SUMMARY

Deutsche Bank welcomes the opportunity to take part in the consultation of CESR's advice on the Level 2 Implementing Measures for the proposed Prospectus Directive. As the implementing measures will have a significant impact on the future capital markets practice, we believe it is important to carefully consider the practical implications of the proposed measures. Before giving our comments in detail, we should like to make some more general remarks.

1. The proposed requirements do not yet reflect an appropriate level of disclosure for all the different kinds of securities.

- To start with, the proposed Registration Document (RD) and Securities Note (SN) for equities has been drafted using the IOSCO standards as a minimum level. This contradicts the relevant provision of the Commission's revised proposal. In the Commission's first proposal's it was intended to use the IOSCO standards as a minimum level. Against this concept, massive objections have been raised. As a result, the revised proposal provides that the implementing measures are only to be *based* on standards like the ones developed by IOSCO. It also contradicts the fact that the IOSCO standards have been drafted with the aim to create a maximum harmonisation, i. e. to create disclosure standards acceptable to all national authorities by gathering the requirements in effect in all countries, and so to allow – but not to force - issuers to use a single prospectus as the basis for an offer in different countries.

  Using the IOSCO standards as minimum requirements would put a heavy burden especially on smaller issuers, and in many cases prevent them from the issue of securities.

  What would be required in so far would be that CESR itself determines a level of disclosure that is regarded as appropriate for equities. This level should be lower than the "maximum" disclosure level required by the IOSCO standards. Subsequently, the standards laid down in Annex A should be amended accordingly.

- The proposed RD and SN for debt securities have been created by deleting certain items from the IOSCO standards for shares. Whilst no objection can be raised against this method of creating the requirements, it seems that the appropriate level of disclosure for such securities had not been determined beforehand. In the case of debt securities, the assessment of the investor which the prospectus information is meant to allow is that of the risks that the issuer becomes unable to fulfil its obligations. Only information which directly contributes to this assessment should be required for the prospectus. For example, information on the issuer's investments, principal markets and property plants and equipment does under normal conditions not give investors further guidance to be able to make an assessment about the issuer's insolvency risk. Again, the proposed requirements should be amended on the basis of an appropriate level of disclosure.

- For derivative securities, although there is no principal difference in the risk that an investor has to assess compared to debt securities, it has to be taken into consideration that such securities are almost always issued by banks. Due to the supervision exercised over banks, these have a lower risk to become insolvent than other companies. This should be reflected in the disclosure requirements. Accordingly, the prospectus requirements should be lower than those for debt securities. Furthermore, the relevant RD should, due to the reason for the lower requirements, correspond to that for securities issued by banks, which, at the same time, would contribute to the urgently needed limitation of the number of disclosure standards applying (see next point).

No difference should be made between guaranteed and non-guaranteed derivative securities, as the issuer risk is exactly identical in both cases (insolvency), and such a differentiation would cause huge practical difficulties. A differentiation would also seem unjustified vis-à-vis the fact that a capital guarantee within a derivative structure is usually equally financed on the basis of hedging transactions as the pure derivative features within such structure. If any differentiation in the disclosure requirements can be justified, then only one which is based on the question whether the proceeds from the issue of a security are used to finance hedging transactions, or if they are used to fund the company's general or special business activities; in the latter case, the purpose of the issue would be the same as for a bond. Even then, however, higher disclosure requirements would only be justified with regard to the description of the intended use of the issue proceeds; in addition, a differentiation on this basis would in practice hardly be possible.

2. The annexes to the Consultation Paper demonstrate the risk associated with the building block concept, namely the creation of an enormous number of special disclosure standards aiming to provide specific rules for each sub-type of issuer, security etc. Such a system would not only erase all flexibility and would, in many cases, provide for rules which would seem unjustified for some of the cases which they are meant to cover. It would also cause great practical difficulties for issuers that issue different types of securities, including the question for which other kinds of securities a certain RD will be valid (for example, could the debt securities RD also be used by a non-bank to issue derivative securities?).

   It therefore appears necessary to limit the number of disclosure standards, especially that of RDs and SNs, as much as possible. This could mean, for example, that the RD for derivatives and banks could also be used for debt securities directed to wholesale investors.

   This approach naturally requires a certain degree of abstraction from the particulars of each type of security, issuer etc.; however, it cannot be the intention to create rules specifically tailored to cover each possible feature and case.

   In addition, to make the shelf registration system workable, there should be a clear ranking between the different RDs. For example, an issuer who has prepared a RD for equities should also be able to issue debt securities and derivatives on this basis. This not only requires explicit rules about the relationship between the different RDs, it also means that all RDs (or at least the main ones) have to be ”upwardly compatible”, meaning that the ”strictest” standard may only have additional requirements compared to the ”loosest” one (and the same has to apply to the standards in between).

DETAILED DISCUSSION

- **29**: The understanding of the IOSCO standards as to be minimum requirements does not reflect the changes made in this respect in the latest draft of the Prospectus Directive. The Commission's first draft for the directive had in deed provided for this concept. However, this was meant to be given up by the Commission's revised draft. An interpretation of the IOSCO standards as minimum requirements would also be in conflict with the nature of the IOSCO standards. These are aimed at a maximum harmonisation of disclosure rules, in order to allow all countries to accept prospectuses drafted on this basis.

  What would be required in so far would be that CESR itself determines a level of disclosure that is regarded as appropriate for equities. This level should be lower than the "maximum" disclosure level required by the IOSCO standards. Subsequently, the standards laid down in Annex A should be amended accordingly (see introductory remarks above).

- **39**: The phrase that the RD should contain "all the necessary information concerning the issuer" is too broadly drafted. It should be qualified in a sense that only the information that is necessary "to enable investors to make an informed assessment of the issuer" (see Art. 5 para. 1 of the Prospectus Directive).

- **44**: With regard to the disclosure obligations set out in Annex A, we should like to comment as follows:

  I.B. It is unclear why the company's principal bankers and legal advisers with whom the company has a continuing relationship need to be mentioned here. We do not see why this information is relevant (or even necessary) for the assessment of the company. Further, this information may give the wrong impression that these entities are in any way responsible for the contents of the prospectus. Such a responsibility is not very likely. Typically, investment banks and legal advisers are mandated for the preparation of a prospectus that are specialists for capital markets transactions. They are normally not identical to the banks and legal advisers that are having a continuing relationship to the company. It is not appropriate to mention them publicly in connection with the prospectus if they have not assumed responsibility for it (in full or in part). It appears that item I.B. has been inserted with regard to the requirement to disclose the identity of (*inter alia*) advisers in Annex I (item II), and Annex II (item I) of the Prospectus Directive. However, these provisions clearly set out that the identity of the advisers should be disclosed as they are (among others) the persons responsible for the drafting of the prospectus. Conversely, this means that there is no requirement to disclose the identity of advisers that have a continuous relationship to the issuer but are not involved in the drafting of the prospectus (which conclusion is, as we believe, also reasonable, as explained above).

  Furthermore, it should be mentioned that the "principal banker's concept" is old-fashioned and no longer practised as it used to be. This is also often true for legal advisor(s). Also therefore the inclusion of their details is of no avail to any investor.

  II.A.2 If unaudited (interim) financial statements have been reviewed by an auditor, the auditor's review opinion should be included into the prospectus (see also Annex A. IV. D. 2, where an auditor's report on trend information is required to be set out in the Prospectus).

Generally, a review of interim financial statements that are included into the document should be required. This would significantly enhance the quality of the respective financial information and thus improve the reliability of the whole document.

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

IV.D.2 Obviously, it is difficult to make any concrete statements as to future prospects. Even more, it appears highly risky and thus also potentially misleading to make specific forecasts. Thus, in practice, issuers usually are reluctant to give such statements. Accordingly, there should not be any obligation to produce a profit forecast or similar estimation, also because of the huge liability risk connected.

Therefore, it should be clarified that the giving of profit forecasts, profit estimates (and so forth) is voluntary (the sentence starting with "Where..." can be understood in this sense but this is not entirely clear).

The willingness to give specific forecasts could only be supported if there was a safe harbour as regards prospectus liability if these forecasts have been based on reasonable and appropriate assumptions and reliable data.

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

V.A.1 The distinction between "directors" and "management" as well as "senior management" is unclear. For the protection of the investors it should be sufficient if information regarding the board of directors (*Geschäftsführung*) or in two tier companies of the board of directors (*Vorstand*) and the supervisory board (*Aufsichtsrat*) is given. In any event, this paper has to specify what is meant by the terms.

It should also be clarified that the disclosure obligations are limited by the restrictions of the applicable privacy or data protection laws in the respective country. For example, in Germany, after the expiry of a certain period, the registration of criminal offences is extinguished in the relevant register. If an offence is extinguished, it can no longer be asserted against the respective person or used to such person's detriment.

VI.B The requirement set out under no. 1 is unclear in so far as it extends to transactions which are *material* to the company or the related party. It is difficult to see what is meant with "material"; in practice, this could have the effect that a large number of contracts is described in the prospectus. It appears questionable to require the details of transactions to be disclosed that are only

material to the related party but not to the company itself (and therefore are most likely irrelevant for the information of the investor, see also Art. 5 para. 1 of the Prospectus Directive).

The obligation under no. 1 should also be restricted to *unusual* transactions. Further, the meaning of the last sentence in no. 1 ”Where such transactions were concluded (...) and have not been definitively concluded” appears unclear and should be clarified. No. 2 should be deleted altogether, as no. 1 will already cover unusual loans; there is no need to inform investors about the extension of credit within the scope of market practice.

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

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

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

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

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

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

VII.H.2 A review of interim financial statements that are included into the document should be required. This would significantly enhance the quality of the respective financial information and thus improve the reliability of the whole document.

VIII.C The term "material contract" is too vague. One has to bear in mind that the purpose of a prospectus is not to provide a due diligence report to the investor but only to inform him about the nature and the major risks of his investments (see also Art. 5 para. 1 of the Prospectus Directive). The additional condition that the contract has to be able to result in an obligation ”that is material to the

issuer's ability to meet its obligation to security holders" does not constitute a real restriction: This only describes the issuer's insolvency risk, and it remains unclear have to be regarded as "material" in creating such risk. Accordingly, it should be sufficient if the risks resulting from such a contract that are material for the assessment of the company and/or the securities have to be described in the prospectus.

VIII.F It is not appropriate to require that material contracts have to be put on display. They often are of a confidential nature and the secrecy at least of their technical contents may be essential for the company's business. A complete display of these contracts could affect the competition because such a display would give to. Further, it does not appear necessary for the protection of the investors' competitors an easy access to contracts they otherwise would not have access interests to provide access to the agreements themselves. A summary of their contents (it being understood that this can reasonably can only be those issues that are material for the assessment of the company and the issued securities) will be contained in the prospectus anyway (see VIII.C). An overload of information by putting documents on display in addition to the prospectus disclosure does not improve the information of the investor but might rather confuse him.

- **47**: Yes. The approach taken by CESR appears reasonable.

- **51**: Pro-forma financial information can be helpful to show the effects a recent transaction might have with regard to the financial position of a company. However, with regard to the problems outlined by CESR under no. 48, pro forma financial information should not be mandatory in any case of a significant gross change. The reluctance with regard to pro formas is based on the difficulties in preparing pro formas that became apparent in the past and their (sometimes) highly hypothetical nature. A different view could only be taken if otherwise the actual figures were misleading. However, this should be decided on a case by case basis.

  An extension of a pro forma information to also reflect the effects of a future transaction that is only planned, appears even more problematic. It is extremely difficult to give estimates as to future developments. Obviously, such a scenario is even more hypothetical than to show the effects if changes that actually occurred are assumed to have taken place earlier. Due to their highly hypothetical nature, pro forma information to reflect the effects of planned transactions could be regarded as misleading. Additional problems might be caused by different accounting standards and accounting policies of the company itself and the target of the acquisition. It is crucial for the preparation of pro-forma financial information to have data as a basis that has been prepared in accordance with the same accounting principles and policies. However, before a target company is acquired it will hardly be possible to gain sufficient information to be able to "harmonise" the financial statements of the company and the target in order to be able to prepare pro formas. Thus, pro forma financial information to reflect the hypothetical effects of a future significant gross change should under no circumstances be required.

- **52**: A mere change in the size of a company does not seem to be sufficient to justify pro forma adjustments of financial information. Rather, a requirement to include pro forma financial information, if any, should be limited to structural changes in a company.

- **53**: No. Apart from the aforementioned general doubts in relation to pro forma financial information, a 10% threshold appears too low.

- **55**: No. For the above reasons, an authority to *insist* on pro forma financial information should not be granted, especially not in the cases of future transactions. Furthermore,

pro forma financial information should only be *allowed* if the effects to be shown therein is ”material” to investors. This should mainly be the case if there were structural changes in the company.

- **57**: It should be clear that pro forma financial information can by no means give a true picture of the company, simply because it shows a hypothetical scenario. Thus the wording ”*may* not give a true picture” is too soft and should be replaced by ”*cannot* give a true picture (...) as it shows a hypothetical scenario”.

- **61**: The auditor’s opinion should not only be limited to the proper compilation (the word ”complied” in no. 61 should probably read ”compiled”) and the compliance with the company’s accounting principles.

- **62**: Instructions with regard to the auditor’s review are highly welcome. More specifically, the auditor should examine and state in his opinion whether:

  - the pro forma financial information has been based on the historical amounts in the audited financial statements included in the prospectus and that necessary reconciliation from other accounting standards have properly been made,

  - the management's underlying assumptions providing the basis for those pro forma adjustments provide a reasonable and appropriate basis for presenting the significant effects directly attributable to the transaction concerned,

  - the related pro forma adjustments give appropriate effect to these assumptions,

  - the pro forma financial information reflect the proper and consistent application of those adjustments to the historical financial statements, and

  - the pro forma financial information has been prepared in conformity with the applicable accounting standards and on a basis substantially consistent with that of the audited financial statements included in the prospectus.

  (similar: AICPA Professional Standards Section AT §300 Reporting on Pro Forma Financial Information)

- **64**: With regard to the pro forma financial information disclosures set out in Annex B, we should like to comment as follows:

  - To ensure their reliability, the restated financial statements should be audited.

  - A mandatory requirement to prepare pro forma financial information should be avoided, especially if the changes to be reflected therein have not yet occurred at all (see above).

  - As a matter of fact, the statement under ”c)” is misleading. Pro forma financial information can by no means give a ”true” picture of the issuer’s financial position or results as it reflects a fictitious scenario that is clearly not consistent with the real situation in the respective reporting period (see above).

  - The auditors report should not be limited to the proposed statements and rather also report on the subjects set out in the comment to no. 62 above.

- **67:** Obviously, as already explained in the comment to Annex A, item IV.D, there should not be a mandatory requirement to make profit forecasts. The ”encouragement”

mentioned in no. 67 can only be effective if an explicit safe harbour rule avoid an inappropriate burden of potential liability (see above, comment to Annex A, item IV D. 2).

- **69:** The requirement to disclose ”the future prospects” of the company should be limited to a disclosure of known facts that give an indication as to the future prospects.

- **73**: It appears questionable to provide for profit forecasts – although voluntary – as they are extremely difficult if not impossible to make. If a voluntary statement to this effect is to be mentioned at all, indication of the likely level of profits or the trend of its development compared to a reference period should be sufficient. A suggestion that a minimum and maximum level could be stated should be avoided. In any case, the voluntary nature of profit forecasts is to be highlighted.

- **80**: It is unclear what CESR means by the expression ”the Company’s financial advisor” as this term is too unspecific. No. 80 also appears somewhat contradictory to Annex A, item IV.D.2. It does not appear realistic to expect a substantial statement of any kind of expert as to forecasts or estimates. Thus, the denial of such a requirement is reasonable.

- **85**: This should already be covered by the existing ad hoc disclosure requirements and must in any case be qualified by materiality for the assessment of the company and the securities issued by the company.

- **86**: No. IV. D. 3 (a) and (b) suggest that profit forecasts should be made. For the aforementioned reasons, we do not support this idea. Realistically, profit forecasts are highly speculative and thus potentially misleading.

- **87**: In principle yes, see above comment to no. 80.

- **89**: It should be carefully considered whether ”public criticism” should really be in order disclosed. Public criticism clearly has a different quality compared to convictions for criminal offences. Public criticism may both be unjustified and irrelevant for the assessment of the securities by the investor. Further, it can be assumed that ”public” criticism is already common knowledge. Whether public criticism should nevertheless be mentioned in a prospectus should be decided by the persons responsible for the prospectus on a case by case basis. This should only become relevant if the fact that public criticism was raised as such appears material to enable the investor to make an informed assessment of the issuer and the securities. This will most likely only be the case if the subject of the criticism is still current, relevant also for the issuer (and not only to the respective person) and may also have a substantial effect on the respective securities of the issuer. We believe that this will only be the case exceptionally. Thus, the general rule that all information that appears material for the assessment of the issue and the offered securities has to be disclosed (see Art. 5 para. 1 of the Prospectus Directive and our comment on item 39). As to privacy laws, see above comment to Annex A, item V.A.1.

  Other than in no. 89, in Annex A., item V.A.1, fourth paragraph, the expression ”public criticism” is qualified in order to only mean public criticism by statutory and regulatory authorities. However, it should be clarified what this means in particular. If published statements by such an authority about certain breaches of applicable rules are meant and these publications have been made in compliance with applicable law, such a disclosure might be considered. Nevertheless, CESR should explain this further.

- **91**: Yes.

- **92**: The proposed obligation to make all documents which the prospectus refers to available to investors must be abolished. The relevant documents will often contain

information the publication of which would be highly detrimental to the issuer's business activities. There is no legitimate interest of investors to inspect such documents, given that the prospectus itself must provide a summary of the relevant details of the documents. This obligation must therefore be restricted to the issuer's articles of association and its annual and interim reports.

- **93**: There is no need to put the documents referred to on display if the prospectus reports, as it is required anyway, all the material information contained therein (see the above comment to Annex A, item VIII. F).

- **95**: We do not believe that it is necessary or even helpful to have specific disclosure requirements for various industries. These appear already be too specific and, as a result, cumbersome. They may also be difficult to handle if a company is a conglomerate or has activities in several of the industries addressed by specific building blocks. The important information should already be covered by the general list of items in the building block for the respective type of securities. A more general approach, as it has so far been taken in Germany, enables both issuers and their advisers as well as the supervisory authority and stock exchanges to take a more flexible approach with regard to individual issuers and offerings.

- **96**: None. We rather believe that a further extension of the number of building blocks is counterproductive. Irrespective of how many building blocks will be added it will be impossible to cover every industry and to ensure to have a building block that will perfectly suit each issuer. Moreover, a further increase in numbers of building blocks will make the transformation into national law more burdensome and will negatively affect the flexibility on the side of the competent authority if an issuer does not fit 100 per cent. into a specific building block.

- **100**: With regard to the disclosure obligations set out in Annex C, we should like to comment as follows:

  The information required under Annex C is not necessarily limited to start-up companies. Thus, the items listed in Annex C should be integrated into Annex A. Thus, there is no need to have a separate Annex C.

  I.C The auditor's report is an expert's statement important for the investors and must therefore, as it is common practice and prescribed by presently applicable law, be included into the prospectus, see above comment to Annex A, item VII.A. A mere statement that the information has been audited is not sufficient, also as it may leave the auditor's scope of responsibility towards the investors who rely on the auditor's opinion unclear. This would also be contrary to the current practice and to international standards.

  IV.D. As set out earlier, we believe it is extremely problematic to require or even suggest a concrete profit forecast. Such a forecast is highly speculative by its nature and thus potentially misleading. It also may create a liability risk for persons responsible for the prospectus that cannot be justified. Consequently, it appears questionable whether an expert would be willing to give any statement to this effect. However, if, nevertheless, there will be an auditor's statement about the basis of a forecast, it should also be repeated in the prospectus as it appears important for the investors.

- **101**: The proposed requirement appears much too unspecific. It is unclear what expert should be able to give such an opinion. Even if such an opinion was given, its scope and content is entirely unclear. An opinion (for example issued by an auditor) will probably be limited to the question whether a business plan has been based on correct financial

information. Before introducing such a requirement, it should be clarified what kind of statement can be expected from what kind of expert.

- **102**: This should be disclosed for all companies. It is also of interest whether there are such restrictions or not.

- **105**: No. If admission to a regulated market is sought, there should be uniform minimum requirements for all kinds of issuers. If a special treatment of SMEs is sought, there should be a separate market for SMEs that allows them a lower level of disclosure. This concept would ensure transparency of the disclosure requirements and avoid a different treatment of issuers listed in the same market.

- **106**: N/A (No).

- **107**: No.

- **111**: No. We doubt that it is realistic to require a valuation report for inclusion in the prospectus as set out in Annex D. The regulations applicable to property experts are, as Annex D already indicates, different in the various member states. Thus, there will be different standards governing the contents of prospectuses that will be recognised within all EU member states. Further, it is unclear what ”country of origin” means. The home member state of the issuer, of the property expert or of the respective property?

  As regards the date of the inspection, the relevant details as well as the 42 days deadline under no. 4 of Annex D, it is unrealistic to have this information within this time span and in a format that is suitable for prospectus disclosure. From the mentioned time span, which is already short as such, the time required in Art. 13 of the Prospectus Directive for the scrutinisation of the prospectus by the competent authority in connection with their decision on its approval would have to be subtracted. In some cases, this would only leave twelve days for the completion of the valuation report, which appears totally unrealistic. Also, property companies may have a real estate portfolio of several hundred different properties in different countries. The inclusion of valuation details of each property would make a prospectus would blow up the size of a prospectus to a volume that is neither acceptable for investors nor feasible to be prepared as regards time and cost. Once again, CESR should consider that the value of an individual property usually is not necessarily relevant if there is a portfolio of several hundreds. What actually counts is the total value; this should already be reflected in the balance sheet. Therefore we believe that a valuation report is neither necessary nor can it actually be delivered in an acceptably harmonised standard and in a size suitable for prospectus disclosure.

- **112**: See above under ”111.”

- **113**: No. We believe that the value of the property portfolio is an issue that is peculiar for the company and only as a result thereof for the respective security. Therefore, we think that the RD is the more appropriate document to include a valuation report than the SN. Having said that, we should like to refer to our comment on no. 111 and emphasise that we have serious doubts as to whether a valuation report should and even can be required for any kind of prospectus.

- **116**: No. It is totally unclear what the contents of the expert report should be. Before such a report can be required, this must be specified. Further, both the quality of these reports and their suitability for a prospectus that shall be recognised throughout the EU is doubtful as long as there is not at least a framework of common standards for such reports. Finally, we believe that the way the requirement to disclose all the information necessary to enable investors to make an informed assessment of the issuer (Article 5 para. 1 of the Prospectus Directive) has to be interpreted with regard to specific

industries should be dealt with on a case by case basis and not by an increasing amount of additional building blocks for lots of different kinds of companies (see above).

- **117**: Apart from our general comment on the extension of the building block approach to various industries, we wonder whether the information set out in Annex E is always necessary to enable investors to make an informed assessment of the issuer (and the securities). This also applies to the expert's report required under Annex F. In particular, the arguments made in relation to the valuation report for property companies also apply here. Further, we strongly doubt that the location of wells, platforms, bore holes and so forth is of any relevance for the investor's assessment. Also, the sheer size of such a report will make the prospectus unsuitable for the information of the investor. Thus, the general description of property, plants and equipments as set out in Annex A under "III. E" should suffice.

- **120**: No. We do not believe that the additional disclosure requirements set out in Annex G justify a separate building block.

- **123**: No. The contents of Annex H are much too detailed. Details of patent application and the progression of testing may often be confidential. If not, a requirement to disclose is not necessary as this is positive information that the issuer will want to insert in the prospectus anyway. Further , this is already covered by Annex A, item IV. C: Thus, a separate building block is not necessary.

- **129**: In the case of debt securities, the assessment of the investor which the prospectus information is meant to allow is that of the risks that the issuer becomes unable to fulfil its obligations to pay interest and to repay the capital. Only information which directly contributes to this assessment should be required for the prospectus. For example, information on the issuer's investments, principal markets and property plants and equipment does under normal conditions not enable investors to make an assessment about the issuer's insolvency risk.

  Therefore, the disclosure requirements for debt securities have to be different from those for equity, in fact they should be less. In addition, the proposed requirements should be amended on the basis of an appropriate level of disclosure (see introductory remarks above).

- **134**: No. Such information would not help investors to assess the relevant issuer risk and is of no relevance for the investment decision (see also comment on Annex A, item I B).

- **135**: No. Investors would not be able better to assess the issuer risk if they know which bankers and legal advisors were involved in the issue. This information has nothing to do with the quality/credit of the issuer.

- **137 to 139**: For the reason set out above regarding no. 129, such information should not be required. Normally, debt investors are not concerned with the principal past and future investments of the issuer. Only if those investments could have any influence on the ability of the issuer to pay the interest and the capital.

- **142**: Yes, for the reasons set out for no. 129 the IOSCO disclosure standards are inappropriate for debt securities. The disclosure level is too detailed.

- **145**: There should not be specific rules on the form and content of such statements. In so far, it follows from the purpose of the statements, in combination with the general rules on form (easily analysable and comprehensible) and content (all material information) what has to be contained in such statements. Moreover, interim financial statements are prepared differently in most jurisdictions (unless the company follows internationally

accepted accounting standards like IAS/IFRS or US-GAAP). Therefore, it should be sufficient to state that the interim financial statements should be prepared in compliance with the rules of the applicable accounting standards. No further details regarding the interim reports need to be stipulated. The listing rules should just require a minimum standard of information and everything else should be kept flexible.

- **146**: The reasons set out under no. 145 for debt securities equally apply for equity. In addition, the Transparency Directive, which will prescribe certain standards for interim financial statements, will be applicable for the vast majority of the relevant issuers.

- **148**: The proposed obligation to make all documents which the prospectus refers to available to investors must be abolished. The relevant documents will often contain information the publication of which would be highly detrimental to the issuer's business activities. There is no legitimate interest of investors to inspect such documents, given that the prospectus itself must provide a summary of the relevant details of the documents. Furthermore, the issuer might not be in a position or entitled to put all these documents on display due to privacy laws, contract laws, data protection laws, criminal provisions, etc. This obligation must therefore be restricted to the issuer's articles of association and its annual and interim reports.

- **149**: See answer for no. 148.

- **150**: Notwithstanding our comments in relation to no. 148, a translation of the documents should not be made mandatory, given that only a summary of the prospectus will have to be translated, and that the material content of the documents will have to be disclosed in the prospectus. A translation is usually time consuming and expensive and would present a new source of prospectus liability. If a translation should be required at all, it should only have to be made into a language customary in the sphere of international finance.

- **153**: For the reason set out above regarding no. 129, such information should not be required, as it would not help investors to assess the relevant issuer risk.

- **154, 155**: For the reasons set out for no. 129, only information which directly contributes to the assessment of the risk that the issuer becomes unable to fulfil its obligations under the respective security should be required for the prospectus. On this basis, we should like to comment as follows on to the disclosure obligations set out in Annex I (in addition to the points already discussed above):

  I.A.1. It is not altogether clear, what kind of responsibility is contemplated and what consequences responsibility has: personal liability or liability of the legal person. Further more the cumulative (”and”) designation seems to be inconsistent compared to the alternative (”or”) designation requirement contemplated by the SN, I.6

  I.B It is unclear why the company's principal bankers and legal advisers with whom the company has a continuing relationship need to be mentioned here. We do not see why this information is relevant (or even necessary) for the assessment of the company. Further, this information may give the wrong impression that these entities are in any way responsible for the contents of the prospectus. Such a responsibility is not very likely. Typically, investment banks and legal advisers are mandated for the preparation of a prospectus that are specialists for capital markets transactions. They are normally not identical to the banks and legal advisers that are having a continuing relationship to the company. It is not appropriate to mention them publicly in connection with the prospectus if they have not assumed responsibility for it (in full or in part). It appears that item I.B. has been inserted with regard to the requirement to disclose the identity of

(*inter alia*) advisers in Annex I (item II), and Annex II (item I) of the Prospectus Directive. However, these provisions clearly set out that the identity of the advisers should be disclosed as they are (among others) the persons responsible for the drafting of the prospectus. Conversely, this means that there is no requirement to disclose the identity of advisers that have a continuous relationship to the issuer but are not involved in the drafting of the prospectus (which conclusion is, as we believe, also reasonable, as explained above). In addition, the ”principal banker’s concept” is old-fashioned and no longer practised as it used to be.

The same arguments are also true for the company’s regular legal advisor(s). Therefore, the information required under item I.B. is of no avail to any investor.

II. These disclosure requirements are much too detailed for debt securities. The Financial Statements contemplated in VII. are sufficient.

II.B. This disclosure provision should be limited to factors, that may effect the company’s ability to fulfil its obligations under the debt securities, i.e. the payment of interest and repayment of capital, and only in cases where the respective issuer has an unflattering rating.

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

III. B. Past, current and future investments, as well as holdings in companies are in general of no interest for the investor in debt securities.

III.C.2 The ”breakdown of total revenues” is in general of no interest for the investor in debt securities.

III.E The disclosure of property plants and equipment does not contribute to the assessment of the issuer’s relevant insolvency risk.

IV.A Capital expenditure does not affect investors in debt securities.

IV.B.2 Obviously, it is difficult to make any concrete statements as to future prospects. Even more, it appears highly risky and thus also potentially misleading to make specific forecasts. Thus, in practice, issuers usually are – for good reasons - reluctant to give such statements. Accordingly, there should not be any obligation to produce a profit forecast or similar estimation, also because of the huge liability risk connected.

Therefore, it should be clarified that the giving of profit forecasts, profit estimates (and so forth) is voluntary (the sentence starting with ”Where...” can be understood in this sense, but this is not entirely clear).

The willingness to give specific forecasts could only be supported if there was a safe harbour as regards prospectus liability if these forecasts have been based on reasonable and appropriate assumptions and reliable data.

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

V. The distinction between "directors" and "management" as well as "senior management" is unclear. For the protection of the investors it should be sufficient if information regarding the board of directors (*Geschäftsführung*) or in two tier companies of the board of directors (*Vorstand*) and the supervisory board (*Aufsichtsrat*) is given. In any event, this paper has to specify what is meant by the terms.

It should also be clarified that the disclosure obligations are limited by the restrictions of the applicable privacy or data protection laws in the respective country. For example, in Germany, after the expiry of a certain period, the registration of criminal offences is extinguished in the relevant register. If an offence is extinguished, it can no longer be asserted against the respective person or used to such person’s detriment.

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

VI. Transactions with related parties under normal circumstances do not contribute to the assessment of the relevant risk; the fulfilment of such a disclosure obligation would also be highly burdensome for issuers.

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

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

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

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

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

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

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

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

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

- **156**: None.

- **160**: Even though derivative securities do not principally differ from bonds and other debt securities with regard to the issuer risk, it should be considered that derivatives are almost always issued by credit institutions, which, due to the supervision exercised over them, do carry a lower insolvency risk. It would therefore seem logical if the special RD for banks, which, as we understand, will contain lower disclosure obligations, would also be used as RD for derivatives (see introductory remarks above).

- **169**: The definition of derivatives which will be used for the determination of the disclosure obligations should be independent of the definitions used within the directive. The main reason that, in the directive, derivatives linked to shares of the issuer itself are defined to be equity securities, is that otherwise the home country principle for the competent authority could be circumvented. For the determination of the disclosure obligation should, on the other hand, the derivative character of the security generally be the only decisive factor; only to the extent that the issuance of the derivative in economic terms corresponds to the issuance of the respective underlying should the standards in effect for the respective kind of underlying be applied, in combination with the SN for derivatives. Therefore, e. g. for warrants linked to shares of the issuer generally the RD and SN for derivatives should apply; only in cases in which the issuance of the derivative in economic terms corresponds to the issuance of the respective underlying should RD and SN for equity securities be applied in combination with the SN for derivatives.

- **170**: A separate definition is necessary to define the area of applicability of the RD and SN for derivatives.

- **171**: Both proposed definitions do not seem convincing. The first one does not go far enough, as it refers to ”forward transactions” – which would exclude e. g. index certificates – and only specifies certain types of underlying. The second one is too diffuse and subsequently would also exclude certain kinds of derivatives. Preferable would be a definition which is based on the linkage of the payment or delivery promised under the securities to a certain underlying asset or value, if and to the extent such linkage is not limited to the simple payment of interest on a nominal amount (as bonds provide for).

- **172, 173**: See answer for no. 171.

- **179, 180, 185**: No difference should be made between guaranteed and not guaranteed derivatives, as the issuer risk is exactly identical for both kinds (in both cases, the risk of an insolvency) and a differentiation would in practice only cause additional expenditure. Such differentiation would also contradict the fact a capital guarantee for derivatives is usually equally financed by issuers with hedging transactions as the other features of the respective derivative. If the intention should be to treat certain derivatives like bonds, the necessary differentiation could only be made on the basis of the question if the issuer wants to use the proceeds from the issue for hedging transactions or wants to spend them for general or particular corporate purposes; such a differentiation would however also not be very practical, and would only justify additional information in the RD on the purpose of the issue. Such differentiation would also not make much sense against the background of the required acceptance of a common RD for banks and derivatives, because then exactly the same disclosure requirements would apply for derivatives and debt securities issued by banks (see also introductory remarks above).

- **187**: As derivatives are almost always issued by credit institutions, which are subject to special supervision, the issuer risk for these products is substantially lower than for other issuers. Subsequently, the RD for derivatives should demand considerably less disclosure than that for debt securities. As set out above for the question under no. 160, the disclosure requirements for derivatives should correspond to those for credit institutions.

- **190**: The proposed information about the issuer’s senior management does not help investors in their assessment of the – solely relevant – issuer risk. This requirement should therefore be deleted, as should be the corresponding requirement for debt securities.

- **192**: In so far, the remarks for no. 190 apply likewise.

- **195**: Regarding the issuer risk, a risk description should not be required for the reasons set out above for no. 187.

- **196, 197**: The requirements in III. A should, due to the lower issuer risk of credit institutions, be lowered considerably.

- **199**: For the reasons set out above for no. 187, the information under IV.A.3 should not be required here.

- **202, 203**: As suggested, only a general description of the most important activities of the issuer should be required here (see remarks for no. 187).

- **204**: This information should not be required (see remarks for no. 187).

- **207**: This information should not be required (see remarks for no. 187).

- **209, 210**: For the reasons set out above for no. 187, the information under V.B should not be required.

- **212**: The proposed information about the issuer's directors does not help investors in their assessment of the – solely relevant – issuer risk (see remarks for no. 190).

- **213**: For the reasons set out above for no. 187, all the information under VI.B should not be required.

- **214**: For this point as well, the supervision exercised over credit institutions has to be taken into account, which also extends to holders of interests. This requirement should therefore be abolished completely.

- **217**: Here, at least the information under c) should not be required, as it does not help investors in their assessment of the issuer risk present in such cases. For the same reason, VIII.A.1.(f) should be deleted.

- **218**: For the reasons set out above for no. 187, this information should only be required for the last year.

- **219**: Disclosure on this point would be helpful, as it would provide investors with additional information which allow a better assessment of the issuer risk and at the same time can be given by issuers relatively easily.

- **220**: VII.D and VII.E are of general nature and should therefore be taken over into the RD for derivatives.

- **222**: In so far, only X.A.1 and X.A.2 should be kept. All other information does not contribute to the assessment of the issuer risk.

- **223**: In so far, only X.B.1 should be kept. All other information does not contribute to the assessment of the issuer risk.

- **224**: Due to limited issuer risk (see remarks for no. 187) there should not be an obligation to disclose contracts.

- **225**: Disclosure of these points seems relevant, because the restrictions set out under X.D can lead to risks for the investor also in the case of derivatives.

- **226**: This information does not have any relevance for an investor into derivatives.

- **227**: The proposed obligation to make all documents which the prospectus refers to available to investors must be abolished. The relevant documents will often contain information the publication of which would be highly detrimental to the issuer's business activities. There is no legitimate interest of investors to inspect such documents, given that the prospectus itself must provide a summary of the relevant details of the documents. This obligation must therefore be restricted to the issuer's articles of association and its annual and interim reports.

- **228**: Due to limited issuer risk (see remarks for no. 187) there should not be an obligation to give disclosure on this point.

- **232** et seq.: See remarks for no. 179.

- **249**: The building block – approach as such is to be rated positively. It does however bring about the risk that detailed provisions are created for each single sub-type of issuer, offer, market and security; if this should happen, the disclosure standards would not have the necessary flexibility, and the requirements would often not fit for sub-types which differ only marginally from the ones which the requirements aimed at. It therefore seems highly important that the building blocks do not become too detailed (see introductory remarks above).

- **250**: The approach selected now makes the requirements easier to understand. Generally, however, a duplication of the information already contained in the RD should be avoided .

- **251**: The right of the competent authority to demand, in certain cases, additional information which either derives from other building blocks or in the respective case seems necessary due to the particular circumstances of the security, is a direct consequence of the necessary creation of flexible building blocks (see remarks for no. 249).

- **252**: Advisers should only have to be mentioned if they if they can be held liable. This should only be the case if they have been involved in the drafting of the prospectus/SN and are responsible for the entire document or parts of it (especially for own statements like audit opinions; consequently this is already provided for in Annex K item VI.D).

  In particular, we cannot see why the identity of company's principal bankers or legal advisers that have a continuing relationship with the company needs to be disclosed. It appears unlike that their identity is a material information for the investors' assessment of the securities. Further, it should under any circumstances be avoided that the impression that these parties might have any responsibility for the contents of the prospectus/SN although in fact they were not involved in its preparation is avoided.

  The mandatory identification of the legal advisers to the issue in the SN is also not necessary. They basically just support the prospectus preparation but – other than auditors – do not appear with own statements as experts that form the basis of the investor's decision.

  On the other hand, the identification of the auditors must be required as their audit and their consent to have the auditor's report included into the prospectus (see above note clearly is at least a strong indication for the correctness of the financial statements of the company and thus an essential building stone of investor confidence. It is common practice and required already by applicable law to include their names and addresses into a prospectus (as it is also provided for in Annex K item VI.D).

- **253**: Yes, as also the report as such is an important basis for investor confidence. The fact that the auditor agrees to have the report included is an important sign that the auditor has no indication that the reviewed information is incorrect.

- **254**: Although it may well be that the same persons are responsible for each of the three documents, this might also be different. Thus, each of the documents should clearly state who assumes the responsibility for what parts or for the entire document.

- **255**: Due to the lower issuer risk of credit institutions which almost always issue such products, such statement should not be required (see answer for no. 187).

- **256**: For derivatives, only the intention of the issuer could be disclosed to make a profit out of the respective offer (which profit would be calculated by subtracting the costs of the issuer, in particular for entering into hedging transactions, from the proceeds). This information would not have any relevance for investors; it should therefore not be required.

- **257**: 1), 2) This information should not be required, as such calculation would not help investors to understand the economic nature of, and the risk associated with, the security. The same applies for the requirement to describe a ”best case scenario”. Investors would take far more profit from a description of the economic nature of the respective security, in the course of which best and worst cases could be mentioned.

  3) The obligation proposed alternatively should be integrated into III.C.2 a) as it is directly connected to the general risk of the security.

  In addition, the information under III.C. c) and e) should not be required. What is meant with ”Examples of the way the instrument works” remains unclear; should further exemplary calculations be meant (in addition to the ones referred to under d)), so would these not help investors to understand the economic nature of the respective security. It would make far more sense to require a description of the economic nature of the respective security. The ”hedging instruments” referred to under e) do not have any relevance for derivatives.

- **258**: This information should generally, not just for derivatives, not be required. The holding of an interest in the company by an expert does not yet imply a conflict of interests which justify a disclosure obligation.

- **259**: The information under a) and b) can be regarded as useful at least for derivatives. The same applies for a disclosure of the issuer’s rating; here the second alternative is preferable, as it would go too far to require the disclosure of the absence of a rating.

  With regard to other disclosure obligations set out in Annex K., we should like to comment as follows:

  I.1 The distinction between "directors" and "management" as well as "senior management" is unclear. For the protection of the investors it should be sufficient if information regarding the board of directors (*Geschäftsführung*) or in two tier companies of the board of directors (*Vorstand*) and the supervisory board (*Aufsichtsrat*) is given. In any event, this paper has to specify what is meant by the terms.

  I. 2 The identity of the company’s principal bankers and legal advisers should not be disclosed. It appears that CESR does not distinguish between the bankers and legal advisers acting in connection with the issue/offer and those that have a continuing relationship with the company. However, this should not be mixed up. Typically, investment banks and legal advisers are mandated for the

preparation of a prospectus that are specialists for capital markets transactions. They are normally not identical to the banks and legal advisers that are having a continuing relationship to the company. Mentioning the latter bankers and legal advisers also does not have an added value. We do not see why this information is relevant (or even necessary) for the assessment of the securities. On the contrary it may even be misleading as it may give the wrong impression that these entities are in any way responsible for the contents of the prospectus. Thus, it is not appropriate to mention them publicly in connection with the prospectus if they have not assumed responsibility for it (in full or in part). Furthermore, it should be mentioned that the ”principal banker’s concept” is old-fashioned and no longer practised as it used to be. This is also often true for legal advisor(s). Also therefore the inclusion of their details is of no avail to any investor.

II.A It is unclear on which basis a distinction between securities offered for sale and securities offered in subscription should be made.

IV.B Conflicts of interest are dealt with by various regulatory requirements. A number of potential conflicts of interest can as a matter of law not be disclosed due to the confidential nature of potentially conflicting transactions or customer relationships. As far as financial institutions are concerned (apparently being the main focus of the provision) the issue of conflicts of interest is sufficiently dealt with by the appropriate compliance measures (Chinese walls etc.). In addition, there is no guidance at all to determine the existence of a ”conflict of interest” in this sense. Thus, IV B. should be deleted. At least, a certain guidance should be provided here, for example by inserting examples or restricting the disclosure obligation to cases in which there is a concrete risk of a damage for investors.V.A.12In order to have a prospectus/SN concentrating on the material information regarding the issue in an easily understandable manner, a general description of the applicable legislation appears neither necessary nor useful. In this respect, there is a variety of generally available sources of information.

V.D 4 b The details of the underwriting agreement and the underwriting quotas are irrelevant for the investor and not material for the assessment of the company or the securities. Thus, there is no reason to disclose this information.

V.D 4 d: The terms of the agreements among the selling group members are irrelevant for the investor and not material for the assessment of the company or the securities. Thus, there is no reason to disclose this information.

V.D 6 The price history of securities is publicly available from many sources. Thus, there is no need to include this information in the prospectus/SN.

V.I Discounts and commissions agreed with the underwriters or members of the selling group are irrelevant for the investor and not material for the assessment of the company or the securities as it is obvious that the underwriters and selling group members will be paid a certain amount for their services and thus have an interest in the success of the issue. Thus, there is no reason to disclose this information.

The same applies for the expenses incurred in connection with the issue; as transparency is not a purpose in itself, it should only be extended to the information material for the investor’s decision.

V.I. From an investor’s perspective the various categories of expenses (like fees of law firms or other experts) are irrelevant for the assessment of the company

and the offered /admitted securities. Only the total proceeds might be of interest. In contrast, the details of the conditions of a legal adviser's mandate are part of the confidential relationship between a lawyer and his client and also for that reason should not be disclosed.

VI. C Only information on withholding taxes applying should have to be provided; the first sentence and the second half of the second sentence should accordingly be deleted. As regards further tax issues a recommendation to the investor to seek individual tax advice should be sufficient.

VI. E It is not appropriate to require that material contracts have to be put on display. They often are of a confidential nature and the secrecy at least of their technical contents may be essential for the company's business. A complete display of these contracts could affect the competition because such a display would give competitors an easy access to contracts they otherwise would not have access to. Further, it does not appear necessary for the protection of the investors' interests to provide access to the agreements themselves. A summary of their contents (it being understood that this can reasonably can only be those issues that are material for the assessment of the company and the issued securities) will be contained in the prospectus anyway (see VIII.C). An overload of information by putting documents on display in addition to the prospectus disclosure does not improve the information of the investor but might rather confuse him.

- **260**: This requirement should be abolished. It is generally recognised that past performance of an asset does indicate a similar development in the future; the Conduct of Business rules in place in many EU member states require that investors are made aware of this fact in marketing documents. It does then not make any sense to require information on this point in a prospectus.

- **261**: For debt securities:

I.1 The distinction between "directors" and "management" as well as "senior management" is unclear. For the protection of the investors it should be sufficient if information regarding the board of directors (*Geschäftsführung*) or in two tier companies of the board of directors (*Vorstand*) and the supervisory board (*Aufsichtsrat*) is given. In any event, this paper has to specify what is meant by the terms.

I. 2 The identity of the company's principal bankers and legal advisers should not be disclosed. It appears that CESR does not distinguish between the bankers and legal advisers acting in connection with the issue/offer and those that have a continuing relationship with the company. However, this should not be mixed up. Typically, investment banks and legal advisers are mandated for the preparation of a prospectus that are specialists for capital markets transactions. They are normally not identical to the banks and legal advisers that are having a continuing relationship to the company. Mentioning the latter bankers and legal advisers also does not have an added value. We do not see why this information is relevant (or even necessary) for the assessment of the securities. On the contrary it may even be misleading as it may give the wrong impression that these entities are in any way responsible for the contents of the prospectus. Thus, it is not appropriate to mention them publicly in connection with the prospectus if they have not assumed responsibility for it (in full or in part). Furthermore, it should be mentioned that the "principal banker's concept" is old-fashioned and no longer practised as it used to be. This is also often true for

legal advisor(s). Also therefore the inclusion of their details is of no avail to any investor.

II.A It is unclear on which basis a distinction between securities offered for sale and securities offered in subscription should be made.

III. A An inclusion of the financial statements, as contemplated in Annex I VII. should be sufficient. An investor of bonds does not invest in the equity of the company.

IV. A This is irrelevant for investors of debt securities.

IV.B Conflicts of interest are dealt with by various regulatory requirements. A number of potential conflicts of interest can as a matter of law not be disclosed due to the confidential nature of potentially conflicting transactions or customer relationships. As far as financial institutions are concerned (apparently being the main focus of the provision) the issue of conflicts of interest is sufficiently dealt with by the appropriate compliance measures (Chinese walls etc.). In addition, there is no guidance at all to determine the existence of a ”conflict of interest” in this sense. Thus, IV B. should be deleted. At least, a certain guidance should be provided here, for example by inserting examples or restricting the disclosure obligation to cases in which there is a concrete risk of a damage for investors.

V. A. 13 Historical data especially with respect to interest rates are per nature potentially misleading if the market environment changes. This is even more true in a highly sensible market such as the debt securities market, where slight breaks in the market can render pricing sessions futile.

V. A. 14 The term ”other advantages” has to be clarified to oversee the scope of disclosure.

V. A. 17 The term ”debt securities” should be replaced by ”capital” to avoid any doubt because the payment of interest is contemplated later on. There is no practical need and no added value for the investor being a legal layman for making available/put on display the contracts relating to the guarantees, sureties and commitments. At least the should not be translated as this would create a new source of liability in the case of incorrect translations.

V. A. 18 With respect to disclosure of representations see above.

V. A. 19 This is relevant for equity securities only, and should be deleted.

V. C. 6 This would force the banks to disclose vital facts of their ability and standing in a market to their market competitors. This could lead to the effect that certain banks will not be prepared to participate in certain transactions, which could be detrimental to the financial market in general, minor financial markets in particular, disadvantaging investors, especially on minor financial markets.

V. D. 2 This information won’t be available in advance, but only on the secondary market stage.

V. F. 3 This is not very likely for debt security market, contrary to the equity market.

V. H Debt securities are almost never offered as the result of a replacement. This information should therefore only be required for equity.

V.I From an investor's perspective the various categories of expenses (like fees of law firms or other experts) are irrelevant for the assessment of the company and the securities, because they are not decisive for the issuer's ability to pay interest and capital at the end of the day. In contrast, the details of the conditions of a legal adviser's mandate are part of the confidential relationship between a lawyer and his client and also for that reason should not be disclosed.

VI. C Only information on withholding taxes applying should have to be provided; the first sentence and the second half of the second sentence should accordingly be deleted. Otherwise this would be disadvantageous to issuances where the countries where the public offer is being made or admission to trading is being sought have not been finally decided. Alternatively, the provision should only be mandatory in those cases where the offering states have already been decided.

VI. D The term "material contract" is too vague. One has to bear in mind that the purpose of a prospectus is not to provide a due diligence report to the investor. It shall only contain all information which according to the particular nature of the issuer and of the securities offered to the public or admitted to trading necessary to enable investors to make an informed assessment (...) of the issuer and the rights attaching to the securities (see Article 5 para. 1 of the Prospectus Directive). The additional condition that the contract has to be able to result in an obligation "that is material to the issuer's ability to meet its obligation to security holders" does not constitute a real restriction: This only describes the issuer's insolvency risk, and it remains unclear have to be regarded as "material" in creating such risk. Accordingly, it should be enough if any risk resulting from such a contract is described in the prospectus. It is also unclear why this requirement appears both in the Registration Document and the Securities Note for debt securities; for the other security types, it only appears in the Registration Document.

VI. F It is not appropriate to require that material contracts have to be put on display. They often are of a confidential nature and the secrecy at least of their technical contents may be essential for the company's business. A complete display of these contracts could affect the competition because such a display would give competitors an easy access to contracts they otherwise would not have access to. Further, it does not appear necessary for the protection of the investors' interests to provide access to the agreements themselves. A summary of their contents to the extent they are material for the assessment of the issued securities will be contained in the prospectus anyway. An overload of information by putting documents on display in addition to the prospectus disclosure does not improve the information of the investor but might rather confuse him.

For derivatives:

I.1 The distinction between "directors" and "management" as well as "senior management" is unclear. For the protection of the investors it should be sufficient if information regarding the board of directors (*Geschäftsführung*) or in two tier companies of the board of directors (*Vorstand*) and the supervisory board (*Aufsichtsrat*) is given. In any event, this paper has to specify what is meant by the terms.

I. 2 The identity of the company's principal bankers and legal advisers should not be disclosed. It appears that CESR does not distinguish between the bankers

and legal advisers acting in connection with the issue/offer and those that have a continuing relationship with the company. However, this should not be mixed up. Typically, investment banks and legal advisers are mandated for the preparation of a prospectus that are specialists for capital markets transactions. They are normally not identical to the banks and legal advisers that are having a continuing relationship to the company. Mentioning the latter bankers and legal advisers also does not have an added value. We do not see why this information is relevant (or even necessary) for the assessment of the securities. On the contrary it may even be misleading as it may give the wrong impression that these entities are in any way responsible for the contents of the prospectus. Thus, it is not appropriate to mention them publicly in connection with the prospectus if they have not assumed responsibility for it (in full or in part). Furthermore, it should be mentioned that the ”principal banker’s concept” is old-fashioned and no longer practised as it used to be. This is also often true for legal advisor(s). Also therefore the inclusion of their details is of no avail to any investor.

II.A It is unclear on which basis a distinction between securities offered for sale and securities offered in subscription should be made.

II.B The information set out under II. B should be shortened considerably for derivatives. There is usually no subscription period for derivatives. In addition, it is obvious that the proposed disclosure requirements have been developed for the issuance of shares, for which usually a part of the subscriptions can not be accepted, whereas in the case of derivatives, usually such number of securities is issued as have been subscribed for. At least the information under 3. and 8. should therefore be deleted. – The same applies for the information under V.B.1 to V.B.5.

III. A An inclusion of the financial statements, as contemplated in Annex I VII. should be sufficient. An investor of derivatives does not invest in the equity of the company.

III.C.1 This obligation should be deleted. Disclosure about the specific risks of derivatives is required under III.C.2.

IV. A This is irrelevant for investors of derivatives.

IV.B Conflicts of interest are dealt with by various regulatory requirements. A number of potential conflicts of interest can as a matter of law not be disclosed due to the confidential nature of potentially conflicting transactions or customer relationships. As far as financial institutions are concerned (apparently being the main focus of the provision) the issue of conflicts of interest is sufficiently dealt with by the appropriate compliance measures (Chinese walls etc.). In addition, there is no guidance at all to determine the existence of a ”conflict of interest” in this sense. Thus, IV B. should be deleted. At least, a certain guidance should be provided here, for example by inserting examples or restricting the disclosure obligation to cases in which there is a concrete risk of a damage for investors.

V.A.13 This point should by amended by the words ”if any”, as the mentioned terms do not become relevant for all derivatives.

V.A.14 It is not clear what is meant with ”price at maturity”; this point should therefore be deleted.

V.B.1 to V.B.5 See comment for II.B

V.B.9 It should not be required, as proposed under V.B.9, to list up the definitions in a separate section, because the composition of the product conditions differs from issuer to issuer, and the product conditions do not always contain a separate section with definitions. The composition of the product conditions must be left to the issuer.

V.B. 13 to 17 All these points should be amended by the words ”if any”, because not all the securities have the mentioned features.

V.C This information should not be required, as it only makes sense for the issuance of shares.

V. H Derivatives are never offered as the result of a replacement. This information should therefore only be required for equity.

V.I From an investor’s perspective the various categories of expenses (like fees of law firms or other experts) are irrelevant for the assessment of the securities, because they are not decisive for the issuer’s ability to pay interest and capital at the end of the day. In contrast, the details of the conditions of a legal adviser’s mandate are part of the confidential relationship between a lawyer and his client and also for that reason should not be disclosed.

VI. C Only information on withholding taxes applying should have to be provided; the first sentence and the second half of the second sentence should accordingly be deleted. Otherwise this would be disadvantageous to issuances where the countries where the public offer is being made or admission to trading is being sought have not been finally decided. Alternatively, the provision should only be mandatory in those cases where the offering states have already been decided.

VI. E It is not appropriate to require that material contracts have to be put on display. They often are of a confidential nature and the secrecy at least of their technical contents may be essential for the company’s business. A complete display of these contracts could affect the competition because such a display would give competitors an easy access to contracts they otherwise would not have access to. Further, it does not appear necessary for the protection of the investors’ interests to provide access to the agreements themselves. A summary of their contents to the extent they are material for the assessment of the issued securities will be contained in the prospectus anyway. An overload of information by putting documents on display in addition to the prospectus disclosure does not improve the information of the investor but might rather confuse him.

- **262**: None for derivatives.

- **281**: The auditor’s report should not be incorporated by reference as it is a material cornerstone of the investor’s reliance in the financial information contained in the prospectus.

  For press releases, which are mentioned as one of the documents which can be incorporated by reference, it remains doubtful in which cases these are published on the basis of the Prospectus Directive or Directive 2001/34 (to which cases Art. 11 restricts incorporation by reference). A general reference to all documents published to comply with the obligation laid down in Art. 10 of the Prospectus Directive would be preferable; press releases could then be mentioned as one example.

- **314**: The criteria for the determination of the admitted newspapers proposed here are too formalistic. Among the eight newspapers with the highest circulation in the country in many cases will be several tabloid and sports newspapers which would not be suitable for the publication of the prospectus (or a notice). Instead, the competent authorities should receive a certain degree of discretion in determining newspapers, which should be based on the total circulation, but also on the circulation in the circle of people particularly interested in economic affairs.

- **324**: There should not be an obligation to mention the intended time schedule of the offer or admission to trading, as this is information about the securities themselves which is disclosed in the prospectus; the notice should only contain information about the publication of the prospectus.

- **325**: Where the prospectus is published in form of a brochure or is inserted in one or more newspapers, it should not be required to put an additional notice on the issuer's web-site. In such cases, the issuer's web-site will often not contain information about securities issued; an obligation to publish a notice on the web-site in addition to the publication of the prospectus or a notice in a newspaper would not be justified.

- **327, 328**: An indication in the list on the competent authority's web-site would be useful and should indeed be considered as a substitute to the publication of a formal notice. It would be easier for interested investors to inform themselves about the publication of a prospectus over such list than over a notice published in a newspaper or on the issuer's web-site.

- **334**: Deliver or mail costs should not have to born by issuers, because issuers otherwise would be worse off than in the case that the prospectus is made available as a brochure. Issuers should at least be allowed to specify that the prospectus is available for investors and can be received under a certain address.