31 December 2002

M. Fabrice Demarigny
Secretary General
CESR
11-13 Avenue de Friedland
75008 PARIS
FRANCE

Dear M. Demarigny

PROSPECTUS DIRECTIVE - LEVEL 2 CONSULTATION

Thank you for the opportunity to respond to CESR's consultation paper on its proposed advice to the Commission regarding technical implementing measures for the Prospectus Directive ("the Directive").

In general, we are concerned about the level of detail in the proposed legislation. This may lead to inflexibility, and a decreased ability to evolve to deal with changing market practices and new products, and we would propose that these matters should be developed in practice by regulators in level 3 of the Lamfalussy process. Although harmonised prospectus disclosure standards are an essential building block in the pan-European financial markets, they should not stymie the innovation that is critical to the continued success of the industry.

In addition, we believe that the proposed standards would benefit from greater differentiation, in order to take account of the nature of both securities and investors, and thereby reflect fully the practical demands of the market place. Professional investors have the experience and market knowledge not to require rigorous investor protection requirements, and imposing these could lose Europe these markets. A key example is the market for international debt – currently worth some $3 trillion – where excessive disclosure requirements could drive the market away from the EU to a jurisdiction with less onerous requirements.

We have appended further, more specific comments on the proposed disclosure requirements for different types of financial instrument.

Equity

We support using the IOSCO standards as a basis for EU disclosure requirements. We further believe that the reference in article 7(2) of the Directive that disclosures should be "based on" IOSCO standards should be interpreted as requiring equivalence to these standards, rather than that they should be used as a minimum level of disclosure to be "topped up" by EU law. Disclosure requirements should be imposed only when the benefits of investor protection outweigh the costs of compliance to issuers.

It is also necessary to clarify the process over any future changes to IOSCO standards. If level 2 of the Prospectus Directive is based on IOSCO standards, there needs to be a practical and transparent process for updating the legislation to ensure consistency with IOSCO standards.

We support identical disclosure requirements for all equity issuers, regardless of their size. Given the materiality tests in Annex A, we do not believe that there should be any specific disclosure requirements for SMEs at a lower level than for other companies.

We also support of the concept of different building blocks for certain specialist types of equity issuer, such as mineral companies, property companies and investment companies. These help to ensure that potential investors receive all the information that is necessary for them to make a properly informed investment decision.

On a specific issue, we understand that working capital statements are highly valued by investors. Therefore, we would recommend that the reference to working capital statements in the IOSCO standards should be returned to the liquidity and capital resources requirements in Annex A, section IV.b.1.a.

Debt

We are concerned that the costs of the disclosures proposed for debt issues may cause significant harm to the EU market in international debt, which currently centres on London and Luxembourg. This market moved in its entirety to Europe after the US government imposed a withholding tax in 1963. This demonstrates how mobile the market is, and how additional costs at the margin are highly significant to its participants.

Extra costs may have the result of shifting this market away from the EU altogether, and towards a jurisdiction which imposes less stringent requirements. Although the standards for wholesale debt do not form part of this consultation, these should be far less onerous than those for retail debt, given the information needs of these investors. For example, a derogation from requirements to state accounts according to IAS would be appropriate.

Retail investors in equity and debt securities require different levels of information, and disclosure requirements should be tailored accordingly. For example, debt investors, unlike equity investors, would have no real interest in knowing the identity of major shareholders (Annex I, Section VI), and this should therefore not be a required disclosure for debt issuers.

The IOSCO standards were established for equity securities only. For debt securities, we believe that the IOSCO standards provide a useful benchmark for the quality of information that should be disclosed, but not the nature of information that would be relevant to investors. We would therefore suggest that these standards be tailored to meet investor requirements.

Derivatives

Derivatives represent a broad range of financial instruments; the derivatives market has grown dramatically in recent years, and is characterised by high levels of innovation. We believe that wholesale derivative products should be addressed by a single annex of the Directive, imposing limited disclosure requirements.

On the other hand, products aimed more at retail investors - such as covered warrants - should each have their own annex, with discrete disclosure requirements for each product category.

Third country issuers

Third country issuers who are targeting financial instruments - whether equity, debt, convertibles, covered warrants or other derivatives - at professional investors require a flexible regulatory regime. Any requirement, for example, to state accounts according to IAS, or to provide a reconciliation to IAS, would be a significant extra cost to third country issuers, and would discourage them from raising capital in Europe.

We would recommend mutual recognition for appropriate jurisdictions, as approved by the Commission, or on a case-by-case basis by the competent authority of a member state.

Availability of prospectuses

Under paragraph 322 of the consultation, a notice stating that a prospectus has been published should be disclosed either in a newspaper or on the issuer's website. We believe that another acceptable method of publicising a prospectus should be by the electronic "push" of information through competing dissemination services. This provides widespread, simultaneous, real-time, non-selective dissemination to all investors, and, indeed, greater pan-European transparency and timeliness than either newspapers or the websites of individual companies.

The Directive should also enable competent authorities to delegate their obligations in regard to allowing companies to discharge their obligations under the Directive to (appropriately regulated) commercial organisations. This will help to encourage efficiency and innovation, thereby reducing issuers' costs of compliance without prejudicing the demands of investor protection.

If you would like to discuss any of these issues in any further detail, please do not hesitate to contact me.

Yours sincerely

Philip Mastriforte
Head of Issuer Services
020 7797 1230