INTERNATIONAL PRIMARY MARKET ASSOCIATION

Response to CESR's Recommendations for the Consistent Implementation of the European Commission's Regulation on Prospectuses n°809/2004 dated June 2004

The International Primary Market Association is the organisation which represents the managers and lead managers of debt and equity securities in the international capital market. A list of IPMA members may be found on its website at www.ipma.org.uk

Date: October 18, 2004

INTRODUCTION

IPMA is pleased to respond to the publication by CESR of the Recommendations (the "Recommendations") for the Consistent Implementation of the European Commission's Regulation on Prospectuses No809/2004 dated June 2004 (the "Regulation"). We would be pleased to discuss any aspect of our submission with you. Please contact Mary Hustings (mhustings@ipma.org.uk) or Clifford Dammers (cdammers@ipma.org.uk).

Although we have indicated in some cases how the Recommendations should be adapted to a particular type of security, in most cases we have made our comments based on the Recommendations as they apply to shares. We have not undertaken a detailed analysis of how the Recommendations need to be adapted for different types of securities and we should note that, in order to achieve disclosure requirements that are clear and unambiguous, it is essential that CESR's Recommendations address the other schedules, and that market participants have the opportunity to comment thereon, before the deadline for implementation of the Prospectus Directive (the "Directive"). If CESR determines that there simply is not sufficient time to adapt the Recommendations and consult in this way, it is important that it is expressly stated in the Recommendations that competent authorities may in particular, in their discretion, adapt the Recommendations for securities other than shares.

As a general matter, we note that many of the Recommendations are derived from existing rules and practice in particular member states. Substantial thought, therefore, needs to be given to allow the Recommendations to be adapted appropriately for non-EU issuers (who are a significant part of the European capital markets). It is important that it is expressly stated in the Recommendations that competent authorities may in particular, in their discretion, adapt the Recommendations for non-EU issuers.

Issuers will also need adequate time to reconfigure their disclosure documents so that they are in position to offer securities from July 1, 2005 if necessary. Accordingly, it is essential that issuers and their advisers have certainty about the disclosure requirements for prospectuses in good time before July 1, 2005.

As a general point on the structure of the Recommendations, it is not currently clear whether a particular paragraph is intended as a general descriptive statement or as a recommendation. We would urge CESR to make this clearer in the final Recommendations.

Our response follows the structure of the Recommendations -- the paragraph numbers refer, unless otherwise stated, to the corresponding paragraph numbers of the Recommendations. The absence of a comment on any Recommendation should not be considered to be an endorsement by IPMA or its members of that Recommendation.

Executive Summary

We set out below a summary of key issues, which we explain in more detail in our comments on the specific Recommendations or paragraphs.

1. Scope of Recommendations

We agree with CESR that key objectives of the Recommendations are to "avoid any kind of ambiguity that could lead to different interpretations of the rules and, therefore, hamper the functioning of the Single Market" and to facilitate the understanding of certain disclosure requirements… [to] facilitate the consistent implementation of the future Regulation". Many of the Recommendations, particularly those relating to financial information issues, help to clarify level 2 legislative measures. However, any Recommendations should be limited to level 2 legislative measures that do in fact require clarification.

Level 3 Recommendations should not impose further obligations on issuers. The Recommendations should be scaled back wherever this occurs. We refer, for example to selected financial information (please see paragraphs 25 and 27 below), operating and financial review (please see below in this Executive Summary and paragraph 36 below), capital resources (please see paragraph 41 below), profit forecasts and estimates (please see below in this Executive Summary and paragraph 46 below) and capitalisation and indebtedness (please see paragraph 135 below).

In a number of cases we suggest that the Recommendations are also too complex and introduce requirements that may be inappropriate for both existing and future issuers, particularly those from outside the EU.

2. Need for Tailored Recommendations

It is essential that CESR adapts the Recommendations for other schedules. The absence of tailored Recommendations for registration documents other than shares will cause considerable uncertainty and may result in a lack of uniformity in the application of the Recommendations. Please see, for example, paragraph 64 below. In addition, the level 2 Commission Regulation 809/2004 (the "Regulation") provides for distinctly different approaches on, for example, financial statements, profit forecasts and material contracts disclosure for different types of securities. Articles 5 and 7 of the Directive itself require such differentiation. The Recommendations should therefore be clear as to how they apply to specific types of security and issuer. It is only by giving such clarity that the Recommendations can perform their objective of avoiding *any kind of ambiguity that could lead to different interpretations of the rules and, therefore, hamper the functioning of the Single Market".* We also note that CSER has used IOSCO standards as its model in a number of Recommendations. IOSCO standards, which were developed by regulators in the context of suggested disclosure for share issues, are not the appropriate model for other types of securities' issuance.

3. Profit Forecasts and Estimates

The Recommendations go substantially further than the Regulation with respect to inclusion of profit forecasts and estimates in a prospectus. The Regulation makes it clear that issuers should not be obliged to include in a prospectus outstanding profit forecasts or estimates that have been made **outside** previous prospectuses or explain why they are not still valid.

We do not agree that an outstanding forecast made outside of a prospectus would inevitably be material information pursuant to Article 5.1 of the Prospectus Directive. Article 5.1 requires that materiality should be measured with regard to the nature of the issuer and the securities being issued. This can only be done on a case-by-case basis. For example, a profit forecast or estimate that would be material in the context of the issuance of shares or global depositary receipts may well not be material in the context of the issuance of debt and derivative securities, where a profit forecast is less important than, and not necessarily indicative of, an issuer's ability to meet its obligations as they fall due.

4. Transfer Mechanism for Approval of Base Prospectuses for Multi-issuer Programmes

The Recommendation on this topic (paragraphs 324-327) directly conflicts with Recital 27 of the Regulation. Recital 27 is clear that all base prospectuses should be approved by a single competent authority. Paragraph 324 contradicts this by stating that each base prospectus requires an approval by "its" competent authority. A clear mechanism must be established by which a single competent authority can approve prospectuses for multi-issuer programmes. Competent authorities must be given strong guidance to accept the transfer of approval in certain specified circumstances. We disagree that the appropriateness of a base prospectus approval's transfer cannot be generally evaluated in advance and have referred in paragraphs 324-327 below what the criteria should be. We should note that any transfer should not be permanent, since circumstances might change in the future, but the issuer should not have to make an application for transfer each year, which would be unnecessarily onerous, uncertain and costly for issuers.

Achieving a consistent and standard approach, which permits a prompt choice of a single competent authority, is particularly important for the continuing smooth functioning of the debt capital markets, as most of the debt securities issued in Europe are issued pursuant to debt programmes.

5. Extensions of liability

In many instances, the Recommendations include provisions that, perhaps inadvertently, would be likely to extend the responsibility and consequent liability of issuers and responsible persons beyond the liability that would be imposed under Article 5 and Article 6 of the Directive. This is beyond the scope of the Recommendations. Such provisions should be deleted. Please see paragraphs 25, 36, 44, 117, 131 and 132 for examples.

6. Financial Information and related party transactions

(a) Issues raised by IFRS 1. IFRS 1 would appear to undermine some of the concessions granted to issuers in the Regulation. By way of examples, whereas the effect of the Regulation would be to require restatement to IFRS of one year of financials only in certain circumstances for issuers of debt securities with a minimum denomination of less than euro 50,000, and whereas Article 35 of the Regulation would have the effect of only requiring one year of financial statements to be restated

in accordance with IFRS in certain circumstances, IFRS 1 would appear to require a further year of comparative financial statements to be prepared. We strongly encourage CESR to seek a solution to this issue, so that, in the circumstances set out in the Regulation, only one year's financial statements would have to be restated to IFRS. Please see paragraph 64 below.

(b) Clear guidance on financial statement requirements. The application of the financial information requirements of the Regulation (including the transitional provisions under Article 35 of the Regulation) for an offering prior to 2010 and guidance in respect of issuers with a complex financial history are significant omissions from the Recommendations regarding historical financial information. We include, as an exhibit to this document, a schedule outlining what the financial statement requirements would be, as we understand them, for offerings at a certain date given particular circumstances. We would request that a similar schedule is included in the final Recommendations. Please see paragraph 75 below.

Important guidance in the Recommendations assumes that the relevant issuer will be a European issuer. Since non-EU national GAAP will be relevant to non-EU issuers, reference should be made where appropriate to national accounting standards of third countries. Care should, however, be taken not to refer only to the national GAAP of the jurisdiction of incorporation of the issuer since many issuers prepare their accounts in accordance with GAAP of other countries. Please see paragraph 84 below.

When a non EU GAAP has been deemed 'equivalent', and in other circumstances in which an issuer is not required to report according to IFRS, it is essential that Level 3 does not impose IFRS style reporting or disclosure obligations (and this would be beyond the scope of Level 3).

(c) Capitalisation and indebtedness table. A form of capitalisation and indebtedness table should not be included. The suggested format is too prescriptive and flexibility needs to be given for issuers to include a capitalisation and indebtedness table that is appropriate for them and the GAAP they report under, as long as it complies with the clear requirements of the Regulation. We note that issuers such as banks and insurance companies, when using the share schedules, are likely to have particular problems complying with the disclosure requirements for contingent liabilities on a timely basis. Please see paragraph 135 below.

(d) Related party transactions. Requiring the use of the IFRS definition of related parties for related party transaction disclosure where the prospectus was permitted to include non-IFRS financial statements, which themselves use a particular definition of related parties, would be a substantial burden on issuers that is not outweighed by any significant benefit to investors.

(e) Operating and financial review. References to "prospective review" should be deleted from the Recommendations discussing the Operating and Financial Review. The Regulation is clear where information is required to be included that is prospective, and it does not appear to be required under the Regulation in the Operating and Financial Review. (We provide examples in paragraph 31 below of where we believe it is required.) An ambiguous reference to prospective review in the

Recommendations suggests something additional is required, which is beyond the scope of the level 3 Recommendations. Please see paragraph 31 below.

7. Working capital

Issuers must not be required to analyse any information beyond the 12-month period suggested in the Recommendations. Please see paragraph 116 below.

The Recommendations should not exclude the possibility that although an issuer would not be able to give a "clean" working capital statement because an issuer believes there is a significant possibility that it does not have sufficient working capital, it would be more accurate for the issuer to say this rather than a definitive statement that it believes it does not have sufficient working capital. That is, it may be more accurate for the issuer to say that it believes that there is a significant possibility that the issuer does not have sufficient working capital. Although this would clearly not be a "clean" working capital statement, it would not mislead investors by suggesting that the opposite is true, i.e. that the issuer believes that it does not have sufficient working capital. The issuer should then be able to explain (along the lines of Recommendation 128) how the issuer plans to rectify the shortfall if indeed such a shortfall occurs. Please see paragraph 118 below.

Although guidance on what type of due diligence measures issuers should consider is helpful, the manner in which they have been included in the Recommendations is too prescriptive. Issuers, together with their advisers, should determine what due diligence measures ought to be taken in light of the particular circumstances. We note that the working capital statement would be subject to the general duty of disclosure under Article 5 of the Directive and the Market Abuse Directive, as is the whole of the prospectus. Please see paragraph 131 below.

Competent authorities should grant derogations to particular types of companies that would not be capable of analysing their working capital requirements in the traditional manner, in particular banks and insurance companies. These types of institutions are already typically subject to rigorous capital adequacy requirements, so investors should not be prejudiced by the absence of a working capital statement. Please see paragraph 132 below.

8. Specialist issuers

The definitions of the specialist issuers need to be clarified. We have made suggestions below. Please see paragraphs 150, 165, 171, 177, 188 and 200 below.

The proposed Recommendations for expert reports and valuations for specialist issuers are overly prescriptive, in our view, and need to take into account the requirement under Article 5.1 of the Directive to have regard to the nature of the issuer and of the securities being offered on a case-by-case basis. The Recommendations, in particular, should differentiate between what might be appropriate for shares versus unsecured debt and derivative securities and convertible debt securities.

Issuers should be allowed to use reports prepared in accordance with other countries' reporting standards, when they are accepted or recognised in international usage, whether or not those countries are members of the EU. Issuers should not be tied to the standards of any particular EU member state or to a set of uniform standards developed within the EU.

Many of the requirements for specialist issuers are too detailed and in many such cases, the information should only be required to be included if it is material, or should be allowed to be included in a condensed form in certain circumstances. Please see paragraphs 152, 177, 200, 201, 202 and 205.

9. Level of Detail of Recommended Disclosure

There is too much detail provided for in most of Section IV(2) of the Recommendations, which is intended to clarify disclosure required under the Regulation. In many cases, the Regulation is clear and no guidance is necessary. In other cases, the required disclosure should be tied to the materiality of the detail specified, with regard being given to the nature of the issuer and the particular securities being offered to the public or admitted to trading, as per Article 5.1 of the Directive. In many cases, the issuer should be able to include the disclosure in a condensed form to help make the prospectus more easily analysable and comprehensible, also as per Article 5.1 of the Directive. In many cases, the guidance is encouraging a "tick-the-box" approach to disclosure, which we submit is the wrong approach. Please see paragraphs 218-274 and 286-291 below.

10. Interests of certain persons

The Recommendations should clarify that disclosure about material interests of experts would inevitably only be required where derogations from the requirement that such expert be independent have been granted. If the expert had a material interest in the issuer, determined in accordance with the professional standards that apply to such expert, it would not be independent and, accordingly, it would not be permitted to make the statement or report required by the Regulation without derogation from the relevant competent authority. Please see paragraphs 278 and 279 below.

Disclosure required under "interests of persons involved in the offer" is too detailed and unnecessary in our view and the Recommendations should limit the requirement to make disclosure under that heading. Disclosure about interests of persons involved in the offer should only be relevant to investors if those persons are making experts' statements or including an expert's report in the prospectus – these should be the only circumstances in which investors should be placing reliance on such persons and where they should be concerned by those persons' interests in the issuer. Accordingly, the Recommendations should include clarifications to this effect.

11. Prospectuses on websites

If issuers are required to post their prospectuses on their websites, they must be able to take measures to avoid breaking the law in other jurisdictions. Including the legend proposed by the Recommendations, which according to Recommendations 331

appears to be intended to help issuers avoid infringing upon the securities laws of member states and third countries, may well not help issuers in that regard. We have made suggestions in paragraph 332 below of measures that are likely to help issuers in that regard. We request that issuers may implement such measures and any other measures that are advisable. There should not, however, be a requirement or expectation for issuers to include any legend, or take any such measures. Please see paragraph 332 below.

Given the breadth of the definition of "an offer of securities to the public," clarification on which issuers can legally rely should also be made that posting a prospectus on a website does not constitute a public offer of the securities described therein or any other securities. Otherwise posting the prospectus on a website could well be a continuous offer of those securities for the time that the prospectus is on that website. Please see paragraph 332 below.

COMMENTS ON THE RECOMMENDATIONS

III FINANCIAL INFORMATION ISSUES

Page 12 *"Unless specifically stated, the references and the recommendations below relate mainly to the disclosure requirements in the share registration document... but should be adapted for the other registration documents, as appropriate."*

We agree that the disclosure requirements must be adapted for other registration documents (in accordance with Articles 5.1 and 7.2 of the Directive). Since a primary objective of the Recommendations is to "*avoid any kind of ambiguity that could lead to different interpretations of the rules and, therefore, hamper the functioning of the Single Market"*, the potential ambiguities, some of which we identify below, should be avoided by setting out specific recommendations tailored to each of the schedules to the Regulation. For example, how would paragraphs 62, 63 and 64 apply to retail debt registration documents? Please see our comment on these paragraphs below under paragraph 64. In addition, the level 2 Commission Regulation 809/2004 (the "Regulation") provides for distinctly different approaches on, for example, financial statements, profit forecasts and material contracts disclosure for different types of securities.

1. SELECTED FINANCIAL INFORMATION

23 The list of examples at the end of this paragraph should also include "the type of securities being offered or issued".

24 This paragraph should be deleted for the reasons set out below.

It conflicts with paragraph 25 - paragraph 24 states that the key figures must be *"extracted directly from the historical and interim financial information"*, whereas paragraph 25 provides for the possibility of including *"additional figures which entail some kind of calculation from, or elaboration based on, the basic figures directly contained in the financial information"*. These two alternative propositions are in direct conflict with each other.

In addition, paragraph 20.4.3 of Annex I to the Regulation provides for inclusion in the registration document of financial data that is not extracted from the issuer's audited financial statements as long as the source of the data, and a statement that the data is unaudited, is disclosed - it should be permissible to include such data in the selected financial information table. This would be consistent with paragraph 3 of Annex I to the Regulation.

We should note that paragraph 32 of the Recommendations also provides for inclusion of non-financial key performance indicators – it should be

permissible to include these in the same table as the table that discloses selected financial information, albeit that these numbers may not strictly be GAAP numbers. This would be consistent with paragraph 3 of Annex I to the Regulation.

In addition, it is not clear what "on a straight-forward basis" means, in particular, given paragraph 25, which states that the basic information can be elaborated upon. Article 5.1 of the Directive already requires that the information in the prospectus must be presented in an easily analysable and comprehensible form. This provides a clear statement as to what is needed, amongst other things, in relation to selected financial information. To add other, different, standards is unnecessary and confusing.

If paragraph 24 is to be retained in some form, we suggest that it should read as follows: **"The key figures included for the purpose of compliance with paragraph 3.1 of Annex I to the Regulation should be extracted directly from, or be calculable from figures contained in, the historical and (if any) interim financial information included under paragraph 20.1 of Annex I to the Regulation or should be extracted from other parts of the prospectus."**

A Recommendation amended in this way would address the issues raised above.

25 This paragraph should be amended so that it reads, simply: "**The issuer can include additional figures which entail some kind of calculation from, or elaboration based on, the basic figures directly contained in the financial information."** The overarching requirement under Article 5 of the Directive, in essence to include all material information in an easily analysable and comprehensible form, is all that is needed to deal with everything else that paragraph 25 suggests as recommendations. The language set out below appears to extend the liability and responsibility of the issuer and other responsible persons, which is beyond the scope of the Recommendations. Further commentary on issues raised by the rest of paragraph 25 is set out below.

The language *"Relevant, i.e. they should be supported by a thorough analysis of the specific issuer's business environment and should fairly highlight the key issuer's financial aspects about the financial condition (and performance)"* is unnecessary given that paragraph 3.1 of the Regulation states *"the selected historical financial information must provide the key figures that summarise the financial condition of the issuer"*. In addition, it is difficult to see how the inclusion of irrelevant information could comply with the requirements of Article 5.1 of the Directive.

It is also unclear what the words *"should be supported by a thorough analysis"* are intended to mean. A summary is, by its very nature, incomplete and therefore cannot be subject to thorough analysis. Only the

full financial statements are capable of such analysis. Therefore, any analysis that should be included is set out in the requirements for the Operating and Financial Review. In addition, it suggests that relevance for this purpose requires a more thorough analysis than in making judgments about all the other information required to be included in a registration document which, we submit, is an inappropriate suggestion.

The language *"Comparable, i.e. they should be capable of justification by being compared with the historical financial information data included in the prospectus, where the figures are expected to be taken out from"* is unnecessary to the extent the key figures are extracted directly from (or calculable from figures contained in) the financial information included under paragraph 20.1 of Annex I to the Regulation. The key figures, by virtue of originating from the financial information, would inevitably be comparable with information contained in or calculable from that financial information. In addition, paragraph 20.4.3 of Annex I to the Regulation does not require that any such financial data not extracted from the issuer's audited financial statements have any particular characteristics. It would be beyond the scope of level 3 recommendations to impose further restrictions on the inclusion of such data by requiring, for example, that they be "*comparable, i.e. they should be capable of justification by being compared with the historical financial information data included in the prospectus, where the figures are expected to be taken out from,"* if such information is included in the selected financial table. Disclosure that such information is not comparable, if that is indeed the case, would be sufficient.

26 This paragraph should be deleted for the reasons set out below.

Examples of selected financial data are not necessary or particularly helpful as long as paragraph 24 is deleted or dealt with in a clear manner, as discussed above. Paragraph 3.1 of the Annex I to the Regulation states clearly that the selected historical financial information must provide the key figures that summarise the financial condition of the issuer – examples are not necessary given this clear statement.

The examples provided in paragraph 26 also do not address the fact that different types of issuers and different types of securities warrant different types of selected financial information to be included. The examples encourage a "tick-the-box" approach by issuers, which we believe is the wrong approach. If the examples are ultimately retained, verification should be added that the use of such terms is not mandatory.

27 This paragraph should be deleted for the reasons stated below.

If the key figures are extracted directly from financial information included under paragraph 20.1 of Annex I to the Regulation, such figures will inevitably be prepared in accordance with the financial reporting standards used in preparing such financial information.

If the key figures are calculable from figures extracted directly from such financial information, financial reporting standards may or may not provide how such calculations are made.

If the information is included pursuant to paragraph 20.4.3 of Annex I to the Regulation, it would be beyond the scope of level 3 recommendations to impose further restrictions on the inclusion of such data by requiring, for example, that they be defined in accordance with the financial reporting standards used in preparing the historical financial information if they are included in the selected financial information table. Disclosure that such information is not defined in that way, if that is indeed the case, would be sufficient, and the overarching requirement under Article 5 of the Directive is sufficient, in our view, to require such disclosure where appropriate.

If the information is non-financial data included pursuant to paragraph 32 of the Recommendations, then the information may not be capable of being defined in accordance with the financial reporting standards used in preparing the historical financial information. This should not preclude the information from being included in the prospectus as part of the selected financial information disclosing selected financial information. Disclosure that such information is not defined in accordance with the financial reporting standards used in preparing the historical financial information, if that is indeed the case, would be sufficient, and the overarching requirement under Article 5 of the Directive is sufficient, in our view, to require such disclosure where appropriate.

28 This paragraph should be deleted since, as stated above, the information contained in the selected financial information table should not be limited to information contained in the historical and interim financial information included under paragraph 20.1 of Annex I to the Regulation.

In addition, to the extent information included in the selected financial information table is extracted from the restated historical and interim financial information included in the prospectus under paragraph 20.1 of Annex I to the Regulation, flexibility needs to be given to include information from non-restated financial statements to make it work with the recommendations as to presentation in paragraph 29.

29 We understand that this paragraph is suggesting that if an issuer's latest accounts are consistent with its next year's basis, but the first year was on a different basis, the issuer should consider the 'four column' approach. But this is not completely clear from the drafting. We suggest this paragraph should be clarified.

30 *Do you agree with this proposal? If not, please state your reasons.*

Please see our responses above.

2. OPERATING AND FINANCIAL REVIEW

31 References to "prospective review" should be deleted from the Recommendations discussing the Operating and Financial Review. The Regulation is clear where information is required to be included that is prospective. For example, paragraph 10 of Annex I to the Regulation requires a liquidity and capital resources section; paragraph 12.2 of Annex I to the Regulation requires information on any known trends, uncertainties, demands, commitments or events that are reasonably likely to have a material effect on the issuer's prospects for at least the current financial year. Such disclosure would inevitably be forward-looking. However, the Regulation does not require any information under Operating and Financial Review that is prospective (except, arguably, the paragraph 9.2.3 of Annex I - if this is what the Recommendations relating to the Operating and Financial Review are referring to, then this should be made completely clear). An ambiguous reference to prospective review in the Recommendations suggests something additional is required, and such an additional requirement would impose additional potential liability and risk to issuers. It is beyond the scope of the level 3 Recommendations to add to the requirements in the level 2 Regulation.

We also believe it is important that the Recommendations clarify that any such qualitative prospective disclosure included in the operating and financial review, capital resources or trend information sections would not constitute a profit forecast.

33 We do not believe that this paragraph provides useful information and submit that it is confusing. Paragraph 32 is sufficient in its discussion of non-financial key performance indicators -- such indicators will differ from company to company and paragraph 33 does not appear to add anything that would help a company make a judgment as to what key performance indicators it should discuss. We do not understand what it means to say "*performance should be discussed in the context of the long-term objectives of the business*". Paragraph nine of Annex I to the Regulation is clear as to what discussion is required in an operating and financial review about the performance of a company. We submit that paragraph 33 should be deleted.

34 The last sentence of this paragraph should be deleted. It does not appear to add anything.

35 We agree with this paragraph.

36 **Audience:** This is a good example of where a Recommendation is difficult to adapt for registration documents other than those for shares. For example, a registration document for depositary receipts with a minimum denomination of greater than that €50,000 would also require an operating and financial review. However, because of the very high minimum denomination of such depositary receipts, the Level 3 recommendations should say that the issuer is *entitled* to assume that investors in such

depositary receipts would be qualified investors. This Recommendation would be consistent with the Directive, particularly Article 7.2(b), which says that "*information required in a prospectus shall be appropriate from the point of view of the investors concerned for non-equity securities having a denomination per unit of at least EUR 50,000"*. The Recommendation as written would, conversely, not be consistent with the Directive.

Reliability: The reference to "*and complete*" should be deleted. Any Operating Financial Review, by virtue of it being a summary, is necessarily going to be incomplete. The overall standard of disclosure contained in Article 5(1) of the Prospectus Directive, the focus of which is on materiality, and the specific content requirements of the Regulation, should govern the level of completeness of any registration document. It is beyond the scope of level 3 recommendations to impose further requirements as to the level of completeness of a registration document.

Comparability: There should not be any need for an operating and financial review to be comparable with previous operating and financial reviews of the same issuer. An operating and financial review is required to review the financial periods that have been determined to be relevant for an investor at any particular time -- for a share registration document, this has been determined to be three years and any interim periods for which financial information has been required to be included in the registration document. That operating and financial review will necessarily be internally comparable for the financial periods discussed therein. It is not clear to us why the operating and financial review needs to be comparable to a prior operating and financial review that discussed a financial period four or more years ago. Although in many cases an operating and financial review will be comparable in this way, there may have been a change in the business of the company that management believes warrants a change in the way the operating and financial review is presented or in the way that any particular line item of its accounts is discussed. A company may well decide for good reason that the presentation of the operating and financial review can be improved – such a change, although it may be a substantial improvement, may ultimately be in a way that would make comparability with previous operating and financial reviews more difficult. The evolution of operating financial reviews for any particular company should not, we submit, be discouraged by including a requirement that operating and financial reviews be comparable with previous reviews.

It is also difficult to see how the recommendation on comparability could work where there has been a major change in the financial statements of the issuer – for example, where it has recently made a major acquisition. Under the Level 2 Regulation, pro forma accounts are expressly provided for shares. The OFR may well include a discussion to help investors to understand these; but, if it did so, it would not be comparable with any OFR included in a prospectus issued before the acquisition.

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

We agree that in many instances, it will be appropriate to include key performance indicators about past performance, and we agree that this should be encouraged, though not required.

3. CAPITAL RESOURCES

38 This is not the appropriate place to discuss the issuer's share capital structure -- the correct place for that discussion is under paragraph 21.1 of Annex I to the Regulation. The amount of an issuer's share capital is not necessarily relevant to the discussion of the company's liquidity and capital resources -- any monies that have been made available historically to an issuer by way of equity investments may well already have been invested. We do, however, agree that this would be the appropriate place to discuss the issuer's debt commitments.

39 An overriding reference to materiality should be added with respect to all the matters recommended for disclosure under this paragraph. Such matters warrant disclosure to the extent that they are material to the group. For example, any legal or economic restrictions on the ability of subsidiaries to transfer funds to the company should only be discussed to the extent that any such restrictions are material to the group or on the ability of the company to meet its cash obligations.

41 This paragraph should be deleted or at a minimum, a reference to materiality should be added. The trigger for matters to be disclosed under this paragraph – "*negotiations… are expected to take place…" "…which could have the effect of restricting the use of credit facilities…"* is very broad and goes further than the level 2 Regulation, which is beyond the scope of the level 3 Recommendations. The disclosure that would be required could be highly sensitive to an issuer, and indeed, may prejudice the outcome of any such negotiations. If any such negotiations were material and the level of certainty of any negotiations that were contemplated warranted it, the general duty of disclosure under Article 5.1 would require its disclosure. This is sufficient and that issuers should not be constrained by additional requirements at level 3. If recommendations are nevertheless included, an express reference to the trigger for disclosure in paragraph 10.4 of Annex I to the Regulation – which is based on materiality – should be included and an express reference to the level of certainty of any contemplated negotiations as a factor to be considered in determining the materiality of potential negotiations should be included.

42 *Do you agree with this proposal? If not, please state your reasons and*

please provide alternative information.

Please see our responses to paragraphs 38 to 41 above.

3. PROFIT FORECASTS OR ESTIMATES

43 This paragraph is unnecessary and should be deleted. This paragraph includes a requirement that due care and diligence is taken to ensure that profit forecasts or estimates are not misleading to investors. This is unnecessary, because it is already covered by Articles 5.1 and 6 of the Directive. It is also unhelpful, because it introduces multiple standards to the information that has to be included in a prospectus, thus creating uncertainty for issuers as to what the appropriate standard is and confusion for investors, who may be able to rely on some parts of the prospectus more than others. If CESR considers a reference to the already existing obligation to be useful, then this paragraph, at most, should cross-refer to the already existing obligation. It is beyond the scope of the level 3 Recommendations to add to the requirements at level one and two in the way it appears to do in this paragraph.

44 This paragraph should be deleted for the reasons set out below.

We are concerned about the consequences for issuers if CESR reissues short-form recommendations that originate from guidance to directors by the Institute of Chartered Accountants of England & Wales ("ICAEW"). This guidance in itself has no legal status, but takes on a radically different complexion if issued by CESR and included in recommendations to issuers from competent authorities. The ICAEW guidance sets out a statement of best practice but is by no means a legal benchmark against which issuers and its directors should be measured for liability purposes, which is the risk if the guidance is included in the level 3 Recommendations. The Recommendations therefore purport to layer responsibilities upon issuers and their directors in addition to those imposed by the Directive and the Regulation.

Reliable: It is unclear what the words *"should be supported by a thorough analysis"* are intended to mean - what type of thorough analysis is necessary? It suggests a more thorough analysis is required in making judgments about forecasts for this purpose than in making judgments about any other information required to be included in a registration document. One of the effects of Article 4.1 of the Directive would be to ensure that due care would be taken with respect to all the information in a prospectus, including any profit forecast or estimate. If CESR considers a reference to the already existing obligation to be necessary, then this paragraph, at most, should cross-refer to the already existing obligation.

Comparable: Given that paragraph 13.3 of Annex 1 to the Regulation states that the profit forecast or estimate must be prepared on a basis

comparable with the historical financial information, it is not clear what the language that follows the word "comparable" is intended to add. This language should be deleted.

Relevant: Any profit forecast to which paragraph 13 of Annex 1 to the Regulation would apply would be included in a registration document that would need to be published before any public offer under the Prospectus Directive was made. Accordingly, the profit forecast would inevitably be provided on a timely basis. We therefore believe that this language should be deleted.

45 The first sentence of this Recommendation is not correct since profit forecasts are not required to be reported on for all types of securities. Please see our comment with respect to Page 12 above.

46 This Recommendation goes substantially further than paragraph 13 of Annex I to the Regulation, which, we submit, is beyond the remit of the Recommendations. Paragraph 13 of Annex I to the Regulation clearly states that an issuer has the choice whether or not to include a profit forecast or an estimate in a registration document. Paragraph 13.4 of Annex I to the Regulation clearly provides for further requirements, "*if a profit forecast* ***in a prospectus*** *has been published which is still outstanding…"* In contrast, paragraph 46 of the Recommendations provides for further requirements in relation to profit forecasts that have been published outside a prospectus. This goes substantially further than facilitating consistent implementation of the Regulations, which is the stated objective of the Recommendations.

We do not agree that an outstanding forecast made outside of a prospectus would inevitably be material information pursuant to Article 5.1 of the Prospectus Directive. We set out the reasons below.

Article 5.1 requires that materiality should be measured with regard to the nature of the issuer and the securities being issued. A profit forecast or estimate that would be material in the context of the issuance of shares or global depositary receipts may well not be material in the context of the issuance of debt and derivative securities, where a profit forecast is less important than, and not necessarily indicative of, an issuer's ability to meet its obligations as they fall due. If CESR does not accept the points made below (as they apply broadly to all types of securities but to differing degrees), it is essential in our view that the profit forecasts are at a minimum not automatically deemed to be material in respect of debt and derivative securities. Such an approach would be consistent with Article 7.2 of the Directive, which specifically provides for account to be taken, for example, of the various types of information needed by investors relating to equity securities as compared with non-equity securities, the various types and characteristics of offers and admissions to trading on a regulated market of non-equity securities.

Profit forecasts or estimates made outside of prospectuses often constitute "soft" information, heavily qualified due to the lack of certainty that characterises it and often expressed as a range. An important aspect of determining materiality of information is the level of certainty that characterises such information. In addition, the extent to which such information is inconsistent with information disclosed in the prospectus would also be taken into account in determining the materiality of such profit forecast or estimate. For example, if the qualitative prospective disclosure included in the capital resources and trend information or other sections was consistent with any "soft" profit forecasts or estimates that had been published in the market, it may well be reasonable for an issuer to conclude that such specific, quantitative, "soft" profit forecasts or estimates were not material. It is imperative that the issuer, with its advisers, is allowed to consider whether any profit forecast made outside of a prospectus is material or not, taking into account all the circumstances it believes are relevant to that judgment.

Applying the analysis under the Market Abuse Directive would also, in many instances, result in such information not being considered to be "price sensitive" information. If such information is generally available, it would not constitute "inside information". If the profit forecast is consistent with the information included in the prospectus, including the profit forecast in the prospectus would not "be likely to have a significant effect on the price" of the securities, if such securities were already admitted to trading on a regulated market. This lends strong support to our argument above regarding materiality.

We also believe that any requirement to repeat and update in a prospectus any profit forecast or estimate that had been made in the market (and have that forecast or estimate reported on by accountants) would result in a severe "chilling" effect on the willingness of issuers who voluntarily produce such earnings guidance. There is a general market appetite for the release of such information that would not be served by the requirement to repeat and update and consequently to obtain a report thereon. In addition, the absence of such a requirement would not, in our view, encourage ill-considered forecasts or estimates because of the existence of alternative safeguards. These include the Market Abuse Directive.

A requirement to repeat and update and to include a report on a profit forecast or estimate would be unfairly prejudicial to issuers that are required by local rules to produce profit forecasts or estimates. Any such requirement would deter issuers from such jurisdictions from offering securities to the public or listing securities in the EU. We provide Japan as an example: under the rules of the Tokyo Stock Exchange ("TSE"), companies whose shares are listed on the TSE are required, after the end of each fiscal year and the end of mid-year fiscal period, to file profit forecasts (gross sales, ordinary profit, net income for current term, etc.) using a disclosure form designated by the TSE. Quarterly disclosures are also required if forecasts are recalculated at the end of quarterly period. In

addition, if there is a change in forecasts (by more than 10 percent up or down on gross sales, or by more than 30 percent up or down on ordinary profit or net income for current term) at any time, the companies are required to file amended forecasts. No accountants' report is required in connection with the disclosure of profit forecasts by the Japanese rules.

Japanese companies do not currently include such forecasts in their prospectuses prepared for EU listing; and to do so in the future would result in an extremely expensive change in market practice.

We also refer to the United States as an example of where many issuers customarily publish earnings guidance that would, in many (if not most) cases, fall within the very broad definition of profit forecasts or estimates. Such issuers do this under a safe harbour from US federal securities civil liability provisions, which does not exist in the EU, for forward looking statements that are identified as such and accompanied by "meaningful cautionary statements…" Such issuers very rarely, if at all, subsequently include such information in their prospectuses for securities offerings, not least because of the higher levels of potential liability that exist for prospectuses. Any obligation to require issuers to include previously published profit forecasts in a prospectus, would seriously prejudice these issuers, of which there are many, again potentially resulting in an extremely expensive change in market practice.

47 The issuer should only be required to report on the profit forecast if it chooses to include the profit forecast in the prospectus after the issuer has considered whether it is appropriate to make a statement, as set out in paragraph 47. The last sentence of paragraph 47 is therefore not completely correct.

48 We agree with this Recommendation.

50 *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.*

Please see our responses to paragraphs 43 to 49 above.

51 *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?*

We do not believe examples are necessary.

5. HISTORICAL FINANCIAL INFORMATION

57 The last sentence of this Recommendation should be amended so that it reads "*the restated financial information must be audited or reported on"* to conform it to the language in paragraph 20.1 of Annex I to the Regulation.

58 We agree with this Recommendation.

59 We agree with this Recommendation.

61 We agree with this Recommendation.

64 Although we agree with this Recommendation as it applies to share registration documents, we should highlight a particular issue in relation to Annexes of the Regulation that require less than three years' accounts. For example, Annex IV (debt) and Annex XI (banks) to the Regulation requires audited historical financial information covering the last two financial years, the most recent one of which must be presented and prepared in a form consistent with that which will be adopted in the issuer's next published annual financial statements. It would appear from paragraph 64 of the Recommendations and IFRS 1 that the one year of financial statements that would be restated under the second sub-paragraph of item 13.1 of Annex IV and 11.1 of Annex XI to the Regulation (for purposes of illustration, for the financial year 2009) would be the issuer's first time IFRS accounts, and accordingly, IFRS 1 would then require the prior year's financial statements (2008) to be restated into IFRS as comparatives. This would clearly undermine the objective of the Regulation to require only one year's financial statements to be restated into IFRS. We strongly encourage CESR to seek a solution to this problem so that, in the circumstances set out in the Regulation, only one year's financial statements would be required to be restated into IFRS.

A similar issue would arise under any transitional provision under Article 35 that would have the effect of only requiring one year of financial statements to be restated in accordance with IFRS. For example, Article 35.1 of the Regulation provides that in certain circumstances an issuer does not have to restate financials to IFRS for any period earlier than January 1, 2004. This means that an issuer could, under that provision, be including financial statements comprising 2004 accounts prepared in accordance with IFRS and 2003 and 2002 accounts prepared in accordance with French GAAP. This would not appear to be possible, however, under IFRS 1. We would strongly encourage CESR to seek a solution to this problem so that, in the circumstances set out in the Regulation, only one year's financial statements would be required to be restated into IFRS.

65 This paragraph, with its reference to "all IAS/IFRS", highlights a significant potential issue, given that IAS 32 and 39 may not be endorsed and adopted in all EU member states. It is important that an EU issuer is

not required to apply any IAS/IFRS that has not been endorsed and adopted in its home member state for equity securities and non-equity securities with a minimum denomination of less than €1,000. It is equally important that non-EU issuers are not put in any worse a position than EU issuers – accordingly, non-EU issuers should not be required to apply any IAS/IFRS that has not been endorsed and adopted in all EU member states.

We understand that this paragraph (and 66 and 67) probably mean that issuers do not need to do more than GAAP requires in relation to new accounting standards (which we agree with), but the drafting is ambiguous. We suggest that the Recommendations include a statement to this effect.

68 We agree with this Recommendation.

72 We agree with this Recommendation.

74 This Recommendation is unnecessary and should be deleted.

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

Please see our responses above. In addition, the application of the financial information requirements of the Regulation (including the transitional provisions under Article 35 of the Regulation) for an offering prior to 2010 and recommendations in respect of issuers with a complex financial history are significant omissions from the Recommendations regarding historical financial information. We include, as an exhibit to this document, a schedule outlining what the financial statement requirements would be, as we understand them, for offerings at a certain date given particular circumstances. It would be helpful if similar examples were included in the final Recommendations.

76 We agree with this Recommendation.

77 The first sentence of this Recommendation should be amended to read:

"When historical information has been restated <u>for the purposes of the prospectus pursuant to the requirements of the Regulation</u>, an audit report produced for the purposes of the prospectus shall be provided on any <u>such</u> restated accounts presented in the prospectus."

This is consistent with what paragraph 20.1 of Annex I to the Regulation requires.

84 This Recommendation refers to "*national accounting standards of a Member State*". This assumes that the issuer will be a European issuer. Since non-EU national GAAP will be relevant to non-EU issuers,

reference should be made in this Recommendation to national accounting standards of third countries. Care should, however, be taken not to refer only to the national GAAP of the jurisdiction of incorporation of the issuer since many issuers prepare their accounts in accordance with GAAP of other countries.

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

Please see our responses above.

6. PRO FORMA FINANCIAL INFORMATION

91 It is not clear why the meaning of "independent auditors" should not keep track with changes to EU legislation in that regard. In addition, many issuers will not be subject to such EU legislation, and the independence of such issuers' auditors should not necessarily be governed by such EU legislation.

As this paragraph and also paragraphs 87, 88, 89 and 90 do not appear to be related solely to pro forma financial information, we would suggest that they be moved to the previous section that discusses historical financial information.

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

Please see our response above.

94 Clear recommendations should be given to competent authorities to allow pro forma information to reflect adjustments to present the financial information fairly in accordance with the requirements of Article 5 of the Directive in circumstances where such adjustments are not directly attributable to the relevant transaction.

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

The following might be appropriate indicators of size:

- Assets -- the gross assets the subject of the transaction divided by the gross assets of the issuer;
- Profits -- the profit attributable to the assets the subject of the transaction divided by the profits of the issuer;
- Consideration to market capitalisation -- the consideration divided by the aggregate market value of all the ordinary shares (excluding treasury shares) of the issuer; and
- Gross capital -- the gross capital of the company or business being acquired divided by the gross capital of the issuer.

We note that it is important that clear guidance relating to the tests chosen should be set out so that the requirements are unambiguous and so that they can be applied consistently across the EU. It is essential that competent authorities should be given flexibility to adjust the above indicators of size and/or substitute other relevant indicators if any of the above calculations produced an anomalous result or where the calculations are inappropriate to the sphere of activity of the issuer. This would be consistent with paragraph 50 of the Consultation Paper -- CESR's Advice on Possible Level 2 Implementing Measures for the Proposed Prospectus Directive dated October 2002.

A statement should also be included in the Recommendations that pro forma financial information should only be included if the relevant significant gross change occurred since the beginning of the last full annual accounting period. Otherwise the pro forma financial information would be meaningless (given Item 5 of Annex II to the Regulation).

99 *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 examples of indicators of size in response to the preceding question, please explain your preferences on definitions of the proposed indicators.*

Reference to any particular GAAP would not be practicable given that many acquisitions would involve companies or businesses that have historically produced financial statements in accordance with a GAAP different to that of the acquiror. The calculations involving accounting numbers should be based on figures shown in the latest published audited accounts (although there should be flexibility to refer instead to any later annual results if such results have been published in the form of a preliminary statement or otherwise). Competent authorities should allow adjustments to take into account any transactions undertaken by the issuer or the acquired company or business since the date of since the date of the reference accounts.

Please see paragraph 98 above.

7. FINANCIAL DATA NOT EXTRACTED FROM THE ISSUER'S AUDITED FINANCIAL STATEMENTS

101 It may not be practicable or possible for an issuer to describe the basis of preparation of the relevant information if, for example, the information is in relation to a third party or if such information was prepared when the person to which it relates was a third party.

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

Please see our response above.

8. INTERIM FINANCIAL INFORMATION

104 This Recommendation is unnecessary given the clear wording of paragraph 20.6.1 of Annex I to the Regulation. It is also problematic. As with profit forecasts, managers of companies are sometimes prepared to give information to markets that has not been subject to the levels of diligence that would be the case if the information were to be included in a prospectus. (This could, for example, be done in the United States under a safe harbour for certain forward-looking statements.) Such a practice is helpful to the market, in that it establishes a useful information flow. If managers become aware that whatever financial information they may give will have to be included in any future prospectus (and will therefore subject the issuer to the higher levels of potential liability that exist for prospectuses), they will not provide such information.

It is confusing why the word "disclosed" (which is over-broad) has been used in paragraph 104 instead of the word "published" (which is more appropriate) as used in paragraph 20.6.1 of Annex I to the Regulation.

105 This Recommendation is unnecessary given the clear wording of paragraph 20.6.2 of Annex I to the Regulation. In addition, references to "prospectus" should actually be references to the "registration document" as per the text of the Regulation.

107 It is not clear what this paragraph means.

Does it mean that an issuer should include the financials that it has already published under the Transparency Directive? If so, this is excessively strict – an issuer may have changed its GAAP, for example, to IFRS from a GAAP that is equivalent to IFRS and restated the US GAAP interims to IFRS. In such an event, the issuer should be able to include IFRS interims. It would also not be relevant in many instances – an issuer may not have prepared any interim financial statements under the Transparency Directive, perhaps because of transitional provisions or perhaps because the issuer has only issued debt with a minimum denomination of €50,000 or more.

Alternatively, the paragraph might mean that issuers should look to the Transparency Directive to determine the content requirements of the half-yearly interims. If this is the case, it is also excessively strict – for example, the content requirements for interims required by the Transparency Directive would be irrelevant to issuers of debt with a minimum denomination of €50,000 or more since the financial reporting requirements of the Transparency Directive do not apply in relation to such securities. Accordingly, such issuers should not be required to include interims that comply with that part of the Transparency Directive.

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

Please see our responses above.

9. WORKING CAPITAL STATEMENTS

113 This Recommendation is reasonable.

114 "Present requirements" should go no further than 12-months.

115 The last sentence of this Recommendation should be deleted. The level of due diligence that an issuer should consider is dealt with under national laws implementing Articles 5 and 6 of the Directive. To add additional requirements will confuse both issuers and investors. There should be one standard of preparation and due diligence that applies to the whole prospectus.

116 . The Recommendation should provide that if issuers are aware of working capital difficulties beyond the 'present requirement', they need to consider whether supplementary disclosure in the prospectus is appropriate. The general duty of disclosure under Article 5 of the Directive and the Market Abuse Directive should guard against withholding of such information if it were material. Paragraph 116 as drafted suggests an obligation on the part of issuers to analyse all information that is available beyond the twelve-month period. This introduces uncertainty as to the period that must be analysed and would also penalise issuers that have the raw information available to enable a longer-term analysis by requiring them to analyse all such information just because it's there. We submit that it has to be clear what an issuer is required to do, that paragraph 116 as drafted is unclear and that there should be a level playing field by requiring that all issuers that have to make a working capital statement make it with respect to the same 12-month period.

117 This paragraph should be deleted. The working capital statement is subject to the general duty of disclosure under Article 5 of the Directive and the Market Abuse Directive as is the whole of the prospectus. Recommendations 132 and 133 give guidance on the work an issuer should consider undertaking to help ensure the reliability of the working capital statement. Paragraph 117 is therefore redundant. It is also problematic, in that it will create uncertainty and confusion as to whether there is one, or a number, of different standards that applies to the disclosure made in a prospectus. In addition, the Regulation requires that auditors must report on profit forecasts included in a prospectus.

118 We generally agree with this Recommendation. However, the Recommendations should not exclude the possibility that although an issuer would not be able to give a "clean" working capital statement because an issuer believes there is a significant possibility that it does not have sufficient working capital, it would be more accurate for the issuer to say this rather than a definitive statement that it believes it does not have sufficient working capital. That is, it may be more accurate for the issuer to say that it believes

that there is a significant possibility that the issuer does not have sufficient working capital. Although this would clearly not be a "clean" working capital statement, it would not mislead investors by suggesting that the opposite is true, i.e. that the issuer believes that it does not have sufficient working capital. The issuer should then be able to explain (along the lines of paragraph 128) how the issuer plans to rectify the shortfall if indeed such a shortfall occurs.

122 Reference should be permitted to be made in the working capital statement to cash, bank and other facilities currently available to the issuer's group; the working capital statement should be permitted to be made expressly on the basis of the transaction proceeds and taking into account underwritten, guaranteed or firm placed proceeds.

See also our comments on paragraph 118 above.

123 As stated above in relation to paragraph 118, if an issuer is unable to make a clean working capital statement, it may well be more appropriate and accurate for an issuer to state that there is a significant possibility that the issuer does not have sufficient working capital than for it to say definitively that it does not have sufficient working capital.

124 Please see our comments to paragraph 118 and 123 above.

126 Subject to our comments above on paragraph 118, 123 and 124 above, this Recommendation is reasonable.

127 This Recommendation should be deleted. It may well not be possible for an issuer to quantify a precise shortfall. It is more important for investors to know how the issuer plans to rectify the maximum shortfall the issuer believes it is reasonable to assume may occur and believe that this ought to be dealt with under paragraph 128. It should not be necessary for the potential shortfall to be quantified as long as the issuer is confident that it would be able to give a "clean" working capital statement if its plans for rectification are successful. Disclosure on the issuer's confidence about the likelihood of the actions being successful is dealt with adequately by paragraph 129.

130 The disclosure recommended by paragraph 130 should only be included if the issuer is not able to express confidence under paragraph 129 in the proposed actions being successful.

131 This Recommendation should be deleted. The due diligence procedures that an issuer should consider are dealt with in paragraph 132. The standards of disclosure in a prospectus should be governed by Article 5 of the Prospectus Directive and will be regulated by the Market Abuse Directive and other relevant legislation in each member state in which an offer of the securities is made.

132 Although recommendations on what type of due diligence measures issuers should consider are helpful, the manner in which they have been included in

the Recommendations is too prescriptive. Issuers, together with their advisers, should determine what due diligence measures ought to be taken in light of the particular circumstances. The following change to the sentence immediately before the list would address our concerns:

"*Such procedures may well include*:"

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

Please see our responses above.

In addition, a clear recommendation should be given to competent authorities to grant derogations under Article 8 of the Directive to particular types of companies that would not be capable of analysing their working capital requirements in the traditional manner, in particular banks and insurance companies. These types of institutions are already typically subject to rigorous capital adequacy requirements, so investors should not be prejudiced by the absence of a working capital statement.

10. CAPITALISATION AND INDEBTEDNESS

135 This Recommendation should be deleted for the reasons set out below.

The suggested format is too prescriptive and flexibility needs to be given for issuers to include a capitalisation and indebtedness table that is appropriate for them and the GAAP they report under, as long as it complies with the clear requirements of the Regulation. In addition, recommendations should be included so that competent authorities are encouraged to give consideration to particular types of issuers, such as banks and insurance companies, whose business consists, in large part, in the daily creation or extinction of contingent liabilities (for example, through the issue of guarantees or through the issue or acceptance of letters of credit). Competent authorities should be guided to grant derogations under Article 8 of the Directive in such circumstances.

Sub-paragraph 2 of this Recommendation requires information in excess of that required by paragraph 3.2 of Annex III to the Regulation. (For example, cash and cash equivalents are neither capitalisation items nor indebtedness items; disclosure of shareholders' equity subdivided into share capital, legal reserves and other reserves is beyond the Regulation.) It may also require the issuer to prepare profit and loss information for an interim period, given the 90-day requirement, which may not be possible unless the issuer reports quarterly.

The requirement to disclose contingent liabilities will be problematic for a number of issuers – notably banks – whose business consists, in large part, in the daily creation or extinction of contingent liabilities (for example, through the issue of guarantees or through the issue or acceptance of letters of credit).

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

Please see our responses above.

IV NON FINANCIAL INFORMATION ITEMS

1. SPECIALIST ISSUERS

142 *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?*

As a general matter, we do not think detailed recommendations are needed for specialist issuers. We 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 but also under Article 5.1 of the Directive.

In any event, a clear statement should be made recommending that competent authorities derogate from the requirements if it is anomalous that a particular company falls within the definition of a particular type of specialist issuer.

1a. PROPERTY COMPANIES

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

We do not agree that a valuation report would in all cases be necessary to comply with Article 5.1 of the Directive. This cannot, in our view, be prejudged – issuers need to be able to determine on a case-by-case basis, having regard to the particular nature of the issuer and the securities offered to the public or admitted to trading on a regulated market, what is material under Article 5.1. The following factors, which should be considered as a whole and balanced against each other, are some of the factors that might be considered in determining whether an independent valuation report would be material or not to investors:

- is there likely to have been material change in the overall valuation of its properties since the last balance sheet valuation?
- are the securities debt securities, where cash flow, rather than the

valuation of the company's properties, is likely to be a key investment consideration? What is the maturity of the debt issue? What is the size of the issue? What is its debt rating?

- are the securities being issued secured on the properties of the issuer, in circumstances such that the investor is placing substantial reliance on the value of the properties?

- if global depositary receipts are being issued, do they have denominations of €50,000 or more, such that the securities are likely to be purchased and traded by sophisticated investors?

- does the company have securities listed a stock exchange as a result of which a lot of information about the company is in the public domain?

This would also be consistent with Article 7.2 of the Directive.

Accordingly, the determination as to whether an independent valuation report is material information needs to be judged on the particular facts.

At a minimum, any recommendations should differentiate between shares and other securities – a valuation report should not be mandatory for unsecured non-equity issues including convertible debt securities. A valuation report should also not be required for global depositary receipts with a denomination of €50,000 or more. We believe such an approach would be consistent with Article 7.2 of the Directive.

We also believe that clearer recommendations should be made as to when a company should be considered to be a property company. A company should only be considered to be a property company if **(A) the company is in the business of holding and developing properties for letting and retention as an investment; purchasing or developing properties for subsequent sale; or purchasing land for the development of properties for retention as an investment; and (B) the majority of its operating expenses and revenues is incurred as a direct result of or derived from, as the case may be, these activities.**

151 *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.*

The location of the competent authority is not relevant to the decision as to which rules a company should comply with. In principle, a company should be permitted to comply with the rules to which it is otherwise subject, provided that they are acknowledged as being of a sufficiently high standard. For example, companies should be able to use reports prepared in accordance with standards which are accepted or recognized in international usage, regardless of whether those standards originate from an EU jurisdiction.

152 *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.*

Where the issuer includes a report, the issuer should apply its judgment as to whether that report should show individual property valuations or whether a condensed report (or whether a mixture of these alternatives) would be appropriate, regardless of the number of properties held. The following factors might be considered in making this judgment:

- would a condensed report help in making the prospectus more easily analysable and comprehensible, as per Article 5.1 of the Directive or would it omit information material to investors, having regard to the nature of the issuer and the securities?

- are the securities secured only on some of the properties, warranting a valuation report relating only to those properties? In such a situation, is the quality of security over some properties sufficiently different to the quality of security over other properties to warrant a valuation on an individual basis?

The Recommendations could help issuers by including in them the type of factors (for example, those above) an issuer might consider in determining whether to include a condensed report or a report with individual valuations or a mixture of the two. A more detailed report should not be made available, even if it is not included in the prospectus. It would not serve any use in our view if the issuer were comfortable that the condensed report was adequate, which is the conclusion it would have to reach under Article 5.1.

153 *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.*

Please see our comments to paragraph 152 above.

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

The report should be allowed to be older than sixty days if the issuer believes that there has not been an adverse change in the valuation of its properties since its date that would be material to investors, having regard to the nature of the issuer and the securities. This should clearly be considered in light of the reason the issuer thought the report would be material in the first place. This should be a judgment that should be made by the issuer under Article 5.1.

We also believe that any recommendations as to the age of the report should provide that the age of the report runs from the date of the registration document, not the date of the securities note. Otherwise, the shelf registration system will not be workable for property companies.

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

Please see our comments above.

1b. MINERAL COMPANIES

159 The term "valuation report" is misleading. The report is a competent expert's report on reserves and certain other matters.

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

We agree with the usefulness of requesting a valuation report where the issuer (or, more importantly, the group generally) has not been involved in a mineral business for at least the three preceding years. (Please note that we would not support the Recommendations if they required a report where the issuer had a three-year track record.) However, a report should also not be required if the company is already listed on a regulated market in the EU or on a market of international standing elsewhere. The issuer should, in such circumstances, still be recommended to include information pursuant to paragraph 162.1 of the Recommendations.

Companies should be able to use reports accepted in certain third countries, regardless of whether those standards originate from an EU jurisdiction.

To illustrate the problem, a major Canadian oil and gas issuer (Canada being home to a large number of significant resource companies) listed in both Canada and the US has indicated that it does not disclose "probable reserves" on the basis that it complies with US disclosure requirements as mandated by Regulation S-K, SEC Industry Guide 2, FAS 69 and US disclosure practices. If it were required to disclose "probable reserves" in, for example, a Eurobond prospectus, it would then be forced to disclose such reserves on a global basis, thus putting it at a distinct disadvantage to its US peers. Moreover, as required by Canadian and US securities law, it is only required to prepare an expert's report valuing its reserves on an annual basis, which in the case of a subsequent material change is required to be supplemented by a report prepared by the issuer alone discussing its reasonable expectations as to how the expert's report would differ had the material change occurred before the date of the expert's report. As such, if the Recommendations were to require an expert's report to be dated within 6 months of a prospectus, this would add significant cost and present logistical problems for large senior issuers such as the one noted above.

Finally, the definitions of, inter alia "proven reserves" and "probable reserves" are not consistent with the definitions used under Canadian and US securities laws. Accordingly, mineral companies should be able to comply with international reserve reporting standards in their entirety, including without limitation applicable definitions and categories of reserves required to be disclosed, provided that the applicable standards are clearly identified. Enabling such international standards to be used would also facilitate incorporation by reference of such disclosure, thereby encouraging non-EU issuers to access the euro markets.

The following language should be added to help determine whether the issuer has the appropriate track record:

"For the purpose of determining whether a company has been involved in a mineral business for at least the three preceding years, the business activities of the issuer's subsidiaries will be attributed to the issuer. The business activities of the subsidiaries of any guarantor will also be attributed to the issuer."

165 *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.*

A test should be included to help determine whether an issuer is a mineral company or not. The test should be as follows (which is based to some extent on the existing test in the UK):

"In determining whether the principal activity of the issuer's group is the extraction of mineral resources, the issuer should consider whether 25% or more of its operating expenses and revenues is incurred as a direct result of or derived from, as the case may be, these activities."

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

Issuers that are only involved in exploration of mineral resources and are not undertaking or proposing to undertake their extraction on a commercial scale should not be classed as mineral companies. The volume of its proven or probable reserves would not drive a valuation of such company, and accordingly, a competent person's report would not be of material value to investors.

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

Please see our comments above. Paragraph 164(1) should be qualified by materiality. The Canadian issuer noted in paragraph 164 above indicated, for example, that the requirement in paragraph 162(1)(c) to disclose the main terms of any license or concession may be overly onerous for large issuers without some materiality component.

1d. INVESTMENT COMPANIES

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

The Recommendations should make it clear that the definition of an investment company excludes property companies and companies issuing asset backed securities, for which different requirements apply.

1f. SCIENTIFIC RESEARCH BASED COMPANIES

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

A test should be included to help determine whether a company is primarily involved in scientific research. A company should only be considered to be a scientific research based company **if (A) the company is involved in the laboratory research and development of chemical or biological products or processes, including pharmaceutical companies and those involved in the areas of diagnostics and agriculture and (B) the majority of its operating expenses and revenues is incurred as a direct result of or derived from, as the case may be, these activities.**

Details under sub-paragraph (a) of this Recommendation should only be required to the extent material to investors, bearing in mind the particular nature of the issuer and the securities, as per Article 5.1. Otherwise the disclosure could become unwieldy, contrary to the requirement under Article 5.1 and providing immaterial information would be unnecessarily onerous on issues.

Key technical staff and locations of laboratories should not be required to be named or specified, particularly in situations where they may be targeted by political activists.

Information on whether the issuer has engaged in collaborative research and development agreements with organizations of high standing and repute will not necessarily be material for many issuers, particularly where they themselves have a track record and are of high standing and repute. Accordingly, such disclosure should be recommended only to the extent material to investors, bearing in mind the particular nature of the issuer and the securities, as per Article 5.1.

1e. START-UP COMPANIES

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

An issuer's disclosure about strategic objectives should not be required to include figures. There would be inherent liability risks for the issuer in doing that, not only in the EU but also in other jurisdictions such as the United

States where the securities might also be offered, and the issuer should not be forced to face such potential liability if the figures are not met. Inclusion of certain types of figures may also trip the profit forecast requirements under the Regulation – the inclusion of profit forecasts should, as we state above, be voluntary, not mandatory. If the reference to "figures" is intended to refer to qualitative disclosure about the issuer's capital expenditure plans and financial commitments, together with an estimate of the funding requirements of the business for a period following the listing and a statement explaining how these requirements will be met, under current estimates, with reference to existing resources and the proceeds of any issue of securities made at the time of listing (for example, as per rule 25.6(e) of the UKLA's listing rules) then this should be clarified. If this issue is clarified in this way, we suggest the period could be 12 months, which is the same as the period for the working capital statement.

Including risk factors would satisfy including "a sensitivity analysis of the business plan". No further "sensitivity analysis" should be required, in our view.

188 *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.*

We do not agree with the proposed definition of start-up companies. The proposed definition would catch holding companies that had been put in place for an IPO or other securities offering, which would be an incorrect result. The definition should focus on the business of the group (where the term group includes any subsidiaries of any guarantor) not the business of the issuer only. We agree that an SPV should not be considered to be a start-up issuer. The period of existence of the issuer should be irrelevant to the determination of whether an issuer is a start-up issuer or not. Inclusion of the following definition would address our concerns:

"A start-up issuer is a company that has been operating in its current sphere of business activity for less than three years. For this purpose, the business activities of the issuer's subsidiaries will be attributed to the issuer. The business activities of the subsidiaries of any guarantor will also be attributed to the issuer. A special purpose vehicle formed for the purposes of issuing the contemplated or other securities will not be considered to be start-up issuer. The period of existence of the issuer shall be irrelevant in determining whether the issuer is a start-up issuer or not."

189 *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 from being provided;
(iv) the report would not be mandatory but the issuer would be free to include it.

We believe option (iv) is the correct option - a report should not be mandatory but an issuer should be free to include one. We agree that it could be quite difficult to find a qualified expert able to present meaningful information, particularly if the business of the issuer is a very specific one and that this requirement would impede start-up issuers from accessing the market.

190 *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 merits 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 issuer's 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 expertise.

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.

If an issuer voluntarily includes a report, we suggest that it should be tailored to the circumstances of the particular issuer and offering of securities. It might or might not include some or all of the factors CESR suggests. We do not think CESR should provide detailed Recommendations on the contents of the report at this stage.

We agree that any expert who prepares a report should be independent of the issuer. Independence should be determined in accordance with the standards applicable to the particular expert.

1f. SHIPPING COMPANIES

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

The additional disclosure requirements are, on the whole, too detailed and are not conducive to achieving a prospectus that is easily analysable and comprehensible, as per Article 5.1 of the Directive.

The basis of remuneration of any ship management company or group should only be disclosed if it is material, having regard to the nature of the issuer and the securities being issued. Some of the factors an issuer might take into account in determining materiality are the following:

- is the remuneration reflected in the issuer's accounts?
- are the terms of the contract on arm's length terms?
- are the amounts material to the group as a whole?
- if debt securities are being issued, would the level of remuneration have a material impact on the ability of the issuer to meet its obligations on those debt securities?

Arrangements relating to the termination of the appointment of any ship management company or group should only be required to be disclosed if such termination would be likely to have a material impact on the business of the issuer.

Information about the vessels under sub-paragraph (b) and (c) should be allowed to be given on a condensed basis with substantially less detail - this would help make the prospectus more easily analysable and comprehensible, as per Article 5.1 of the Directive.

Disclosure of insurance policies should only be required to be disclosed under the material contracts disclosure, which is required elsewhere in the Regulation. If they would not constitute material contracts under that test, we do not understand why they would nevertheless be required to be disclosed.

We also believe that clearer recommendations should be given as to when a company should be considered to be a shipping company. A company should only be considered to be a shipping company if **(A) the company is in the business of ocean-going shipping and manages, leases or owns cargo and/or passenger vessels either directly or indirectly; and (B) the majority of its operating expenses and revenues is incurred as a direct result of or derived from, as the case may be, these activities.**

201 *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 issued;
(iv) not be required at all.

Please state your reasons for your answer.

This question cannot be answered without knowledge of all the relevant considerations, which cannot be known in advance. A valuation report should only be required if the issuer, having regard to the particular nature of the issuer and the securities offered to the public or admitted to trading on a regulated market, determines that such a valuation report would be material under Article 5.1. A valuation report would not in all cases be necessary to comply with Article 5.1 of the Directive. The following factors, which should be considered as a whole and balanced against each other, are some of the factors an issuer might consider in determining whether an independent valuation report would be material or not to investors:

- will the proceeds of the securities offering be used primarily to finance the acquisition of a vessel? Is that acquisition being conducted on arm's length terms? If it is, an issuer may well conclude that an independent valuation of that vessel is not material to investors.

- are the securities debt securities, where cash flow, rather than the valuation of the company's vessels, is likely to be a key investment consideration? What are the size and the maturity of the issue? What is its debt rating?

- are the securities being issued secured on the vessels of the issuer, in circumstances such that the investor is placing substantial reliance on the value of the vessels?

- if global depositary receipts are being issued, do they have denominations of €50,000 or more, such that the securities are likely to be purchased and traded by sophisticated investors?

- does the company have securities listed a stock exchange as a result of which a lot of information about the company is in the public domain?

This would also be consistent with Article 7.2 of the Directive.

Accordingly, the determination as to whether an independent valuation report is material information or not needs to be judged on the particular facts.

At a minimum, the Recommendations should differentiate between shares and other securities – a valuation report should not be mandatory for unsecured non-equity securities, including convertible debt securities. A valuation report should also not be required for global depositary receipts with a denomination of €50,000 or more. We believe such an approach would be consistent with Article 7.2 of the Directive.

202 *Do you agree with the contents of the expert valuation report? If not, please state your reasons.*

state your reasons.

On the whole, we think the content requirements set out in paragraph 197 are very detailed. This level of detail may well be too much, and a condensed report may well be more appropriate. (Please see our response to question 205 below.)

203 *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.*

Issuers should not be held to the rules of the competent authority reviewing the prospectus, particularly given that in many instances, an issuer will not be able to choose which competent authority that is, since for certain offerings, it will be required to use its permanent home member state. The rules of any particular competent authority may be inappropriate in one or more respects. Companies should be able to use reports prepared in accordance with international standards, regardless of whether those standards originate from an EU jurisdiction.

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

The report should be allowed to be older than ninety days if the issuer believes that there has not been an adverse change in the valuation of its vessels since its date that would be material to investors, having regard to the nature of the issuer and the securities. This should clearly be considered in light of the reason the issuer thought the report would be material in the first place. This should be a judgment that should be made by the issuer under Article 5.1.

We also believe that any recommendation as to the age of the report should provide that the age of the report runs from the date of the registration document, not the date of the securities note. Otherwise, the shelf registration system will not be workable for shipping companies.

205 *Do you think that 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.*

Where the issuer includes a report, the issuer should apply its judgment as to whether that report should show individual valuations of vessels or whether a condensed report (or whether a mixture of these alternatives) would be appropriate, regardless of the number of vessels held. The following factors might be considered in making this judgment:

- would a condensed report help in making the prospectus more easily analysable and comprehensible, as per Article 5.1 of the Directive or would it omit information material to investors, having regard to the

nature of the issuer and the securities?

- are the securities secured only on some of the vessels, warranting a valuation report relating only to those vessels?

The Recommendations could help issuers by including in them the type of factors (for example, those above) an issuer might consider in determining whether to include a condensed report or a report with individual valuations or a mixture of the two.

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

Please see our comments above.

2. CLARIFICATION OF ITEMS

Introduction

210 *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?*

Each of the annexes should be considered separately for the reasons set out below.

The IOSCO disclosure regime was designed to apply to prospectuses for shares, where disclosure with a particular emphasis or with a particular level of detail in certain instances may well be appropriate. A similar emphasis or level of detail may well not be appropriate to certain other types of securities, including debt and derivative securities, where the investment considerations of investors will not be the same as for shares in many respects.

The Regulation recognises that a different emphasis or level of detail is appropriate for different types of securities – the disclosure requirements in respect of, for example, material contracts and investments are different for a share registration document and a debt registration document. These distinctions would inadvertently be eroded or eliminated through level 3 Recommendations that failed to take a tailored approach to the schedules. Even where the Regulation sets out broad requirements that use the same language in each annex, it would be correct for issuers to tailor the particular level and content of the disclosure to the particular type of securities, rather than taking a "one size fits all" approach. A single set of Recommendations giving guidance across all annexes would undermine the tailored approach that issuers ought to take, and indeed, are required to take under Article 5.1 of the Directive since it requires issuers to take in account "the particular nature of the issuer and of the securities offered…"

We should also note that Article 7.2 of the Directive specifically provides for account to be taken, for example, of the various types of information needed by investors relating to equity securities as compared with non-equity securities, the various types and characteristics of offers and admissions to trading on a regulated market of non-equity securities, appropriateness from the point of view of investors concerned for non-equity securities having a denomination per unit of at least €50,000 and the various activities and size of the issuer. This objective would also be undermined without Recommendations tailored to the different annexes.

We should add, in particular, that securities that are customarily traded by sophisticated investors, such as convertible debt securities, asset backed securities and depositary receipts, merit specialist treatment -- investors in these securities do not require the level of background information in the prospectus that might be appropriate for less knowledgeable investors, who typically trade in shares. This is consistent with Article 7.2 of the Directive. Accordingly, the Recommendations should provide for greater flexibility and be tailored for securities that are customarily traded by sophisticated investors.

211 *Do you think adaptations are necessary with respect to the different needs as regards debt and derivatives registration document?*

Yes -- please see our response to paragraph 210 above.

212 We disagree with the last sentence of this paragraph. Please see our comments to paragraph 210 above.

2a. PRINCIPAL INVESTMENTS

219, 220 *Do you think recommendations are needed on this matter? If not, please state your reasons. Do you agree with the proposed recommendations? If not, please state your reasons.*

Recommendations are not necessary on this matter. The use of the word "principal" in the relevant paragraphs of the Annexes to the Regulation themselves suggest that a concept of materiality should be applied in determining whether or not any particular investment should be described. Paragraph 218 sets out certain criteria in helping an issuer to determine whether an investment is material or not. However, whether or not an investment is material may well depend on factors other than those set out, and in particular may vary depending on the type of securities being offered. Issuers should make their determination about materiality based on factors that are appropriate according to the type of issuer and the securities being issued, as per Article 5.1 of the Directive. Accordingly, paragraph 218 should be deleted.

221 *Would you prefer a stricter and more objective approach to determine*

whether an investment should be regarded as a "principal investment", such as a numeric one? Which level would you choose and why?

The test should be based on a non-numeric concept of materiality, as appears already to be the case in the Regulation. Although a numeric concept would provide issuers with certainty, a numeric concept would be arbitrary and would encourage issuers to ignore investments that were material in respects other than just size.

2b. PROPERTY, PLANTS AND EQUIPMENT

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

We do not believe that the proposed Recommendation is useful. We also believe that it is too detailed. Paragraph 223 should be deleted. We set out our reasons below.

Compliance with such detailed requirements would be excessively onerous for issuers and would provide very little benefit to investors.

If the paragraph is not deleted, it should be replaced with a paragraph that directs issuers to consider what they believe would be material for investors to have disclosed to them bearing in mind the particular nature of the issuer, the securities and the asset.

2c. COMPENSATION

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

This Recommendation is reasonable, although we would note that the reference to the "*period during which options can be exercised*" is duplicative with "*the date in which they expire*". One of those phrases should be deleted with conforming changes elsewhere in the paragraph.

230 *Do you think additional information is required? Which one?*

We do not believe additional information is required.

2d. ARRANGEMENTS FOR THE INVOLVEMENT OF EMPLOYEES

234 *Do you agree with the usefulness of the proposed recommendations and with their content? If not, please state your reasons.*

This Recommendation should be deleted. This Recommendation, although reasonable in its content, is unnecessary given the clear wording

of the Regulation.

2e. NATURE OF CONTROL AND MEASURES IN PLACE TO AVOID IT BEING ABUSED

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

A Recommendation with respect to this particular Regulation requirement is not necessary – the wording of the Regulation is clear.

In addition, it should not be necessary to identify every single entity through which control is exercised. Investors should only be concerned about the entity or entities that is or are the ultimate legal holder(s) of shares in the issuer (or its ultimate parent company) and the identity of the person that is the ultimate controlling party. It should be of no concern to investors that an indirect controlling shareholder might exercise its control through a chain of six companies above the legal shareholder in the issuer (or its ultimate parent company). Indeed, we think that a requirement to disclose such information would make the information less easily analysable and comprehensible, which is contrary to the requirement in Article 5.1 of the Directive.

We also do not believe that the emphasis in paragraph 237 is correct – the focus should be on disclosing what measures, if any, are in place to ensure that controlling shareholders do not abuse any control they may have through representation on the boards of directors of the issuer's group companies. Shareholders should always have the right to use their votes in shareholders' meetings in their own best interests. To the extent the absence of any such measures may be material to investors, disclosure of such risks should be made in the prospectus.

In addition, Recommendation 237 is not made up of a complete sentence and therefore does not make sense. Perhaps it was intended to mean that disclosure should be made of measures in place, if any, to ensure that transactions will be at arm's length and on normal commercial terms and that such controlling persons will not exercise their control [through representation on the board] against the interests of the issuer.

239 *Do you think other information is needed to clarify the nature of control or mechanisms in place to avoid control being abused? Please state your reasons.*

Please see our response above.

2f. RELATED PARTIES TRANSACTIONS

240 Although we accept that recommendations with respect to the definition of

related parties may be appropriate to ensure a uniform approach by competent authorities, we do not believe that reference to the IFRS definition is appropriate where financial statements are included in the registration document that have not been prepared in accordance with IFRS. Where a GAAP has been determined to be equivalent to IFRS, the concept of a related party should be as provided in the relevant GAAP. Otherwise there would appear to be little point in going to the trouble of identifying GAAPs that are equivalent to IFRS. Where non-IFRS accounts have been allowed to be included in the prospectus (even where the non-IFRS GAAP has **not** been determined to be equivalent), as long as the GAAP for those accounts require disclosure of related party transactions, any requirement for the issuer to include additional disclosure based on a different definition of related party under IFRS definition would be unfair to, and unduly onerous upon, issuers. In addition, it does not appear to be consistent to allow non-IFRS financials to be included in the prospectus and then nonetheless require those issuers to prepare related party disclosure in accordance with IFRS.

We believe that the correct approach is to encourage issuers to use the definition of related parties for each year covered by the financial statements that is used pursuant to the GAAP used for that year's financial statements. If the "bridge" form of presentation described in paragraph 60 of the Recommendations is used, so there is one year for which two GAAPs have been used, since IFRS would be one of the GAAPs used in that situation, the IFRS definition of related party should be used for that particular year. If the non-IFRS GAAP used for any such accounts for any particular period did not require disclosure of any related party transactions, then the application of the IFRS definition for that period would be reasonable.

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

Please see our response above.

244 *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.*

Please see our response above.

2g. LEGAL AND ARBITRATION PROCEEDINGS

246 Recommendations are not necessary for this item, given the clear wording of the Regulation. The list included in this paragraph will encourage a "tick-the-box" approach by issuers. The list is also not clear – for example, what is meant by "*proceedings in relation with the issuer's business"?*

If a list is retained, it should refer to the same materiality reference that is included in the Regulation itself to avoid a suggestion that the Recommendation goes further than the Regulation. In addition, the Recommendation should include a clarification that Item 20.8 of the Regulation requires the issuer to disclose only those governmental, legal or arbitration proceedings specified in the Item that the issuer or members of its group are or would be a party to.

247 *Do you agree with the level of detail being provided? If not, please state your reasons.*

Please see our response above.

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

Please see our response above.

2h. ACQUISITION RIGHTS AND UNDERTAKINGS TO INCREASE CAPITAL

251 A number of changes should be made to this Recommendation:

The required disclosure should be considered in the context of the nature of securities being offered to the public or admitted to trading. The level of detail required, although it may be appropriate for an offering or admission to trading of shares, may well be too much for convertible debt securities where the conversion option would only be available some time in the future, at which time the amount of rights or obligations over authorised but unissued capital etc. may well be different and where the investment considerations are different to those for straight equity.

The level of detail should also be limited so that such information is only required to the extent it is material. A requirement to include immaterial information would not be conducive to a prospectus that was easily analysable and comprehensible, in line with the requirement in Article 5.1 of the Directive.

Both the points above could be addressed by inclusion of language as follows:

"The disclosure required by Item 21.1.5 of Annex I should be considered according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market and the detail set out in paragraph 251 should be provided to the extent it is material in that context. Less detail may be appropriate for convertible debt securities."

We support the use of the word "normally" in the fourth line of paragraph 251.

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

Please see our response above.

2i. OPTION AGREEMENTS

255 It is not reasonable to require that the exercise price of all outstanding options be specified. At a minimum, issuers should be able to include the information in a condensed form, giving ranges of dates for exercise and ranges or averages for the exercise price. This would be conducive to including disclosure that was easily analysable and comprehensible, in line with the requirement in Article 5.1 of the Directive. In general, this provision should be qualified by materiality, that is, detail should only be provided to the extent it is material in the context of the issuer and the securities being offered or admitted to trading. Particular regard should be given, in our view, to securities such as convertible debt securities where the conversion option would only be available some time in the future, at which time the option agreements in place may well be different and where the investment considerations are different to those for straight equity.

The addition of the following language would help address this concern:

"The disclosure required by Item 21.1.6 of Annex I should be considered according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market and the detail set out in paragraph 255 should be provided to the extent it is material in that context. The issuer should consider presenting the information in a condensed form with less detail using, for example, a range of exercise dates and/or exercise prices or an average of exercise prices, in particular, where such a format would help the disclosure be more easily analysable and comprehensible. Less detail may be appropriate for convertible debt securities"

In addition, the reference to the "*period during which options can be exercised*" is duplicative with "*the date in which they expire*". One of those phrases should be deleted with conforming changes elsewhere in the paragraph.

We support the use of the word "normally" in the third line of paragraph 255.

256 This Recommendation is reasonable.

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

Please see our response above.

2j. HISTORY OF SHARE CAPITAL

259 and 260 This Recommendation provides for too much detail. The issuer should have the option of including the information in condensed form. This would be conducive to including disclosure that was easily analysable and comprehensible, in line with the requirement in Article 5.1 of the Directive. We also believe that this provision should be qualified by materiality, that is, detail should only be provided to the extent it is material in the context of the issuer and the securities being offered or admitted to trading.

The addition of the following language would help address this concern:

"The disclosure required by Item 21.1.7 of Annex I should be considered according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market and the detail set out in paragraphs 259 and 260 should be provided to the extent it is material in that context. The issuer should consider presenting the information in a condensed form with less detail, in particular, where such a format would help the disclosure be more easily analysable and comprehensible."

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

Please see our response above.

2k. RULES IN RESPECT OF ADMINISTRATIVE, MANAGEMENT AND SUPERVISORY BODIES

264 This Recommendation provides for too much detail. The issuer should have the option of including the information in condensed form. This would be conducive to including disclosure that was easily analysable and comprehensible, in line with the requirement in Article 5.1 of the Directive. We also believe that this provision should be qualified by materiality, that is, detail should only be provided to the extent it is material in the context of the issuer and the securities being offered or admitted to trading. Particular regard should be given, in our view, to securities such as convertible debt securities where the conversion option would only be available some time in the future, at which time the rules in respect of administrative, management and supervisory bodies may well be different.

The addition of the following language would help address this concern:

"The disclosure required by Item 21.2.2 of Annex I should be

considered according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market and the detail set out in paragraph 264 should be provided to the extent it is material in that context. The issuer should consider presenting the information in a condensed form with less detail, in particular, where such a format would help the disclosure be more easily analysable and comprehensible. Less detail may be appropriate for convertible debt securities."

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

Please see our response above.

2l. DESCRIPTION OF THE RIGHTS ATTACHING TO SHARES OF THE ISSUER

267 The level of detail provided for in the Recommendation should only be provided to the extent it is material in the context of the issuer and the securities being offered or admitted to trading. We also believe that the issuer should have the option of including the information in condensed form. This would be conducive to including disclosure that was easily analysable and comprehensible, in line with the requirement in Article 5.1 of the Directive.

The addition of the following language would help address this concern:

"The disclosure required by Item 21.2.3 of Annex I should be considered according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market and the detail set out in paragraph 267 should be provided to the extent it is material in that context. The issuer should consider presenting the information in a condensed form with less detail, in particular, where such a format would help the disclosure be more easily analysable and comprehensible."

In addition, it is not clear what type of provision sub-paragraph (h) is contemplating.

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

Please see our response above.

269 *Do you see other ways of presenting the information provided by the Regulation?*

Please see our response above.

2m. MATERIAL CONTRACTS

273 Too much detail is provided for in the Recommendation. The required disclosure should, in our view, be tied to materiality. We also believe that the Recommendation should be tailored for each Annex where the Regulation itself includes different disclosure requirements. Our more detailed comments are set out below.

Since the Regulation requires lighter disclosure under Annexes IV, IX and XI than that required for Annexes I and X, the following amendments should be made to paragraph 273 for those Annexes:

When summarizing a contract that the issuer is requested to refer to in the prospectus, issuers are normally expected to mention, to the extent these matters are material to the issuer's ability to meet its obligations to security holders in respect of the securities being issued:

(a) the dates on which the contracts were entered into;
(b) the parties to the contracts;
(c) the object of the contracts; and
(d) key terms and conditions of the contracts.

For Annexes I and X, the following amendments should be made to paragraph 273:

When summarizing a contract that the issuer is requested to refer to in the prospectus, issuers are normally expected to mention:

(a) the dates on which the contracts were entered into;
(b) the parties to the contracts;
(c) the object of the contracts; and
(d) terms and conditions of the contracts that are material according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market.

You will note that we have deleted sub-paragraph (e) with respect to "*amount of any consideration*…" To the extent any such consideration was material, it would be disclosed under sub-paragraph (d), as amended above. If the consideration is not a material term, for example it is negligible, then there should be no need to disclose it. In addition, consideration is not always monetary, so it is not necessarily accurate to describe it as an "*amount*".

In addition, regard needs to be given to the fact that in some instances, an issuer will not be able to provide the information recommended because of confidentiality obligations, perhaps because of a confidentiality agreement that has been entered into with the counterparty, perhaps because of duties

owed to regulators. The Recommendations should include a statement that in these circumstances, competent authorities should grant a derogation so that issuers only have to comply with the relevant recommendation to the extent they can without breaching their confidentiality obligations or duties.

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

Please see our response above.

2n. STATEMENTS BY EXPERTS

278 and 279 We do not believe the proposed recommendation is useful and believe that the level of detail being provided for is too much. We set out our reasons below.

We assume that the experts that this Recommendation refers to are the accountants that audit or report on the financial statements of the issuer included in the prospectus and any experts that would be required to prepare a valuation or other report for a property company, a mineral company or a shipping company. Since these experts are already required to be independent pursuant to the Regulation and/or the Recommendations, the relevant Items of the Regulation and the relevant paragraphs of the Recommendations are effectively redundant. Paragraph 276 supports our view that this Item of the Regulation relates to any matter that would compromise the independence of these persons. Since these persons are required to be independent, which would rightly be judged by the principles as to independence governing the particular type of expert, we submit that that expert could not be concluded to have a material interest in the issuer and, accordingly, a disclosure requirement would not be triggered under Item 23.1 of Annex I unless derogation from the independence requirement had been sought and obtained from the relevant competent authority. Accordingly, paragraph 278 should make this clear. We also believe that in such a situation, the "material interest" should be considered to be the interest that compromised the expert's independence under the principles as to independence governing the particular type of expert. We therefore believe that the recommendation as to the meaning of "material interest" is flawed and that it should be deleted and replaced with language that refers to the principles as to independence governing the particular type of expert.

As well as the fundamental point raised above, we have the following comments on the text of the paragraph as it stands:

This Recommendation is drafted as if the expert will necessarily be a natural person, which will often not be the case.

Subparagraph (b) requires that the issuer must consider whether the expert "*receives or has received any form of compensation from the issuer*". It may well not be relevant if the compensation was received a long time ago. If the issuer will be expected to consider historical compensation, a time limit should be referred to in the Recommendation – perhaps an appropriate time limit would be the period for which financial statements have been included. In addition, assuming the compensation has been determined on an arm's length basis, the compensation relating to the report included in the prospectus itself is irrelevant.

It is not clear what "*is related to*" means in subparagraph (d).

In any event, the issuer should only be recommended to disclose information that it has knowledge of or is reasonably ascertainable since these experts would be third parties.

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

Please see our responses above.

281 *Are there other circumstances that would qualify as "material interest" in the issuer? Which ones?*

Please see our responses above.

2o. INFORMATION ON HOLDINGS

286 Details of the registered office of the undertaking should not be required.

We also believe that (a) (to the extent our comment above is not taken, though if it is not, no more than the jurisdiction of incorporation should be required) and (c) should be able to be satisfied by way of a condensed structure diagram.

In addition, the level of detail provided for in the Recommendation should only be provided to the extent it is material in the context of the issuer and the securities being offered or admitted to trading.

The addition of the following language would help address this concern:

"The disclosure required by Item 25.1 of Annex I should be considered according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market and the detail set out in paragraph 286 should be provided to the extent it is material in that context."

287 Please see our comments on paragraph 286 in relation to consideration

about the level of detail that should be included.

288 The presumption should be that the omission of the information would not mislead the public if consolidated accounts are included and that competent authorities **should** permit the omission of that information in these circumstances. In addition, in order to preserve competent authorities' discretion to grant derogations under the Directive, the Recommendations should make it clear that the language in paragraph 288, and indeed in the rest of the Recommendations, is without prejudice to their discretion to authorise omissions from the prospectus pursuant to Article 8.2 of the Directive.

289 This Recommendation is reasonable, subject to our comments above in respect of paragraph288, and subject to clarification that it is in the opinion of the *relevant* competent authority.

290 Details of the registered office of the undertaking should not be required – it is very unlikely to be material. In addition, the reference to "negligible" importance raises the threshold set down under Article 8.2 of the Directive. The lower threshold used in paragraph 289 ("if… such omission does not mislead investors") should be used instead, given that it relates to level 3 recommendations rather than a Directive or Regulation requirement. We also believe that it should be supplemented by the 'without prejudice to the Article 8.2 discretion' described under paragraph 288 above.

291 *Do you agree with the usefulness of the proposed recommendations and the level of detail provided for? If not, please state your reasons and propose the details that you consider appropriate.*

Please see our responses above.

2p. INTERESTS OF NATURAL AND LEGAL PERSONS INVOLVED IN THE ISSUE/OFFER

294 Only disclosure of experts' interests should be required under this Item of the Regulation. We set out our reasons below.

Any disclosure about interests of persons involved in the issue/offer is only relevant to investors, and should only be disclosed, to the extent a statement of those involved persons has been included as a statement of an expert. Investors will be placing reliance on the statements made by such persons. Investors should not be encouraged to place any such reliance on persons who are not named as experts in the prospectus.

We also believe that what is material should be determined by the professional standards applicable to those experts. See our comments on paragraph 278 above in relation to the "material interests".

295 *Do you agree with the level of detail provided for? If not, please state your reasons.*

Please see our responses above.

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

Please see our responses above.

2q. CLARIFICATION OF TERMINOLOGY USED IN THE COLLECTIVE INVESTMENT UNDERTAKINGS OF THE CLOSED END TYPE

299 Where the portfolio contained in the fund is static, this requirement should make clear that the overall composition of the portfolio is sufficient (e.g. 20% AAA, 90% listed, 30% banks). The requirement would be unduly onerous if it were to be interpreted as a requirement to list each item of information in relation to each underlying asset. For example, for a typical portfolio, which could have up to 300 names, this could mean the provision of 1,500 separate pieces of information to be listed. This would not be conducive to achieving a prospectus that was easily analysable and comprehensible, as per Article 5.1 of the Directive.

300 We think there should be an additional requirement that the index is made available for purposes other than the calculation of the return on the relevant fund – potentially as an interpretation of "recognised". Otherwise, it is possible for investment managers to construct an "index" based on a portfolio of assets and by doing so avoid the disclosure requirements that would otherwise apply in relation to that portfolio.

303 We question the value of being required to provide details of amounts of third party funds under discretionary management. This would tend simply to favour existing bigger providers in the market. The quality of the fund management is not dependent on the amount of funds under management.

304 For the same reason as stated in 299 above, this requirement should be clear that the overall breakdown of the portfolio, and not details of underlying assets, are required.

305 *What are your views on the proposed recommendations the closed ended investment funds? Please state reasons for your answer.*

Please see our responses above.

3. RECOMMENDATIONS ON ISSUES NOT RELATED TO THE SCHEDULES

3a. RECOMMENDATIONS FOR DOCUMENTS CONTAINING INFORMATION ON THE NUMBER AND NATURE OF THE SECURITIES AND THE REASONS FOR AND DETAILS OF THE OFFER, MENTIONED IN ART. 4 OF THE PROSPECTUS DIRECTIVE

310 *Do you think recommendations are needed on this matter? If not, please state your reasons.*

We do not believe that any Recommendations are necessary given the clarity of the wording in article 4 of the Directive. In addition, the Recommendation goes further than article 4 in that it recommends that the document includes a summary of the rights attaching to the relevant securities, the securities code, cross reference to other information, reference to the exemption – none of these are required by the Directive and some, for example, the reference to the exemption, are irrelevant.

311 *Do you agree with the level of detail provided for? If not, please provide reasons for your answer.*

Please see our response above. We do not agree with the level of detail provided for as it goes further than the Directive and, in our view, unnecessarily so.

312 *Do you think that CESR should issue recommendations on the language regime applicable to the document referred to in article 4.1.d and e and 4.2.e and f of the Prospectus Directive and of its modalities of publication (i.e. when and by which means it should it be made available)? If not, please state your reasons. If so, which language regime would you deem applicable and which modalities of publication would you choose?*

We do not believe that CESR should issue such recommendations. The issuer should be at liberty to choose a language and a modality of publication that is appropriate in the particular circumstances.

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

Please see our responses above.

3b INDENTIFICATION OF THE COMPETENT AUTHORITY FOR THE APPROVAL OF BASE PROSPECTUSES COMPILED IN A SINGLE DOCUMENT AND BASE PROSPECTUS COMPRISING DIFFERENT SECURITIES

317, 318, 319, 320 and 321 We do not believe that this Recommendation is necessary. An issuer would not want to choose more than one competent authority and whether or not the issuer has a choice is clear from the Directive itself. Accordingly, this Recommendation should be deleted.

We also believe that these paragraphs are not easily analysable and comprehensible. In addition, paragraph 317 is incorrect – the third sentence ignores the home member state of a non-EU issuer for equity or non-equity securities with a minimum denomination of less than €1,000, which is determined by Article 2.1(m)(iii) of the Directive. If CESR determines that it is important to include recommendations on this point, we suggest the following alternative:

"The Regulation permits issuers to use a single base prospectus that relates to different securities. In the event such a base prospectus is prepared, more than one authority might be competent under the Directive and the issuer under such base prospectus could, theoretically, choose more than one home member state. This could be the case where the base prospectus related to multiple securities that included non-equity securities with a minimum denomination of €1,000 or more. In such an event, it is essential that only a single home member state be given the document for approval. Accordingly, where the base prospectus is for multiple securities comprising only non-equity securities with a minimum denomination of €1,000 or more, the issuer shall be free to choose which member state will be that single home member state; where the base prospectus includes equity securities or non-equity securities with a minimum denomination of less than €1,000, that single home member state shall be the home member state pursuant to Article 2.1(m)(i) or (ii) for the issuer, as the case may be."

324, 325, 326 and 327

This directly conflicts with Recital 27 of the Regulation. Recital 27 is clear that all base prospectuses should be approved by a single competent authority. Paragraph 324 contradicts this by stating that each base prospectus requires an approval by "its" competent authority. A clear mechanism must be established by which a single competent authority can approve multiple base prospectuses. Competent authorities must be given strong recommendations to accept the transfer of approval in certain specified circumstances. We disagree that the appropriateness of a base prospectus approval's transfer cannot be generally evaluated in advance. The approval process for a prospectus is appropriate for transfer whenever a document comprises more than one base prospectus and the circumstances are such that more than one home member state must otherwise be involved in approving all the base prospectuses comprised in that document. An issuer should, in these circumstances, have the choice in determining which competent authority should have the approval process transferred to it. However, if CESR disagrees, it would be reasonable for the final Recommendations to give strong recommendations that the appropriate competent authority would be the one located in the home member state of either (A) the largest issuer of all the individual issuers specified in the document or (B) the largest guarantor, if any, of all the guarantors specified in the document, in each case in terms of consolidated total assets. Under option (A), if the issuer has not previously

elected a home member state, then it should be able to do so at that time under Article 2.1(m) of the Directive. Under option (B), if the guarantor has not previously elected a home member state, then the guarantor should be free to choose any member state from among the Home Member States that apply to the issuers and guarantors under the programme to review the prospectus – this would not, however, constitute a home member state election by it under Article 2.1(m) of the Directive since it would not be an issuer.

It is also important that any mechanism for transfer of the approval process (in respect of a particular base prospectus) provides that transfer to the relevant member state is valid until the issuer applies for and has been granted a transfer to another member state. The transfer should not be permanent, since circumstances might change in the future, but the issuer should not have to make an application for transfer each year, which would be unnecessarily onerous, uncertain and costly for issuers.

The Recommendations should also make it clear that if the same terms and conditions can apply for more than one issuer, then those terms and conditions do not need to be repeated for each issuer – instead, a single set of terms and conditions can be described along with a list of issuers that could issue such securities. This would be conducive to achieving an easily analysable and comprehensible prospectus as per Article 5.1 of the Directive.

328 *Do you agree with the proposed recommendations for the base prospectus relating to different securities? If not, please state your reasons.*

Please see our responses above.

329 *Do you agree with the proposed recommendations for the single document compiling more than one base prospectus? If not, please state your reasons.*

Please see our responses above.

332 If issuers are required to post their prospectuses on their websites, they must be able to take measures to avoid breaking the law in other jurisdictions. Including the legend proposed by paragraph 332(a) of the Recommendations, which according to Recommendations 331 appears to be intended to help issuers avoid infringing upon the securities laws of member states and third countries, may well not help issuers in that regard and should not be required. Measures that may help include:

- restricting access to specified persons, for example, by means of password protection of the part of the website on which the prospectus is posted or by using appropriate software to crosscheck certain information that has been input by persons seeking access

to the prospectus, such as postcodes and location and residence information. Such measures, and any other measures that are appropriate, should be permitted;

- including selling restrictions or legends relating to particular jurisdictions

Issuers should be permitted to take (but not required to take, since such a requirement would be beyond the scope of the Recommendations and since the consequent risk would be of the issuer) any such measures, or any other measures that were appropriate, to avoid infringing the laws of member states and third countries.

It is also undesirable that issuers should include their prospectuses (and other official documents under the directives) on their general websites, where readers will rapidly be confused between approved, Directive-compliant materials and other material (such as sales or recruitment brochures) which are not prepared to an appropriate standard. Without guidance on this, many companies will simply include the prospectus as another document on their website, with the result that investors will be confused as to which materials they can rely on. There may even be a risk that, if they do not properly segregate prospectus materials on their websites, the other materials on the website may, for the purposes of the laws of some jurisdictions be assimilated to the prospectus and become part of the offering materials for the securities being issued. Issuers should therefore be permitted to take (but not required to take) measures that help address such issues.

We refer to the legend proposed by paragraph 332(a) of the Recommendations. As mentioned above, legends should not be required or "expected to be included", but simply permitted. As well as being unlikely to achieve its proposed purpose, the legend that has been suggested is inflexible and onerous - it would be inflexible and onerous for issuers to be expected to list all the jurisdictions in which an offer will be made. We therefore believe that if a legend "is expected to be included," it should be permitted to be framed so that it deals specifically with the selling restrictions for particular jurisdictions that the issuer has been advised may be problematic and then provides that the securities are not being and will not be offered in any jurisdiction where it would be unlawful to do so, in accordance with current permitted practice and legal advice.

Given the breadth of the definition of "an offer of securities to the public," clarification on which issuers can legally rely should also be made that posting a prospectus on a website does not constitute a public offer of the securities described therein or any other securities. Otherwise posting the prospectus on a website could well be a continuous offer of those securities for the time that the prospectus is on that website.

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

Please see our response above.

Exhibit

Prospectus Directive

Annual Historical Financial Information Requirements for Prospectuses

Worked Examples

1

Facts	Non-EU issuer of shares / first listing on an EU regulated market / reporting under Third Country GAAP/ Third Country GAAP not equivalent to IFRS listing in 2010 after 2009 financials published
Prospectus Disclosure	2009 financials- restated to IFRS 2008 financials- restated to IFRS 2007 financials- Third Country GAAP
Analysis	- Next published financials will be for 2010, prepared in accordance with IFRS - Second paragraph of item 20.1 requires latest two years of financials disclosed in the prospectus to be comparable with next published financials

2

Facts	Non-EU issuer of shares / first listing on an EU regulated market / reporting under Third Country GAAP/ Third Country GAAP not equivalent to IFRS / listing in 2010 before 2009 financials published
Prospectus Disclosure	2008 financials- Third Country GAAP 2007 financials- Third Country GAAP 2006 financials- Third Country GAAP
Analysis	- Next published financials will be for 2009, prepared in accordance with Third Country GAAP - Second paragraph of item 20.1 requires latest two years of financials disclosed in the prospectus to be comparable with next published financials

3

Facts	Non-EU issuer of shares / already listed on an EU regulated market / reporting under US GAAP in accordance with TOD / US GAAP determined to be equivalent to IFRS / listing in 2010 after 2009 financials published

Prospectus Disclosure	2009 financials- US GAAP 2008 financials- US GAAP 2007 financials- US GAAP
Analysis	- Next published financials will be for 2010, prepared in accordance with US GAAP - Second paragraph of item 20.1 requires latest two years of financials disclosed in the prospectus to be comparable with next published financials

4

Facts	EU issuer of shares / already listed on a EU regulated market / offering shares in 2005 after PD comes into force (July 2005) and after published 2004 financials in accordance with Member State GAAP / Issuer has not published, voluntarily or otherwise, financials in accordance with the IAS Regulation
Prospectus Disclosure	2004 financials- Member State GAAP 2003 financials- Member State GAAP 2002 financials- Member State GAAP
Analysis	- Next published financials will be for 2005, prepared in accordance with IFRS under the IAS Regulation - Second paragraph of item 20.1 requires latest two years of financials disclosed in the prospectus to be comparable with next published financials - However, under Article 35(1), there is no obligation to restate financials until the issuer has published its first consolidated financials in accordance with the IAS Regulation (i.e. early 2006)

5

Facts	EU issuer of shares / listed on an EU regulated market / offering shares in 2005 after PD comes into force and after published 2004 financials in accordance with IFRS / voluntarily adopted IFRS for 2004 financials
Prospectus Disclosure	2004 financials- IFRS 2003 financials- Restated to IFRS[1] 2002 financials- Member State GAAP

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[1] Issuer will have IFRS comparable financials for 2003 pursuant to the IFRS 1 first time adoption rules

Analysis	- Next published financials will be for 2005, prepared in accordance with IFRS under the IAS Regulation - 2003 financials disclosed in the prospectus must be prepared in accordance with IFRS as the transitional provisions in Article 35(1) cannot be utilized because issuer has securities admitted to trading on a regulated market on July 1, 2005 - The second limb of Article 35(1)[2], which applies to community issuers with securities admitted to trading on a regulated market on July 1, 2005, cannot be used as the issuer has voluntarily published 2004 financials prepared in accordance with IFRS
Alternative Analysis[3]	- Voluntary adoption of IFRS in 2004 does not constitute publishing "first consolidated annual accounts in accordance with Regulation 1606/2002" (i.e. IAS Regulation) and therefore transitional provisions in the first limb of Article 35(1)[4] can be used. **OR** - The first limb[5] of Article 35(1) can be utilised instead of the second limb[6] to avoid any restatement obligations, as the first and second limbs are not mutually exclusive. Prospectus disclosure: 2004 financials- IFRS 2003 financials- Member State GAAP[7] 2002 financials- Member State GAAP

6

Facts	Non-EU issuer of shares / already listed on an EU regulated market / listing in 2005 after PD comes into force (July 2005) and after

2 "The obligation for Community issuers to restate in a prospectus historical financial information according to Regulation (EC) No 1606/2002, set out in Annex I, item 20.1, Annex IV item 13.1, Annex VII item 8.2, Annex X item 20.1 and Annex XI item 11.1 shall not apply…..where an issuer has securities admitted to trading on a regulated market on 1 July 2005, until the issuer has published its first consolidated annual accounts with accordance with Regulation (EC) No 1606/2002"

3 We would be grateful if CESR would confirm whether it would adopt this approach instead

4 See Footnote 2, above

5 "The obligation for Community issuers to restate in a prospectus historical financial information according to Regulation (EC) No 1606/2002, set out in Annex I, item 20.1, Annex IV item 13.1, Annex VII item 8.2, Annex X item 20.1 and Annex XI item 11.1 shall not apply to any period earlier than 1 January 2004"

6 See Footnote 2, above

7 Impact of IFRS 1 first time adoption rules need consideration

	published 2004 financials in accordance with Third Country GAAP
Prospectus Disclosure	2004 financials- Third Country GAAP 2003 financials- Third Country GAAP 2002 financials- Third Country GAAP
Analysis	- Next published financials will be for 2005, prepared in accordance with Third Country GAAP, as TOD not in force[8]

7

Facts	EU issuer of shares / already listed on an EU regulated market / Listing shares in 2005 after PD comes into force and after published 2004 financials in accordance with Member State GAAP /
Prospectus Disclosure	2004 financials- Member State GAAP 2003 financials- Member State GAAP 2002 financials- Member State GAAP
Analysis	- Next published financials will be for 2005, prepared in accordance with IFRS under the IAS Regulation - However, under Article 35(1), there is no obligation to restate financials until the issuer has published its first consolidated financials in accordance with the IAS Regulation

8

Facts	EU issuer of shares / first listing shares in 2005 after PD comes into force and after published 2004 financials in accordance with Member State GAAP
Prospectus Disclosure	2004 financials- IFRS[9] 2003 financials- Member State GAAP 2002 financials- Member State GAAP
Analysis	- Next published financials will be for 2005, prepared in accordance with IFRS under the IAS Regulation - Under Article 35(1), there is no obligation to restate financials for any period prior to January 1, 2004

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8 Although it would be available, do not need to rely on Article 35(3), which states that the obligation to restate historical annual financial information does not apply until January 1, 2007 if the issuer has securities admitted to trading "on" Jan 1, 2007 (which we believe should be applied by competent authorities as "before" Jan 1, 2007).

9 Impact of IFRS 1 first time adoption rules need consideration

9

Facts	EU issuer of shares / first listing on an EU regulated market / listing in 2006 / EU issuer is a newly incorporated holding company of a Non-EU company / Non-EU company has historically reported under US GAAP/ EU issuer has been incorporated for less than a year and has not published any financials.
Prospectus Disclosure	We would like to know what annual historic financials would be required in this situation. Would there be any difference if the listing occurred in 2010?

10

Facts	EU or non-EU issuer of shares / first or follow-on listing on an EU regulated market / listing in 2006 / issuer (successor) is a recently incorporated company that acquired a discrete business from another group (predecessor) / predecessor has historically reported under Third Country GAAP / issuer has not prepared financial statements yet but the business has a track record as a discrete part of the predecessor
Prospectus Disclosure	We would like to know what annual historic financials would be required in this situation. Would carve-out financial statements be acceptable where financial statements were reconstructed as if that business had operated on a standalone basis? What GAAP requirements would there be? What audit opinion requirements would there be? We believe that tremendous flexibility would need to be shown by competent authorities to deal with the many complexities that would arise in this type of situation.