

IRISH STOCK EXCHANGE

Response to CESR Consultation Paper dated 17th October 2002 “CESR’s Advice on possible Level 2 Implementing Measures for the Proposed Prospectus Directive” (‘the Consultation Paper’)

1. Introduction & Methodology

- 1.1 The Irish Stock Exchange welcomes the opportunity to comment on the Consultation Paper. We welcome the concept of developing an integrated and unified regulatory environment which should, in principle, provide better access to capital for European issuers. We appreciate the body of work which has been done by CESR, in a very short time frame, in bringing the regulations to this consultative stage. We regret the very short time frame given to the industry in this consultation process. Given the complexity and scope of the regulations, a longer period would have been desirable in order to properly consult with all interested parties.
- 1.2 To ensure a comprehensive and wide ranging response, the Irish Stock Exchange established an expert consultative panel to consider the Consultation Paper. The panel consisted of prominent advisers to and participants in the Irish capital market, drawn, in particular, from the legal, corporate finance and listed company sectors. The participants on the panel are detailed in Appendix 1. The panel had frequent and extensive meetings to consider both the impact of the Directive (and these proposed regulations) on the Irish market and questions posed in the Consultation Paper. We have also sought the views of the leading accountancy firms in Ireland in preparing our response to those questions which relate to financial information.
- 1.3 We have both general and specific comments that we set out below. Wherever possible, we have attempted to offer drafting suggestions and/or proposed solutions to issues identified by us.

2. General comments

2.1 General Approach

‘Based on IOSCO standards’?

- (a) The Prospectus Directive requires CESR to draft detailed rules ‘based on IOSCO standards’. This has been clearly interpreted by CESR as meaning that IOSCO standards form the basic level of disclosure augmented by other requirements drafted by CESR. We appreciate that this interpretation is the subject of a debate at European Council & Parliament, the outcome of which is not yet clear.

- (b) We have significant concerns in relation to this approach for the following reasons:
- IOSCO standards provide a cohesive, standalone set of regulations for equity. Equally, certain of the additions to those standards suggested in this paper provide valuable information and investor protection *in a different type of regulatory regime*, based, as they appear to be, on a UK-type regulatory approach. To simply add the two together results in an overbearing, sometimes duplicative and inconsistent regime which is unlikely to achieve the (presumed) aim of enhancing investor protection while maintaining the current cost of fund raising. The UK approach follows a model of reporting by exception as opposed to the US full disclosure type regime. The approach taken by CESR in linking these together has led to a doubling of effort and, therefore, costs in key areas. For instance, there is a requirement for a ‘no significant change’ statement (VII.L) as well as expansive disclosure on trends (IV.D), liquidity (IV.B) and capitalisation (III.A).
 - In an ideal world what should be produced is a synthesis of the best aspects of international disclosure requirements. It appears that this exercise was not done and instead a decision was taken to impose the IOSCO standards without a comparative analysis being carried out as to the relative demerits and merits of those standards. As further elaborated below, these standards will result in significant amounts of questionably relevant information having to be included in the prospectus. Despite this (and allied to the above point) there also appears to be certain gaps in the disclosure requirements (e.g. no working capital statement is required) and, as discussed at comment 6 of our response to Question 44 below, there is no requirement for issuers who are subject to a particular regulatory regime (e.g. a telecoms company) to describe the manner of regulation.
 - The result of the approach taken is that there does not appear to be any underlying philosophy behind these rules. The danger with this is that important issues may be missed (as already mentioned) and interpreters of the regulations, in the future, will have no overriding principles to guide them in the application of the rules. We have raised specific issues emanating from this point below.

2.2 Costs

This regulatory regime must balance the costs inherent in its regulation with the benefits achieved as a result of such regulation. Indeed, an aspiration of Lamfalussy is to reduce the cost of capital in the European markets. Obviously, increased cost diminishes value and therefore disadvantages both issuers and investors (both existing and new). However, the overall perspective one gets from this document is

that the need for disclosure has been considered from only one perspective – that of completeness of information – with little to no regard being given the relative cost of providing the information as balanced with its benefit to investors. We are of the view (borne out by the detailed comments below) that the quantity of information which these Annexes impose upon issuers will dramatically increase the cost of the prospectus process, for little shareholder protection. Specific examples include Items III.E, IV.A, IV.B and VI.B of Annex A.

The Annexes require the production of a vast amount of ‘raw’ data giving the perception that CESR believes that more information is better in all circumstances – we believe this concept to be fundamentally flawed. Although it may be possible for sophisticated investors to wade through vast quantities of information with a view to gaining a realistic picture of the company’s business, risks and rewards, we do not believe that the same can be said for retail investors, the very group which, presumably, CESR is trying to protect. We appreciate there is now a requirement for a summary and a Management Discussion & Analysis (“M D & A”) section, however, given the potentially litigious nature of these sections, we do not believe that they will be used appropriately to alleviate these concerns. This is borne out by the experience in the US, where the summary document can often merely replicate a majority of the full prospectus and the M D & A merely acts as a method for comparing financial ratios with little subjective comment and analysis. We have discussed these concerns further in our responses to the specific questions posed.

2.3 Interpretation

Ireland is a common law jurisdiction which provides for a very literal interpretation of legislation. This approach is fundamentally different to that of other EU states who probably will not share our concerns in this specific issue. In a common law context, we are concerned that the scope of the Annexes, in many instances, is overly comprehensive or undefined which will lead to extensive disclosure and legal issues particular to common law jurisdictions.

In addition, it is not clear that the disclosure obligations cover an issuer’s business as a whole in the case of the issuer that is holding company for specific tax or legal reasons.

This lack of clarity will place a significant burden on issuers and on the Competent Authority (“CA”) in the prospectus approval process. This will again significantly increase costs as the reality is that costs increase dramatically and proportionately to the analysis required to be carried out and the discussion needed with the CA as to the meaning of particular concepts.

Specific examples in Annex A include:

- Items III.B.3, IV.A.1, IV.B, V.C.4, V.D, VI.A.1.c, VI.C, VII.E, VII.I, VIII.C, VIII.G.I.

Specific examples in Annex K include:

- Items V.E, V.F.4, V.J.

To assist you in meeting this concern we have reviewed the Annexes as a whole in this context and attach in Appendices 2 and 3 a copy of Annexes A and K marked to show drafting suggestions which we believe clarifies the text.

2.4 Materiality/Applicability

Adding to the concerns articulated above, the text lacks a general materiality or applicability clause. Ideally, disclosures should only be required if, and the extent to which, those disclosures are capable of influencing the investment decisions of the investor. Many of the disclosure requirements, if followed blindly in all cases, as opposed to when the substance of the disclosure is material to the assessment of the securities, would be unduly burdensome and costly with little to no benefit for investors. We would consider the following disclosure requirements to be particularly problematic in this regard:

Annex A: Items III.A.5, III.E, IV.B.1.b & c, V.C, V.D, VI.C

Annex K: III.C, IV.A, IV.B, V.D.4.b, V.D.4.d

We can appreciate the use and benefit of these comprehensive disclosure requirements in certain circumstances. However, we question the merit of having, for instance, a bank with a large property portfolio being obliged to abide by the letter of Item III.E, when the individual contents of that portfolio are highly unlikely to be material to the assessment of the banks' securities. The corollary of this is that clearly, we see the merit in any company whose value is determined substantially by its underlying property assets being obliged to meet these requirements. In our review of the Annexes, we have suggested wording in the particular disclosure items which would deal substantively with these concerns. In addition, we also believe that an over arching interpretative clause is essential – e.g. to the effect of:

'A prospectus must contain the information described in the relevant Annexes having regard to the nature and circumstances of the issuer and the type of security'.

2.5 Commercially sensitive information

- Many of the disclosures require information which is commercially sensitive in nature. Specific examples include:

Annex A: III.E, IV.B.1, IV.D.1, Annex K: III.B, V.I.

- Whatever the merits or demerits of requiring these disclosures (and we have significant concerns in relation to this), we believe these disclosure requirements pose significant problems for issuers which could potentially be detrimental to shareholder value. We appreciate that the Prospectus Directive itself provides for derogation in certain instances (under Article 8(2)(b)). However our experience of a similar provision in the Listing Particulars Directive (Article 7) is that this exemption is only permitted in extremely limited and exceptional circumstances. The conditions under which this exemption can be granted effectively places the responsibility of what is or is not seriously detrimental.....[and]...not likely to mislead...” .., upon the CA, rather than the persons responsible for the prospectus. For this reason, we would be very concerned that the new exemption would continue to be similarly granted in extremely limited circumstances. However, given the scope and nature of the disclosures in the Annexes we believe that there will be significant pressure from issuers for this exemption.
- (b) Our optimal solution would be for this flexibility to be built into the Annexes themselves or the particular parts of the Annexes which we have identified as being problematic in this respect. However, at the very least, it will be essential for CESR to provide guidance for CA’s as to the circumstances in which this exemption will be granted acknowledging that this exemption is likely to be more frequently used in the future.

2.6 Distinction between IPO and further issues

The draft disclosures do not distinguish between different types of offer of securities. The information typically disclosed when a company is conducting an initial public offer is far in excess of that disclosed by an already public quoted company engaging in a rights issue, for instance. The Annexes do not acknowledge this, nor do they provide for reduced levels of disclosure depending on the nature of the offer. This will result in a considerable cost to quoted companies entering into a fund raising for the first time under this new regime. In addition the first prospectus prepared under the Directive by an already publicly trading company will be obliged to comply with all the disclosure requirements, notwithstanding the fact that the market already has significant information about the issuer. We believe that the rules should deal specifically with these circumstances – it makes little sense to oblige an already listed company to make the types of disclosure necessary for a full IPO.

2.7 Inconsistency between the Registration Document and Securities Note

- (a) We note that several conflicts and overlaps exist between the Registration Document and Securities Note. As noted below in

our response to question 261, several items in the Securities Note are clearly addressed in the Registration Document and accordingly are duplicative. Any amendment to the disclosure requirements based on the consultation process must avoid any such duplication.

- (b) It is important that a logical and consistent approach be taken to the information provided at IPO (or 1st offer) and for further fundraisings. A clear example of the fact that this has not been thought through entirely, is in the area of large transactions (i.e. “significant gross changes”). In an IPO document, it would appear (although it is also not totally clear – see [our response to question 51 and 52 below) that financials on the target and a pro forma are required. It would appear that no financial information is required for a further issue in the same circumstances. This seems illogical. There seems little basis for requiring different information (whatever that might be) in each set of circumstances.

2.8 Wholesale and retail debt

- (a) We welcome the fact that CESR is providing an addendum to meet the disclosure needs of wholesale non-equity markets (paragraph 126). We welcome the fact that these disclosures will be reduced from that which applies to the retail equity and debt markets. Clearly, there can be no argument that in a sophisticated market selling sophisticated financial products retail type disclosure standards are either possible (for the type of product) or necessary (for the type of investor).

3. Specific comments

3.1 It would be useful to have a general caveat stating that:

- (a) the prospectus should provide factual information, in as easily analysable and comprehensible a form as possible; and
- (b) pictures, charts, graphs and other illustrations should only be included if the CA is satisfied that they are not misleading.

This would allow the CA to request deletion of inappropriate/marketing type information and/or information which is capable of being interpreted wrongly.

3.2 It would be useful to have a general clause that negative statements are only required when this is explicitly stated.

3.3 It is unclear whether the disclosure requirements relate to the issuer in question or the group of companies of which the issuer is a member.

For example, if an issuer of equity is a holding company, many of the disclosure requirements may not adequately address the disclosure of information relating to the group as a whole. In our review of Annex A for the purposes of our comments above and in response to question 44 above, we have also included specific suggested drafting to deal with this issue.

EQUITY SECURITIES

Question 44

Do you agree with the disclosure obligations set out in Annex A?

The following are our comments on specific disclosure items in Annex A.

1. I.C.1 - Auditors

The words “or such lesser period for which the company is in operation” should be included after the word “body”.

2. II.B – Risk Factors

Please see our response to Question 47 below.

3. III.A – History and Development of the Company

- III.A.4 - The inclusion of the telephone number of the Company is not relevant and is potentially problematic since in many instances the Company’s telephone number will be the telephone number of its registered office at the office of its legal advisors or auditors;
- III.A.5 - The words “for the period covered by the accounts” should be included after the word “event” in the first line of III.A.5;
- III.A.5 - Requires a materiality threshold relating to the “important events” in the history of the issuer (See comment 2.4 above);
- III.A.5 - The requirement to disclose name changes should be deleted. It has no impact on the ability of the investor to assess the company and the securities in question.

4. III.B.3 – Investments

This should be deleted. The disclosure of future investments is potentially misleading to investors since the investment may not actually occur. It is also commercially and legally questionable to refer to specific investments since this creates an expectation that such investment will occur.

5. **III.D.2 – Organisational Structure**

The requirement to list “significant” subsidiaries is unclear (see comment 2.3 above). We suggest that this requirement be deleted since it overlaps with Item VIII.G.1.

6. **III.E – Property, Plants and Equipment**

- A large capitalisation issuer could potentially be required to include enormous amounts of disclosure in an offering document relating to its “material” fixed assets notwithstanding the fact that these may not be material for investors assessing an issuer (see comments 2.2 and 2.4 above);
- The requirement to “describe any environmental issues that may affect the company’s utilisation of assets” is potentially extremely far-reaching - should be tailored to relate to any *existing* environmental issues that are material to the issuer’s business;
- The inclusion of “an estimate of the amount of expenditures” is also commercially sensitive in a tender situation (see comment 2.5 above);
- The Annex does not contain a disclosure requirement relating to regulation in general. Issuers that are subject to a heavy regulatory burden, such as a telecoms company, would typically describe, *inter alia*, the manner of regulation, the regulator itself and any particular legislation impacting upon that issuer. We note that IOSCO disclosure item IV.B.8 (Description of effect of Government regulations) is not included in the Annex. The inclusion of such a disclosure requirement could address this point.

7. **IV.A – Operating Results**

- IV.A.1 is very vague over and above the disclosures contained in IV.A.2 through IV.A.5. We suggest it be deleted;
- If retained, IV.A.1 should only relate to the period “covered by the accounts”. Issuers should not be obliged to provide disclosure for a period greater than this;
- The disclosure requirement in IV.A.5 is very broad and serves as an example of the difficulties that competent authorities will be faced with (see comment 2.3 above);
- The words “*current, existing or proposed*” should be inserted before the word “governmental” in the first line of IV.A.5 to ensure clarity (see comment 2.3 above).

8. **IV.B – Liquidity and Capital Resources**

- It is not clear in IV.B.1 whether the liquidity and capital resources information should relate to the previous 3 years operations or another period (see comment 2.2 above). There seems little sense in requiring historic information under this heading – all that is necessary is the current status;
- IV.B.1.b relating to legal or economic restrictions which “are expected to have” an impact on the ability of the company to meet these cash obligations is vague (see comment 2.3 above). The words “if material” should be inserted after “loans or advances and the impact”;
- IV.B.1.c relating to the seasonality of borrowing requirements should only be disclosed if material (see comment 2.4 above);

It is not envisaged that a working capital statement be included as a disclosure requirement. This is a significant departure from the current regime in Ireland and the UK. The simplicity of this statement provides clear, easily understood information to investors and is therefore extremely valuable. Instead, the CESR proposals require a vast amount of raw data, Annex A, disclosures IV.B.1.a to c which may not be so easily understood or analysable. However, in suggesting the inclusion of such a statement, we are concerned that this would represent a key difference between US and UK style documents. Obviously, it is desirable that these differences be kept to a minimum. For this reason, we suggest such a statement be included in place of these current requirements IV.B.1 to IV.B.3 at the option of the issuer. We do not believe that having to provide both would be desirable or necessary and would lead to a significant increase in costs.

9. **IV.D – Trend Information**

- The disclosure of costs and selling prices in IV.D.1 highlights the commercially sensitive nature of disclosures (see comment 2.5 above);
- Is not reconcilable with Item VII.L (Significant change) (see comment 2.1(b) above);
- Will cause a difficulty for issuers who will be reluctant to include a profit forecast in their offering document for the reasons outlined in our response to Question 85 below.

10. **V.A.2 – Management and Directors’ Conflicts of Interest**

- No definition of “major shareholders” is provided –we suggest that a major shareholder be defined as a person or entity holding 5 per cent or more of the issued share capital of the company.

11. V.B – Compensation

- V.B.1 should be standardised to ensure harmonisation. We suggest the deletion of the references to “not required in the company’s home country and is not otherwise publicly”, since this will result in an incentive to issuers to “forum shop” across Member States.

12. V.C – Board Practices

- V.C.4 presupposes that each Member State has a particular corporate governance regime (see comment 2.3 above). We are unsure if this disclosure requirement relates to a supposed *statutory* corporate governance regime or otherwise. This should be clarified.
- For example, at present, in Ireland and the UK a “regime” is imposed by virtue of the Listing Rules requirements (the “Combined Code”). When the Listing Rules are replaced with the Directive and the new disclosure requirements, these requirements will presumably fall away, meaning that there will not be a corporate governance regime in either jurisdiction.

13. V.D – Employees

The disclosure should relate to the number of employees as at the most recent balance sheet date” rather than at the “end of the period or the average for the period for each of the past three financial years (and changes in such numbers, if material” (see comment 2.3 above).

- Unclear whether the disclosure of “information regarding the relationship between management and labour unions” must only be disclosed if material, or disclosed in all events (see comment 2.4 above);
- In certain circumstances, such as where a high growth company is conducting an offer, the disclosure of the number of employees at the end of the most recent balance sheet date may be misleading in situations where the company has undergone significant growth since the date of that balance sheet, and issuers should be obliged to disclose any change, if material. See comment 2.4 above.

14. VI.A – Major Shareholders

- VI.A.1.b should be prefaced by a proviso stating, “insofar as is known to the company”, to be consistent with VI.A.1.a;
- VI.A.1.b - No definition of “major shareholders” is provided – we suggest that a major shareholder be defined as a person or entity holding 5 per cent or more of the issued share capital of the company.
- VI.A.1.b - The meaning of “significant” in the first line should be defined. See comment 2.3 above;

- V.A.1.b - The disclosure of changes over the past three years in shareholdings is not material to investors. It should relate to a *specific date* such as the last balance sheet date;
- V.A.1.b - The disclosure of changes in ownership should only relate to changes in “beneficial” ownership;
- VI.A.1.c referring to the “different voting rights” is unclear (see comment 2.3 above).

15. **VI.B – Related Party Transactions**

- We believe that the definition of “related party” is overly inclusive and results in large amounts of raw data. We have made suggested amendments to Annex A.
- Certain exceptions should be included:
 - disclosure of employees’ share schemes should not be required;
 - disclosure of “amounts of outstanding loans (including guarantees of any kind)” will result in investors receiving excessive amounts of completely unnecessary information (see comment 2.2 above);
 - grants of credit or loans on normal commercial terms, and all transactions of a revenue nature in the ordinary course of business with related parties, should not be required to be disclosed.

16. **VI.C – Interests of Experts and Counsel**

The scope of this section is unclear. What is of use and value to investors is an understanding of the interests which are material to their assessment of the issue and the existence of any material conflicts of interest. This section does not deliver this. On the one hand the term ‘material to that person’ is extremely subjective and far too wide – surely what is of concern is materiality to the issuer? On the other, the prescriptive nature of this section means that, for instance, interests of associated companies would not be required to be disclosed. For these reasons, we believe a more generic disclosure requirements would be more appropriate.

17. **VII.D - Own -v- Consolidated Accounts**

The words “and confirmation of this is provided to the competent authority” should be included after the word “information” in the last line of this disclosure requirement as the CA will be making the determination as to the inclusion of the accounts.

18. **VII.E – True and Fair View**

If the accounts do not give a true and fair view the issuer should be obliged to quantify the likely financial effect on the issuer, if possible.

19. **VII.F – Auditing of Accounts**

VII.F.1 should in no way inhibit the ability of the CA to require a clean audit report as a condition of admission to listing. The words “and date” should be inserted after the word “source” in VII.F.3 for the sake of completeness.

20. **VII.G – Age of Annual Accounts**

We presume that this does not preclude the CA from imposing a shorter period as a condition of admission to listing.

21. **VII.I – Export Sales**

Clarification should be given on the meaning of “export sales” - for instance does this include sales to other Member States within the EU or does it instead refer to sales only to non-EU Member States? It is not clear whether the disclosure relates to the most recent financial statements, or the period covered by the accounts. It should relate to the most recent financial statements.

22. **VII.K – Litigation**

Litigation which may reasonably expected to have a “significant effect” should be disclosed (see comment 2.4 above).

23. **VII.L – Significant Change**

This disclosure requirement conflicts with IV.D (Trend Information) (see comment 2.1(b) above).

24. **VIII.C -Material Contracts**

It is unclear as to whether the language relating to “and dates, parties, general nature of the contracts...” Is also meant to apply to the second paragraph of this requirement (see comment 2.3 above). We have inserted the relevant language in the second paragraph to address this.

25. **VIII.F – Documents on Display**

In relation to VIII.F.b, please see our comment relating to question 93 below.

26. **VIII.G – Subsidiary Information**

VIII.G.1 - The reference in the third paragraph is unclear to whom must the issuer prove that its holding is of a purely provisional nature.

Question 47

Do you agree with this approach?

We support the approach suggested concerning risk factors, i.e. to include a disclosure requirement for risk factors in the core RD building block for equity and then develop guidance at Level 3 at a later stage.

With regard to the Risk Factors disclosure (II.B of Annex A), we suggest replacing the words ‘are specific to the company or its industry and make an offering speculative or one of high risk’ with ‘could potentially have a material adverse affect on the company (or if it is a holding company, the Group companies or the holding company’s trading companies, as applicable)’. Every offer is ‘speculative’. Therefore, this wording will result in exhaustive and irrelevant lists of non-material risks in prospectuses- with little benefit for investors and significant costs to issuers. (see comments 2.2 and 2.3 above).

Questions 51 & 52

Do you agree that pro forma should be mandatory in the case of a significant gross change in the size of a company, due to a particular actual or planned transaction?

Do you agree that pro forma financial information should also be required in all cases where there is or will be a significant gross change in the size of a company?

No.

It is essential that a definition of ‘pro forma’ be provided by CESR, as currently it is not clear as to whether pro forma is intended to include statements of net assets, profit and loss accounts, cash flow statements, or other statements (for example, capitalisation and indebtedness statements, dilution tables etc.).

The requirement to include pro forma information relating to an actual or planned transaction should also be included as a requirement in the securities note where the securities note is issued as a result of a fundraising to finance an acquisition. (See comment 2.7 (b) above.)

We are unsure as to what specific information needs to be provided relating to a transaction. Item 4, Annex B provides that “*if applicable* the financial statements of the acquired businesses or entities will be included in the prospectus”. We are unclear as to when this requirement will be applicable and, therefore, suggest that this is clarified by CESR.

Question 53

Do you agree that 25% is the correct threshold figure? Would a different figure, say 10%, be more appropriate?

Yes (to 25%), although we believe that aggregation of several gross changes should only occur where it is logical to aggregate based on the related nature of the gross changes (e.g. the same counterparty).

Question 55

Do you agree that the competent authority should be able to insist on pro forma information being included where this would be material to investors?

Yes.

Given that such a power could potentially lead to a lack of harmonisation between Member States, it is necessary that clear guidance on the use of such a power be provided at Level 3.

Question 64

Do you agree with the disclosure requirements in respect of pro forma financial information as set out in Annex B, in particular with the obligation of an independent auditor's report?

Yes, although we wish to stress the importance of the retention of the limitation of pro forma information to the current financial year as set out in Item 6 of Annex B.

Question 65

Would it be appropriate to restrict the disclosure of pro forma information to the occasions where securities are being issued in connection with the transaction and hence require pro forma information in the securities note?

Yes. The inclusion of pro forma information in a Securities Note should be at the option of an issuer if it deems the inclusion of such information to be necessary for investors.

Question 73

Do you have any comments at this stage about this preliminary definition of a profit forecast?

No.

Question 85

Should issuers be required to repeat or update outstanding ad-hoc profit forecasts in the prospectus?

In their first prospectus, issuers should not be obliged to include profit forecasts that pre-dated the prospectus. The obligation to update forecasts should only relate to profit forecasts published in prospectuses drawn up in accordance with the Directive.

In our experience many companies face a practical difficulty in having to, on the one hand, deliver sufficient information to the market to allow the market assess future prospects and, on the other, avoid falling into the realm of profit forecasts. In practice this has meant that companies have relied on analysts' commentary to deliver the information while publishing only extremely bland information in their prospectus with little value to the market.

Question 86

Do you agree with the disclosure requirement in respect of profit forecasts set out in disclosure requirement CESR reference IV.D.3 (a) and (b) of Core Equity Building Block (Annex "A").

Yes.

Question 87

Do you agree with the arguments set out regarding mandatory reporting by the Company's financial advisor?

No. We believe that auditors can confine the scope of their review to give limited comfort on profit forecasts. In addition, the reporting on forecasts imposes a discipline on the issuer to ensure that the assumptions upon which the forecast is based are realistic, and that the issuer is forecasting in accordance with its normal accounting policies.

Question 89

(i) Do you agree that such information may be material to an investor's decision to invest?

(ii) Would the provision of such details breach privacy laws in your jurisdiction?

(i) Yes.

(ii) No.

In circumstances where public criticisms of a director have been expunged, then the disclosure required under V.A.1 (g) of Annex A should not apply to the expunged criticisms.

Question 91

Do you think that the additional disclosures of any limiting measure should be required?

Disclosures regarding any measures in place to limit the degree of control operated by a controlling shareholder should be required in a prospectus.

Question 93

Do you feel that issuers should be required to put on display all documents referred to in the prospectus (as set out in CESR reference VIII in Annex A)?

Would this cause problems due to privacy laws or practical problems as a result of having to review lots of documents for commercial information?

No, to the 1st question. Issuers are required to provide the significant terms of all material contracts in the prospectus and, therefore, having such contracts on display provides investors with no additional value information. The disclosure of material contracts may also be commercially sensitive (see comment 2.5 above). However, such disclosure does not cause problems with privacy laws in this jurisdiction.

Questions 95 & 96

Do you believe that the building blocks in Annexes D, E, F, G and H are appropriate as minimum disclosure standards?

What other specialist building blocks (if any) should CESR consider producing in the future?

Annex D

Annex D does not properly addresses the disclosure requirements for property companies.

1. A definition of “property company” should be included.
2. The valuation report should also:
 - state the names, addresses and professional qualifications of the valuer;
 - state whether the valuation is based on open market value, existing use value, depreciated replacement cost subject to adequate profitability, or other;
 - in cases in which directors or promoters have been interested in any acquisitions or disposals of any of the properties during the two years preceding the valuation, contain details of the nature and extent of such interests and the date of transactions and the prices paid or received or other terms on which the transactions were effected; and
 - identify any other matter which the valuer considers relevant for the purposes of the valuation.

Annex E

1. It appears that companies that are involved only in exploration for mineral resources and are not undertaking or proposing to undertake their extraction on a commercial scale do not fall within the scope of Annex E. This Annex should be amended to allow the inclusion of such companies.

Annex F

1. ‘Financial matters’ disclosure (ii) should not be required for a company with proven and probable reserves that has not commenced extraction of mineral resources on a commercial scale, as such estimated information cannot be provided by issuers with any degree of reliability and, therefore, it could be potentially misleading for investors who may place undue reliance on it.
2. Certain disclosure requirements set out in the expert’s report section of Annex F lack clarity. In particular, the following disclosure is not clear:

‘Split according to proven and probable reserves, a description of the value, nature and extent, characteristics, methods of exploration or extraction of, and recovery estimates of reserves.’

We suggest replacing the above disclosure with the following disclosure requirements:

Reserves

- (i) the nature and extent of the company's rights of exploration and extraction and a description of the properties to which the rights attach;
 - (ii) the geological characteristics of the occurrence of the reserves, the type of deposit, its dimensions and grade distribution;
 - (iii) the methods to be employed for exploration and extraction;
 - (iv) an estimate of the volume, tonnage in place and grades, as appropriate, each split between proven and probable reserves;
 - (v) the method by which they were estimated; and
 - (vi) the expected recovery and dilution factor.
3. The following additional disclosures should be included in the expert's report:
- (a) the full name, address and professional qualification of the competent person and if the competent person is a firm or company, of the relevant partner or director;
 - (b) a statement in relation to the company or, where relevant, to the consortium to which it belongs setting out the production schedule, as follows:
 - (i) the production policy, including production rates of sites, mines and wells where production has already commenced;
 - (ii) the estimated production rates relating to the new mines, or reworkings, or new drilling, or work-overs;
 - (iii) an estimate of the working lives and degree of depletion of each major property;
 - (iv) an assessment of the expertise of the technical staff being or to be employed; and
 - (v) an indication of the bases on which these estimates have been arrived at.
 - (c) Valuation:
 - (i) an estimate of the net present value (or valuation arrived at on an alternative basis, with an explanation of the basis and of the reasons for adopting it) of proven and probable reserves (analysed separately);
 - (ii) the principal assumptions on which the valuation of proven and probable reserves is based including those relating to discount factors, exchange rates and economic conditions; and

- (iii) information to demonstrate the sensitivity to changes in the principal assumptions.

Annex G

Please see our response to Question 120 below.

Annex H

Annex H is appropriate as a minimum disclosure standard.

Question 100

Do you agree with the specific disclosure requirements set out in the building block for start-up companies?

The disclosure requirement in II.A relating to advertising expenses should only be disclosed if material (see comment 2.4 above).

The requirement to comply with the Liquidity and Capital Resources disclosure requirements for the next 24 months is extremely difficult, potentially misleading and should be deleted.

Question 101

Do you feel that additional disclosure requirements should be included, for example, an independent expert opinion on the products and business plan?

In general, additional disclosure requirements, such as an independent expert opinion on the products and business plan, should not be included in the start-up companies' building block. However, where the value of a company is dependent on the value of an unproven technology, then CA should have the power to require an independent expert opinion, if it deems such an opinion to be necessary for investor protection.

Question 102

Do you feel that disclosure of restrictions regarding holdings by directors and senior management etc. should be applied to all companies through the core building block? Or should this only be required for all companies where there are such restrictions?

Yes. If no such restrictions apply, a negative statement should be provided in the prospectus.

Question 105

Do you believe that SMEs should only be required to provide details for two years under disclosure requirement II.A?

No.

Question 106

If so, do you believe that all historical information should be restricted to this two-year period?

See answer to 105 above.

Question 107

Bearing in mind the materiality test in the disclosure requirements contained in the core capital Equity building block, if you believe that there should be some specific disclosure requirements for registration documents for SMEs, please list them.

No.

Question 111

Do you agree that valuation reports as set out in Annex D should be required for property companies?

Please see our response to Question 95 relating to Annex D above.

Question 112

Do you consider it appropriate that the valuation must not be more than 42 days prior to the date of publication?

Yes.

Question 113

Do you agree that it would be more appropriate for such reports to be required when securities are being issued by a property company and hence should form part of the securities note?

No, as this is potentially unduly burdensome on issuers. We believe that inclusion of the valuation report in a Securities Note should be at the option of an issuer if it deems the inclusion of such information to be necessary for investors.

Question 116

Do you agree that expert reports should be required for mineral companies?
Do you agree that it would be more appropriate for such reports to be required when securities are being issued by a mineral company and hence should form part of the securities note?

Expert reports should be required for mineral companies, as follows:

1. at the time of initial public offering; and
2. when a mineral company has not been trading for at least the three years preceding the date of the Securities Note.

In all other cases, there should be no requirement for an expert's report.

A mandatory requirement to provide expert's reports when securities are being issued would be potentially unduly burdensome on issuers. Therefore, the inclusion of expert reports in a Securities Note should be at the option of an issuer if it deems the inclusion of such information to be necessary for investors.

Question 117

Do you agree with the disclosure requirements in registration documents for mineral companies set out in Annex E?

Yes.

However, the definition of mineral company as set out in paragraph 114 of the Consultation Paper (*“the principal activity”*) is inconsistent with that set out in the definitions section of Annex E (*“a principal activity”*). The definition contained in Question 117 is appropriate.

Question 120

Do you agree with the disclosure requirements in registration documents for investments companies set out in Annex G?

We note that a separate building block is being prepared for closed-ended funds, but it is not clear what type of issuer Annex G seeks to address. This should be clarified, and in particular, a definition of *“investment company”* should be included. See comment 2.3 above.

Question 123

Do you agree with the disclosure requirements in registration documents for scientific research based companies set out in Annex H?

No comments arising.

DEBT SECURITIES**General Comment**

It is very common for various subsidiaries of an issuer to be used for bond issuance – these schedules would oblige the group to provide detailed information on these subsidiaries (being the issuer). Where an issuer of retail debt securities is a subsidiary of a company with equity securities admitted to trading on a regulated market, and that company fully guarantees the debt securities being issued as to principal and/or interest, the issuer should not be required to comply with all of the disclosure requirements of Annex I. The more relevant information required by investors is that concerning the parent-guarantor and its capacity to repay the debt in the event of default by the issuer. All of the necessary information concerning the parent-guarantor will have been previously published in the parent’s registration document filed with the home competent authority. As a result, in assessing the debt securities, detailed information concerning the debt issuer, as required under Annex I, becomes less relevant for investors. CESR should consider the introduction of reduced disclosure requirements for debt issuers in circumstances, such as those outlined above.

Question 129

Do you consider that the disclosure requirements for debt securities should be identical to those for equity, as set out in Annex A?

No.

An investment decision regarding debt securities is very different to an investment decision regarding equity securities. Therefore, the information required to be included in a debt prospectus should not be the same as that for an equity prospectus.

Question 134

Do you consider disclosure about the issuer's bankers and legal advisers to the extent that the company has a continuing relationship with such entities to be relevant for corporate retail debt?

No.

Inclusion of such information in a prospectus does not provide an investor with additional value information in assessing an issuer's capacity to fulfil its debt obligations.

Question 135

Do you consider that disclosure relating to the bankers and legal advisers who were involved in the issue of that particular debt instrument to be relevant?

Yes, in the Securities Note building block.

Question 137

Do you consider disclosure about a company's past investments in other undertakings to be material for an investor to make an investment decision about investing in the company's debt?

No.

Question 138

Do you consider that disclosure about a company's current investments in other undertakings to be material for an investor to make an investment decision about investing in the company's debt?

No.

Questions 139

Do you consider that disclosure about a company's future investments in other undertakings to be material for an investor to make an investment decision about investing in the company's debt?

Yes, in certain very confined circumstances, for example, where a company has made significant binding commitments that could potentially affect its ability to fulfil its obligations under the debt agreement.

Question 142

Do you agree that these different interests should be reflected by different disclosure standards and in particular that retail bondholders do not need the same disclosures as shareholders in respect of these sections of the IOSCO IDS?

Yes, equity disclosure standards are not applicable for debt securities.

Question 145

Do you consider it necessary for a disclosure requirement that stipulates when interim financial statements should be disclosed in the registration document, to also stipulate what the form and content of these statements should be?

No. Currently, this is not a CARD requirement.

Question 146

If you consider that the reduced level of detail is more appropriate, should the same approach be taken for equity?

Yes.

Question 148

Do you feel that issuers should be required to put on display all documents referred to in the prospectus (as set out in CESR reference VIII in Annex A)? Would this cause problems due to privacy laws or practical problems as a result of having to review lots of documents for commercial information?

No. Please see response to question 93 above.

Question 149

On review of the list of documents set out CESR ref VIII.E of the corporate retail debt building block in Annex "I", please advise with reasons: (1) Whether or not there are any documents that are listed that you consider do not need to be put on display? (2) Whether or not there are any documents that are not listed that should be put on display?

We are not aware of any documents falling within (1) and (2) above.

Question 150

Please give views on which if any of the documents that are not in the language of the country in which the public offer or admission to trading is being sought should be translated.

None of the documents referred to in disclosure requirement V.III.E of Annex I should be translated into the language of the country in which the public offer or admission to trading is being sought.

Question 153

On a review of the equity disclosure requirements (CESR ref VIII.G of the Core Equity Building Block) set out in Annex “A”, please advise which if any of these requirements you consider to be relevant for retail corporate debt. Please give your reasons.

None of the equity disclosure requirements set out in Annex A are relevant for retail corporate debt.

Question 154

Do you agree with the CESR disclosure proposals for corporate retail debt as set out in Annex “I”?

Yes.

Question 155

Please advise which if any items of disclosure should not be required for corporate retail debt. Please give you reasons.

- II.A.1 to II.A.3 – this information is provided in full in an issuer’s financial statements and, therefore, should not be required elsewhere in a prospectus;
- III.C.2 – the following part of disclosure requirement III.C.2 is not relevant for investors in debt securities: ‘breakdown of total revenues by category of activity and geographic market for each of the last two financial years’. In any event, such disclosure is normally provided in the Notes contained in financial statements;
- IV.B – please see ‘Trend Information’ section of response to Question 44;
- V.A.1 – this disclosure requirement should apply to directors of a company, but not its management;
- V.C.1 – this disclosure requirement does not appear to be relevant for debt investors. It should be noted that this information is currently not required under Schedule B of CARD (2001/34/EC);
- VI.A.1.b – this disclosure requirement does not appear to be relevant for debt investors. It should be noted that this information is currently not required under Schedule B of CARD (2001/34/EC); and
- VI.B – this disclosure requirement does not appear to be relevant for debt investors. It should be noted that this information is currently not required under Schedule B of CARD (2001/34/EC).

Question 156

Please advise if there are any items of disclosure for corporate retail debt that are not set out in the schedule, but should be. Please give your reasons.

None.

DERIVATIVE SECURITIES

Question 160

Do you consider it necessary to have specific derivative registration document requirements, or do you consider this unnecessary as the registration document requirements for debt securities should be used for derivative securities as well? Please give your reasons.

It is necessary to have specific derivative registration document requirements.

Derivative products where the return is contingent on the performance of an underlying instrument are different to derivative products where an absolute liability exists (i.e. a 'debt' type obligation), and the disclosure requirements developed by CESR should reflect this.

Question 170

Do you think it is useful to provide some form of definition for these securities?

No.

It would be almost impossible to develop a definition that caught all derivative products without catching other categories of securities. In addition, the derivatives market is highly innovative and dynamic and any definition developed by CESR would be likely to become quickly outdated as new derivative products are issued in the market that fall outside the scope of any definition developed.

Question 171

If so, which of the two approaches set out above do you prefer? Please give your reasons.

The fundamental features approach is appropriate for derivative products.

Question 172

If you prefer the approach based on a wide definition of derivatives, do you have any comments on the proposed definition?

Not applicable – see response to Question 170.

Question 173

If you prefer the approach based on fundamental features, are there other features that should be but are not included in the above list?

The fundamental features of derivative securities relate to:

- (1) the nature of the obligation(s) created by the issuer; and
- (2) the issuer's capacity to fulfil the obligation(s).

Question 179

Do you agree with the above broad sub-categorisation of derivative products?

Yes.

Question 180

Do you agree with the approach of having two distinct registration document building blocks to reflect this sub-categorisation?

It is appropriate to have two distinct registration document building blocks, as follows:

1. a building block applicable to all derivative products, irrespective of whether the obligation of the issuer is contingent or absolute; and
2. an additional building block applicable where the obligation created is essentially that of a 'debt'.

Question 185

Do you agree that the nature of the decision that an investor is making about the issuer in the case of a non guaranteed derivative is different to the one an investor is making in the case of a guaranteed derivative? Please give your reasons.

No.

In both cases, an investor is assessing the ability of an issuer to fulfil its obligations.

Question 190

Do you consider that disclosure about the issuer's senior management, as set out in IOSCO reference I.A, is relevant for these products? Please give your reasons.

No.

Such disclosure is not relevant for investors assessing the ability of an issuer to fulfil its obligations.

Question 192

Do you consider disclosure about the issuer's advisers, as set out in IOSCO reference I.B, to be relevant for these products? Please give your reasons.

No.

An investor's return is based on the value of an underlying instrument and, therefore, disclosure of an issuer's continuing relationships with advisors is not relevant in making an investment decision.

Question 195

Do you have any views at this stage about CESR's provisional guidance in this area?

The Risk Factor disclosure requirements, as set out in paragraphs 193 (a) and (b), are appropriate for derivative products.

Question 196

Are there any other sections of Key information section at section III of IOSCO that you deem as being relevant disclosure for these products? Please give your reasons.

No.

Question 197

Are there any sections of key information section at section III of IOSCO you consider superfluous as regards the disclosure of these products? Please give your reasons.

Not applicable – see response to Question 196 above.

Question 199

Do you consider the level of detail set out in IOSCO disclosure standard IV.A to be inappropriate for these products? Please give your reasons.

Yes.

The level of detail as set out in disclosure standard IV.A of Annex J is both unnecessary and irrelevant for derivative investors. In particular, the following disclosures are not relevant for derivatives investors:

- IV.A.4 – information concerning important events in the development of a company's business;
- IV.A.5 – a description of the company's principal capital expenditures and divestitures over past 3 years;
- IV.A.6 - a description of the company's current principal capital expenditures and divestitures; and
- IV.A.7 – an indication of any public takeover offers by third parties.

Question 200

Which particular items of IOSCO disclosure in this section do you consider to be relevant for these products? Please give your reasons

- IV.A.1 – legal name of the company;
- IV.A.2 – date of incorporation; and
- IV.A.3 - domicile and legal form etc.

Question 202

Do you consider that a general description of what the issuer's principal activities are is a more appropriate level of disclosure for these products? Please give your reasons.

Yes.

The information required under this section is very detailed and not relevant for derivative securities whose value is dependent on the performance of an underlying instrument.

Question 203

Please advise what, if any, other items of Section IV.B of IOSCO you consider to be of relevance for these products. Please give your reasons.

- IV.B.1 – a description of the nature of the company's operations and its principal activities, stating the main categories of products sold and/or services performed. However, such information should not be required for the last three years and a description of new products and services is not relevant for derivative products.
- IV.B.7 – any statement made by an issuer regarding its competitive position would need to be substantiated in a registration document.

Question 205

Do you consider that a brief description of the issuer's group and the issuer's position within it, as set out in IOSCO reference IV.C, to be an appropriate disclosure requirement for these products?

Yes.

However, specific details about the nature of significant subsidiaries and ownership interests are not relevant for investors assessing whether or not to invest in derivative securities.

Question 207

Do you consider Section IV.D of IOSCO to be relevant disclosure for these products? Please give your reasons.

No.

Investors are not investing in the share capital of an issuer and, in addition, their return depends solely on the performance of an underlying instrument. Therefore, information concerning the property, plants and equipment of an issuer is not relevant for investors making an investment decision.

Question 209

Do you consider Section V.D of IOSCO to be relevant disclosure for these products? Please give your reasons

Question 210

Please advise what, if any, other disclosure requirements set out in Section V of IOSCO you consider to be relevant for these products. Please give your reasons.

None of the disclosure requirements in section V of Annex J are relevant for derivative products. Such information will not assist an investor in determining how an underlying instrument is likely to perform in the future, or whether an issuer will be able to fulfil its obligations under the terms of a derivative product.

Question 212

Do you consider that the name and function of the directors of the issuing company to be the appropriate level of disclosure for these products?

Yes.

Question 213

Please advise what if any other items of Section V of IOSCO you consider to be of relevance for these products. Please give your reasons.

None, as these disclosures are based on IOSCO disclosure standards and, therefore, relevant disclosures for equity issuers, but not derivative issuers.

Question 215

Do you consider that a statement setting out whether or not the company is directly or indirectly owned or controlled by another entity and the name of that entity to be the appropriate level of disclosure for these products?

No.

Question 217

At this stage do you have views about whether the following types of financial information about the issuer are relevant and as such should be disclosed in the registration document for these products? Please give your reasons.

- a) balance sheet
- b) profit and loss account
- c) statement showing either (i) changes in equity other than those arising from capital transactions with owners and distributions to owners; or (ii) all changes in equity (including a subtotal of all non-owner items recognised directly in equity)
- d) cash flow statement
- e) accounting policies
- f) related notes and schedules required by the comprehensive body of accounting standards to which the financial statements are prepared.

Disclosures (a) to (f) are relevant for derivative issuers.

Question 218

For how many years should the above disclosure be given?

- a) for the last year, or
- b) for the last two years.

Two years.

Question 219

Do you think that there should be a disclosure requirement that the notes to the accounts be included in the registration document for these products? Please give your reasons.

Yes.

Question 220

Please advise which (if any) of the other CESR disclosure standards set out in Sections VII.C-VII.I of the Corporate Retail Debt building block at Annex “I” you deem to be relevant disclosure for these products. Please give your reasons.

The following Sections of Annex I are relevant disclosures for derivative products:

- VII.C – standard of account preparation;
- VII.D – own versus consolidated accounts;
- VII.E – true and fair view;
- VII.F – auditing of accounts;
- VII.G – age of latest annual accounts; and
- VII.H – interim financial statements – should only be required if an issuer has already published these. If interim financial statements have not already been published by an issuer, then this disclosure requirement should not apply.

The above information should be disclosed in a registration document so that investors are able to properly assess the ability of an issuer to fulfil its obligations under the terms of the derivative.

Question 222

At this stage do you have views about which of the following sections of IOSCO regarding the issuer’s share capital you consider to be relevant information to be disclosed in the registration document for these products? Please give your reasons.

None of X.A.1 to X.A.6, relating to share capital, is relevant for derivative products.

Question 223

At this stage do you have views about which of the following sections of IOSCO regarding the issuer’s Memorandum and Articles of Association you consider to be relevant information to be disclosed in the registration document for these products? Please give your reasons.

- X.B.1 - an issuer’s registration number; and
- X.B.3 – a summary of the rights that a derivative investor is entitled to.

Question 224

In relation to Section X.C of IOSCO which sets out the Material Contracts disclosure requirements, at this stage do you have views about which material contracts for these products should be summarized in the registration document for these products? Please give your reasons.

An issuer should summarise in the registration document all material contracts that could result in any group member being under an obligation or entitlement that is material to the issuer’s ability to meet its obligation to security holders in respect of the class of securities being issued.

Question 225

Do you consider Section X.D of IOSCO which sets out the Exchange Controls disclosure requirements to be relevant for these products? Please give your reasons.

No.

Question 226

Do you consider that the information about the issuer's dividend policy as set out in Section X.F of IOSCO to be relevant for these products? Please give your reasons.

No.

Information regarding an issuer's paying agent is relevant and, therefore, should be disclosed in the securities note.

Question 227

In relation to Section X.H of IOSCO which sets out the Documents on display disclosure requirements, at this stage do you have views about which documents should be put on display for these? Please give your reasons.

The following documents relating to derivative issuers should be put on display:

- any trust deed of the issuer;
- all reports, letters, and other documents, balance sheets, valuations and statements by any expert any part of which is included or referred to in the registration document; and
- the audited accounts of the issuer or, in the case of a group, the consolidated audited accounts of the issuer and its subsidiary undertakings for each of the two financial years preceding the publication of the registration document.

Please see response to question 93 above.

Question 228

Do you consider that information about the issuer's subsidiaries as set out in Section X.I of IOSCO to be relevant disclosure for these products? Please give your reasons

No.

Question 232

Should all guaranteed derivative securities, irrespective of the percentage return they offer an investor, be treated in the same way, or should there be some form of minimum return that is guaranteed for these instruments in order for the product to be classifiable as a guaranteed return derivative as opposed to a non-guaranteed return derivative?

All derivative securities, where an absolute liability exists, should be treated in the same way.

Question 233

If you consider that a percentage benchmark should be set to distinguish between those products where the return is high and therefore additional disclosure about the issuer is justified, please specify what this percentage of return should be, and give a reason for your answer.

Not applicable – please see response to question 232.

Question 234

Do you consider that in addition to the percentage return on the investment, the life of the product should be taken into consideration, so that an instrument that has a 100% capital guarantee return with only a 6 month life cycle should be treated for disclosure purposes differently than a product with 100% capital guarantee but with a 10 year life cycle? Please give reasons for your answers.

All derivative securities, irrespective of the life cycle of the product, should be treated in the same way. An investor making an investment decision needs all necessary information available at the time of purchase, irrespective of the life cycle of the product involved.

Question 249

Do you consider it an appropriate approach to obtain flexibility by creating specific building blocks on particular characteristics of some issuers, offers, markets and securities?

Yes.

Question 250

Format of the Schedules - Is the format of the three main Schedules acceptable? These Schedules are comprised of (i) common items and (ii) specific items for each type of securities, amalgamated in one single document. Is this approach sensible or should the common items and specific items form distinct blocks?

Yes.

Question 251

Complex Financial Instruments – In order to ensure adequate disclosure for securities that do not fall within one of the three main types, do you agree that the CA should (as envisaged by Article 21(4)(a) of the amended proposal for the Directive of the European Parliament and of the Council on the Prospectus to be published when securities are offered to the public are admitted to trading and amending Directive 2001/34/EC), be able to add specific items of another schedule to the main schedule chosen, that it considers it necessary having regard to the characteristics of the securities offered, as opposed to their legal form?

We believe that a CA should not only be able to add specific items of another Schedule to the main Schedule chosen, but also disapply specific disclosure items having regard to the characteristics of the securities. In saying this, we are conscious of the need to ensure uniform interpretation across Member States, so as to avoid “forum shopping”. We favour the adoption of this type of approach since it will permit a CA to admit to trading innovative, complex financial instruments immediately, without having to delay an issuer’s access to the capital markets by waiting for CESR to issue guidance on that specific type of instrument. In order to address our concern relating to “forum shopping” we suggest that CESR should consider the drafting of general guidelines for CAs to rely on in this situation, having

specific regard to the characteristics of the securities offered. We believe that this guidance is essential to ensure that a “body of interpretation” does not build up in certain Member States thereby defeating the aim of harmonisation in the Directive.

Question 252

Section I.2 – Should advisers be mentioned in all cases or only if they could be held liable by an investor in relation with the information given in the Prospectus?

We believe that this question is flawed since it appears to imply that the naming of an advisor in a Prospectus equates to liability for the contents of the prospectus attaching to that advisor. While investors should know who the advisers to the issue are, the mentioning of advisers does not relieve the directors of their liability for the contents of the prospectus.

Question 253

Section I.5 – Under Section I.5, the securities note should mention any other information in the Prospectus besides the annual accounts, which have been audited or reviewed by the auditors. Should the Securities Note contain the “auditors report within this information”?

No, the Auditors Report should instead be included in the Registration Document unless something within the Auditors Report is specific to the issue, in which case it should be included in the Securities Note.

Question 254

Sections I.6 and I.7 – Sections I.6 and I.7 both concern the responsibility attached to drawing up a Prospectus. Although under the proposed Directive it is possible to choose a format consisting of three documents (Registration Document, Securities Note and Summary), these issues documents are considered as making one Prospectus. Is it therefore correct to assume that responsibility of each of these three parts must rest with the same persons?

We believe that the Directors of the issuer must take responsibility for each of the three documents. However in the case of a secondary offering where a shareholder sells its shares and such sale constitutes an offer of securities to the public within the meaning of the Directive, the selling shareholder should be obliged to take responsibility for certain elements of the Securities Note.

Question 255

Section III.A – All Securities Notes must contain a Statement of Capitalisation and Indebtedness. Is such a statement necessary for Derivatives?

Yes.

Question 256

Section III.B.1 – For the Derivatives Schedule – Section III.B asks to list the reasons for the offer and the use of the proceeds. While this is an important item for bonds and shares, is it also the case for derivatives?

Yes, we believe that the same disclosure should apply to both bonds and derivatives and that no case exists for distinguishing between the two.

Question 257

Section III.C.2 (d) requires inclusion of a worked example of the “worst case scenario”.

(1) Does this information provide material information for investors? (2) Are there circumstances in which an example of the worst-case scenario is not appropriate?

(3) Would the disclosures as set below be an appropriate alternative:

- (a) a risk warning to the effect that investors may lose the value of their entire investment; and/or
- (b) if the investor or investor’s liability is not limited to the value of his investment, a statement to that effect together with a description of the circumstances in which such additional liability arises and the likely financial effect.

We believe that the disclosures contained at (a) and (b) above are more beneficial than the inclusion of a “worst case scenario”, which we feel does not provide material information to investors.

Question 258

Section IV.A. Under Section IV.A the interests of experts in the issue or the offer must be disclosed. These interests encompass those of any expert or counsellor who “has a material, direct or indirect economic interest in the company”. Is it necessary in the case of derivatives?

We believe that if the disclosure is necessary in the case of debt it should also be relevant for derivatives.

Question 259

Section V.A – Section V.A lists the items to be disclosed in order to give a description of the securities that are offered or admitted to trading. Should the following additional licence be added to Section V.A: (a) Legislation under which securities have been created; (b) Court competent in the event of litigation; (c) Redress service available for investors, if any? Should information about the rating of the issuer or of the issues be mentioned under that item? If yes, which one of the following wordings would be more appropriate:

- Rating assigned to the issue or to the securities by rating agencies and/or commercial bank lenders pointing at the main rating organisation, whose rating is disclosed and explaining the meaning of the rating. If a rating does not exist, to the knowledge of the issuer, it is required to disclose the fact that there is no rating, or
- Rating assigned, at the issuers request or with his co-operation, to the issuer or to the securities by rating agencies and/or commercial bank lenders, pointing out the name of the rating organisation whose rating is disclosed and explaining the mean of the rating.

We believe that the information in question (a) should be disclosed, but (b) and (c) are not appropriate. In pan-European offerings, it will not be possible to specify the competent court, and the redress service available for investors will also vary, and is potentially extremely broad. It could for instance, require the disclosure of all consumer protection legislation.

We believe that the former wording relating to ratings is more appropriate than the latter, but this should only be required for bond and derivatives, and it not relevant for equities.

Question 260

Section V.B.12, first indent of Annex M – Section V.B.12, first indent of Annex M requires a statement concerning the past performance of the underlying [security] and its volatility. Is this disclosure necessary? Should the requirement for disclosure vary depending on whether the underlying instrument is admitted to trading on a regulated market and the nature of the market? Should the requirement for disclosure vary depending on the nature of the underlying instrument?

No. Disclosure concerning the past performance of an underlying security and its volatility is not necessary in a SN.

Question 261

For the three main schedules please identify those items that you deem unnecessary?

We have attached at Appendix B to our submission a marked copy of our proposed amendments to the Annexes, including the deletion of items that we deem unnecessary.

- I.3** Auditors – This should be deleted as it is already addressed in Item I.C of the Registration Document (see comment 2.7 (a) above).
- I.4** This should be deleted and should instead be required under I.C of the Registration Document (see comment 2.7 (a) above).
- I.5,6,7** This should refer to the “securities note” rather than the prospectus.
- III.A** This should refer to “those offered *for* subscription”.
- II.B.1** This should also state where applications forms are available and V.B.1 should be deleted since it is duplicative.
- III.B** We believe that the information required here is overly specific. The disclosure of use of proceeds raises practical difficulties for issuers, since the intended use of proceeds may change following publication of the prospectus. The requirement to disclose information about potential acquisitions is commercially sensitive, (see comment 2.5 above) and as a result will cause difficulties for issuers. Instead, this disclosure should only relate to acquisitions committed to *as of the date* of the prospectus.

The requirement to “briefly describe the assets and their cost” in III.B.2 is inconsistent with the requirement to include pro forma information relating to a “significant gross change” in the Registration Document (see comment 2.4 above).

IV.A We are unsure as to what this requirement seeks to address. In particular, guidance should be given by CESR as to the meaning of “contingent”. Investors need to know the aggregate fees payable on the issue, the existence or otherwise of contingency fees and the existence of material conflicts of interest. Disclosure of contingency, number of shares or economic interest should therefore only be required if “material”(see comment 2.7 above). The requirement to provide “a brief description of the nature and terms of such contingency or interest” is highly commercially sensitive information providing little benefit to investors.

IV.B This requirement provides a further example of the interpretational difficulties that the disclosures raise (see comment 2.3 above). We suggest that guidance should be forthcoming from CESR as to the meaning of “conflict” since it is unclear as to how broadly this should be interpreted.

V.A. The requirement in V.A.6 more appropriately relates to debt, and should be deleted.

The requirement in V.A.12 is extremely broad, and should be deleted. In a pan-European offer, huge amounts of legislation may be applicable, depending on the jurisdiction(s) in which the offer is made. This disclosure will be overly burdensome on issuers and of little value to investors.

The requirement in V.A.13 relating to bearer shares is already addressed at V.A.3 and should be deleted.

The requirement in V.A.14 is more appropriately included the Registration Document and accordingly should be deleted.

The requirement in V.A.15 relating to takeover bids should also refer to private bids.

V.C The requirement in 4(b) relating to the maximum size of clawback will not be known in most cases. We suggest that this be deleted.

V.C.4.g should be deleted since it overlaps with II.B.2. V.C.5.b and c should be grouped with V.F.4.

V.E We do not believe that the inclusion of pricing information is of value to investors. Ultimately investors will make a determination to purchase a security based on its price, rather than the method by which the price was calculated, or the price history of the security. It should also be remembered that issuers who are being admitted to trading would not be able to ascertain price history prior to such admission as no public market for their securities would previously have existed. We suggested that this requirement be deleted.

- V.F.4** We suggest that CESR provide guidance on the meaning of “price stabilisation activities”, as this a further example of the interpretative difficulties that issuers and CAs as will face in attempting to comply with the disclosure examples (see comment 2.3 above).

It is important to ensure that this disclosure requirement will be consistent with any requirements under the Market Abuse Directive.

- V.I.** The requirement in V.I.2 concerning “itemized” expenses should be amended. This information is commercially sensitive and is of little to no value to investors (see general comment 2.5). We suggest that the *total* estimated expenses incurred in the offering should instead be disclosed.

- V.J** This disclosure requirement in V.J.1 is overly burdensome on issuers and will increase costs without benefits to investors (see general comment 2.2 above). To imply that the disparity between public contribution in the public offer and effective cash contributions of senior management is dilutionary is incorrect. Dilution should more correctly relate to instances where a subscription offering is made to existing equity holdings as envisaged by V.J.3. The objective comparison of the price of shares of a company over a five-year period is not possible, because the circumstances of that company will in all probably have changed over that period due to transactions, reorganisations etc. We also believe that the disclosure of this information is misleading to investors, since an investor in a private company is basing his investment decision on different factors to an investor in a company conducting an IPO.

We suggest these disclosure requirements be deleted. As an alternative, at a minimum V.J.1 should only relate to a one year period. In addition, V.J.2 should only be applicable in the context of further issues, or if the company has already conducted a public offer, as there is simply not logical to requiring a company that has never conducted such an offer to describe the dilution of privately held shares as a result of a public offer. We have made suggested amendments to Annex K.

- VI.A** This requirement overlaps with VIII.B of the Registration Document and should be deleted (see general comment 2.7 above).

- VI.B** This requirement overlaps with VIII.D of the Registration Document, and accordingly should be caveated to make clear that this information need only be disclosed if specific to the issue (see comment 2.7 above).

- VI.F.2** The requirement should be to include information relating to “material” recent developments (see comment 2.4 above).

Question 262

For the three main schedules, please list those items that are missing and that should be in the securities notes.

Please see our mark-up of Annex K attached at Appendix B (see comment 2.3 above).

Question 281

Do you think that the above illustrative list is acceptable?

We believe that clarification should be given on the meaning of “merger and de-merger documents”, and also believe that circulars or regulatory announcements issued by issuers should be included in the list of illustrative documents that can be incorporated by reference. We also believe that the meaning of “press releases” should be clarified to indicate whether this means all forms of press release, or is instead confined to regulatory announcements.

Question 282

Should further technical advice be given on the documents that can be incorporated by reference in the prospectus? In the case of an affirmative answer please indicate which technical advice that should be given.

We believe that further technical advice should be given on the documents that could be incorporated by reference in the prospectus. In particular, specific guidance should be given on whether or not any documents incorporated by reference replace or entirely dispense with the related disclosure requirements in either the registration document, or the securities note. For example, we are unsure whether the incorporation by reference of an issuer’s Memorandum and Articles of Association would supplant the need to include a description of the issuers share capital, or voting rights, in the Registration Document. We also believe that the requirement that any documents to be incorporated by reference should have been filed with the CA either previously or together with the prospectus should be amended to reflect the fact that in certain situations documents may not necessarily be filed with the CA but instead, filed with another regulatory agency in each jurisdiction. For instance an issuers memorandum and articles of association is typically not filed with the competent authority but would instead be filed with the Registrar of Companies.

We also believe that the list of documents that can be incorporated by reference should include those referred to in the list of documents filed with the competent authority in accordance with Article 10 of the Directive.

Question 289

Should other aspects concerning the accessibility of the documents incorporated by reference be considered?

No.

Question 290

Should CESR give other technical advice on further aspects of incorporation by reference? In the case of an affirmative answer please indicate which technical advice should be given.

Please see our answer to question 282 above.

Question 307

Should there be technical implementing measures at Level 2 further defining what is deemed to be “easy access” and which specific file formats are accepted for this purpose?

Yes.

Question 314

Are there any additional factors and/or requirements that should be taken into account at Level 2 concerning the availability via the press?

We believe that the requirements that should be taken into account at Level 2 concerning availability via the press are inappropriate and should be amended. In particular, we suggest that the requirements concerning the availability via the press should be subjective rather than objective. We believe that it would be more beneficial to require that any newspaper in which a prospectus is inserted according to Article 14(2)(a) should instead relate to a newspaper that is “read by a substantial portion of persons in the relevant Member State”.

We note that in certain members states there may not be eight national newspapers. In addition we query the meaning of “super-regional scope”, and if this is retained, guidance should be forthcoming from CESR as to the meaning of this phrase.

Question 325

Do you consider appropriate the requirement to publish the said notice in the absence of a specific provision in the Directive proposal?

Yes.

We believe that the requirement to publish a formal notice is helpful, particularly given the fact that the Directive does not contain a requirement to actually deliver the prospectus to an investor. However, we believe that the necessity to publish the notice no later than the next business day is unnecessary since ultimately the notice is merely a matter of record and, therefore, we suggest that the notice should instead be published as soon as is reasonably practicable such as by the 5th business day after the publishing of the prospectus, but any event no later than 4 days before the offer closes, to take account of the requirement in Article 14(1) of the Directive requiring offers to be kept open for a minimum of 6 days.

Question 326

Should the minimum content of the notice be determined at Level 2 legislation?

Yes.

Question 327

When the prospectus is made available by the insertion of one or more newspapers or in the form of a brochure, besides of the publication of a specific notice, should the list available at the website of the competent authority (see introduction) mention when the prospectus is available?

Yes.

Question 328

In the case of an affirmative answer to the previous question, should the indication in the website of the competent authority be considered enough and, consequently, should it be considered as an alternative to the publication of a formal notice by the issuer/offeree?

Yes.

Question 331

Which other issues regarding the availability of the prospectus in the form of a brochure should be covered by CESR's technical advice?

We do not believe that any other issues regarding the availability of the prospectus in the form of a brochure should be covered by CESR's technical advice.

Question 334

Do you agree that the issuer should not ask the investor for the payment of the delivery or mail costs?

Yes.

Question 335

Should additional issues relating to delivery of a paper copy of the prospectus be dealt with by Level 2 legislation?

We believe that Level 2 legislation should make it clear that publication in an electronic format is optional only, and is not mandatory. We also believe that any legislation at Level 2 should clearly state that publication of the prospectus on the website of the competent authority is again optional rather than mandatory.

Appendix 1

Panel Participants

Title	Company
Director of Listing	Irish Stock Exchange
Manager – Company Listings	Irish Stock Exchange
Commercial Partner	A&L Goodbody (Solicitors)
Corporate Finance Partner	Arthur Cox (Solicitors)
Corporate Finance Associate	Arthur Cox (Solicitors)
Group Treasurer	CRH plc (listed company)
Head of Corporate Finance	Davy Corporate Finance Limited
Head of Corporate Finance	Goodbody Corporate Finance
Director, Corporate Finance	IBI Corporate Finance
Corporate Finance Partner	McCann Fitzgerald (Solicitors)
Head of Corporate Finance	NCB Corporate Finance
Commercial Partner	William Fry (Solicitors)

Appendix 2

Annex A

Appendix 3

Annex K