SUMMARY

Regarding the three different areas addressed in this consultation paper (RD for sovereign issuers, accounting standards and advertisements), and one issue outstanding from the last consultation round (the proposed RD for closed ended investment funds), we would like to summarise our major comments as follows:

- In our view, the schedule proposed for sovereign issuer should also apply (with some changes) to public international bodies, as well as certain public bodies on national level, given that the general schedules are not suited to describe such entities.
  Regarding the disclosure requirements proposed in this schedule, in our view a more generic approach should be chosen, to allow the competent authority to adopt the amount of information required to the risk of the respective issuer.

- For equity securities, we agree with CESR's proposal to require issuers which will, in their subsequent financial statements, apply a different accounting standard (IAS) to restate their two latest accounts. For issuers of non-equity securities, however, we regard the same requirement as too burdensome; in such cases, the obligation should therefore cover only the latest account. Here, we would not give the interest of investors to obtain comparability within the IAS figures the same weight as for equity; it should therefore be sufficient that investors are able to assess the issuer's current financial situation on the basis of IAS figures. Providing comparability for the future is, in our view, not a legitimate objective, as investors in the secondary markets (for which the following accounts will be relevant) generally can not reasonably expect the same amount of information as those subscribing to newly issued securities.
  In addition, we think that companies need a substantial period of time to prepare themselves to the proposed restatements. Therefore, we would suggest that the proposed requirement should only apply as from 1 January 2007.
  Finally, there should also be a clarification on the question if the issuer's figures can be given on the basis of US GAAP and other important accounting standards.

- Regarding advertising, we do not think that blackout periods should be imposed, as this, in our view, would contradict the principles behind the general prospectus rules.

Also, we do not think that control over advertising activity should be harmonised. As national practices on this field currently diverge to a great extent, such harmonisation would be difficult; we also think that the introduction of harmonised rules is not required by the interests of the European capital market.

Harmonised rules might make sense only in one point: regarding the question how control will be exercised by the home country authority for advertisements to be used in other countries. In particular, it should be made clear specifically that advertisements do not have to be translated in a language accepted by the home country authority for this purpose.

In our view, the provisions of Art. 15 of the Directive leave no doubt that for all procedural and material rules concerning advertising activity for a certain security, the respective home member state has exclusive competence.

- There should not be a separate RD for closed ended investment funds. In our view, the only workable criterion on the basis of which the scope of a special RD for closed ended investment funds could be decided would be a formal one, meaning that such schedule could only apply for entities which are regulated as investment funds in their home country. However, the prospectus requirements for such entities are usually closely related to those for UCITs. We would regard it as preferable if such entities would be governed by the rules in place in those countries, without a harmonisation of such rules, and that all other entities should be subject to the general schedules.

DETAILED DISCUSSION

- **30**: No. We do not think that the general schedules are suited to describe the relevant details of public international bodies. These entities, like states, have a far lower risk of insolvency, so that less information should be required; at the same time, they do not pursue a commercial business, so that most of the information required under the general schedules could not be given for them.

  We would therefore take the view that the sovereign schedule should also cover public international bodies. For this purpose, the proposed requirements should, where necessary, be amended so that they are suitable for such entities (for example, item 3.1 could require disclosure of ”the legal name of the issuer and a brief description of its legal basis and functions”, and items 3.4 and 3.5 should not apply).

  In addition, the scope of this schedule should in our view also be extended to ”non-commercial administrative bodies responsible to states or regional or local authorities or authorities which exercise the same responsibilities as regional or local authorities”, as such entities carry the same remote insolvency risk and do not fit under the general schedules.

- **32**: We agree with the list as such, except for points h and i.

  Regarding these and the specific proposals made in Annex D, we have the following comments:

  3. 2 Given that countries as issuers do not have a contact address or telephone number, the words ”or its governing body” should be added after ”of the issuer”.

  3.4 Given that this schedule will be used by industrialised countries as well as emerging market states, only a ”brief description of the issuer’s economy, including the gross domestic product” should be required here. This would give the competent authority the possibility to adapt the amount of information required under this point to the risk of the respective issuer.

  4 As for 3.4, we think that this requirement should be restricted to a general requirement to give a ”brief description of the issuer’s current financial situation,

including debt, income and expenditure figures, and its development". Again, this would leave room to adapt the amount of information to the specific issuer. There should not be a requirement to present the information "for the two fiscal years prior to the date of the registration document", as the issuer will have these figures available only several months after the expiry of the last fiscal year, and the issuer would not be able to issue securities in the meantime if this requirement would apply.

7 As the accounting requirements for companies do not apply to sovereign and quasi-sovereign issuers, we do not see how statements or reports of experts could be relevant in such cases. This requirement should therefore be deleted.

8 As set out for no. 7 above, experts will not be involved in such issues. The requirement under (b) should therefore be deleted.

For the same reason, it would seem to us that the requirement under (a) relating to financial and audit reports does not make sense for such issues and should also be deleted. As for the budget, this constitutes publicly available information, so there should not be a requirement to put this on display for investors. In order to help foreign investors, the prospectus should only have to specify how information about the budget can be obtained.

- **33**: No.

- **35**: Please see our answer to no. 32 on item no. 4.

- **40**: We do not think that such plans generally have a material effect on the issuer's solvency. This can be the case for certain emerging market countries; in this case, however, disclosure of such plans could be covered under the general requirement for item 4 proposed above (see our answer to no. 32).

- **42**: Please see our answer to no. 42 on item no. 7.

- **56**: We agree with the assessment expressed under no. 49 that reconciliation, in the relevant cases, would require a similar amount of work as restatement, as the issuer has to go through all figures in both cases.

- **57, 58, 59, 60**: We generally agree with the idea underlying CESR's proposals: that EU issuers, when having securities listed on a regulated market, should be obliged to prepare their financial figures so that investors can assess the issuer's situation on the basis of IAS. In our view, this indeed follows from the function of IAS as the accounting standard for all companies which have securities listed, which also lies behind the IAS Regulation. We also agree that the requirement of a restatement on the basis of IAS serves this purpose best.

  As for the number of years for which the accounts should be restated, we would however see a difference between the issuance of equity and non-equity securities. For the former, a restatement of the previous two accounts seems necessary, but also sufficient to us. For this, we would not refer to the need to give investors, in the following (two) years, some historical track record, as investors in the secondary markets (for which the following accounts will be relevant) generally can not reasonably expect the same amount of information as those subscribing to newly issued securities. On the basis of the above described function of IAS, we do however think that investors have to be able to assess at least the current financial situation of the issuer according to IAS, so that the latest account should always be restated.

  For equity securities, we also think that investors should be able to assess the issuer's financial development on the basis of IAS; we therefore agree that the issuer should also have to restate the previous accounts. On the other hand, for non-equity, in particular debt securities, we would regard the same requirement as too burdensome for issuers, and would not give the interest of investors to obtain comparability within the IAS figures the same weight as for equity. In so far, we would regard it as sufficient that investors have the possibility to compare the issuer's (restated) IAS figures with those of already listed companies, and at the same time have, for the issuer, a track record in the previous accounting standard available, with the possibility to compare non-IAS and IAS financial statements in the last year. Such requirement would also be in line with the requirement, if additional securities are issued by the issuer in the following year, to present financial information for the then previous two years, in other words: For the first issuance, the

issuer would not have to restate more than it would not for a further issuance in the following year (and also for its first IAS account, following the first-time adoption rules).

In addition, we think that companies need a substantial period of time to prepare themselves to the proposed restatements. In our view, the time between now and 1 January 2005 (when the IAS Directive, and consequently the proposed requirements, would become effective at least for equity securities) would not be long enough for such preparations. Therefore, we would suggest that the proposed requirement should only apply as from 1 January 2007.

- **69**: We see no reason why EU issuers should be treated differently from non-EU issuers in so far. If such treatment can be justified against investors in securities issued by non-EU issuers – to which we agree -, there is no reason why a different assessment should apply for securities of EU issuers.

  We have two additional comments regarding the proposed requirements: Firstly, as many other market participants, we take the view that the requirement, for non-EU local GAAPs, to be equivalent to IAS, in order to avoid a restatement in IAS, would cause a great deal of uncertainty in the markets, in particular for issuers reporting on the basis of US GAAP. There should therefore either be a clarification, in the near future, that such equivalence exists for US GAAP (and other important accounting standards), or, which would probably be easier in practice, rather to require the accounting standards to be comparable to IAS, or to provide a ”true and fair view” of the company’s financial situation. In any case, we would regard it as important that the requirement corresponds to that appearing in the final version of the Transparency Directive.

  Secondly, whilst we agree with the requirement proposed in Annex E to include, in the cases where the financial information, or the audit, is based on standards which are generally not accepted for the purposes of the Prospectus Directive, a description of the relevant differences (under (b) in both cases), we think that this obligation should be restricted to a ”brief narrative description” and a ”brief explanation”, as a comparison between the standards could prove to be very complex and the prospectus should not be overloaded with technical details which do not help the investor to assess the financial situation of the specific issuer.

- **70**: In our view, the proposed different requirement should also apply for issues of securities which do not have a denomination, in particular derivatives, if they have an equivalent wholesale function.

- **84**: The proposed scope seems reasonable to us.

- **85**: We do not think that blackout periods should be imposed. In our view, such imposition would contradict the principles behind the general prospectus rules. As long as an advertisement does not constitute an offer, it should be allowed even in the absence of a prospectus. By imposing blackout periods, the practical importance of a prospectus would be overestimated; following the publication of a prospectus, investors still have sufficient time available to inform themselves about the securities, even if they have learned about the planed issue (by way of an advertisement) at a time when the prospectus has not been available yet. In contrast, blackout periods are based on a concept according to which the prospectus should function as the only source of information for the investor, and which also includes a requirement to hand out the prospectus (or at least to offer this to the investor) and a prohibition of producing other informational documents about a security. This is not the general concept of the Prospectus Directive.

- **87**: No, we do not think that such control should be harmonised. As national practices on this field currently diverge to a great extent, such harmonisation would be difficult; we also think that the introduction of harmonised rules is not required by the interests of the European capital market.

  Art. 15 (6) of the Prospectus Directive makes it very clear that control over the compliance of advertising activity with the rules laid down in this article, or level 2 provisions based on it, lies exclusively with the relevant home country authority. In our view, this also means that all procedural questions, e. g. concerning a requirement of prior approval of advertisements, can only be determined by the home country authority. Otherwise, the home country authority would have to apply the procedure determined by the relevant host country, which we would regard as practically impossible.

  In addition, we think that Art. 15 (6) implicitly also gives the home country authority the right to determine the material rules specifying the requirements laid down in paragraphs 2 to 5 of Art. 15. Generally under the Prospectus Directive, the competent authority also

has the right to establish implementing rules for the provisions of the directive, if a question is not covered by level 2 or level 3 provisions; this, for example, is totally out of question for rules on the content of prospectuses, even if they are only to used outside the relevant home country.

However, harmonised rules might make sense in one point: regarding the question how control will be exercised by the home country authority for advertisements to be used in other countries. In particular, it should be made clear specifically that advertisements do not have to be translated in a language accepted by the home country authority for this purpose.

- **Closed Ended Investment Fund RD**: In its Consultation Paper published on 12 June 2003 (Ref: CESR/03-162), CESR had, in Annex G to this paper, also submitted a proposal for a ”Closed Ended Investment Funds RD”. We understand that this RD is not contained in CESR’s final advice of 2 October because some questions relating to the scope of such schedule are still under discussion.

  Having considered CESR’s original proposal again, we now take the view that there should not be a Registration Document for closed ended investment funds. Firstly, closed ended investment funds are, under the applicable national company law, often structured in a way that the Prospectus Directive is not applicable to shares issued by such entities. For example, German closed ended investment real property funds usually offer investors to become limited partners in the company, for which participation securities are not issued. Secondly, among the entities to which the Prospectus Directive is applicable (notably stock corporations), it is in our view not possible to determine if they qualify as ”investment funds” based on their individual business. In particular, the distinction proposed under no. 153 of the June Consultation Paper does not seem suitable to us to determine if an entity constitutes a collective investment undertaking. For the latter, the long or short term and active or passive nature of the investments made be the entity does not have any relevance. The decisive element in so far rather is the existence of collective investment, i. e. the acceptance of capital from investors to pursue a common investment policy. Entities which do not have an investment policy which is predefined and binding vis-à-vis investors do not qualify as a fund, but are ”normal” enterprises. Without such investment policy, the disclosure requirements in the proposed RD, which to a large extent relate to such policy, would also not make much sense in practice.

By way of example, we take the view that Real Estate Investment Trusts (REITs), which exist in a number of European countries (France, Netherlands, Belgium), should in no case be covered by the proposed RD, as they do not have a predefined and binding investment strategy, but have the freedom of any company to determine their business objectives; only the tax treatment of these entities and its shareholders depends on the existence of a high percentage of real estate investments.

We therefore think that the only workable criterion on the basis of which the scope of a special RD for closed ended investment funds could be decided would be a formal one, meaning that such schedule could only apply for entities which are regulated as investment funds in their home country. This would mean that in most countries, the only entities for which special fund-related disclosure requirements would apply are investment stock corporations with fixed capital.

However, the prospectus requirements for such entities are usually closely related to those for UCITs. It would be somewhat odd if UCITs, including stock corporations with variable capital, were subject to substantially different requirement than the entities to which a special close ended investment fund schedule would be applicable.

Against this background, we would regard it as preferable if such entities which are regulated as funds in their home countries would be governed by the rules in place in those countries, without a harmonisation of such rules, and that all other entities should be subject to the general schedules.