a statement that the forecast have been properly prepared. This applies even more in relation to wholesale investors.

- **23**: Given that the relevant issuer risk for debt securities can, under normal circumstances, not be assessed on the basis of business or profit forecasts (see our comments for no. 15, 16 and 22), this requirement should not be retained.

- **25**: Board Practices are of no interest for an investor in debt securities. E.g. if the issuer does not comply with corporate governance rules, this alone does not make it more likely that it becomes insolvent.

- **27, 28**: Due to the relevant issuer risk for debt securities (as set out above for no 15, 16), this information usually is already of limited value for investors in retail debt securities. It should certainly not generally be required for wholesale investors.

- **30**: The risk-benefit-analysis set up in no. 29 already holds true for the retail debt RD. Transactions with third parties under normal circumstances do not contribute to the

assessment of the relevant risk; the fulfilment of such obligation would however be highly burdensome for issuers. This obligation should therefore be abolished (see also comment to no. 27, 28).

- **33**: In general, we strongly support to have less detailed disclosure requirements for wholesale investors with regard to their greater sophistication and their experience in assessing the risks and benefits of investing in certain securities. However, also for sophisticated wholesale investors, recent financial statements are, in addition to other information, the basis of their assessment of securities and thus their investment decision. The more up-to-date financial information given in a prospectus is, the more reliable typically is the basis for the investment decision. Thus, if the prospectus date is more than nine months after the last financial year, it is also in the interest of wholesale investors to have interim financial statements included.

- **35**: No. As for the retail debt RD, we take the view only publicly available documents should be on display. Other documents in particular ”material contracts” often do contain confidential information and therefore may not be publicly displayed due to privacy laws, contract laws, data protection laws, criminal provisions, etc. In addition, a complete display of these contracts may affect the competition since it would give competitors an easy access to contracts they would otherwise have no access to. Furthermore, if all ”material contracts” displayed had to be translated into the same language as the prospectus, this would be cost and time consuming hence extremely burdensome for issuers without any real benefit for the investors. This is even more true, if investors are laymen in the field the respective ”material contracts” do contemplate. Therefore, only a brief summary of these documents, containing their very essentials, should be presented in the prospectus. For the protection of investors, further information is not necessary and also not required under the Directive (see the general approach as outlined in Art. 5 para. 1 of the Directive).

- We have the following additional comments regarding the proposed wholesale debt RD:

  I.A.1. It is not altogether clear, what kind of responsibility is contemplated and what consequences responsibility has: personal liability or liability of the legal person. Further more the cumulative (”and”) designation seems to be inconsistent compared to the alternative (”or”) designation requirement contemplated by the SN, I.6 and the Prospectus Directive itself (Art. 6). As it has to be left to each Member State if it wants to extend liability to natural persons, the word ”and” should be replaced by an ”or”.

  II.(a) For wholesale debt, there should not be a requirement to describe risks specific to the issuer and its industry. This would not be in line with the level of disclosure appropriate for such securities.

  III.A.4 The proposed requirement to mention the issuer’s web-site address should be deleted. The issuer’s web-site cannot, at least not in all cases, be seen as an objective mean of additional information for investors. By mentioning it in the prospectus, there would thus be an increased risk that investors base their investment decision not only on the prospectus, but also on the content of the issuer’s web-site, which would contradict the purpose of a prospectus. Therefore, if the prospectus contains all the information necessary to the investor to make an informed investment decision (and thus is compliant to the requirements of the Prospectus Directive), then a reference to the issuer’s is neither necessary nor useful.

  IV.B.2 Given that the relevant issuer risk for debt securities and derivatives can, under normal circumstances, not be assessed on the basis of business or

profit forecasts (see our comments for no. 15, 16 and 22), this requirement should not be retained.

IV.B.3(a) It should be set out more clearly also in IV.B.3.a that the giving of profit forecasts, profit estimates (and so forth) is voluntary (e.g. by saying – as in IV.D.2 ”If a (voluntary) profit forecast...”). Further, not only a profit forecast, but also a profit estimate cannot be made without being subject to general assumptions as it necessarily depends on future developments that can only be assumed.

V.B & V.C Conflicts of interests as well as the Board Practices are of no interest for an investor in debt securities. E.g. if the issuer does not comply with corporate governance rules, this alone does not make it more likely that it becomes insolvent.

VII.A The reference to the ”audit report” apparently intends to mean the ”auditor's report”. The expression ”auditor's report” is generally understood as the entire text of the auditor's official expert statement to be made and published as a result of his audit, including the audit opinion (see, for example, AICPA Professional Standards, AU Section 508; IFAC Handbook 1999, ISA 700.28). The prospectus must indeed contain the (entire) auditor's report. This contributes to the intended high level of transparency. This is also already common practice and prescribed by applicable law (especially also in the U.S.); the EU can by no means fall behind already existing and accepted international practices.

The expression ”audit report” is, in contrast, usually understood as the auditor's ”long-form” report on the audit work that is given internally to the client only. This long-form audit report is not suitable for inclusion in a prospectus. It is confidential and regularly in a size (sometimes up to more than 1,000 pages) that, as a matter of fact, excludes publication.

VII.B It is unclear what ”notes to the accountant's report” should mean. In the headline, it appears that this provision addresses the ”notes to the financial statements” (IAS 1 para. 91 et seq.).

”Accountant's report” apparently is something different. If the auditor's report should be meant, the wording is inconsistent. Also, this is already covered by ”VII”. Thus, CESR should clarify what VII.B intends to be stated in the prospectus.

VII.E It is unclear what an ”equivalent standard” is, if such standard does not meet the ”true and fair view” requirement.

VII.F.1 The mere ”statement that the annual accounts have been audited" is not sufficient. Rather, the auditor's report issued in relation to the annual accounts must be included in the prospectus, as it is common practice and required by applicable laws in the internationally leading capital markets (see above comment to ”VII.A”). Also, VII.A already provides therefor. CESR should rephrase ”VII.F.1” in order to clarify that it is not intended to qualify ”VII”.

VII.G.1. Three months following the end of a financial year for the establishment/ approval of the financial statements are too short. Six months are required. Therefore, the last year of audited financial statements should be allowed to be as old as 18 and not only 15 months. Otherwise there would be fewer new issues between April 1st and June 30th than there are now.

VII.J It is generally unclear what is meant by changes in the issuer's "trading position". Only the financial position is of relevance in so far.

VIII.A The term "material contract" is too vague. One has to bear in mind that the purpose of a prospectus is not to provide a due diligence report to the investor but only to inform him about the nature and the major risks of his investments (see also Art. 5 para. 1 of the Prospectus Directive). The additional condition that the contract has to be able to result in an obligation "that is material to the issuer's ability to meet its obligation to security holders" does not constitute a real restriction: This only describes the issuer's insolvency risk, and it remains unclear have to be regarded as "material" in creating such risk. Accordingly, it should be enough if any risk resulting from such a contract that are material for the assessment of the company and/or the securities have to be described in the prospectus.

VIII.C In general, only publicly available documents should be on display. Other documents in particular "material contracts" often do contain confidential information and therefore may not be publicly displayed due to privacy laws, contract laws, data protection laws, criminal provisions, etc. In addition, a complete display of these contracts may affect the competition since it would give competitors an easy access to contracts they would otherwise have no access to. Furthermore, if all "material contracts" displayed had to be translated into the same language as the prospectus, this would be cost and time consuming hence extremely burdensome for issuers without any real benefit for the investors. This is even more true, if investors are laymen in the field the respective "material contracts" do contemplate. Therefore, only a brief summary of these documents, containing their very essentials, should be presented in the prospectus.

- **43**: Yes. As mentioned under no. 38, banks are indeed under close regulatory control and supervision, and therefore carry a lower insolvency risk. This has to be reflected by lower disclosure obligations.

- **44**: It would not seem justified to exclude banks from non-EU countries with an equivalent level of prudential and regulatory supervision from the use of the special RD.

- **45**: We have the following additional comments regarding the proposed RD:

I.A.1. It is not altogether clear, what kind of responsibility is contemplated and what consequences responsibility has: personal liability or liability of the legal person. Further more the cumulative ("and") designation seems to be inconsistent compared to the alternative ("or") designation requirement contemplated by the SN, I.6 and the Prospectus Directive itself (Art. 6). As it has to be left to each Member State if it wants to extend liability to natural persons, the word "and" should be replaced by an "or".

II.(a) For securities issued by banks, there should not be a requirement to describe risks specific to the issuer and its industry. This would not be in line with the level of disclosure appropriate for non-equity securities issued by banks. Industry related risks for banks in general mainly depend on the general economic conditions that can be assumed to be common knowledge. Further, extraordinary exposures of the issuer, if any, are dealt with under the banking supervisory regime and thus should not amount to a level that might affect the issuer's ability to fulfil its obligations under the securities covered by this building block.

II.(b) Given the supervision regime exercised over banks, as a result of which banks carry a lower insolvency risk than companies of other sectors, this information should be not required for banks.

III.A.4 The proposed requirement to mention the issuer's web-site address should be deleted. The issuer's web-site cannot, at least not in all cases, be seen as an objective mean of additional information for investors. By mentioning it in the prospectus, there would thus be an increased risk that investors base their investment decision not only on the prospectus, but also on the content of the issuer's web-site, which would contradict the purpose of a prospectus. Therefore, if the prospectus contains all the information necessary to the investor to make an informed investment decision (and thus is compliant to the requirements of the Prospectus Directive), then a reference to the issuer's is neither necessary nor useful.

IV.A.3(a) It should be set out more clearly also in IV.B.3.a that the giving of profit forecasts, profit estimates (and so forth) is voluntary (e.g. by saying – as in IV.D.2 "If a (voluntary) profit forecast..."). Further, not only a profit forecast, but also a profit estimate cannot be made without being subject to general assumptions as it necessarily depends on future developments that can only be assumed.

V.B & V.C Conflicts of interests as well as the Board Practices are of no interest for an investor in debt securities or derivatives. E.g. if the issuer does not comply with corporate governance rules, this alone does not make it more likely that it becomes insolvent.

VII.A The reference to the "audit report" apparently intends to mean the "auditor's report". The expression "auditor's report" is generally understood as the entire text of the auditor's official expert statement to be made and published as a result of his audit, including the audit opinion (see, for example, AICPA Professional Standards, AU Section 508; IFAC Handbook 1999, ISA 700.28). The prospectus must indeed contain the (entire) auditor's report. This contributes to the intended high level of transparency. This is also already common practice and prescribed by applicable law (especially also in the U.S.); the EU can by no means fall behind already existing and accepted international practices.

The expression "audit report" is, in contrast, usually understood as the auditor's "long-form" report on the audit work that is given internally to the client only. This long-form audit report is not suitable for inclusion in a prospectus. It is confidential and regularly in a size (sometimes up to more than 1,000 pages) that, as a matter of fact, excludes publication.

VII.B It is unclear what "notes to the accountant's report" should mean. In the headline, it appears that this provision addresses the "notes to the financial statements" (IAS 1 para. 91 et seq.).

"Accountant's report" apparently is something different. If the auditor's report should be meant, the wording is inconsistent. Also, this is already covered by "VII". Thus, CESR should clarify what VII.B intends to be stated in the prospectus.

VII.E It is unclear what an "equivalent standard" is, if such standard does not meet the "true and fair view" requirement.

VII.F.1 The mere ”statement that the annual accounts have been audited" is not sufficient. Rather, the auditor’s report issued in relation to the annual accounts must be included in the prospectus, as it is common practice and required by applicable laws in the internationally leading capital markets (see above comment to ”VII.A”). Also, VII.A already provides therefor. CESR should rephrase ”VII.F.1” in order to clarify that it is not intended to qualify ”VII”.

VII.G.1. Three months following the end of a financial year for the establishment/ approval of the financial statements are too short. Six months are required. Therefore, the last year of audited financial statements should be allowed to be as old as 18 and not only 15 months. Otherwise there would be fewer new issues between April 1st and June 30th than there are now.

VII.J It is generally unclear what is meant by changes in the issuer’s ”trading position”. Only the financial position is of relevance in so far.

VIII.A The term "material contract" is too vague. One has to bear in mind that the purpose of a prospectus is not to provide a due diligence report to the investor but only to inform him about the nature and the major risks of his investments (see also Art. 5 para. 1 of the Prospectus Directive). The additional condition that the contract has to be able to result in an obligation ”that is material to the issuer’s ability to meet its obligation to security holders” does not constitute a real restriction: This only describes the issuer’s insolvency risk, and it remains unclear have to be regarded as ”material” in creating such risk. Accordingly, it should be enough if any risk resulting from such a contract that are material for the assessment of the company and/or the securities have to be described in the prospectus.

VIII.C In general, only publicly available documents should be on display. Other documents in particular ”material contracts” often do contain confidential information and therefore may not be publicly displayed due to privacy laws, contract laws, data protection laws, criminal provisions, etc. In addition, a complete display of these contracts may affect the competition since it would give competitors an easy access to contracts they would otherwise have no access to. Furthermore, if all ”material contracts” displayed had to be translated into the same language as the prospectus, this would be cost and time consuming hence extremely burdensome for issuers without any real benefit for the investors. This is even more true, if investors are laymen in the field the respective ”material contracts” do contemplate. Therefore, only a brief summary of these documents, containing their very essentials, should be presented in the prospectus.

- **47**: There should not be a requirement to disclose information about the issuer’s principal future investments. For debt securities and derivatives generally, the assessment of the investor which the prospectus information is meant to allow is that of the risks that the issuer becomes unable to fulfil its obligations to pay interest and to repay the capital. Only information which directly contributes to this assessment should be required for the prospectus. Information on the issuer’s investments does under normal conditions not enable investors to make an assessment about the issuer’s insolvency risk.

- **49**: The solvency ratio should not have to be disclosed in the prospectus. This figure does not help normal investors to assess the relevant issuer risk for debt securities and derivatives. In addition, the financial statements of banks regularly disclose the ”BIS capital ratio”, so that investors usually have information in this respect available.

- **51**: Board Practices are of no interest for an investor in debt securities and derivatives. E.g. if the issuer does not comply with corporate governance rules, this alone does not make it more likely that it becomes insolvent.

- **53**: The supervision regime exercised over banks also extends to the persons which hold major interests in banks. Therefore, there is no need for a disclosure of these circumstances in the prospectus.

- **55**: The risk-benefit-analysis set up in no. 29 for the retail debt RD also holds true for the RD for banks. Transactions with third parties under normal circumstances do not contribute to the assessment of the relevant risk; the fulfilment of such obligation would however be highly burdensome for issuers. In addition, such transactions are also subject to the supervision exercised over banks. This obligation should therefore be abolished.

- **57**: With regard to the lower risk associated with securities issued by banks (see comments for no. 43 above), arguably the requirement to include interim reports could be omitted. Nevertheless, also with regard to banks recent financial statements are, in addition to other information, in general the basis of their assessment of securities and thus the investment decision that has to be taken. Obviously, also here, the more up-to-date financial information given in a prospectus is, the more reliable typically is the basis for this investment decision. However, the risk associated with an omission of interim reports appears significantly lower compared to other issuers.

- **59**: No. As for the retail debt RD, we take the view only publicly available documents should be on display. Other documents in particular ”material contracts” often do contain confidential information and therefore may not be publicly displayed due to privacy laws, contract laws, data protection laws, criminal provisions, etc. In addition, a complete display of these contracts may affect the competition since it would give competitors an easy access to contracts they would otherwise have no access to. Furthermore, if all ”material contracts” displayed had to be translated into the same language as the prospectus, this would be cost and time consuming hence extremely burdensome for issuers without any real benefit for the investors. This is even more true, if investors are laymen in the field the respective ”material contracts” do contemplate. Therefore, only a brief summary of these documents, containing their very essentials, should be presented in the prospectus.

- **66**: There should not be a requirement to disclose information about the issuer’s principal future investments. For derivatives, as for debt securities, the assessment of the investor which the prospectus information is meant to allow is that of the risks that the issuer becomes unable to fulfil its obligations to pay interest and to repay the capital. Only information which directly contributes to this assessment should be required for the prospectus. Information on the issuer’s investments does under normal conditions not enable investors to make an assessment about the issuer’s insolvency risk. In addition, due to the lower insolvency risk of banks, the disclosure obligations should generally be lower than for other issuers.

- **69**: It would not seem justified to treat derivatives differently from debt securities in so far.

- **71**: Conflicts of interests cannot become practicable for derivatives. This requirement should therefore be deleted.

- **73, 74:** Board Practices generally are of no interest for an investor in derivatives. E.g. if the issuer does not comply with corporate governance rules, this alone does not make it more likely that it becomes insolvent.

- **76**: The risk-benefit-analysis set up in no. 29 for the retail debt RD also holds true for the derivatives RD. Transactions with third parties under normal circumstances do not contribute to the assessment of the relevant risk; the fulfilment of such obligation would however be highly burdensome for issuers.

- **78**: Due to the lower risk associated with securities issued by banks (see comments for no. 43 above), it seems appropriate not to require the production of interim reports.

- **80**: No. As for the retail debt RD, we take the view only publicly available documents should be on display. Other documents in particular ”material contracts” often do contain confidential information and therefore may not be publicly displayed due to privacy laws, contract laws, data protection laws, criminal provisions, etc. In addition, a complete display of these contracts may affect the competition since it would give competitors an easy access to contracts they would otherwise have no access to. Furthermore, if all ”material contracts” displayed had to be translated into the same language as the prospectus, this would be cost and time consuming hence extremely burdensome for issuers without any real benefit for the investors. This is even more true, if investors are laymen in the field the respective ”material contracts” do contemplate. Therefore, only a brief summary of these documents, containing their very essentials, should be presented in the prospectus.

- We have the following additional comments regarding the proposed derivatives RD:

  I.A.1. It is not altogether clear, what kind of responsibility is contemplated and what consequences responsibility has: personal liability or liability of the legal person. Further more the cumulative (”and”) designation seems to be inconsistent compared to the alternative (”or”) designation requirement contemplated by the SN, I.6 and the Prospectus Directive itself (Art. 6). As it has to be left to each Member State if it wants to extend liability to natural persons, the word ”and” should be replaced by an ”or”.

  II.(a) For derivatives, there should not be a requirement to describe risks specific to the issuer and its industry. This would not be in line with the level of disclosure appropriate for such securities. As set out in our initial response to the Consultation Paper, derivatives are almost always issued by banks, so the disclosure standards appropriate for banks should be applied to derivatives as well. As set out in our comments to no. 45, II.(a), industry related risks for banks in general mainly depend on the general economic conditions that can be assumed to be common knowledge. Further, extraordinary exposures of the issuer, if any, are dealt with under the banking supervisory regime and thus should not amount to a level that might affect the issuer’s ability to fulfil its obligations under the securities covered by this building block.

  III.A.4 The proposed requirement to mention the issuer’s web-site address should be deleted. The issuer’s web-site cannot, at least not in all cases, be seen as an objective mean of additional information for investors. By mentioning it in the prospectus, there would thus be an increased risk that investors base their investment decision not only on the prospectus, but also on the content of the issuer’s web-site, which would contradict the purpose of a prospectus. Therefore, if the prospectus contains all the information necessary to the investor to make an informed investment decision (and thus is compliant to the requirements of the Prospectus Directive), then a reference to the issuer’s is neither necessary nor useful.

  IV.A.2(a) It should be set out more clearly also in IV.B.3.a that the giving of profit forecasts, profit estimates (and so forth) is voluntary (e.g. by saying – as in

IV.D.2 ”If a (voluntary) profit forecast...”). Further, not only a profit forecast, but also a profit estimate cannot be made without being subject to general assumptions as it necessarily depends on future developments that can only be assumed.

VI The supervision regime exercised over banks also extends to the persons which hold major interests in banks. Therefore, there is no need for a disclosure of these circumstances in the prospectus.

VII.A The reference to the ”audit report” apparently intends to mean the ”auditor's report”. The expression ”auditor's report” is generally understood as the entire text of the auditor's official expert statement to be made and published as a result of his audit, including the audit opinion (see, for example, AICPA Professional Standards, AU Section 508; IFAC Handbook 1999, ISA 700.28). The prospectus must indeed contain the (entire) auditor's report. This contributes to the intended high level of transparency. This is also already common practice and prescribed by applicable law (especially also in the U.S.); the EU can by no means fall behind already existing and accepted international practices.

The expression ”audit report” is, in contrast, usually understood as the auditor's ”long-form” report on the audit work that is given internally to the client only. This long-form audit report is not suitable for inclusion in a prospectus. It is confidential and regularly in a size (sometimes up to more than 1,000 pages) that, as a matter of fact, excludes publication.

VII.B It is unclear what ”notes to the accountant's report” should mean. In the headline, it appears that this provision addresses the ”notes to the financial statements” (IAS 1 para. 91 et seq.).

”Accountant's report” apparently is something different. If the auditor's report should be meant, the wording is inconsistent. Also, this is already covered by ”VII”. Thus, CESR should clarify what VII.B intends to be stated in the prospectus.

VII.E It is unclear what an ”equivalent standard” is, if such standard does not meet the ”true and fair view” requirement.

VII.F.1 The mere ”statement that the annual accounts have been audited" is not sufficient. Rather, the auditor's report issued in relation to the annual accounts must be included in the prospectus, as it is common practice and required by applicable laws in the internationally leading capital markets (see above comment to ”VII.A”). Also, VII.A already provides therefor. CESR should rephrase ”VII.F.1” in order to clarify that it is not intended to qualify ”VII”.

VII.G.1. Three months following the end of a financial year for the establishment/ approval of the financial statements are too short. Six months are required. Therefore, the last year of audited financial statements should be allowed to be as old as 18 and not only 15 months. Otherwise there would be fewer new issues between April 1st and June 30th than there are now.

VII.J It is generally unclear what is meant by changes in the issuer's ”trading position”. Only the financial position is of relevance in so far.

VIII.A The term "material contract" is too vague. One has to bear in mind that the purpose of a prospectus is not to provide a due diligence report to the investor

but only to inform him about the nature and the major risks of his investments (see also Art. 5 para. 1 of the Prospectus Directive). The additional condition that the contract has to be able to result in an obligation ”that is material to the issuer’s ability to meet its obligation to security holders” does not constitute a real restriction: This only describes the issuer’s insolvency risk, and it remains unclear have to be regarded as ”material” in creating such risk. Accordingly, it should be enough if any risk resulting from such a contract that are material for the assessment of the company and/or the securities have to be described in the prospectus.

VIII.C In general, only publicly available documents should be on display. Other documents in particular ”material contracts” often do contain confidential information and therefore may not be publicly displayed due to privacy laws, contract laws, data protection laws, criminal provisions, etc. In addition, a complete display of these contracts may affect the competition since it would give competitors an easy access to contracts they would otherwise have no access to. Furthermore, if all ”material contracts” displayed had to be translated into the same language as the prospectus, this would be cost and time consuming hence extremely burdensome for issuers without any real benefit for the investors. This is even more true, if investors are laymen in the field the respective ”material contracts” do contemplate. Therefore, only a brief summary of these documents, containing their very essentials, should be presented in the prospectus.

- **87**: As set out in our comments on the first Consultation Paper, we believe that no difference should be made between guaranteed and not guaranteed derivatives, as the issuer risk is exactly identical for both kinds (in both cases, the risk of an insolvency) and a differentiation would in practice only cause additional expenditure. A differentiation would also contradict the fact a capital guarantee for derivatives is usually equally financed by issuers with hedging transactions as the other features of the respective derivative. A differentiation between ”real” and ”bond-like” derivatives (in order to subject the latter to higher disclosure obligations) could only be made on the basis of the question if the issuer wants to use the proceeds from the issue for hedging transactions or wants to spend them for general or particular corporate purposes; such a differentiation would however also not be very practical, and would only justify additional information in the RD on the purpose of the issue, not a generally different treatment of both types (as the issuer risk, which is the only relevant factor in so far, is exactly identical).

- **88**: As set out above for no. 87, there should not be a special regime for ”guaranteed” derivatives. Each percentage return selected would, for the reasons set out for no 87, be totally arbitrary and would lack a justification.

- **89**: As explained in the introductory remarks above, it cannot be that derivatives issued by banks are subject to higher disclosure requirements than debt securities issued by banks. The general idea behind the special regime for derivatives is that these securities should be subject to lower disclosure requirements than debt securities; otherwise there would be no need for a special RD for derivatives.

- **92**: As set out in our comments on the first Consultation Paper, and in the introductory remarks above, we regard it as highly important to limit the number of disclosure standards, especially that of Registration Documents (RDs) and Securities Notes (SN), as much as possible. This approach naturally requires a certain degree of abstraction from the particulars of each type of security, issuer etc.; however, it cannot be the intention to create rules specifically tailored to cover each possible feature and case. Against this background, and considering the fact that derivatives are almost always

issued by banks, we think that there should in any case be only one RD for derivatives, which should be based on the disclosure requirements for banks.

- **93**: As explained in the introductory remarks above, it would be advisable to create a single RD for all cases in which lower disclosure requirements seem justified.

- **96**: We have the following comments regarding the proposed disclosure requirements:

  Introduction: In practical terms, we cannot think of a vehicle or entity that ”has no separate legal identity”. This reference should therefore be deleted.

  I.A.1.pp It is not clear, what kind of responsibility is contemplated and what consequences such a responsibility would have: personal liability or liability of the legal person. Furthermore, the cumulative (”and”) designation seems to be inconsistent compared to the alternative (”or”) designation requirement contemplated by the SN, I.6 and the Prospectus Directive itself (Art. 6). As it has to be left to each Member State if it wants to extend liability to natural persons, the word ”and” should be replaced by an ”or”. We also do not understand why the language in I.A.1, I.A.2. and I.A.3 deviates from the equivalent sections in other RDs.

  I.B.1 A fund could also per se be an issuer within the meaning of this section. Therefore, ”or fund” can be deleted.

  I.B.2 As mentioned above, we cannot think, in practical terms, of a vehicle or entity that ”has no separate legal identity”. Even if such vehicle or entity were used in practice, we do not see any reason for the distinction made here. Therefore, reference should be made to ”the issuer” in general.

  I.B.3 Since it is not clear whether the tax or the corporate domicile (both can be different from to the place of incorporation) is contemplated, this subject of disclosure needs further clarification. Further, the proposed requirement to mention the issuer’s web-site address should be deleted. The issuer’s web-site cannot, at least not in all cases, be seen as an objective mean of additional information for investors. By mentioning it in the prospectus, there would thus be an increased risk that investors base their investment decision not only on the prospectus, but also on the content of the issuer’s web-site, which would contradict the purpose of a prospectus. Therefore, if the prospectus contains all the information necessary to the investor to make an informed investment decision (and thus is compliant to the requirements of the Prospectus Directive), then a reference to the issuer’s web-site is neither necessary nor useful. A telephone number may not be available for certain issuers.

  I.D.1 We do not consider a disclosure requirement concerning activities outside the group as necessary.

- **102, 103:** As regards depositary receipts, we only see the need for additional disclosure requirements regarding information on the peculiarities of the depository receipt itself. Depositary receipts are basically tools used to better deal with settlement issues in cross-border situations. The depositary in fact only acts as a service provider, but economically is not the issuer of the respective securities. Thus the risk associated with depository receipts is identical to the risk associated with the underlying securities (see for example the definition of ”American Depository Receipts” given by Bloomberg, available under *”http://www.bloomberg.com/money/tools/bfglosa.html#american_depository_receipts".* Thus, the investment decision will hardly depend on the identity of the depositary bank but rather on the assessment of the underlying. The information to be disclosed in

respect of depositary receipts can be limited to the peculiarities of the depository receipts that are relevant for the investor. This is basically the information set out in Annex 5, items IX.A and XI, namely basic information on the identity of the depository, description of the legal basis of the depository receipts and description of the specific rights attaching thereto, as well as the exercise and benefits arising from the rights attaching to the underlying securities (which expression is suggested to consistently be used instead of ”original securities” that appears in Annex 5).

Regarding the ”underlying” security, it is sufficient to refer to the RD and the SN dealing with such securities and its issuer. There is no reason why the level of disclosure on the ”underlying” security should be different from the one which would be required if this security itself was issued.

In addition, to allow a clear distinction from derivative securities, a definition of ”depositary receipts” should be given. This definition should be based on the question if the owner of the respective security holds a position which is, in economic terms, equivalent to that of the owner of the ”underlying” security itself.

A definition of a depository receipt could be as follows:

> ”*Certificates issued by a depository bank, representing ownership of one or more securities of an issuer different from the depository held by the depository bank so that the holder of a depository receipt economically becomes the owner of the underlying security, the depository receipts thus being subject to the same economic risks and chances as the underlying securities*.”

For the sake of completeness, we should nevertheless like to comment on item I.C.3 in Annex 5 providing for an alternative solution where the inclusion of an auditor’s report (as to the terminology see our comments to no. 35, item VII.A et seq.) is prohibited. We are not aware of such restrictions. In any case, item IC.3 is in this respect inconsistent to Annex A to the Consultation Paper (so-called Equity Building Block), to the following building blocks derived therefrom as well as to item VII. A in Annex 5 itself (assuming that ”audit report” is to be read as ”auditor’s report” as set out earlier under no. 35, item VII.A et seq.) where the auditor’s report is correctly understood as an integral part of audited accounts that consequently has to be included in the prospectus as well. An omission of the auditor’s report would also be contrary to the current practice in leading capital markets. It is also unjustified and contrary to the interests of investors. It would then be questionable whether investors can still be entitled to recourse claims against auditor’s in the case of (negligently) wrong audit opinions that otherwise could exist under the laws of many jurisdictions. With a view to the fact that one of the objectives of the prospectus directive is investor protection (see no. 13 of the preamble to the directive), CESR should not water down existing investor protection mechanisms like the inclusion of auditor’s reports as well as liability of experts for their statements that are included in a prospectus as it exists at least in certain jurisdictions. Rather, CESR should strive for the abolition of national restrictions in publishing auditor’s reports in a prospectus, if any, that are contrary to objectives of the directive.

- **104**: Even if there are recourse claims against the depository, this does not require to make the same disclosure as if the depository were the issuer of the underlying. The depository basically acts as a service provider similar to a clearing house. Claims against the depository are conceivable in the case of a breach of the depository’s obligations under the depository agreement that is deemed to be concluded when an investor acquired depository receipts. Accordingly, recourse claims against the depository do not result from the depository receipt as a security (as it only represents the underlying security). It is rather based on the contractual relationship with the depository as a

service provider. Thus, a description of the claims and duties of the depository and the investor from the depository agreement should be sufficient.

- **111:** No. We generally do not believe that it is necessary or even helpful to have specific disclosure requirements for various industries. These appear already be too specific and, as a result, cumbersome. They may also be difficult to handle if a company is a conglomerate or has activities in several of the industries addressed by specific building blocks. The important information should already be covered by the general list of items in the building block for the respective type of securities. A more general approach, as it has so far been taken in Germany, enables both issuers and their advisers as well as the supervisory authority and stock exchanges to take a more flexible approach with regard to individual issuers and offerings.

  This applies in particular to the building block for shipping companies. We do not see why the risks associated with an investment in a shipping company cannot be sufficiently covered by general disclosure requirements. Thus, we strongly support the opinion of those CESR members who feel that also shipping companies should be an can be covered by the Core Equity building block.

- **112**: The issues enumerated for disclosure in Annex 6 can easily be covered general disclosure requirements for any kind of company, as it is further explained as follows:.

  - The relationship to a ship management company that manages the vessels is only relevant if it is material to the issuer, especially if the issuer is dependent on this relationship. This is already covered by item III.C.7 of Annex A.

  - A relationship between controlling shareholders of the issuer and the ship management company, if it is material to either the company or the related shareholder or if they it is unusual is already covered by item VI.B of Annex A. If it is neither material nor unusual, there is no need for specific disclosure.

  - The details of the vessels should already have to be disclosed under Annex A, item III.E (which might, for the sake of clarity, be further specified).

  - We believe that a contract to build a new vessel is a principal future investment that has to be disclosed under item III.B.3 of Annex A; it should also be relevant under Annex A, item III.E.

  - Insurance coverage for the issuer's facilities is important not only for shipping companies and we assume that in the case that there is any thing unusual or any specific risk involved (e.g. no or insufficient insurance coverage) this would have to be mentioned under item III. E of Annex A, so that also here, there is no need for a separate building block for shipping companies).

- **113**: No, we doubt that the relevance of the value of the fixed assets of a shipping company justifies a separate valuation report. As with other kinds of companies, the value of the company's assets will, if at all, only have a very limited influence on its share price (other than, for example ist profitability or prospects). Further, the value of the fixed assets also needs to be reflected in the balance sheet of the company that has to be disclosed anyway. There is no need to have a separate valuation report the preparation of which will also be costly and time-consuming.

- **114**: Apart from our general doubts as explained in no. 113 we wonder whether a valuation that is not older than 90 will be feasible. We assume that the valuation of a vessel will require an on-site visit of the vessel. The same might be travelling on high seas and thus hardly be reachable with justifiable efforts. The same exercise for a

number of vessels appears to be too costly and time-consuming, also with regard to the limited use of such a valuation, as explained under no. 113.

- **115**: Although being related rather to the issuer than to the securities, an additional up-to-date valuation, if it is regarded as necessary, appears more reasonable to be inserted into the SN (rather than the RD, which could become out of date until securities are actually issued).

- **122**: It seems reasonable to provide for a blanket clause for the mentioned cases, as it would not be possible to describe them in more detail on a general level.

- **123**: The proposed reference to information which is ”not applicable” would leave the scope of this rule somewhat unclear. The proposed provision in the Directive speaks of information which is ”inappropriate”. The words ”not applicable to” in the proposed clause should therefore be replaced by ”not relevant for or otherwise inappropriate to”.

- **125, 126**: The proposed distribution of information to RD and SN often seems rather arbitrary. Due the lack of a identifiable system behind the general distribution, it would seem preferable to leave information on the issuer, to the extent possible, in the RD.

- **132**: In so far, it seems sufficient only to provide for the general rule that ”a description of the rights attached to the securities” has to be given. Such rights can take a large variety of forms; it will not be possible to take care of all possible features by way of detailed disclosure obligations. Rather should the general rule be clarified so that it becomes clear that a detailed description of the rights has to be given.

- **136**: For securities which provide for fixed income and at the same time have derivative features, it would seem preferable only to make the derivatives SN applicable. After all, interest rates can also be regarded as an ”underlying”. The Consultation Paper also proposes an amendment of the derivatives SN on the basis of which this could also deal with the payment of interest rates (no. 137, 138). After this, there is no need to conversely also to enrich the debt RD with information on derivative features. Generally, the distribution of securities to one of the three main types should be made on a purely functional basis, without reference to the question what is generally understood to be a bond or derivative. Furthermore, regarding the disclosure requirements inserted under III.C.2, we have the same comments as for the derivatives SN itself: A best and worst case scenario should not be required, as such calculation would not help investors to understand the economic nature of, and the risk associated with, the security. Investors would take far more profit from a description of the economic nature of the respective security, in the course of which best and worst cases could be mentioned. What is meant with ”Examples of the way the instrument works” remains unclear; should further exemplary calculations be meant (in addition to the ones referred to under d)), so would these not help investors to understand the economic nature of the respective security. Again, it would make far more sense to require a description of the economic nature of the respective security.

- **139**: There undoubtedly is a need for disclosure on interest rates, which derivative securities sometimes provide for (V.A.9). However, as already set out in our comments on the first Consultation Paper, there should not be a requirement to disclose historical values. Historical data especially with respect to interest rates are per nature potentially misleading if the market environment changes. – The information required under the newly inserted V.A.14 and 15 is already covered by V.B.11.

- **143:** We doubt that this definition is sufficiently precise, that it covers all ABS transactions and synthetic securitisations as currently existing in and contemplated as such by the market, respectively.

With respect to the building block proposed in Annex 10, we have the following comments:

B. The footnote is missing.

B.1. This item is merely descriptive and does not contain any added value for the investor. We are of the opinion that the disclosure requirements with respect to the underlying assets should be stated in general terms and the additional information as contemplated in B should not be specifically required. Given the multitude of different structures of ABS transactions or synthetic securitisations, necessary additional information has to be singled out on a case by case basis.

B.2 It is not altogether clear, what kind of information has to be disclosed if there is no such ownership interest.

B.2.1 This qualification itself may vary from jurisdiction to jurisdiction. Moreover, it is not clear on which basis the relevant legal jurisdiction(s) to which the assets are subject are to be determined.

B.2.3 It should be clarified what is meant with ”legal nature”.

B.2.8 In synthetic securitisation structures, significant representations and warranties may not be given to the issuer. Therefore, the words ”if any” should be added here.

B.2.11 It is not clear why the thresholds in this section (5 or fewer, 20 per cent or more) differ from those set in B.2.15 for equity securities (five per cent).

B.2.12 Given the huge amount of obligors regularly covered by ABS transactions, it seems impossible to disclose details of the relationship between the issuer, guarantor and each and every obligor.

B.2.13 It should be made clear that this information may be given by specifying ranges of yield and maturity, etc.

B.2.15 As set out above in B.2.11, it is not clear why different thresholds have been set for the two cases. Furthermore, it is not clear if the 5 per cents figure refers to the equity securities share in total or to a single issuer. Moreover, the information in the Core Equity Registration Block in respect of the underlying securities should only be required to be disclosed if it is publicly available.

B.3 Again, it is not clear, what kind of information has to be disclosed if there is no such ownership interest (see above under B.2).

C.1 The disclosure of subordination or other details relating to further issues of securities is not practicable at this stage where the details of any further issue have not yet been determined, except in cases of programmes.

C.2 It is becoming increasingly uncommon for average life figures to be given, as those do not constitute relevant information for investors. Therefore, this information should not be required.

D.1.6 In our view, the information required by B.2 and B.3 should be restricted to what is publicly available.

- **144:** We do not see that the disclosure requirements for asset backed securities should generally be different from those set out for debt securities in Annex L. Regarding the requirements for debt securities, we refer to the comments made regarding Annex L in this response and in our first response to the Consultation Paper.

- **149**: This approach seems sensible.

- **150, 151**: The proposed disclosure obligations seem appropriate. In particular, they provide for a description of the guarantee itself (no. 1 and 2) and of the guarantor (no. 5). For the latter, it makes sense to require equivalent information as for the issuer of the security itself. However, regarding the scope of this building block, it should be clarified under no. 1 that only arrangements which give securityholders a right to demand a payment from the issuer, or a financial backing of the latter in other form, are covered.

- **155**: No. The definitions used for the determination of the disclosure obligations should be independent of the definitions used within the directive. The main reason that, in the directive, derivatives linked to shares of the issuer itself are defined to be equity securities, is that otherwise the home country principle for the competent authority could be circumvented. For the determination of the disclosure obligation should, on the other hand, the derivative character of the security generally be the only decisive factor; only to the extent that the issuance of the derivative in economic terms corresponds to the issuance of the respective underlying should the standards in effect for the respective kind of underlying be applied, in combination with the SN for derivatives. Therefore, e. g. for warrants linked to shares of the issuer generally the RD and SN for derivatives should apply; only in cases in which the issuance of the derivative in economic terms corresponds to the issuance of the respective underlying should RD and SN for equity securities be applied in combination with the SN for derivatives. There is thus no need for an additional SN building block for subscription rights.

  Further, a number of items in Annex 12 have to be clarified. The exact meaning of items 7 and 9 is unclear. Within item 12, sub-ref. 3 and 11 appear to be close to be identical. One of them is sufficient.

- **159**: The latter approach is preferable. Only in cases in which the issuance of the derivative security in economic terms corresponds to the issuance of the respective underlying can it be justified to require all information on the issuer of the underlying as if the latter itself would issue a security (see remarks for no. 155); this will hardly ever be the case if the issuer of the underlying belongs to the group of the issuer of the derivative.

- **168**: There is no need for level 2 rules on the required content of the summary. The requirements provided for in the proposed provision of the Directive, which to some extent conflict with each other (the summary has to be brief and at the same time contain all essential characteristics) can only be dealt with on a case by case basis; it will therefore not be possible to set out in detail and for all possible cases the points which have to be included in the summary.

- **175**: It seems appropriate to require the same amount of information to be disclosed in a base prospectus as in a normal prospectus.

- **176**: What is required here is a general rule on the basis of which it can be decided which information can be left to the final terms. As the major purpose of the special regime for base prospectuses and programmes is to allow issuers to adapt the final terms of a security to the market conditions prevailing at the time of issuance without a delay, the general rule could be drafted as follows: ”Final terms are those terms of an offer which can only be determined shortly before the offer due to the offer’s nature.” This would

correspond to the current practice in Germany, which has proven to be both appropriate and practicable for many years. Given the multitude of possible features and cases, it would not be possible to provide in detail which conditions can be left to the final terms.