

## **Bank of New York Response**

Dear Sirs

Our attention has been drawn to the CESR proposed prospectus directive and your request for comments on the Consultation Paper.

We are pleased that you invite consultation on this important matter and wholeheartedly support the professional development of the wholesale European Capital Markets that operate in a professional, transparent manner.

The following comments are made specifically with regard to the proposed directives commentary on the subject of the use and role of Depositary Receipts. These comments therefore relate to the Addendum to the Consultation Paper and Annex 5

We have included as attachments samples of our standard deposit agreements that are commonly found between ourselves and issuers. These agreements are typically construed under NY Law or English Law.

Together with our internal counsel The Bank of New York has looked at the draft paper and we summarise the main points with the attached commentary. As a general matter "Depositary" and "Depositary Receipts" are usually spelled with an "a" not an "o".

In the "Addendum to the Consultation Paper":

We agree that disclosure practices relating to DRs in general consider the issuer of the underlying shares to be of the utmost importance. We do not believe any level of detail of disclosure relating to the depositary itself is of importance to the investors (other than mere details such as name, address, New York banking corporation as may usually be found). This is consistent with the approach the US SEC and The London Listing Authority take when ADRs or GDRs are listed on their stock exchanges

We do not understand "paragraph 101" or question 104 on page 21 - what "right of recourse" against the depositary are CESR referring to, and what type of additional disclosure would be contemplated? The depositary serves an agency role, primarily issuance, stock transfer, registrar, paying agent and cancellation agent etc. Disclosure on the depositary itself should be extremely minimal, whether or not there is a right of recourse against it. In the US and UK there is always the ability to sue the depositary. We believe that at all times the investor is interested in the assets of the issuing company as represented by the depositary receipt mechanism.

In "Annex 5"

Please see below the "Description of ADRs" section that is commonly used by issuers of the underlying securities in US law governed deposit agreements for their prospectuses. We hope that this standard market place practice disclosure may be helpful in crafting your directive. There are subtleties of difference between NY law and UK law governed agreements.

English Law ( multicurrency)

(See reference document 1: BNY standard form deposit agreement - DTC Euroclear, multicurrency, plus Conditions(v1).DOC)

NY Law

(See reference document 2: Model-ADRDsc.doc)

English Law ( dollars)

(See reference document 3: BNY - standard, no multicurrency, plus Conditions(v1).DOC)

IX A.1.. Depositaries do not normally have a "registered" office - generally we refer to our offices as "principal executive office" and "corporate trust office". We would suggest changing "registered" office to principal office.

XI.1 What "rules" governing the issue of DRs / and place of publication are being referred to we believe these perhaps you are referring to what the UK LA refers to as Listing Rules? The terms and conditions of the DRs are governed by the Deposit Agreement - is that what you mean? It is not "published" either, unless you mean filed with a securities exchange on which they trade. In the US all agreements are documents of public record available at the US SEC, in the UK deposit agreements are typically available on display or by request for a period of 14 days at the issuers registered office or a place within the City of London or an approved address (determined by the UKLA )

XI.2 What are you referring to at the end re: "share in profits and any liquidation surplus"? This does not seem applicable. Again, the sample prospectus disclosure describes to a certain extent voting, dividends and distributions and rights offers, termination etc. If you are looking for anything different we would need to discuss in greater detail.

XI.3. This would not be applicable - there are no Bank guarantees or the like.

XI.6 and 7 These seem to be covered elsewhere in the Annex (trading, markets etc.) in the Proposals. Presumably they would be included in the Offering Document where appropriate and would not need to be included multiple times. It seems less appropriate to have these items here in the Depositary Receipt discussion.

X1.9 Is this meant to refer to "governing law"? Either NY or English law is typical. There is no "legislation" per se that would govern creation of DRs.

We hope these comments are helpful and we the undersigned are available to discuss any of these points together with you and the UK Listing Authority as appropriate

With kind regards

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