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The Committee of European Securities Regulators
11 - 13, Avenue de Friedland
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20 December 2002

Dear Sirs

CESR's Advice on possible Level 2 implementing measures for the proposed Prospectus Directive

We are writing to you as representatives of the PricewaterhouseCoopers firms throughout the Member States of the European Union in response to your request for comments on the October 2002 Consultation Paper in connection with possible implementing measures for the proposed Prospectus Directive.

We are supportive of the proposals to facilitate the creation of an European capital market through harmonising the regulatory framework across the European Union. The challenge for the European Commission is to provide sufficient detail in the Level 2 implementing measures to provide the robust foundation on which consistent disclosure can be provided, but to do so without inhibiting the efficient development and regulation of new products.

In that regard we are particularly concerned that the extremely short consultation periods may not provide sufficient time for commentators to fully understand, and therefore comment on, the considerable detail necessary to fulfil your mandate from the European Commission, nor for you to assimilate and address the concerns that we and other commentators may have. As a consequence of the short timescale we have not sought to provide detailed annotations of the relevant annexes to address the many points we have identified.

We would strongly encourage you to work closely with all commentators as well as the European Commission and your members in creating a prospectus disclosure model that is properly thought through such that it not only works in all Member States but also provides

a framework for capital market disclosure that will survive the test of time. We would be delighted to work with you in this regard.

One clear objective in the Level 2 implementing measures should be to provide sufficient detail to minimise the extent to which individual securities regulators have the flexibility to create differentiated disclosure requirements. Consequently, we believe that the building block approach advocated by CESR is the only practical way in which the disclosures to be required in prospectuses can be articulated. We have structured our response in two parts. Firstly, to address substantive issues which we believe need to be addressed as part of the Level 2 implementing measures, and secondly, responding to the specific questions posed in the Consultation Paper.

The substantive issues which we have identified and in which you have not specifically consulted, and which we believe must be addressed as part of Level 2 implementing issues are:

- Interconnection with IOSCO Disclosure Standards
- Definition of the issuer for the purposes of prospectus disclosure
- Distinguishing different offers of securities
- Presentation of historical financial information
- The role of accountants in providing assurance
- Non-EU issuers
- A definitions annex

In addition, we have substantive concerns on areas such as profit forecasts and pro forma financial information which we have addressed in response to your specific questions thereon.

In conclusion and whilst acknowledging that the draft presented was very much "work-in-progress", we believe that it is essential for CESR to provide an explanation of any

changes made between this draft advice and its final advice to the European Commission in order that all market participants can properly understand the rationale for any changes.

There are a number of areas where we have identified the need for further annexes to be prepared. We would strongly encourage you to work with other expert bodies such as the Federation des Experts Comptable Europeens ("FEE") in developing such material.

Should you have any concerns with or questions on any of our responses please do contact Kevin Desmond in our London office on 00 44 20 7804 2792.

Yours faithfully

PricewaterhouseCoopers

Cc David Wright, European Commission
Göran Tidström, Federation des Experts Comptable Europeens

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Part 1

Commentary on substantive issues

Interconnection with IOSCO Disclosure Standards

Whilst we support the use of the IOSCO Disclosure Standards ("IDS") as the basis for creating the equity building blocks. We would note that the IDS were generated without any formal public consultation nor have they been updated for changes in disclosure practice and therefore do not necessarily reflect an appropriately balanced disclosure standard.

Clearly, it is unfortunate that IOSCO has not finalised its proposals for debt securities. However, we would encourage you to liase closely with the IOSCO working group focussing on this issue to ensure that your proposals are not significantly out of line with the approach IOSCO may advocate. This is particularly important if Europe is to avoid major changes in this area when IOSCO does publish its standards for debt securities.

One area of particular concern is the extent to which disclosure standards should be set differently depending on the type of investor. The principal distinction is between retail investors and sophisticated, or professional, investors. Whilst we understand that you may be promulgating separate proposals for non-retail debt securities, we note that there are also types of securities which are closer to equity securities but which are only offered to sophisticated investors which would, in our view, merit special annexes. Examples that fall in this category include depositary receipts (GDRs or EDRs) , "whole business securitisations" and many types of derivate instruments.

We note that there are a number of areas where the independent drafting of the registration document and securities note building blocks has led to some omissions or duplication of requirements. Unless otherwise justified, such as is the case with the disclosure on risk factors, any omissions could lead to a lack of reciprocity for EU issuers' prospectuses in other markets. Accordingly, whilst omissions or adaptions may well be appropriate they should be properly explained.

We have noted the following IDS omissions from Annexes A and/or K:

- IV.B.8 – Description of effect of Government regulations

- V.B.1a part – Working capital statement
- X.A.7 – share issue authorisations etc
- X.E – Taxation
- X.F – Dividends and Paying Agents

Whilst some of these may be considered to be relatively unimportant, we believe that the working capital statement is an important disclosure that properly should be included in the securities note component of the prospectus.

As for duplication between the registration document and securities note requirements, we are concerned that insufficient account has been taken of the registration document requirements in the securities note; for example factual information about the identity of directors, senior management etc is repeated. If there is to be any value in the separation of a prospectus into a registration document and a securities note, the disclosures in the securities note should be limited to addressing any changes in the facts set out in the registration document together with providing details of the securities being offered and the terms of any offer.

We believe that a number of the securities note requirements may adversely impact the ability of issuers to issue securities notes in short time periods, particularly those of debt securities, for example:

- The requirement for a statement of capitalisation and indebtedness as of a date no more than 60 days prior to the date of the document; and
- The requirement in Annex D for a property valuation not more than 42 days prior to the date of the document.

In relation to the indebtedness statement, we would suggest that a more appropriate basis would be to tie the disclosure to the latest accounts or interim reporting date at which time issuers would have drawn up a balance sheet from which such data could be readily derived, thereby minimising the cost of providing this disclosure.

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Definition of issuer for the purposes of prospectus disclosure

One area that we believe is particularly important is ensuring that the disclosure in a prospectus properly addresses the whole of the business of the issuer concerned.

It is often the case that an issuer's business has been restructured for tax or legal reasons prior to making a public offer for example a new holding company may be required because of deficiencies in distributable reserves in the existing business entity, the business may not have been operated through an incorporated entity, or may have been part of a larger group and not separately constituted.

In addition, an entity to be listed may have made significant acquisitions through the three-year financial history period, an understanding of which would clearly be of great importance to investors.

Whilst it can be argued that the overarching Prospectus Directive Article 5 (1) requirement that a prospectus "shall contain all the information … necessary to enable investors to make an informed assessment of the assets liabilities, financial position, profits and losses, and prospects of an issuer" would capture such situations, we believe that inconsistencies in application should be avoided by making it clear that the contents of the prospectus must cover both the legal issuer and also its significant predecessors irrespective of the timing of any restructuring. The tests of significance should be aligned with those identified in "Annex B" on pro forma financial information.

Indeed, the existing Level 2 advice partially acknowledges this issue when referring to "planned" acquisitions in the context of the requirements for pro forma financial information.

Distinguishing different offers of securities

We believe that it is necessary to draw a distinction between the information necessary to be disclosed in a prospectus at the time of an initial public offer or initial registration and further issues, and that within further issues further distinction should be made between pre-emptive and non-pre-emptive issues.

Whilst it could be argued that the use of incorporation by reference could mitigate this problem, by for example incorporating an issuer's accounts into the prospectus, the

obligation to draw up the prospectus will mean that many disclosures will have to be updated, or at least considered for update. This is of particular concern where many basic factual disclosures about an issuer rarely, if ever, change which could result in incorporation of information from documents which might have been issued many years earlier.

Examples of disclosures which could be omitted in relation to pre-emptive issue prospectuses reflecting the fact that shareholder's are already in possession of the base facts about the issuer include:

- Details of directors, senior management and advisors;
- Description of the company's business;
- The issuer's financial history; and
- Details of the issuer's constitution

We suggest that further consultation with your members and other market participants is necessary in this area to ensure that the final disclosure model is not over burdensome on issuers.

One other area where practical guidance as to the applicability of disclosure requirements is needed is in relation to prospectuses issued in connection with contested take-over offers where the issuer of the securities will not have access to all of the information about the object of the offer.

At a practical level adopting a columnar approach to presenting the rules, whereby relevant disclosures to each circumstance are "ticked", should facilitate this.

Presentation of historical financial information

The presentation of historical financial information in a prospectus is one of the fundamental elements of disclosure when a company wishes to offer its securities to the public. Accordingly, it is essential that the rules set out under the Level 2 implementing measures are sufficiently robust to avoid divergences in practice.

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We believe that in addition to the Level 2 disclosure rules as drafted in "Annex A" there should also be more detailed implementing measures as have been described for pro forma financial information in "Annex B" issued under Level 3 processes.

Firstly, however, in relation to the current draft text set out in "Annex A", we have a number of detailed concerns that must be addressed before the text is finalised. In particular, the text variously refers to:

- "financial statements" (articles IV.A.2, VII.A and VII.G.1);
- "comparative financial statements" (article VII.C);
- "consolidated annual accounts" (articles VII.D and VII.E);
- "accountants' report" (article VII.B);
- "comparative table" (article VII.B); and
- "annual accounts" (article VII.F.1)

We strongly believe that only one term should be used throughout the text and, specifically in Section VII, and that the term should be "historical financial information". A detailed appendix should then describe the ways that historical financial information can be presented.

One of the key interactions that needs to be addressed when presenting historical financial information is that between the annual accounts of an issuer prepared under the Company Law directives and the information to be presented in a prospectus, such as the fact that accounts only present two years' financial information whereas the prospectus requirement is for three years' information. Ways that this can be addressed are either:

- to require special purpose accounts to be prepared, by an issuer's directors or management, that present three years' information whenever a prospectus is required;
- to require an issuer's accountants to prepare a report (an "accountants' report") that presents the required three year's information;

- to extract the necessary information from the underlying accounts and present in a table in the prospectus (a "comparative table"); or

- to require an issuer with securities traded on a regulated market to present three year's information in their accounts facilitating ready inclusion in, or incorporation by reference into, a prospectus.

Our view is that issuers should be permitted to choose the form in which their financial history is presented and that any one of the above is acceptable. The third and fourth options may well be the most appropriate for existing registered companies. However, the first or second options are often needed in order to facilitate an initial registration particularly where an issuer may have been "carved out" of a larger group. Should the last option be supported then, in our view, it should be implemented through the Transparency Obligations Directive.

Apart from providing that a prospectus should include historical financial information for three years for equity issuers and two years for non-equity issuers, we believe the detail should be set out in a separate annex. Such an annex should cover such matters as:

- Format of presentation as outlined above – special purpose accounts, accountants' report, comparative table or annual accounts;

- Presentation consistent with 4th and 7th Company Law Directives;

- Policies and disclosures under IAS;

- Mandate additional disclosures such as cash flow statement if not addressed by either of previous points;

- Address question of significant past or planned acquisitions and particularly as to whether separate full historical financial information on any acquisitions is required;

- Require all historical financial information to be presented on a consistent basis;

- Address question of national GAAP being used by issuers before they offer their shares to the public and how the transition to IAS should be made;

- Disclosure or otherwise of an issuer's own accounts when consolidated accounts are prepared;

- Extent to which interim financial information should be included and its format linked to relevant IAS;

- Age of accounts and whether any subsequent historical financial information should be audited;

- Different approaches necessary for non-EU issuers as discussed below;

- Different approaches applicable as to whether the issue is of equity or non-equity securities; and

- Different approaches necessary depending on whether the prospectus is being prepared for initial registration or in connection with a further issue of securities.

Such an annex should also avoid duplicating requirements elsewhere such as in IAS, consistent with the building block approach being followed, otherwise complications may arise should requirements diverge in future.

We would advise that you work with FEE, with whom we would be delighted to assist, in the drafting of such an annex.

<u>The role of accountants in providing assurance</u>

The draft text uses a number of different terms to describe the involvement of accountants in a prospectus including (references to "Annex A" unless indicated):

- "auditors" (eg I.C, IV.D.2, Annex B paragraph 7, Annex C paragraph IV.D and Annex C paragraph VII)

- "independent auditor" (eg VII.A and VII.H.2)

- "official auditors" (eg VII.F.1)

- "reporting accountants" (eg IV.D.2)

- "an accountant acceptable to the competent authority" (Annex F Financial matters paragraph (iii)).

In our view there are two roles relevant to investors. Firstly, that of the "statutory auditor" of the issuer and, secondly, that of the "independent accountant" who is reporting on the financial information, historical, pro forma and/or prospective, in the prospectus.

As regards the "statutory auditor" the provisions should be as to who it is, whether there have been any changes or disclosures relevant to changes in who has been the auditor, and whether the auditors have reported without modification on previously published information.

As for the "independent accountants", this should be defined as being someone who is qualified to be appointed as auditor. Consequently, an independent accountant may be the statutory auditor but does not have to be. Of course, the independent account could not be a director or officer of the company concerned as they would not be "independent". All the reporting obligations imposed through the disclosure requirements should then refer to the independent accountants. We are concerned as to some of the opinions being asked of accountants, some of which are not currently understood terms. For example in Annex A, IV.D.2, the required form of reporting is that "the forecast has been made after due and careful enquiry". This is the language asked of "financial advisors" or "sponsors" in the current UK and Irish rules – the accountants are only required to report on the compilation of the forecast. Interestingly, Annex C on start-up companies requires the accountants to report on the compilation of forecasts.

We believe that whilst it may be appropriate for accountants to be required to report on profit forecasts, such reporting can only ever be in terms of the compilation of the forecasts on the basis of information prepared by an issuer's directors or management and the proposed disclosures must be amended accordingly.

We also note the requirement to report on pro forma financial information. We would encourage you to work with FEE and the appropriate auditing standards setting bodies in developing guidance for auditors in this regard as well as for reporting on profit forecasts.

Finally, currently some Member States impose more general obligations on auditors in relation to prospectuses. We would not support the extension of such requirements and would seek to ensure that Member States did not impose additional reporting obligations beyond those set out in these proposals.

Non-EU issuers

We note that Article 20 of the draft Prospectus Directive would permit the acceptance by EU competent authorities of prospectuses prepared by non-EU issuers where:

"(a) It has been drawn up according to international standards set out by international securities commission organisations, including the IOSCO Disclosure Standards; and

(b) The information requirements, including information of a financial nature, are broadly equivalent to the requirements under this Directive."

We believe that it is essential that a specific annex be prepared which address the question of equivalence of disclosures. This would minimise the risk of divergent practices being adopted by competent authorities in different Member States.

In particular, we are concerned with the interpretation of whether information of a financial nature is broadly equivalent and the consequences if it is not. A key question is as to whether the same answer applies where the instruments of the issuer being offered are equity or debt.

Our view is that it is appropriate for differential rules to apply as to whether the issue is of debt or equity securities. This is because for a debt issuer its financial statements are particularly allied with measurement against covenants that will invariably be set by reference to the local GAAP of the issuer concerned.

Accordingly, for wholesale debt issuers we believe that local GAAP financial statements should be acceptable but that they should be accompanied by a narrative description of the differences between the issuer's local GAAP and IAS. This would have the substantial benefit to the EU Member States' economies of continuing to facilitate access for non-EU issuers to the European debt capital markets without imposing a substantial additional cost burden through requiring quantitative reconciliation to IAS.

However, for equity and retail debt issuers we do believe that European investors are entitled to be able to benchmark financial reporting between issuers. Consequently, some form of quantifiable comparison should be required. This could range from requiring full IAS financial statements to be presented through to requiring reconciliation of key financial statement components to be presented. We would note that such a reconciliation would only demonstrate the measurement impact of moving from local GAAP to IAS and would note capture disclosures which would be required by IAS but not by local GAAP. However, we believe that to try and set out which disclosures might be required for any particular non-EU state's GAAP would be an almost impossible challenge.

Our view, therefore, is that reconciliation from local GAAP to IAS should be required of all non-EU equity and retail debt issuers. It may be that some non-EU countries' GAAP may be very close to IAS and arguably reconciliation would be unnecessary. Our view is that this would mean that any additional cost would be marginal for issuers from such countries.

We would consider that where a non-EU equity issuer is only offering its securities within the EU that it should be treated as an EU issuer and required to prepare IAS historical financial information.

In addition to requiring reconciliation to be presented by issuer concerned, we believe that it is essential that investors be provided with independent assurance as to the veracity of the reconciliation. Accordingly, we believe that the issuer's auditors or independent accountants should report on any reconciliation, either independently or within the scope of the audit report where the reconciliation is presented as a note to the issuer's financial statements.

We would be pleased to work with you, either directly or through FEE in preparing detailed guidance as to the form of presentation of reconciliations to IAS and of that of the auditors' or independent accountants' opinion thereon.

A definitions annex

We note that the accompanying text to the detailed rules under Level 2 includes a number of definitions particularly in relation to specialist classes of issuers for example we have identified in the text the following:

- paragraph 72 defines a profit forecast;
- paragraph 97 effectively defines start-up companies;
- paragraph 108 defines property companies;
- paragraph 114 defines mineral companies as does Annex E;
- paragraph 118 define investment companies; and
- paragraph 121 defines scientific research based companies

We believe that it is essential that the rules to be promulgated under Level 2 include an annex of definitions that would include all of the above as well as other necessary definitions. We would also note that the interaction between the definitions of classes of specialist issuer needs to avoid duplication of requirements particularly with those of start-up companies.

Additional definitions that we believe are necessary are:

- The issuer (as outlined above);
- Independent accountants (as outlined above);
- Profit estimate;
- Pro forma financial information (as explained below);
- Financial advisor; and

Investment entities as compared with investment companies

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Part 2

Responses to specific questions

Equity securities

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

Whilst overall we agree with the disclosures in Annex A, we do have a number of comments on particular points. Where these have been raised by you as questions they are addressed under the appropriate headings.

Other points we would make are that:

- We believe that investors would benefit from requiring issuers to make disclosure as to the quality of their financial reporting systems and that this should be included as additional to the core IDS disclosures;

- We do not believe that it is necessary for the form and content of interim financial statements to be stipulated in detailed rules governing the content of prospectuses as is set out in VII.H.1. As such requirements will be set out in the Transparency Obligations Directive, it should only be necessary for a prospectus to require information to the standard that would be required under the Transparency Obligations Directive. In addition the timing requirements in Annex "I" article VII.H.1 should be conformed with that in the Transparency Obligations Directive.

- We do not believe that it is necessary for a prospectus to set out the detail as to an issuer's subsidiaries as is envisaged by VIII.G.1. In our view, the overarching requirement in III.D.2 is more than sufficient and meets the requirement for conformity with IDS;

- We are concerned that the disclosure requirements in section IV of Annex A in relation to matters such as "operating results" and "liquidity and capital resources" will prove to be too inflexible in an area where reporting practice by existing public companies is still evolving. A more appropriate requirement would be to require disclosure of an "Operating and Financial Review" with only the key themes to be

covered being prescribed. Detailed disclosures should then be left to individual Member States to determine as appropriate to their markets;

- We question the effective duplication of the disclosure requirements in relation to "related party transactions" as set out in VI.B and those in the equivalent International Financial Reporting Standard. Our view is that, in general, the requirements should be part of an issuer's financial statements and that no additional disclosure requirement should be necessary in a prospectus. It should only be necessary for a requirement to exist in relation to the period since the latest financial statements through to the date of the prospectus and that requirement should be to update the disclosures required by International Financial Reporting Standards; and

- We believe, as noted in response to question 102 below, that disclosure of restrictions regarding holdings by directors and senior management, as well as major shareholders, is essential in any equity securities prospectus.

Risk factors

47 *Do you agree with this approach?*

We agree with this approach, particularly given that the IDS text is merely illustrative of the factors which may be disclosed.

We would support the issuance of national guidance by individual Member States as to the application of this requirement in their jurisdiction albeit acknowledging the need to ensure that practices are not significantly divergent.

Pro forma information

In addition to responding to your specific questions in relation to pro forma financial information, we have a number of general observations we would like to make.

Firstly, in our view the primary financial information in any prospectus must be that which is in compliance with Generally Accepted Accounting Principles ("GAAP"). To permit non-GAAP information which purports to present events which have not actually happened as more important than GAAP information can only mislead investors.

Clearly, some form of pro forma financial information, clearly labelled, can act as a guide to investors to assess the impact of a significant change on an issuer's historical financial position or results in order to assist in making assessments as to an issuer's future performance. Accordingly, to ban pro forma financial information would be inappropriate.

Therefore, it is important to define exactly what is meant by "pro forma financial information". In our view, this should be such as to be based only on extant historical or forecast financial information and only reflect actual events that have either happened or are contingent on the prospectus in question. This is particularly important as regulatory and market practice concerning the presentation of pro forma financial information is currently quite varied across Europe.

Consequently, it is essential that rules as to the presentation of pro forma information be published in order to ensure comparability and consistency between issuers. We also believe that it is necessary for more detailed guidance to be issued, either at Level 3 or by extra-regulatory bodies in consultation with your members, assisting issuers in the interpretation of the detailed rules. We would note that the Institute of Chartered Accountants in England and Wales has issued guidance in similar circumstances on the UK's equivalent Listing Rules which has proved to be particularly useful in practice.

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

52 *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?*

We have answered questions 51 and 52 together as they cover similar ground.

Our view is that it is appropriate that the regulations should mandate that pro forma financial information should be presented when there has been a significant change to an issuer.

Our one caution in respect of mandating the presentation of pro forma financial information is in relation to planned transactions. The reason for this is that issuers may not necessarily have control over, and therefore information in respect of, the subject of a planned transaction for example in the case of a contested take-over. In such

circumstances, preparing pro forma financial information which is definitely not misleading may be impossible. Accordingly, some derogation may be necessary.

Indeed there may be other disclosures which cannot be made in a contested take-over situation. We would recommend that consideration be given to issuing a separate annex which identifies which disclosuresmay be omitted from a prospectus, with a competent authority's consent, but which would have to be issued within a reasonable time period after completion of the transaction.

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

We are comfortable that 25% is the correct threshold. However, we are concerned that given that this is to be a mandatory disclosure requirement there should be no discretion about its application.

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?*

No. We do not agree that competent authorities should have such power. Reflecting our views on the power to waive the requirement in anomalous circumstances, the rules should be clear for all preparers of prospectuses. To introduce competent authority discretion would only introduce uncertainty into the prospectus drafting process.

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?*

In general, we agree with the disclosures advocated in "Annex B". However, we do not see the relevance of paragraph 1.

We do support the requirement for an "independent accountant" to report as a useful check for investors. However, in order that the independent accountants' report can be put into its proper context by investors and thereby not generate an "expectation gap", it is essential that proper definitions and rules are included at Level 2 and that detailed guidance for preparers should be issued. Without these it will not be possible to agree a form of report acceptable to accountants which manages their liability appropriately.

One particularly important requirement that is present in both the United States SEC's and the United Kingdom's Listing Rules equivalent requirements is the existence of some conditions governing the nature of adjustments that are permitted. Such conditions are, in our view, essential if pro forma financial information is to be consistently presented in prospectuses around Europe and is necessary in order that an issuer's independent accountants have a framework against which they can report in the manner anticipated.

We believe that the key conditions necessary for a pro forma adjustment to be made are that it should be factually supportable, not be dependent on future events or decisions and be directly attributable to the transaction or offering concerned.

We would also note that the word "historical" should be deleted from paragraph 4(a) as 6(a) permits presentation of the current period.

65 *Would it be more 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?*

Pro forma financial information should not be restricted to the securities note, although there may be circumstances where transactions have occurred since the registration document was prepared which mean that pro forma financial information will have to be included in a securities note.

Profit forecasts

We welcome the inclusion of text regarding the presentation of prospective financial information in prospectuses as being particularly important. Clearly, some framework that provides a mechanism for issuers to include prospective financial information is an important element in encouraging proper disclosure of all information which investors might wish to receive. Indeed the absence of such a framework or "safe harbour" provisions, is in our view, one reason why the liability risk associated with publishing profit forecasts means that they are rarely if ever made.

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

We agree that a definition of a profit forecast is necessary if there are to be specific rules regarding disclosures in relation to profit forecasts. Presumably this definition would be included in an annex to the main disclosure requirements.

We would note that a definition of a profit estimate is also required; being a statement similar to that for a forecast but for a completed period that has not been reported to the market in accounts or an interim announcement.

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

Yes. Clearly, statements about future financial performance are important to investors and, therefore, issuers should be required to address outstanding statements in a prospectus. The drafting of the requirement needs to provide the flexibility that enables an issuer to update any outstanding ad-hoc forecasts to reflect changes which might have occurred since the ad-hoc forecast was made and to ensure that any change is properly explained.

86 *Do you agree with the disclosure requirements 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")?*

As a basic framework we consider the disclosure requirements in IV.D.3(a) to be adequate. We do believe that a fundamental condition of facilitating the disclosure of quality prospective financial information is the existence of detailed guidance for issuers as to the preparation and presentation of prospective financial information and would strongly encourage you to engage the support of FEE in any such project. We would note that the Institute of Chartered Accountants in England and Wales is consulting in the UK on such guidance at the moment.

As for the requirement in IV.D.3(b), we are unclear as to how this interacts with the obligation imposed on an issuer's "independent accountants" to report set out in IV.D.2. Indeed, the language of IV.D.3(b) is more relevant to an independent accountants report than a due and careful enquiry opinion.

As noted in Part 1 above, we believe that the only opinion which can reasonably be expected of an issuer's independent accountants is as to the proper compilation of a profit forecast. However, we are concerned that the exposure to liability of association with

profit forecasts has not been properly researched and would encourage you to work with FEE in gaining a proper understanding of the implications before finalising the requirements. We certainly believe that an adequate framework for the preparation and presentation of prospective financial information is an essential pre-requisite for reporting by accountants.

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

By way of clarification, we assume that by "financial advisor" you do not mean an issuer's auditor or independent accountants, but an entity which provides "financial advice" such as, but not necessarily, an investment bank.

We believe that there is value to investors in requiring a financial advisor's opinion. This arises from the fact that by requiring such an opinion investors can be sure that appropriate due diligence has been performed in relation to a particularly important element of a prospectus. We would also argue that the direct cost of requiring such a report is not significant given the role which an issuer's independent accountants would be carrying out in any event as a result of their reporting obligation.

Directors and senior management privacy CESR reference V.A of Core Equity Building Block (Annex "A")

89 *Do you agree that such information may be material to an investor's decision to invest? Would the provision of such details breach privacy laws in your jurisdiction?*

We believe that investors must have an understanding of the complete CVs of the directors and senior management of an issuer. Notwithstanding the fact that an individual may have served their penalty for earlier actions, investors must be entitled to know that they had been previously found guilty of such offences.

Controlling shareholders CESR reference VI.A.2 of Core Equity Building Block (Annex "A")

91 *Do you think that the additional disclosures of any limiting measures should be required?*

We certainly agree that comprehensive disclosure of a company's relationship with a controlling shareholder is essential information for any potential investor in equity securities.

Documents on display

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?*

We do question whether there is any value to investors in requiring documents to be put on display. If there are disclosures that are material to investors then they should be included in a prospectus – relying on investors to read other documents is not appropriate.

Specialist Building Blocks

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

We have commented one each of the building blocks in turn in response to your specific questions.

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

Industry specialist building blocks should be created in relation to "banks" and to "insurance companies". We would note that such building blocks may require core Annex A disclosures to be waived. For example an indebtedness statement for a bank is meaningless as its contingent liabilities will fluctuate from moment to moment.

Start-up Companies

A primary concern is with the definition of a "start-up" company as articulated in paragraph 97. In essence, all of the specialist building blocks exposed for comment focus on companies which may not have a three year trading record. Consequently, the definition of a "start-up" company should be in relation to any company which is not a

mineral, property, investment or scientific research based company but one which has not traded in its its current economic form for three years.

As noted in Part 1 to this letter this definition should be incorporated in a separate definitions annex.

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

We do not agree with the proposed disclosures.

The requirement in I.C is unclear. If it is that historical financial information presented for periods which has not been audited should be audited for inclusion in a prospectus, as has been suggested, then the requirement should state that explicitly.

The requirements for auditors to report on profit forecasts should be conformed to that in Annex A in line with our comments above. It is not acceptable to impose on accountants requirements to report as to the reasonableness of assumptions; the assumptions can only be the responsibility of the issuer or its directors.

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

One particularly helpful disclosure in relation to start-up companies that could be required is that of key non-financial metrics. As for independent expert's opinions on products or business plans this should be left to market practice and not imposed by regulation.

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 companies where there are such requirements?*

Disclosure of restrictions regarding holdings by directors and senior management, as well as major shareholders, is essential investor information in all equity prospectuses.

<u>SMEs</u>

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

To the extent that an SME has existed for more than three years, we do not see why such companies should not disclose that information in a prospectus. The marginal cost of presentation cannot possibly exceed the benefit to investors of its presentation.

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

As responded to question 105, all disclosures should, in our view represent three years if the company has existed for that period.

107 *Bearing in mind the materiality tests in the disclosure requirements contained in the Core Equity building block, if you believe that there should be some specific disclosure requirements for SMEs, please list them*

We do not believe that there any specific disclosure requirements for SMEs over and above those required by the main Annexes.

Property Companies

We note that the term "property company" is not defined. In order that this annex has its intended effect such a definition is clearly essential.

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

Yes. We do believe that valuation reports should be required of property companies. We would recommend that the annex be expanded to provide more detailed guidance as to the form and content of a valuer's report and would advise you to work closely with the various professional bodies in this area in drawing up such guidance.

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

We do not believe that a 42 day age limit is too onerous.

The Committee of European Securities Regulators
20 December 2002

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 form part of the securities note?*

Information about the current value of a property portfolio is clearly important to investors. However, this is information that relates to the company and its assets and should properly be included in the registration document. To the extent that the value had changed materially when the securities note is issued the general obligation to update information included in the registration document would apply and disclosure would be made. If it was considered useful, there could be a requirement in the securities note for a significant or no significant change statement as regards the valuation presented in the registration document analogous with the statement on changes in financial position.

Mineral companies

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?*

As with our response to the similar question in relation to property companies, 113 above, we believe that the valuation report properly belongs in the registration document with the securities note obligation being a significant or no significant change type statement.

117 *Do you agree with then disclosure requirements in registration documents for mineral companies set out in Annex "E"?*

Our comments are directed at the information to be disclosed in the Securities Note, Annex F.

To the extent that disclosure regarding restrictions on the ability of directors, senior management and major shareholders is not required in Annex A, then this disclosure must be required of mineral companies who have not operated for at least three years.

We are concerned that the requirement for "an accountant acceptable to the competent authority" to be satisfied as to whether the estimated cash flows have been stated "after due and careful enquiry" is not widely understood. Consequently, if it is decided to retain this

requirement you should work closely with FEE and auditing bodies across Europe to determine the form of reporting acceptable to both accountants and competent authorities.

Investment Companies

Overarching this section, we believe that the rules should capture all investment entities and not just investment companies with the necessary definitions being included in an appropriate annex.

120 *Do you agree with the disclosure requirements in registration documents for investment companies set out in Annex "G"?*

The proposed requirements provide an initial high level disclosure standard for investment companies. However, it may well be necessary to expand on these standards as to such matters as the information to be provided in respect of material investments. Other important disclosures include information about valuation bases and any impairments in value.

Scientific Research Based Companies

121 *Do you agree with the disclosure requirements in registration documents for scientific research based companies in Annex "H"?*

It is unclear as to whether these requirements are separate from or additional to those for start-up companies in Annex C. We believe that the disclosures as to such matters as discussion of the issuer's business plan and strategic objectives is imperative and accordingly that Annex C should apply as appropriate to scientific research based companies.

Debt securities

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

We do not consider that the disclosure requirements for debt securities, whether retail or not, should be identical to those for equity securities. This is because the investor needs

are quite different – for example a debt investor would generally have little interest in corporate governance matters when a trustee enforcing a trust deed represents his interests.

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 debt?*

Such disclosure would be be of little interest to investors in corporate debt.

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?*

This is of more interest than the disclosure of an issuer's retained advisers.

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?*

We do consider that information about an issuer's past investments may be important for an investor in its debt securities.

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?*

To the extent that an issuer prepares consolidated accounts there is little value in listing an issuer's investments in other undertakings.

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 a company's debt?*

We do consider disclosure about material future investments to be relevant for an investor in an issuer's debt securities.

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 those sections of the IOSCO IDS?*

We agree that the different needs of investors demand different disclosure in relation to a non-equity issuer's liquidity and capital resources.

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?*

Consistent with our comments on equity securities above, we do not believe that it is necessary for the form and content of interim financial statements to be stipulated in detailed rules governing the content of prospectuses. Such requirements will be set out in the Transparency Obligations Directive. It should only be necessary for the prospectus to require information to the standard and timing limits that would be required under the Transparency Obligations Directive.

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

To the extent that interim accounts disclosure is to be replicated in the annexes to the Prospectus Directive then the level of detail should mirror that in the Transparency Obligations Directive.

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 lost of documents for commercial information?*

As with our thoughts on equity securities, we would question the benefit to investors of requiring any documents to be placed on display.

149 *On review of the list of documents set out in 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?

See our response to question 148 above.

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.*

On the basis that there is to be no requirement included in the Prospectus Directive for the prospectus itself to be translated, it would be inappropriate for there to be any translation requirement for documents to be put on display.

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.*

No additional requirements are relevant.

154 Do you agree with CESR disclosure requirements for corporate retail debt as set out in Annex "I"?

This has been addressed in response to other questions in this section.

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

Disclosures that we believe should not be required for corporate retail debt include:

V.C.2 regarding corporate governance disclosures (as noted above)
VI.B regarding related party transactions (because covered by International Financial Reporting Standards)

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

We have not identified any additional disclosures which should be required.

Derivative securities

No questions commented on this section.

Incorporation by reference

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

281 *Do you think that the above illustrative list is acceptable?*

List:
Annual and interim financial statements
Merger and de-merger documents
Auditor's report
Memorandum and articles of association
Earlier approved and published prospectuses
Press releases

On the basis that the principles which are to be applied are clearly set out in paragraph 279, we question whether it is necessary to provide a list.

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 should be given.*

We believe that further technical advice is necessary as to the question of partial incorporation by reference. This is particularly relevant, for example, where disclosures as to a company's history or constitution may well have been made in a prospectus at the time of initial registration or admission to trading and would naturally fall to be included by reference.

B. Documents that can be incorporated by reference for annual updating of the registration document

No longer applicable.

C. Additional technical advice

We have no comments in this area.

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

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.*

Availability of the prospectus

No responses submitted to detailed questions.