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Committee of European Securities Regulators
11 – 13 Avenue de Friedland
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Via e-mail

Re: Comments in Response to CESR's Call for Evidence on the European Prospectus Regime (Prospectus Directive and Prospectus Regulation).

I. Introduction

Baker & McKenzie LLP sincerely appreciates the opportunity to provide the Committee of European Securities Regulators ("CESR") with comments concerning the European Prospectus regime. Our comments address the status of convergence of the Member States in connection with employee share plans maintained by non-EU headquartered companies whose equity securities are not admitted to trading on a regulated market in the European Economic Area (the "EEA").

Baker & McKenzie advises over 475 such companies in connection with their employee share plans through attorneys in its Global Equity Services practice, principally headquartered in its San Francisco, New York and Chicago offices. Most of these companies have their common stock traded on the New York Stock Exchange ("NYSE") or one of the markets of the National Association of Securities Dealers Automated Quotations ("NASDAQ") (*e.g.*, NASDAQ Global Select Market, NASDAQ Global Market and NASDAQ Capital Market). On behalf of such companies, we have obtained approval of 6 prospectuses in Belgium and 23 in France under the EU Prospectus Directive 2003/71/EC of the European Parliament and of the Council (the "PD"). We are currently preparing additional prospectuses for filing in Germany and other Member States.

We have organized this Paper around the agenda for the Hearing held on 16 January 2007. Our comments address the prospectus and passporting issues, along with exemptions under Article 4 of the PD. Our focus is on the issues of concern to U.S. issuers offering non-transferable stock options, stock purchase rights, restricted stock and restricted stock units to employees of the company and its EEA-situated subsidiaries. Because divergent views exist with respect to key provisions of exclusions and exemptions in Articles 3 and 4 of the PD, this Paper also addresses non-convergence under these Articles in Paragraph V, below.

II. Background on U.S. Issuer Plans and Securities Laws

In the summary below, we describe the different types of employee share plans typically offered by U.S. issuers on a global basis. This summary explains the limited scope of the

share offerings made by most of the U.S. issuers and is relevant to the concerns these issuers have with regard to the PD as explained more fully below.

A. Employee Stock Option Plans

Under a typical employee stock option plan (hereinafter referred to as "SOP") of a U.S. issuer, the company grants to certain named employees of the company and its subsidiaries options to purchase a number of shares of the company's common stock at a fixed price. The employee typically pays no cash consideration to receive the option grant. The option granted to the employee is typically not transferable except upon death under the law of descent and distribution. The options generally expire no later than ten years after the date of grant.

Due to U.S. accounting and tax rules, the price the employee must pay to purchase the shares of company stock, *i.e.,* the "option exercise price" or "strike price," generally is no less than the fair market value of the U.S. issuer's common stock on the date of grant. For purposes of this price, the fair market value is generally the closing price or the average of the high and low price of the U.S. issuer's common stock on a public (*i.e.,* the NYSE or one of the NASDAQ markets) stock exchange on the grant date.

The options "vest" over a period of time after the date of grant. "Vesting" means that the option becomes exercisable, and that the option right will not be forfeited should the holder cease to be an employee. If the employee leaves employment of the U.S. issuer or its subsidiaries for any reason before the end of the vesting period, the employee generally will forfeit his or her unvested options. In other words, the vesting is based on the employee remaining in the employ of the U.S. issuer or its subsidiaries over the vesting period. Vested options will not be forfeited if the employee leaves the company.

Once vested, the employee can exercise his or her options (and thereby purchase shares) at any time before the option's expiration. If an employee who has remained with the U.S. issuer or its subsidiary for the vesting period exercises his or her options, the employee buys the common stock at the option exercise price, and is then free to keep the stock or sell it.

Depending on the conditions of the individual program, participants in the SOP may pay for the shares of the U.S. issuer's stock with cash, through a same-day sale (or "cashless exercise"), by delivery of shares of the company already owned by the employee or a combination of these methods. Under a cashless exercise program (hereinafter referred to as "Cashless Exercise "), an employee instructs a stock broker to sell the shares issued upon option exercise, to use the proceeds to pay the option exercise price and service fees and commissions, and to remit the balance to the employee in cash. Alternatively, the employee may instruct the broker to sell enough shares to cover the option exercise price plus service fees and commissions. The remainder of the shares is transferred to the employee.

B. Employee Stock Purchase Plans

An employee stock purchase plan of a U.S. issuer is referred to as an "ESPP" or as a Section 423 plan in reference to the U.S. Internal Revenue Code Section under which the tax-favored program is found. Under a typical ESPP, only employees who work for the U.S. issuer or for one of its subsidiaries, which has been designated as eligible to participate in the plan, are offered a right to participate in the ESPP. If the employee agrees to participate, then the U.S. issuer grants to him/her an option or "purchase right" to purchase the U.S. issuer's common stock at a discount. The employee pays no cash consideration to receive the option grant.

The ESPP permits eligible employees who agree to participate to fund stock purchases through voluntary after-tax payroll deductions from salary. Typically, the U.S. issuer will limit the amount that an employee may contribute to 1% to 10% of their salary with an overall cap of U.S. $25,000 worth of stock (based on the market value of the shares at grant) in a given calendar year for favorable U.S. tax treatment. The employee is able to withdraw from the ESPP and obtain a refund of any funds that have accumulated. If the employee does not withdraw as of the date of exercise or "purchase date", the funds are used to purchase shares. The option to purchase shares through the ESPP belongs to the employee participant only; it is not transferable except on death under the laws of descent and distribution.

The purchase price of the shares will be at a discount from the fair market value of the shares of the U.S. issuer's common stock on the purchase date. Typically, the purchase price is the lower of 85% of the fair market value of the U.S. issuer's common stock on the day the option is granted or 85% of the fair market value of the common stock on the day the option is exercised and the shares purchased. The fair market value is generally the closing price or the average of the high and low price of the U.S. issuer's common stock on a public stock exchange on the relevant date.

Options granted under an ESPP typically are six months in length (from the day the option is granted to the day the purchase of the shares is made). The six-month period is known as a "purchase period". The purchase period can be longer than six months or shorter than six months (typically, not less than one month) in length. It is common for U.S. issuers to offer consecutive option grants (*i.e.*, at the end of a purchase period when shares are purchased, an employee is automatically re-enrolled in the ESPP and a new option is immediately granted starting a new purchase period).

C. Employee Restricted Stock and Restricted Stock Unit Plans

Under a typical employee restricted stock and restricted stock unit plan of a U.S. issuer, the company may grant to certain named employees either stock subject to certain restrictions (hereinafter referred to as "restricted stock") or an unfunded promise or right to receive, either in cash or shares of common stock of the U.S. issuer, the value of the U.S. issuer's

common stock (hereinafter referred to as "RS/U's"). The restricted stock and RS/U's granted to the employee are not transferable, except upon death under the laws of descent and distribution.

Restricted stock and RS/U's are subject to certain restrictions. The restrictions on the restricted stock or RS/U's make such awards subject to a substantial risk of forfeiture upon the occurrence of certain conditions. The restrictions that may be imposed include, but are not limited to, a vesting schedule based on the employee's continued employment with the U.S. issuer or its subsidiary or tying receipt of the shares and/or cash to certain U.S. issuer or other performance goals. If the conditions are not met, the employee forfeits the award.

The employees typically do not pay any cash consideration to the U.S. issuer to receive restricted stock, RS/U's, or any shares or cash received as a result of such grants. If a U.S. issuer is incorporated in certain U.S. states, the employees must pay a nominal par value (typically U.S. $0.01 per share) to receive restricted stock.

Employees who have been granted restricted stock (as opposed to RS/U's) typically have all of the rights of a shareholder (e.g., voting rights, dividend rights). Employees who have been granted restricted stock units have a right to shares only upon fulfilling the conditions precedent and have none of the rights of an actual shareholder until the shares are issued to the employees.

III. Obstacles to the Fluid Functioning of the Passport and/or Divergent Practices in Member States that Pose a Risk for the Proper Functioning of the Single Market

A. Is cooperation between competent authorities, especially in the context of the passporting of prospectus, fluid?

In our experience, there has been ongoing cooperation between competent authorities in the passporting of the prospectus. Initially, there were some instances where a delay in the passporting process occurred because the prospectus summary was transmitted from one authority to the next via email and the document was caught in a SPAM or security-screening filter for the competent authority's email. The delays experienced were never more than one to two days, and the issues were immediately addressed by the authorities. However, given these delays, when we request that a prospectus be passported for an issuer, we have taken the additional step of checking with each of the competent authorities where the prospectus has been passported to confirm that the prospectus was received.

In this regard, we commend the practice of some competent authorities in making the approval and passporting of prospectuses immediately available on a public website (*e.g.*, www.fsa.gov.uk, www.amf-france.org, www.cmnv.es). We have found these websites an excellent resource to confirm that the filing and passport process has occurred without delay.

B. Difficulties with the Functioning of the Base Prospectus and Final Terms System

1. The Nature of Employee Share Plans and the Prospectus

The key difficulties we have experienced with regard to the prospectus have been with regard to determining the disclosure necessary for an employee share offering of a U.S. issuer in light of the fact that the PD and Commission Regulation (EC) No. 809/2004 of 29 April 2004 (the "Prospectus Regulation") were drafted with a broader public securities offering in mind. We have found the competent authorities in Belgium and France to be especially good at working out the details of what is necessary to include in the prospectus because such authorities were familiar with U.S. issuers' employee share plans, since under the securities regime in place in those countries prior to the implementation of the PD, a prospectus was required for such offerings. Other Member States have had more difficulty in determining the requirements for the prospectus (as well as any annex requirements) to the employee share offerings of U.S. issuers. The result is that what may be required for a filing of a prospectus for an employee share offering in France or Belgium may be different than what would be necessary if a filing for the same program were made in Poland or Germany.

The differences may be a simple matter of differences in the formatting and organization of the information contained in the prospectus. For example, we have been asked by the competent authority of one Member State to include three full years of an issuer's annual reports (10-K) in the prospectus, although this results in substantial duplication of the accounting information contained in the prospectus, whereas in our filings in France we have had to include at most two annual reports, in order to provide three full years of balance sheet information as required by Item 20.1 of Annex I of the Prospectus Regulation. Although such issues do not result in differences in the substance of what is disclosed, they could lead to confusion among employees who are offered rights to shares. An employee may have received one form of disclosure when the individual was employed at a company that filed a prospectus in France, but a different form of disclosure when the individual changes employment and the company's prospectus is filed in a different Member State. Clearly, a more uniform form of disclosure for employee share plans, along the lines of what has been accepted by the competent authorities in Belgium and France would be useful to employees.

The differences also may be a matter of what documents may be incorporated by reference and how those documents are incorporated. We have had some competent authorities take issue with the summary to the prospectus because it referenced financial information concerning the issuer which was included elsewhere in the prospectus, in the exhibits or in other documents (in particular, parts of the U.S. issuer's 10-K or 10-Q). Other competent authorities have not raised an issue with the inclusion of such references, provided that the employees had access to the material that was cross-referenced in the summary.

2. Certification Requirements

We also have seen differences in what representations must be made in connection with a prospectus filing and who must make such representations. For example, in Belgium, the prospectus includes a responsibility statement which provides that to the best of the issuer's or its administrative body's knowledge, the information contained in the prospectus is in accordance with the facts and there are no omissions likely to affect its import. The Belgian Banking, Finance and Insurance Commission (the "BFIC") does not, however, require any certification statement from a member of the issuer's board of directors or corporate officer.

In France, on the other hand, the *Autorité des marchés financiers* (the "AMF") has required the consent of the U.S. issuer's independent registered public accounting firm to the reference in the prospectus filing to excerpts of the issuer's 10-K and 10-Qs reviewed by such accounting firm and a certification statement signed by the U.S. issuer's chief financial officer or chief executive officer. The certification statement provides that the information contained in this prospectus fairly reflects the current situation of the issuer and that no material omission has been made. Both the accounting firm's consent letter and the officer certification statement must be filed in their original form with the AMF.

The need to include the additional signed letter/statement for the French filing has been difficult for issuers. Before such documents can be executed, the U.S. accounting firm and the U.S. issuer must ensure that appropriate authorizations and procedures are in place under U.S. corporate and securities laws and accounting practices to permit the individuals to sign the documents. Often additional engagement letters must be signed between the accounting firm and the issuer to ensure that appropriate authority is obtained for the accounting firm to take such acts on behalf of the issuer.

It would be a more streamlined process if the competent authorities could agree on one form of responsibility statement under Article 6.1 of the PD, preferably without specially executed authorizations by the accounting firms and officers of the issuer.

3. Fees

Each competent authority has determined a fee schedule for the filing of a prospectus. Because of the nature of the employee share offerings (e.g., ESPP offerings are often ongoing, options are subject to vesting schedules), there has been some confusion as to how to calculate the fees and when the fees should be due.

In addition, some Member State competent authorities (for example, the BFIC) have required a special fee guarantee letter be signed by the Belgian affiliate of the U.S. issuer before a prospectus will be approved. This practice can delay the prospectus approval process because the issuer has to work with a related-company to obtain the necessary guarantee. To the extent that such guarantee letters are necessary, it seems that the letter should be issued by the issuer filing the prospectus, rather than any affiliated company.

C. *Passporting of Prospectuses*

1. Publication and Dissemination of Advertisements

In connection with the passporting of a prospectus, some Member States have required that the issuer abide by the rules of the host country with regard to the publication and dissemination of advertisements and these requirements have differed from the requirements of the home Member State where the prospectus was filed. We have included a discussion of these issues under this Section, rather than under Section III.D (Publication of the Prospectus) below, because these additional requirements affect the ability of the issuer to smoothly passport into a Member State and to offer the share program in all jurisdictions at the same time. Accordingly, there is not a fluid ability to passport a prospectus from one jurisdiction to another as intended under the PD.

For example, in Austria, the competent authorities require that the issuer follow the same procedures with regard to the publication of the prospectus, regardless of whether the prospectus is filed in Austria or it is filed elsewhere and passported into Austria. Under Austrian rules, the issuer offering an employee share plan must chose from the publication methods listed in Article 14.2 (*e.g.,* in electronic form on the issuer's website or in printed form to be made available free of charge to the public). In addition, the issuer must (according to Section 10, paragraph 4 of the Austrian Capital Market Act) publish an advertisement in the Official Gazette (*Amtsblatt zur Wiener Zeitung*) or alternatively in a newspaper with a sufficiently wide circulation. The advertisement indicates where the public may find a copy of the prospectus.

Similarly, in Germany, the *Bundesanstalt für Finanzdienstleistungaufsicht* (the "BaFin") requires that an issuer publish the prospectus, (which is typically done by publication of an advertisement in a German newspaper announcing availability of the prospectus). The BaFin takes the view that this requirement applies even to a prospectus that has been approved in another member state and notified to the BaFin under the EU passport regime, based on the argument that an approval by another Member State replaces only the BaFin approval, but nor any other formalities. Contrary to the view of the regulators in France and Belgium, the BaFin does not dispense with the publication requirement (as opposed to purely internal communication to eligible employees), although the offering is limited to employees. The requirement to publish an advertisement in Germany delays the issuer's offering of an employee share plan in Germany by an additional day because the advertisement in the German publication may not occur until the prospectus is filed and the summary is passported into Germany. The offer may not take place until the advertisement has been published.

For U.S. issuers offering share plans, it is particularly important to make offerings of rights to participate in an employee share plan to all employees on the same day. As a result, if the issuer must publish an advertisement in an Austrian or German publication and if that

publication delays the issuer's ability to offer the plan to employees in Austria or Germany by a day or two, the result is not just a delay for those two countries, but a delay of the offering to all employees worldwide.

2. Fewer than 100 Persons Exemption (Article 3.2(b))

We have included a more detailed discussion of the issues surrounding offers to fewer than 100 persons below. Generally speaking, if an issuer's offer is addressed to fewer than 100 natural or legal persons per Member State, the obligation to file a prospectus doe not apply, and for most Member States, if an issuer has filed a prospectus, it is not required to passport the prospectus into a Member State where the offer will be made to fewer than 100 persons. However, we include a discussion of the exemption in this Section because there are a few Member States that take a different view, and the interpretation of the exemption by these Member States has led to complications in the passporting process.

For example, although a company has fewer than 100 employees in Austria, the Austrian competent authority takes the position that it is necessary to passport a prospectus into Austria if an issuer offers equity awards to 100 or more employees in any Member State. As a result, any time a U.S. issuer prepares a prospectus in connection with an employee share offering, it must passport the prospectus into Austria, although it may have only one employee who is offered the right to participate in the share plan in Austria.

The Czech Republic and Hungary took a similar view to that of Austria. However, they have since changed this view and no longer require passporting if there are fewer than 100 employees in the Czech Republic or Hungary offered shares, even if there are 100 or more employees offered the right to participate in the plans in other Member States.

3. Special Fees

In addition to fee issues where a prospectus is filed, there are some fee-related issues in Member States where a prospectus is passported, and these fees have affected the fluid functioning of the passporting process.

In Poland, for example, there is a requirement that an issuer who files a prospectus in Poland or passports a prospectus into Poland pay a registration fee of 0.06%. The 0.06% fee is based on the value of shares actually purchased by employees in Poland during the period at issue. Given the nature of an employee share program, it has been difficult to determine the amount of the fees and when they are due, and this can disrupt the issuer's ability to passport the prospectus into Poland.

4. Licensed Brokers and Financial Intermediaries

Some Member States impose requirements beyond those established by the PD, such as the requirement to use a broker or financial intermediary licensed under local law in connection

with any share offering, including a limited offering of shares to employees, *e.g.,* Italy, Hungary and Poland. These requirements apply to issuers who are filing prospectuses in the country and to those who have filed elsewhere and are passporting into the country with the licensed broker requirements.

For example, in Poland, the issuer must designate a stock plan broker/dealer licensed in Poland for offers to more than 100 individuals. This need to designate a stock plan broker/dealer for offers in Poland applies whether issuer files a prospectus, passports in or relies on employee share plan exemption to the PD. The manner of publication of prospectus or notice impacts broker/dealer's duties under Polish law.

Similarly in Italy, on May 10, 2004, the *Commissione Nazionale per la Società e la Borsa* (the "CONSOB") issued Ruling DIS/4045379 addressing the activities of securities sales in the context of employee plan offerings. In this Ruling, the CONSOB took the view that an (Italian or foreign) issuer cannot directly sell its shares to the Italian employees of its controlled companies, but it must avail itself of a financial intermediary authorized/licensed to operate in Italy. This requirement to involve a licensed financial intermediary applies where the issuer files a prospectus in Italy, passports into Italy or relies on the employee share plan exemption to the PD.

Since this Ruling, the CONSOB has recognized certain exceptions to the financial intermediary requirements for issuers making employee plan offerings. First, the CONSOB has said that if options are restricted to a Cashless Exercise Alternative 1, as previously described, the CONSOB will not consider the offering to be a placement of shares by the issuer in Italy. Accordingly, no licensed financial intermediary needs to be involved with the exercise or sale of the shares. Second, if the issuer offers restricted stock units to Italian employees and the units require no cash consideration payment from the employees, such units will likewise not be subject to the financial intermediary rules in Italy. However, issuers who offer ESPPs generally must involve a licensed Italian financial intermediary to place shares with employees of their subsidiaries in Italy.

In Hungary, a licensed Hungarian dealer needs to be designated when a prospectus is filed or when an issuer passports a prospectus into Hungary. The dealer must serve as a process agent or intermediary between the Hungarian residents and the issuer. As a process agent, the dealer is in charge of collecting any forms or agreements from the employees wishing to participate in the offer and passing them along to the issuer.

Where they apply, such additional requirements undermine the fluid, single market concept that the PD is intended to promote. These Member States should be encouraged to eliminate these extra-PD requirements for offers subject to the PD.

5. Reporting

Some Member States had laws in place prior to the imposition of the PD that required issuers to prepare and file annual reports with the competent authority. For the most part, these reporting requirements were eliminated after the PD was implemented in the country. However, there are a few countries that continue to have annual reporting requirements that apply to issuers who have filed a prospectus in the country and those who have filed elsewhere and passported into the country. These annual reporting requirements disrupt the single prospectus filing approach. Further, these reporting obligations are particularly challenging to U.S. issuers offering employee share programs because the limited nature of the offerings and ongoing nature of the employee share programs.

For example, in Italy, an annual report must be filed at the end of each calendar year as long as an offering remains outstanding pursuant to CONSOB Ruling DIS/99088087 of 30 November 1999. The report must include the number of purchasers and the number shares purchased during the calendar year. A final report must be filed within 30 days of the end of any offer.

For U.S. issuers offering employee share plans, the annual Italian report is complicated by the fact that not all employee share offerings are subject to the PD. As mentioned above and explained more fully below, if options are restricted to a Cashless Exercise Alternative 1, they do not need to be reported in the annual report because they do not qualify as a solicitation of public savings under Italian securities regulations. Accordingly, the issuer must track and report shares purchased through options not restricted to cashless exercise, as well as any shares purchased under an ESPP or similar program.

Likewise, we understand that there are ongoing reporting obligations in Hungary. With regard to prospectus filings by U.S. issuers that are passported into Hungary, we understand that the company's 10-K, 10-Qs and 8-Ks may need to be filed on a regular basis with the competent authority in Hungary. The issuer is also required to make an immediate extraordinary information disclosure to the Hungarian authorities if there is a significant corporate event which affects the structure and management of the company.

Finally, we understand that, after passporting a prospectus into Poland, the issuer is required to submit a sales report to the Polish securities regulators (KNF) within 14 days of the end of each subscription period for the securities subject to the offering. The report has to provide information on the issuer, the Polish subsidiary(ies), the shares offered by the issuer, the shares purchased by employees in Poland during the applicable period and the purchase price of the shares.

D. Publication of the Prospectus

The publication requirements have differed among the competent authorities.

In Belgium and France, the competent authorities have been mindful of the nature of the employee share plan offering and have focused on the publication of the offering to eligible employee. The BFIC has requested that both a French and Dutch translation be made available to employees at the issuer's Belgium subsidiary, along with the translations of the tax consequences for the employees in Belgium. Additionally, the prospectus and the translations of the summaries and of the Belgian tax consequences must be posted on the issuer's intranet site where the employees can easily access copies.

In France, the AMF has required that a notice, in a form approved by the AMF, be provided to all employees offered the right to participate in the employee share plan, including employees in France and any other country where the prospectus is passported. The notice informs employees of the approval of the prospectus and of its availability. The notice generally is provided in French (for French employees) and in English (for all other employees). The notice also must state that prospectus will be made available at the office of U.S. issuer, as well as at the offices of the issuer's EU subsidiaries in the passport countries. The notice can be sent to the employees by email.

E. Language of the Prospectus: Problems with Related Translations

We have not experienced issues with regard to the translation of the prospectus or the summary of the prospectus that is passported. Generally speaking, because information from a U.S. issuer's financial disclosure mandated by the rules of the U.S. Securities and Exchange Commission (the "SEC") is included in the prospectus and summary, the U.S. issuer's independent registered public accounting firm has wanted to review the translations to ensure their accuracy. In addition, the AMF requires a certification from the French affiliate of the issuer's independent registered public accounting firm whenever the ESPP offering is considered to be a public offering in France under the AMF's rules, resulting in additional expense for the issuer.

F. Exemptions from the Obligation to Publish a Prospectus (Article 4 of the PD): Securities listed on an EU exchange for purposes of employee share plan exemption under Article 4.1(e) and requirements applicable to issuers relying on the exemption

Article 4.1(e) of the PD provides an exemption for employee share plans of issuers whose securities are admitted to trading on an EEA regulated market, provided that the issuer "makes available" certain information about the plan and the offer.

The term "securities" as defined in Article 2.1 includes transferable securities within the meaning of Article 1.4 of Directive 93/22/EEC (with the exception of certain money-market instruments), including bonds and other forms of securitized debt that are negotiable on the

capital market. Therefore, companies with debt securities listed on an EU-regulated market should be able to claim an exemption from the PD, even though their shares are not so listed. Unfortunately, however, there is a lack of convergence on whether debt listings are sufficient to claim exemption from the PD under Article 4.1(e), with countries such as Austria, Finland, Germany, Poland, Portugal, and the United Kingdom taking the view that debt listing is sufficient, while other countries, such as the Netherlands, Spain, and Sweden having the opposite view. Issuers that do not satisfy any other exclusion from the PD or exemption from filing prospectus under the PD risk being considered to have violated the PD by Member States that do not consider debt listings as securities for purposes of Article 4.1(e).

In addition, it is not clear what is meant by a "listing" of securities. For example, is self-listing required, or is listing by third party sufficient? This lack of clarity invites differing interpretations among the Member States.

Article 4.1(e) requires issuers to "make available" information about the offer. This requirement has been interpreted differently among Member States, with some requiring a disclosure filing and others requiring various methods of publishing information about the offer. For example, the Czech Republic requires issuers to file a disclosure document with or provide a copy to regulators; Belgium requires issuers to file a tax disclosure document, and Austria and Germany require issuers to publish an ad in newspaper.

IV. Usefulness of CESR's Q&A on prospectuses and suggestions for improvement.

CESR's July 2006 Q&A (Ref. CESR/06-296d) was very helpful to advisors and issuers as it provided guidance on CESR's interpretation of key provisions of the PD and its views on the proper interpretation of key PD provisions. Please see our comments in this regard under Section V below. Additional Q&A's addressing CESR's views on issues where divergent opinions continue would be helpful.

V. Other -- Key Terms and Provisions Impacting Availability of Exclusions and Exemptions under Articles 3 and 4 of the PD

Divergent interpretations of the meaning of key provisions of certain exclusions and exemptions Articles 3 and 4 of the PD undermine the ability of issuers to rely with confidence on these exclusions and exemptions across the EU. In many instances, an exclusion or exemption is available to an issuer in the view of some Member States, but conflicting views of other Member States precludes consistent reliance on the exclusion or exemption throughout the EU. As a result, some issuers have suspended operation or deferred implementation of employee share plans in the EU or taken other measures to limit offerings under employee share plan in the EU, rather than risk violating the PD in one or more Member States.

We have provided examples below of Member States that we understand to have adopted divergent positions. The views of Member States on key provisions of the PD are fluid, and thus some of the views cited may have changed.

A. Divergent Views as to which Forms of Equity Securities are Subject to the PD

Stock Option Awards. Article 2.1(a) of the PD defines "securities" governed by the PD as "transferable securities." Unfortunately, there is a lack of convergence among a number of Member States as to which forms of securities fall within this category. For example, many countries have taken the position that nontransferable stock options are not subject to the PD. However, where the options are granted over shares in a publicly traded company, some Member States view the offer of stock options and subsequent exercise of the underlying shares (which are tradable) as a single transaction. We understand that Germany, Ireland, Italy, Netherlands, Poland and Hungary are among the countries that take this position.

At least one Member State has carved out an exception to its single transaction theory where the method of exercise is limited to a cashless exercise, *e.g.,* Italy.

Free Shares: Restricted Stock and RS/U's. A number of Member States are of the view that restricted stock and RS/U's are by their nature non-transferable and thus outside the scope of the PD, while others take the position that these forms of award are "transferable securities" but fall outside the scope of the PD if offered for no consideration. As previously mentioned, U.S. issuers generally do not require the employee to put up any of his or her own money for restricted stock or RS/U's. However, some Member States have taken the position that "consideration" includes services performed by the employee, *e.g.,* the Netherlands.

We note that in the July 2006 Q&A, CESR provided helpful guidance with respect to this issue in discussing the views of the Commission Services as to the correct legal basis for the conclusion that no prospectus should be required in connection with free offers. The view of the Commission Services is that there is no offer to the public where there is no element of choice on the part of the grant recipient to accept or reject the offer. Where there is such a choice, the offers of free shares are excluded from the PD under the Euro 2.5 million threshold in Article 3.2(e) and subject to the exemption for offers of less than Euro 100,000. The Commission Services left open the possibility of a different conclusion where there is "hidden consideration" underlying the offer of free shares, but indicated that hidden consideration does not exist unless the shares are expressly offered in place of another quantifiable financial benefit.

Following issuance of the Q&As, the BaFin abandoned its view that consideration can include services and stated that it would follow the view that offers of free shares are not a public offer of securities for purposes of a prospectus filing under the PD as long as they are offered for no cash consideration. We hope that other Member States with divergent views on this issue will be persuaded to bring their views into line with those expressed by CESR.

One area of concern relates to restricted stock and RS/U offerings where payment of an amount equal to the par value of the shares is required in exchange for the shares. Because par value in relation to common shares of a U.S. issuer is a nominal amount that bears no relation to the market price of the shares, payment of par value should not trigger a prospectus filing. Nevertheless, payment of par value must be disclosed to and checked with different regulators and could invite different views among Member States as to whether the offer is a "public offer."

ESPPs: To date, the majority of Member States have taken the position that ESPPs, which typically afford participants an option to purchase shares at a favorable price, are transferable securities subject to the PD, rather than nontransferable options. Because these plans are often the preferred vehicle used by companies to offer share ownership at favorable terms to all or most employees in an organization, companies offering these plans typically cannot take advantage of exclusions and exemptions under Articles 3 and 4 of the PD. This has resulted in the discontinuance in the EU of existing ESPPs and deferring implementation of new plans.

At least two Member States have begun to look more closely at the nature of these plans to see whether they might, in fact, fall outside of the PD. The United Kingdom has indicated that ESPP type plans meeting certain requirements may be regarded as nontransferable securities for purposes of the PD. The competent authority of Spain has advised that an ESPP should be not be subject to a prospectus filing requirement in Spain *per se*, because the purchase rights are not freely transferable

B. Divergent Views as to the Application of Exclusion for Offers where the Total Consideration is less than Euro 2.5 Million (the "Euro 2.5 million exclusion") under Article 1.2(h)

Another area of non-convergence is the application of the Euro 2.5 million exclusion under article 1.2(h). Some Member States differ as to the geographical scope over which awards are valued for purposes of determining whether the Euro 2.5 million limit is exceeded. In addition, some Member States have adopted divergent views that restrict availability of the exclusion.

Definition of "Consideration." As discussed above in Paragraph A, further convergence is needed on this point.

Geographical Scope. While the prevailing view among Member States and the position taken by CESR is that the Euro 2.5 million exclusion should be applied on an EU-wide basis, some jurisdictions apply the exclusion on a per Member State basis, e.g., France, the Netherlands and Spain.

Although applying the exclusion on a per Member State basis may, at first glance, seem helpful to companies because it easier to qualify for the exclusion on this basis, inconsistent views as to the correct geographical scope creates uncertainty and confusion among companies that offer share plans in Member States with conflicting views. For example, assume an issuer ("Company A") offers transferable securities in several Member States in the amount of Euro 3.0 million, with Euro 2.4 million being offered in the Netherlands. The other Member States apply the exclusion on a pan-EU basis. Based on the extent and nature of Company A's business ties to the Netherlands, Company A prefers to designate the Netherlands as its home Member State. If, however, Company A designates the Netherlands as its home Member State, the Dutch competent authority may not accept a prospectus filing. Short of approaching the competent authority in each of the other Member States in which the company offers the plan for a determination as to what filings, if any, must be made to comply with the notice and disclosure requirements of the PD as adopted by each, the company risks being considered to be in violation of PD in one or more of these Member States.

If, on the other hand, if Company A convinces the Dutch competent authority to accept a prospectus filing, Company A cannot be assured that other Member States would honor the prospectus filing with the Dutch competent authority because the prospectus filing was not required under the PD as adopted by the Netherlands.

In summation, companies are left to predict when and whether these jurisdictions will decide to apply the limit on an EU-wide basis and the retroactive implications of such a change.

Divergent views on applicability of the Euro 2.5 million exclusion. Many companies that have not exceeded the Euro 2.5 million exclusion cannot rely on this exclusion in Germany or Sweden due to their interpretations of Article 1.2(h), which are not supported by the language of the PD. For example, Germany is of the view that the exclusion is available only to certain types of financial institutions. In addition, Sweden imposes an exclusion limit of Euro 1.0 million rather than 2.5 million.

Issuers who offer share plans in these countries and who otherwise would be able to rely on this exclusion across the EU, are left having to decide whether to undertake a costly and time-consuming prospectus filing that ultimately will be determined to have been unnecessary.

C. Divergent Views on Application of Exemption for Offers to Fewer than 100 Persons (the "Small Offering Exemption")

As previously mentioned, Article 3.2(b) exempts from publication of a prospectus offers to fewer than 100 natural or legal persons per Member State, other than qualified investors. CESR's view and that of most Member States is that this exemption applies to offers within a given Member State based on the number of offerees in that Member State.

In the case of ESPPs, it is not clear how the number of offerees should be counted for purposes of this exemption. Should the number of employees eligible to participate be counted, or should issuers look only at employees who have enrolled in the plan? Share purchase plans have varying enrollment and/or purchase periods, typically ranging from annual periods to monthly enrollment. It is not clear how frequently an issuer is required to count the number of offerees where there are multiple enrollment and/or purchase periods within a given 12-month period.

D. Issues Concerning the Merger Exemption

The PD may have an effect on business combination transactions exclusively involving U.S. issuers, where one or both of the parties have previously made securities offerings in Europe pursuant, and where neither of the issuers has securities admitted to trading on a regulated market in the EEA. Typically, in a business combination transaction, the acquirer may offer its securities as merger consideration to the shareholders of the target company. It may be the case that the target company's employee' options or other equity rights will be converted into rights over the acquirer's shares. Such business combination transactions are generally documented in the United States in a prospectus on Form S-4 filed with the SEC, which is the form of prospectus used for the registration of securities issued in business combination transactions and exchange offers. European shareholders of the target company, just like their U.S. counterparts, will generally be offered securities of the acquirer in connection with the business combination and accordingly they must, by virtue of U.S. law, receive a copy of the prospectus on Form S-4.

Article 4.1(c) of the PD grants an exemption from the requirement to file a prospectus where the issuer has provided a document containing information equivalent to that which must contained in the prospectus. However, it is not always clear what information must be provided. For example, AMF Instruction n° 2005-11 of December 13, 2005, which covers the other exemptions in Article 4 of PD, does not specify the nature and content of the information required where the securities are being issued pursuant to a merger but not admitted for trading; only the latter case is covered in Article 12 of the Instruction, pursuant to Article 4.2(d) of the PD.

We believe that a U.S. issuer offering securities where the consideration is in excess of Euro 2.5 million to European employee shareholders of the target company by means of a merger may use the S-4 prospectus filed with the SEC and sent to the European shareholders to provide the information required by the PD. Such an interpretation would be consistent with the approach taken by the SEC under Rule 802 under the U.S. Securities Act of 1933, as amended, where a foreign private issuer with fewer than 10% of its shares being held in the United States is entitled to use the local informational documents.

VI. Conclusion

We would like to thank CESR for the opportunity to present our views on the issues discussed above. The PD offers the opportunity for U.S. issuers to offer their securities to employees in the 30 EEA jurisdictions using a single document and subject to review of only the home Member State competent authority. But the promise offered by the PD is often illusory, because of the additional burdens imposed by the host Member States notwithstanding the clear statement in Article 17.1 that "authorities of host Member States shall not undertake any approval or administrative procedures relating to prospectuses." We believe that standardization of the passporting practice as well as additional harmonization on the other areas of non-convergence noted above would greatly facilitate and encourage offerings by U.S. issuers to their European employees.

Finally, we note that in a time of increasing convergence between the U.S. and EU regulators as evidenced by the roadmap on mutual recognition of accounting standards and the Memorandum of Understanding that has just been entered into between the SEC and the College of Euronext Regulators in light of the impending merger of the NYSE and Euronext, efforts to facilitate employee equity plan offerings should be on the agenda of the trans-Atlantic dialogue between CESR and the SEC.

Respectfully submitted,

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