PART ONE MINIMUM INFORMATION

A. REGISTRATION DOCUMENT

CHAPTER 1 EQUITY SECURITIES

Comments on § 43 44:

Question 44: Annex A:

CESR Proposals for the Core Equity Registration Building Block

Section 1: Responsibility for the Prospectus.

a) The drafting of this section implies that there is identity between the "issuer" of the securities and the "seller" of the securities. This assumption may not correspond to the reality. Indeed a company may wish to sell a "minority interest" in the securities of another company. (Example: Dupont selling their stake in General Motors). or issue debt securities convertible into equity securities of another company.

There is therefore a need to clarify the rights and obligations of the "seller" and of the "issuer" with regard to an offering of securities (see comments in annex 2).
In addition a reference should be made, where applicable, to the existence of "guarantors", if relevant to the appraisal of the securities and to their rights and obligations with regard to the information disclosed in the Prospectus

b**) Under section 1B**. there is a reference to the "company's" (issuer's or seller's?) "principal bankers".

i) Clarification is needed to explicit whether this means "commercial banks" granting significant credit to the issuer, and/or "investment banks" performing banking services and/or the financial intermediary (ies) charged with the distribution of the specific securities (underwriters)

Clearly, if the issuer is distinct from the seller, the "underwriter" will be selected by the latter and may be different from the normal underwriter used by the issuer.

ii) The drafting of this section exemplifies one of the principal weaknesses of the draft Prospectus Directive, insofar as it does not consider the responsibilities of the "offeror"(i.e. the financial intermediary (ies)) with regard to the "contents" of the prospectus.

Inspiration from the US practice in this field could be useful: the lead underwriter is co-responsible with the "issuer" for the accuracy of the information contained in the prospectus. He may of course rely on experts for particular sections (auditors, legal advisors) but must exercise reasonable "due diligence" with regard to information provided by the issuer. Failure to do this renders him liable vis à vis regulators and investors.

iii) Section 1 should therefore contain a specific reference to "**the obligations/responsibilities of the offeror(s)"**. Indeed neither the issuer/seller,(nor for that matter the regulator)can assume some of the responsibilities connected with the actual "distribution/marketing of securities. These would include, for instance, compliance with ensuring that investors receive proper information (copy of the prospectus, pricing information etc).

In this connection it is also necessary to revisit the definition of offeror and to be sure that it **"excludes"** the regulator. This does not appear to be the case at present (see comments annexe 2).

Section II. Selected Financial Data

Under II A 3, one may wish to consider also including "earnings per share" on a **"fully diluted basis"**, i.e. taking into account un exercised options/warrants/shares issued upon conversion.

Under II.B, I agree with the recommendation of CESR not to include list a specific risk factors and to proceed under a "guidance formula". On the other hand the contents of this section should be made the "joint responsibility of the issuer and the "lead offeror" as well as the "seller" where applicable.

Section III. Information about the Issuer.

Under section III.A.5. it could be appropriate to mention "significant legal proceedings", though these would also normally appear under "risk factors" (examples: asbestos or tobacco related law suits).

Section III.B. "Investments" : Is there meant to be a distinction between "investments" with the meaning of "participations" in the equity of other undertakings and "capital expenditures" (i.e. expenditures in plant and equipment) ?

Section III.E. (Property, Plant and Equipment) appears to address adequately some of the ground covered in section III.B1 andB.2.so that the more restrictive definition of "investments" may be more appropriate

Under sections III. B.1 and III. B.2, it might be more appropriate to replace the expression "**principal** capital expenditures" by "**material** capital expenditures".

Section III.B.3 : this section is not clear: is it the management of the issuer or of the acquired undertaking that is meant? Why is this exempted?

Disclosure with regard to "future investments" may prove to be a difficulty, both in terms of "confidentiality" and "competitive position" or in terms of management flexibility to alter plans in light of future developments. General indications on the "capital expenditure budget" envisaged and the relevant "sources of finance" should be adequate to fulfil disclosure obligations in this field.

Section III C.5.: Rather than single out the price "volatility" , it may be more appropriate to require "risk factors" associated with the availability.(In addition to price volatility, there can be other factors such as political risk, weather etc..).

Section III.C.6: Add the "accounting treatment" with regard to recognition of revenues and profits.

Section III. D.1.: Where relevant a cross reference to section VI.A. (major shareholders) may be required if there exists a situation where business can be influenced by other parts of the "group" to which the issuer belongs.

Section IV.A: Operating results

Section IV.A.3: "Impact of inflation". It is difficult to see the relevance of singling out this factor with regard to currencies of a country that has experienced "hyper inflation". Indeed it is highly unlikely that such equity securities would be offered on the European market and, to the extent they were, such a phenomena would automatically be covered by the next section concerning information on the impact of "foreign currency fluctuations".

Section IV.A.4. It is suggested to replace the words "foreign currency net investments", by "foreign currency net exposures" in order to include, where material both receivables and accounts payable.

Section IV.A.5. Clearly this point should be cross-referenced with the section on risk factors.

Section IV.B: Liquidity and Capital Resources.

Section IV.B.1.a: What is meant by "unused sources of liquidity"? Are they unused committed/uncommitted credit lines? Do they include excess inventory, marketable receivables etc.? Some sort of accepted harmonised interpretation is necessary to render such information useful and comparable with other companies.

Section IV.B.1.b: As drafted this section appear "biased" towards negative disclosure. Should it not simply refer to a normal table of "sources and application of funds" (normally part of the financial statements) with appropriate explanatory footnotes

Section IV.B.1.c: The last part of the last sentence concerning restrictions on the "transferability" of shares seems odd in this section as drafted: If such restrictions apply to shares of the "issuer", then such disclosure belongs in the section concerning the "shareholders" If such restrictions apply to shares "owned" by the issuer, that are being used as "collateral", then it should be disclosed in the loan terms and in the section on "investments".

Section IV.B.3: Part of the requirements of this section seem to be covered elsewhere (Section III.E.).

Section IV.D: Trend Information

Section IV.D.3.a: The start of the first sentence should read "The profit forecast contained in the prospectus…".

There appears to be a contradiction between the statement at the beginning of the section stating that "the profit forecast should include the principal assumptions for each factor…." And the last sentence stating that "A profit estimate may be subject to assumptions only in exceptional circumstances".

Section IV.D.3.b: The third line should read "that the basis of calculation is consistent with the accounting policies of the company".

Section V.A.: Directors and Senior Management.

Section V.A.1.: In the section concerning additional information concerning directors and key managers, the requirement under (d) and (e) seems excessive by insisting on **"details"**. A **"listing"** should be sufficient to inform the recipient of the prospectus.

(f) Needs rewriting because as currently drafted it would mean that any director or key manager who held in his private portfolio shares (i.e. an asset) in a bankrupt company (Enron, Worldcom or Leernouht & Hauspie) would be subject to this requirement which is certainly not the objective sought.

Clearly also the requirement concerning "disqualification" under (g) seems odd as, should this be the case, the regulator should withhold approval of the prospectus.

It would be appropriate to add a new obligation under this section requiring the **"disclosure of all transactions in the company's shares"** by Directors and Senior Management during the current and previous fiscal year.

Section V.B.1.: Compensation:

Third line: delete last three words.

If it is deemed politically to difficult at present to impose disclosure on an individual basis for companies where their "home State" does not require it, should however be an aim to have as much uniformity as possible. Such an exemption should on the other hand in no way limit the freedom of any "regulated market" to impose disclosure on an individual basis if it so wished as a condition for "admission to trade".

The requirement to disclose the "purchase price" seems odd as it must be equal to the exercise price. On the other hand disclosure of the number of shares issued over the relevant period as result of the exercise of options should find its place under the history of the share capital and number of shares outstanding.

Section V.C.: Board practices

What is the meaning of the insert "unless otherwise specified"?

Section V.C.4.: Needs clarification: clearly if the company does not comply, then the regulator will withhold approval. Where the corporate governance regime is "voluntary" then the proposal as written makes sense.

Section V.D.: Employees

Information required under section V.D.1 should be provided under section V.B. rather than here.

Section VI.: Major Shareholders

A New Sub Section VI D.: "Selling Shareholders" should be introduced when the sellers are not the issuer. Appropriate information covering the sellers should be provided, including: the reason for the sale, the number of shares they will continue to hold (if any) the arrangements between the sellers and the issuer and the sellers and the distributors concerning the costs relating to the issue (inter alia: prospectus, underwriting, listing) etc.

Section VII: Financial information

Section VII.A: Why suddenly introduce the words «registration document» rather than "prospectus"? This creates confusion.

Why are capital transactions with "owners" or distribution to "owners" exempted from inclusion in the statement showing equity changes?

Should the drafting of the end of the first § not refer to an "audit report covering…." rather than an "audit report comprised of….". After all the listed documents are prepared by – and belong to - the issuer and verified by the auditor.

Section VII B: The first sentence should read "The notes to the financial statements must as a minimum cover:"

Point b) under this section should read "…for all periods covered by the accounts report".

Section VII.C: For obvious reasons there is every reason to impose the accounting standards used for the prospectus to conform to those required by the Directive for the follow on filings (i.e. IFRS). If other standards are to be accepted, then at a minimum a detailed reconciliation with IFRS should be required.

Section VII.E: The drafting of this section is for the least "odd". The terms **"True and fair view"** are descriptive. It therefore appears contradictory to allow a different standard that would be either **"untrue" or "unfair"** (or both) as being an "equivalent standard".

Section VII.F.3: What is the meaning of the words "without material adjustment"? The sentence would be more understandable without these words.

Section VII.H.1: The choice of own or consolidated interim financial statements should follow the same rules as specified in section VII.D. This means that it would not be acceptable to have audited annual consolidated financial statements accompanied by "un-audited" own financial statements if there is a "significant difference" in the comparability of information provided.

Section VII.H.2: Why suddenly introduce in the text the new word "document" rather than keeping to the "prospectus". It should also be specified whether the relevant date is the "filing" with the regulator or the date the regulator issues his approval.

Section VII.I: What is the definition of export? Should this not be limited for "community/euro zone" based issuers to sales outside the Community/euro zone). The proviso, as currently written, tends to lower the profile of the single market.

Section VII.J.1: The adjustment of the dividend per share only needs to be adjusted to the extent that the number of shares has increased by a free (stock split or stock dividend) or below market sale (rights issue) of new shares.

Sections VII.K and VII.L: At a minimum a cross reference to "risk factors" (Section II.B) is required.

Section VIII.F: The reference under (c) and (d) to **"listing particulars"** should be replaced by a reference the contents of the "prospectus". Indeed, listing particulars (which include the availability of a valid prospectus) are a matter of private contractual terms between the issuer and the relevant "regulated market" to which the securities are being admitted for trading. Listing particulars should not be subject to review by the regulator with regard to the provisions of the Prospectus Directive (though regulators, in their capacity of market watchdogs, set separately minimum standards for regulated markets)

In § d), reference to the terms "group" and "subsidiary undertakings" could lead to misinterpretation and difficulties in compliance with this section. A company can be part of a group (as the word is used elsewhere in this document) without there being a need (or a right) to consolidate accounts. Normally at least a 50% holding is required for consolidation to be permitted. As written the issuer would have to provide accounts for all subsidiary undertakings regardless of ownership.

Section VIII.G.1: This requirement, as drafted, would be difficult to meet for some "holding/portfolio" companies which have significant but minority long term interests in a group of diverse undertakings.(example the holding company "Berkshire Hathaway managed by Warren Buffet and listed on the NYSE). A cross reference to Annex G (Investment company building block) should be developed to overcome these difficulties.

Comments on § 48 through 65: Pro forma information

1) Pro forma figures should be mandatory (Question (51)) where they provide a meaningful tool for investor information. The basis on which the figures are

developed must be described transparently. An auditor's opinion on the fairness of the figures is desirable (Question 64)

2) The criteria for mandatory presentation of pro forma figures (Question 52 and 53) should be based on the standard of **"materiality**" of the information with regard to disclosure necessary for an investor to make an informed decision. **Thresholds should be "indicative"** rather than mandatory and the discretion should be left to home regulators to require inclusion of such data (Question 55).

3) **Comments on Annex B**

Section 1: The company should also provide notes to allow reconciliation of the two sets of accounts.

Section 2: The use of the words **"actual or planned transaction"** in relation to pro forma information may be confusing; it may be more appropriate to refer to **"completed or agreed"** transactions. Indeed unless there is some formal commitment, making the planned transaction irrevocable pro forma figures could be more misleading than helpful (Question 65).

Section 3: "pro forma information" should be limited to the impact of a gross size change (merger, acquisition, and divestiture) on the financial statements:

References in § 3 of Annex B to pro forma information including "a description of the transaction and the businesses involved", are not germane to the concept of pro forma information . Such information must be included as being "material" but it is not "pro forma".

Section 5: It is important that the accounting principles relating to the pro forma statements be disclosed if they are different from those used in the actual audited statements of any or all of the entities concerned. **Attention should be drawn in particular to the pro forma accounting impact of the treatment of such items as**: goodwill, depreciation, asset valuations, elimination of intra company transactions, etc., so that the pro forma information gives a "fair view" of the financial statements as they should emerge after completion of the transaction.

Section 6: What is the purpose of limiting so drastically the periods for which pro forma figures are allowed? For instance in the case of a major divestiture, it may be interesting to restate figures relating to "continuing operations" on a pro forma basis to give more perspective to the remaining business.

Section 7: I agree with the obligation that pro forma figures be subject to an independent accountants report (Question 64).

4) **Pro forma information should not be limited to gross size changes:**.
Example: a successful primary sale of equity may result in reducing debt, and related interest charges affecting both the balance sheet and the profit and loss statement. This will be balanced by a certain amount of dilution of equity affecting per share

data. Pro forma figures presenting these facts can be useful information for inclusion in a prospectus.

Comments on § 66 through 87: Profit Forecasts

Question 73:

The approach to the definition of forecast as outlined is acceptable.

However there is a directly related topic that should also be addressed in this context. It should be specified that "offerors" may only refer to profit forecasts contained in the Prospectus. This would therefore preclude offerors from producing their own research/recommendation/forecasts in relation to either an offering or a listing which were at variance with information included in the Prospectus.

Question 85

Yes.

Question 86

See comments in section on Annex A.

Question 87

While the profit forecasts are the specific responsibility of the issuer, it seems appropriate that in the framework of the **"general due diligence obligation"** of the lead financial advisor, he should assume responsibility for the "reasonableness" of the forecast included in the Prospectus.

This remark points again to a main weakness of the Prospectus Directive, where the question of the responsibilities of financial advisors/underwriters/distributors has not been properly addressed.

Comments on § 88-89: Directors and senior management privacy.

Question 89

See comments in section on Annex A.

Again here the key is the standard of "materiality". Rendering the lead financial advisor and possibly the "legal advisors" to both the issuer and financial advisor, co-responsible with the issuer for such judgement will certainly reinforce investor protection.

Comments on § 90-91: Controlling shareholders

Question 91

Yes if they exist.

Comments on § 92-93: Documents on Display

Question 93:

To the extent the prospectus refers to documents, the contents of which are material to an informed judgement, they should be filed with the regulator and available for consultation. There should be no obligation to "display" such information and the regulator should have the right to allow all or parts of such documents to remain confidential.

Comments on § 94-96: Specialist Building Blocs

Question 95

As a matter of principal, it would seem appropriate to have only a single set of regulatory requirements to cover all issuers, recognising that some of the requirements may be "not applicable".
The "building blocks" covering specific types of issuers should be "illustrative" of the way the core requirements will normally be met. They should not be meant, from a "regulatory" point of view, to grant specific exemptions or impose specific additional requirements on issuers or types of issuers.

In this respect, there is a specific area of disclosure relating to "secondary offerings" (i.e; public offerings where the seller is an existing shareholder) that deserves further consideration. While this takes on particular importance with respect to Start up Companies (as mentioned in Annex C.V.A.), it is also more widely applicable.

It would appear appropriate to introduce into the scope of the Prospectus Directive the concept **"registered securities"** in the American meaning of the term. Indeed, it should be accepted that only "registered shares" i.e. shares having been subject to a valid registration document (prospectus) could be distributed publicly **and** admitted to trading on a recognised exchange.

This would mean that in addition to specific measures such as "lock up" periods for owners of "unregistered shares", these could only be sold either through a public "secondary offering" or through a recognised exchange (on which identical "registered shares" were being traded) after the filing of an updated prospectus. (See comments in Annex 1 point B).

Comments on Annex C:

Section II.A: This section should be made coherent with the provisos on "forecast".

Section IVB: The text is ambiguous. What does compliance mean? Is the aim that updates filed by the company must cover each time all the points of this section in detail? Such a requirement could prove particularly onerous on start up companies. Could it not be replaced by imposing on the company to disclose any major change in

liquidity and capital resources that would endanger the realisation of the business plan?

Section V.A: See above comments on registration of securities.

Section VII: As audited statements are a requirement, if an auditor refuses then the PD requirements are not met and cannot be cured by an "explanation".

Comments on Annex D:

While the points raised with regard to valuation are useful they constitute by no means sufficient "additional" information. That is why it is important that the use of "building blocs" should not imply that the specific information they cover should be sufficient to cover an adequate standard of disclosure in the field of Property Companies.

For example it is necessary to have details on the length and level of rental agreements for both freehold and leasehold properties owned.

It is also particularly important to disclose the terms of property management contracts, and powers of the company management to decide real estate transactions as there are often conflicts of interest between the owners and managers of properties.

Comments on annexes E and F

Annex E resembles more a "guidance document" than a building bloc which is probably more appropriate.

Information required under Annex F would seem to be needed in any case within the core of the registration document and it is difficult to understand the purpose of suddenly having a "building bloc" aimed specifically at the "securities note".

Comments on Annex G

See below on answer to Question 120

Comments on Annex H

All the points mentioned seem to be either explicitly or implicitly already covered by the general disclosure requirements.

Question 96

As mentioned here above the question of the purpose of CESR issuing building blocs must be carefully assessed and defined.

In our opinion, they should serve as "guidance documents", interpreting the core requirements of the disclosure rules within the context of specific types of companies, industries or issues. They should not form part of the core "legislative/regulatory" framework.

They could be developed either at the initiative of CESR or at the request or interested parties. They should be reviewed and updated as experience is acquired and new market developments occur.

It is important that the issuer (and related experts) remain fully responsible for meeting the standard of adequate disclosure and not be able to hide behind meeting prima facie a list of specific limited topics. It is only to the extent that the issuer assumes this responsibility that the necessary confidence can be built between companies and their shareholders.

Comments on § 97- 102 : Start up Companies

Question 100: See above.

Question 101: By making the financial advisor (mainly) and experts (in part) co-responsible for the contents of the prospectus one should leave it up to them as to whether additional value will be provided by further external experts view. The main thing is to have the reputation of all actors fully at stake so as to provide a clear incentive for transparency.

Question 102: Yes. (See above second part of answer to question 95).

Comments on § 103-107: SME's

Question 105 and 106: No

Question 107: Disclosure requirements for SME's should at a minimum be identical (where applicable) to core requirements. As the object is to gain investor confidence, if anything SME issuers should be encouraged to meet the highest standards of disclosure or risk finding access to the market difficult. In particular for start ups and/or family controlled SME's particular attention should be given to sections on share ownership, restrictions on share sales and generally any element which might affect the investor as compared with the status of the existing owners.

Comments on § 108-113 Property Companies

Question 111-112: See above Comments on Annex D.

Question 113: This question seems somewhat artificial as under most circumstances both the registration document and securities note will be issued simultaneously and therefore aggregated.

Issuance of a separate security's note will normally only apply to "frequent issuers" and therefore the point is more germane to fixed income securities than equity.

Comments on § 114 -117

Question 116: Same answer as 101 for first part and 113 for second part

Question 117: See comments on Annex E above.

Comments on § 118-120: Investment Companies

Question 120: With regard to the definition used it is difficult to distinguish between an "investment company" and a "holding company". Some "closed end investment companies" might be subject to other European Directives with regard to disclosure requirements. All in all here again a "guidance approach" seems more appropriate leaving appropriate compliance to the issuer subject to review of the regulator.

Comments on § 121-123

Question 123: See above comments on Annexe H.

End of Chapter 1 on Equity Securities

CHAPTER 2. DEBT SECURITIES

Comments on § 124-129

Question 129: Yes. As a consequence all comments pertaining to Annex A should be incorporated but will not be repeated hereunder.

Comments on § 130-135

§130: The definition needs tightening as it would not cover "retail" "zero coupon bonds".

Question 134: Yes

Question 135: Absolutely yes. As already explained in Chapter 1 bankers and advisors to the issue must assume shared responsibility for the contents of the prospectus.

Comments on § 136 -139

Question 137-139: The answer to these questions cannot be addressed by a simple yes or no. It all depends of the strength of the company and its profile.

There are several ways of trying to address these questions: for instance, if the securities to be offered benefit from an "**investment grade Rating"** by a recognised rating agency, less detailed disclosure may be sufficient. For non rated debt, full disclosure should be required.

Another approach consists of incorporating by reference, documents where this information is disclosed. For example the initial prospectus and regular updates filed by the issuer with the home regulator with regard to its equity securities.

However if the home regulator for equity securities is different from the regulator approving the debt offering both regulators must be provided with the original filings (including updates) and the new filing in conjunction with the issuance of debt securities so that there is **one consistent and coherent set of documents** available within the regulatory system.

Finally, more flexibility should be allowed with regard to the age of such the information as compared with equity filings (but not greater than say 12 months) as the relevance to the investor is lower. This should of course always be weighed against the obligation of full disclosure of events that would significantly have affected the credit standing of the company since publication of the latest audited figures.

Comments on § 140-142

Question 142: The same considerations as in the reply to questions 137-139 apply.
Comments on §143-146

Questions 145-146: Same comments as here above.

Comments on § 147-150

Questions 148-149: See comments in annex A and here above.

Question 150: The same rules as those outlined in the PD should apply: In essence as these documents must be filed with the regulator approving the prospectus, the filings should be made in a language acceptable to him or in a language usually accepted by the market.

Comments on § 151-156

Questions 153-156: The same principals as mentioned here above should apply. Clearly however detailed items concerning shareholders, restrictions on marketability of shares or other such items that do not effect the relative position of debt holders need not be disclosed (but should be available in documents incorporated by reference).

CHAPTER 3 DERIVATIVE SECURITIES

Comments on the whole section

The question of a specific registration document for derivative securities needs to be addressed in the context of revisiting the architecture of the Prospectus Directive.

A “public offering” of derivatives makes only sense in the framework of an admission to trade, because it is the liquidity and clearing/settlement arrangements provided by the admission to trade that form the principal reasons for such a public offering, rather than the characteristics of the security itself.

Furthermore the notions of “**issuer”** of a **“derivative security”** or of the **“underlying instrument”** are far from uniform and are not necessarily coherent with their use in the document submitted for consultation.

For example an institution (Bank/institutional investor) can issue derivative securities based on underlying instruments it “owns”, but of which it is not the issuer or even on instruments for which there are **no “issuers”** such as “indexes”.

Alternatively, a registered market (stock exchange or recognised trading platform) can organise the admission to trade of “standard products” for instance options on a stock or an index or futures contracts on a standard underlying instrument and **any investor** can be the issuer (or seller) if there is a counterparty (buyer) found to complete the transaction on the other side.

For these latter types of “traded derivatives” it is the importance of the arrangements provided by the market to ensure both a meeting place for counterparties (liquidity) **and** the solvency of the market (counterparty risk managed through daily mark to market) that are the main characteristics of investor protection. These are the features on which any type of envisaged “registration document” should also focus.

It follows that the role of the intermediary facilitating transactions in these “traded instruments” should be of particular concern to regulators, not so much in terms of the Prospectus Directive, but within the rules covering “suitability” and “know your customer rule” that are particularly relevant to the risks associated with derivatives.

In this regard, CESR may wish to develop ten plates for compulsory agreements, between intermediaries and investors, drafted in such a way as to ensure that the investor is made fully aware of the risks associated with particular “traded” derivative instruments.

These considerations underline the point raised in Annex 1(Point A) that the “offer to the public” and the “admission to trade” are not equal terms of a single equation and should be treated separately.

It should also be considered whether “derivatives”, as a class, do not constitute a category of securities that would only be suitable for “qualified investors” as defined by the PD and therefore would automatically benefit from an exemption.

(Note: the remarks concerning specific risk factors attached to derivatives also apply to OTC derivatives which are not considered here as being, by definition, not the subject of “public offerings or admissions to trade”.)

Additional difficulties stem from the fact that the consent of the “issuers” of underlying instruments (when they exist), is not required. It seems therefore

problematic to impose obligations on the issuer of the derivative in connection with the information provided on the issuer of an underlying security.

What may be possible is to insist on incorporating by reference, the latest filed documents by the issuer of the underlying security but this would seem more appropriate to be left to the rules governing admission to the different trading platforms.

Conclusion.

For the reasons outlined here above, one should reconsider the need and the format of a specific derivative registration document. The attempt to follow in the consultation document, the pattern used for equity and debt securities does not appear adequate.

Indeed, it should be apparent from the remarks above, that neither approach to the definition of the word "derivative" as proposed in § 161-169 are appropriate

It is our opinion that the PD should not apply to derivative securities. Recognised markets, on which such instruments are listed, should be made responsible for the preparation, of an appropriate document to be distributed to investors (through professional intermediaries). Unlisted derivatives would benefit from the exemption covering "qualified investors".

For the reasons outlined no further comment is made on Chapter III (§ 170-234)

B. SECURITIES NOTE

Note: Comments on this section pertain exclusively to the proposed schedules on equity and debt securities. For reasons given in Part A. Chapter III derivatives are not considered.

Question 249: Yes

Question 250: Clarity might be better served by distinguishing between the common and specific items.

Question 251: The competent authority should always have the right to require addition of any information necessary to ensure adequate information. This should not be limited to the case of complex financial instruments.

With regard to instruments such as bonds convertible into equity, the question of "registration" of both the debt security and the underlying equity must be addressed. Under normal circumstances, both will occur simultaneously so as to provide immediate liquidity to the underlying security upon conversion. It follows therefore that the registration document must address fully all aspects relevant to both equity and debt securities. If the issuer only "registers" the debt security, then upon conversion the underlying shares should not be "fungible" with the shares of the

company already listed and investors will be restricted in their opportunity of disposing of these shares. It is clear that to facilitate placement of the convertible bond the issuer will therefore have a great incentive to register both the primary and underlying security at the time of issuance.

Question 252: Yes in all cases, as I firmly believe that advisors to the issue should always be co-responsible for information contained in the Prospectus.

Question 253: Yes if such a report is different from the one contained in the registration document. Otherwise a cross reference would be sufficient.

Question 254: Yes.

Comment on Section II: Offer Statistics and expected Timetable

Section II.A.2: This point should disclose in any case a specific "proposed amount", and a "maximum amount and conditions under which the size may be increased (green shoe).

Where applicable (IPO), a specific min/max price range should be indicated.
For offerings of traded securities, indication of a relation to market price unless a primary issue is done on a rights basis, in which case the (unchangeable) subscription price must be indicated.

Section II.A.3: This announcement should also be concomitant with the announcement of the final pricing.

The investor must have in all cases the right to withdraw his subscription when he is notified of the final price. (This of course does not affect the issuer if the offer is fully underwritten).

Section II.B.8: What is meant by making the **"full details**" of the distribution available publicly? Underwriters and members of the placing syndicate will not necessarily agree to give certain types of information to the public (or even to the issuer for that matter).

With regard to refunds, this is normally not germane as investors pay for the actual amount of shares allotted after the final pricing on the settlement date.

Section III.A: In addition to the categories of indebtedness (guaranteed/secured) it is necessary to rank indebtedness and equity securities by order of priority (subordination)

Question 255: Not applicable. (See Chapter III)

Section III.B: With regard to "use of proceeds" disclosure of equity public offerings, distinction should be made between primary offerings (new capital raised by the issuer) and secondary offerings (funds raised by shareholders not benefiting the issuer). Clearly selling shareholders should not be required to indicate the use of

proceeds though if they are "insiders", this should be clearly stated together with their holdings before and after the offer (if any)

Question 256: Not applicable. (See Chapter III)

Section III.C. Risk factors

Question 257: Not applicable.(See Chapter III). Regulators must devise a different method of protecting investors with regard to derivatives and the risks associated with these instruments rather than trying to squeeze rules under the PD Directive. This is best accomplished, as discussed, through regulating disclosure to be provided by markets on which such instruments are publicly traded.

Question 258: Not applicable. (See Chapter III).

Comments on Section V: Offer and Admission to Trading Details

Reference is made to point A in Fundamental Concepts of annex 1. The concepts of "offering" and "admission to trade" should be treated separately.

This could be easily accomplished by introducing in the PD a specific heading concerning **the "Admission to trading on a Regulated Exchange"** containing two articles as follows:

"Art.....: Prospectus

Admission to trade on any regulated market within the European Union is subject to the filing of a Prospectus with the competent home authority in line with the provisions of this Directive.

With regard to admission of newly issued securities(primary offerings) or admission of securities previously issued under an exemption to the Prospectus Directive, the Prospectus should contain the latest updated information available and be sanctioned accordingly by the competent authority.

With regard to admission of securities having previously been offered to the public and subject at the time to the requirements of the Prospectus Directive, information contained in the initial Prospectus must have been updated regularly and filed with the competent authority.

The up to date Prospectus information must be available both from the competent authority in the home state and host state where admission to trading is sought.

Art....: Additional listing requirements

Admission to trading on a regulated exchange may be subject to additional listing requirements (not contained in the Prospectus Directive) as set out either by the competent authority of the host State where the regulated market is situated or by the rules of the exchange concerned. These rules may not directly or indirectly restrict the

dissemination of a Prospectus sanctioned by a competent authority within the Community or limit the capacity of "offerors" to solicit orders from investors for the securities covered by an approved Prospectus.

When an offering of securities subject to the Prospectus Directive takes place simultaneously with the admission to trading on a regulated exchange, the additional information that may be required by the host state and/or exchange in/on which the securities are to be listed must be included under a special heading and attached to the Prospectus."

In such a format, the new Commission proposal should be revised to eliminate the continuous dual reference to "securities offering" and "admission to trade" as it would be redundant.

This approach also clearly distinguishes between the respective roles and responsibilities of regulators and trading market authorities.

Question 259: Subject to taking into account the comments here above, the specific answers to this question are:

a) The law applicable to the securities should always be clearly stated. For equity it will be the law of the state of incorporation but for debt securities can vary.
b) It may be useful to indicate in all Prospectuses the forms of redress available to investors within the framework of a public offering of securities: appeal to the regulator (home or host), to trade watchdogs (ombudsmen);to courts. Distinction should also be made with regard to actions against the issuer, the experts and the distributors with regard to their respective compliance with their obligations.
c) **Ratings apply to an issue and not to an issuer**. Distinction should be made between equity and debt issues.

   No obligation should be imposed on issuers with regard to ratings of "equity securities"

   With regard to debt securities, if the offering (or if extant issues of the issuer are rated), this should be disclosed.

   Interpretation of the meaning of the rating should be confined to definitions given by the Rating Agencies themselves.

Question 260: Not applicable.

Question 261 and 262:

Section V.C.3: This disclosure obligation seems unnecessary unless the subscription would put such subscriber in a category where disclosure was compulsory. From a practical point of view it may be difficult to enforce.

Section V.C.4 5.6(Annex L): The disclosure arrangements under these sections should be relocated under **Section V.D**. to ensure coherence with Annex K.

Section V.C.5. (Annex L): It is only necessary to disclose in the Prospectus distribution arrangements that represent contractual obligations (i.e. underwriting). With regard to brokers/dealers participating on a best efforts basis, their only obligation is to ensure that final investors receive a copy of the Prospectus and the additional pricing information when available.

Section V.D.4.b (Annex K): The wording of the second sentence is contradictory: by definition if an issue is underwritten it is not on a best efforts so all underwriters are always committed to take up to the amount of securities they have underwritten.

Section V.D.4.e (Annex K): Distribution (other than underwriting arrangements) through selling groups is a marketing matter which is not the responsibility of the issuer and does not properly belong in the Prospectus. In particular it is not possible to disclose the allotments reserved for the members of the placing syndicate.

Section V.E. Pricing.

Settlement date required in Annex L V.E.3 should be extended to annex K.

Items in Annex K.V.E.3.4.5.should be part of point 2.

Price is set by agreement between lead underwriter(s)/placer(s) and issuer based in part on market information at the time of pricing (for securities already traded in the secondary market or where a market exists for comparable securities (bonds)) and partly on the demand for the issue being offered. This is impossible to quantify ahead of the offer and constitutes "market sensitive information" that should not necessarily be disclosed.
Pricing information released by the syndicate manager should be considered by investors to be "guidance" in terms of either:

- maximum/minimum for IPO's,
- reference prices/rates where secondary trading exists.

This information should be issued under the sole responsibility of the selling syndicate.

Section V.F. Admission to trading and dealing arrangements

See also general comments here above on Section V.

Section V.F.1: the text needs amendment to indicate that **"distribution does not occur in a regulated market"** (where, by definition, transactions are only of a secondary and not primary nature). This does not prevent lead managers from inviting Members of a regulated exchange to participate in an offering (as underwriters/brokers) on which subsequent admission is being sought. However the nature of the relationship between the lead managers and such exchange members is not regulated by the Exchange but is a direct contract between the parties. This does not inhibit either an Exchange from imposing, as a listing condition, that a certain proportion of the issue be reserved for exchange Members. These arrangements should be disclosed under Section V.D. "Placing".

Section V.G.: Markets

This section needs redrafting to the following effect: “indicate all stock exchanges and other markets on which securities fungible with those to be offered are currently trading and, to the extent required, a request for admission to trade has been made for the securities being offered.”

Section V. J. (Annex K)

The content of this section V.J.1 does not correspond to the definition of Dilution. The information requested should already appear in the sections on the capitalisation of the company and need not be repeated here.

Section V.J.2. only applies to new “primary” offerings at a price “below” market prices. Reference to the net book value is not appropriate.

Section VI.B. and VI C Exchange controls and Taxation

Only a most general statement can be made relative to remittances. The issuer will not be aware of the country of its share or debt holders and these can be affected by bi-lateral tax treaties. It should be up to each investor to investigate his position with regard to securities of a given issuer.

Furthermore, the section on Taxation is written with regard only to countries in which **admission to trade is sought**, while the purpose of the PD is to give a “European passport for distribution throughout the whole Union, even when secondary trading is limited to markets in one or several countries. This gives another reason to separate the concepts of public offering from that of admission to trading.

Section VI.F. Registration Document.

Considerable further thought should be given to the obligations of **the issuer and intermediaries** with regard to ensuring that each investor receives a copy of the **full Prospectus**. While this should in principle be the case for any public offering, it is of particular relevance, with regard to securities associated with certain types of risks (equity, convertibles, junk bonds, structured securities…). Such an obligation would also be the best protection for issuers and intermediaries against investor suits.

PART TWO INCORPORATION BY REFERENCE

A. Documents that can be incorporated by reference in a prospectus

Question 281: Yes.

Question 282: No

B. Documents that can be incorporated by reference for annual updating of Registration Document

Comment on § 283: Maybe the interpretation of the Commission proposal should be that, insofar as documents produced otherwise (annual report, auditors report etc.) meet the standards imposed by the PD, then filing of these documents with the competent authority and making them available will meet the updating requirement.

C. Additional Technical Advice

Questions 289 and 290: No

PART THREE AVAILABILITY OF THE PROSPECTUS

Comments on § 291-301

The approach to **"availability"** should, in our opinion, be complemented by an **obligation** on any intermediary who accepts a subscription to an offer from an investor to ensure that the latter has actually received a copy of the Prospectus. As mentioned elsewhere this ensures also legal protection for the intermediary concerned.

The means of transmission of the Prospectus to the investor should indeed be flexible and reflect the possibilities offered by modern technology. Therefore, transmission by e-mail of the Prospectus to an investor's address should be accepted.

On the other hand, meeting even the "availability obligation" through publication in one or several papers within the Member States should be rethought.

Indeed, this approach lends itself much more to the "admission to trading" formalities (which we have suggested to be treated separately) than to the "public offering" formalities.

The reason is that the principal aim of the Prospectus Directive is to make an offer of securities having received approval from a competent authority, legal (single

passport) in all Member States. It would therefore put undue onus on investors located in Member States which were not specifically targeted (but where the offer was none the less "legal") to obtain access to the Prospectus if it were only published in a newspaper of another Member State.

Another point to be considered is the posting of the Prospectus on the competent authority's Webb site. It would appear, under the present drafting of the PD that this would make the competent authority an "offeror" (see annex 2). Such posting should therefore be accompanied by an appropriate disclaimer whereby the competent authority vouches exclusively for the formal compliance of the document with the disclosures set out in the PD and related secondary legislation but not for the accuracy of such disclosures which remain the responsibility of the issuer, lead financial advisors, and experts respectively.

An additional very important point that is not considered in the consultation concerns the timing of the availability of the prospectus to investors.

Should an "unapproved prospectus" in draft form and under the responsibility of the issuer/lead manager be authorised for marketing purposes prior to the visa of the competent authority? This is similar to the US practice of the distribution of so called "red herrings" which display prominently that visa of the authority has been sought but not yet obtained. Clearly such a draft should be identical to the copy filed with the authority.

This practice is useful for conducting road shows and reducing the time lag between final approval by the competent authority and the setting of final terms completing the offer.

It may be appropriate to limit such drafts to publication in hard copy and electronic means and exclude newspapers.

In all cases, where an intermediary has forwarded such a draft, he should be under an obligation, should the investor subscribe, to see that the latter also receives a full copy of the approved prospectus.

A. Availability in an electronic format.

Comment on § 304.

This approach seems to contradict the whole purpose of the "single passport" .as discussed here above. By definition any "public offering" of securities approved by any competent authority with regard to compliance with the PD is de facto legal throughout the Community. The suggested disclaimer seems therefore inappropriate.

Question 307: No

B. Availability via the press.

Comment on § 308-313

As stated here above, we are of the opinion that publication in newspapers should not **on its own** satisfy the "availability" criteria.

It would be difficult for the intermediary receiving the subscription to ascertain whether the investor had actually seen the document (unless such subscription was made exclusively through a form that was part of the printed newspaper offer document.

It may however be appropriate to consider newspaper publication as sufficient within the framework of "admission to trade" formalities as set out by each exchange or trading platform in conjunction with a listing of securities.

Question 314: See here above.

C. Additional technical advice.

C.1: Notice stating where the prospectus is available.

Comments on § 316-324

CESR recognizes in this section that the publication in the press is often linked to admission to trading procedures in many Member States.
To remain coherent with earlier comments, we are of the opinion that, to the extent a formal obligation is put on intermediaries who gather subscriptions on behalf of investors to ascertain that each one has received a copy of the Prospectus, then it becomes **unnecessary to insist on a publication in the press of either the prospectus itself or of a "notice of availability"**. Such publication, however, remains an option linked to marketing considerations.

Question 325: No (see above).

Question 326: To the extent a notice is published, its content should be determined at Level 2 legislation.

Question 327: Yes

Question 328: Yes (always subject to introducing an obligation on the intermediaries on prospectus dissemination).

C.2: Publication in form of a brochure.

Comment on § 330.

In addition to this statement one could add “that the document in question should be read in conjunction with the other parts of the prospectus” in order to avoid the impression that these are self containing documents.

Question 331: Where documents are available in more than one language this should be stated.

C.3: Delivery of a paper copy

Question 334: Yes

Question 335: No.
