

**STATE STREET.**

For Everything You Invest In-

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Mr. Eddy Wymeersch  
Chairman  
Banking and Finance Commission  
Avenue Louise, 99

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25 November 2003

Dear Messrs Godeffroy and Wymeersch:

State Street Bank GmbH, Munich is pleased to submit this letter on behalf of all State Street entities in Europe providing custody services, in response to the request for comments on the ESCB-CESR Working Group documents dated August 1, 2003, entitled *Standards for securities clearing and settlement systems in the European Union* ("Standards Report" or "the Standards") and *The scope of application of the ESCB-CESR standards* (Scope Statement).

The State Street entities in Europe that provide custody services include branches and subsidiaries in Germany, Austria, Italy, Ireland, Jersey, Luxembourg, Switzerland, and the UK. In each case, these entities are licensed and fully regulated under applicable banking or other financial services legislation by the appropriate regulatory authorities in the market in which they operate. Together, these entities are referred to collectively hereafter as State Street Europe. State Street Europe is part of the State Street group of companies ("State Street"), which provides securities custody and investment management services to a worldwide base of mostly institutional investors clients. With more than USD8.5 trillion in assets under custody and in excess of USD900 billion under management, State Street is an industry leader in financial services. State Street manages a global network of subcustody service providers in over 100 markets and maintains offices in more than 20 countries, covering all of the major financial centers worldwide. In particular, State Street maintains substantial custodial operations in the European markets through State Street Europe, and our global client base maintains very substantial securities investments in Europe.

**I. Introduction**

While we share the ESCB-CESR Working Group's interest in harmonizing the clearance and settlement of securities transactions in the European Union, creating efficiency, and reducing risk and cost, State Street believes that such harmonization requires unambiguous standards that are adopted as part of an enforceable framework of norms not only across all member markets, but which are consistent with



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norms being developed and applied globally. As such, State Street supports the promotion of integration, efficiency and risk management, provided that the following fundamental tenets are respected and preserved;

- different market participants perform different functions which must be properly understood, distinguished and sustained; and
- the market must be served prudently and equitably.

We find the Standards Report lacking in both respects, and find it unfortunate that ESCB-CESR has been persuaded to promote a particular market model that strongly reflects the competitive interests of one segment of the industry, to the detriment of other industry participants. Despite being couched in the unobjectionable guise of objectives relating to market integration, efficiency and risk containment, the inclusion of the custodian segment of the financial industry in the Standards Report is premised on a number of misconceptions and fallacies, some of which were surfaced at the Open Hearing but about which ESCB-CESR appeared not to be concerned:

1. Custodians do not "clear and settle securities", nor do they "operate clearing and settlement systems". Custodians merely facilitate the receipt and delivery of cash and securities necessary to enable the appropriate transfers to be made on the books of a central securities depository ("CSD") or an international securities depository ("ICSD"). They record transactions as a function of client activities, not as market utilities.
2. Nevertheless, to include custodians within the scope of its Standards, ESCB-CESR characterizes the custodian segment of the industry as operators of "systemically important clearing and settlement systems". Such a characterization is simply erroneous, and we are more than willing to help members of the ESCB-CESR Working Group understand why that is the case.
3. The ESCB-CESR Standards are based on the CPSS-IOSCO Recommendations. Those recommendations were, however, specifically tailored to CSDs and central counterparties ("CCPs"). The attempt to extend those same recommendations to a wholly separate industry segment which is driven by different functions and different competitive dynamics is fundamentally flawed.
4. CPSS-IOSCO excluded custodians from its recommendations because the functionality they provide to the financial market was correctly deemed beyond that of clearing and settlement systems. The inclusion of custodians by ESCB-CESR contradicts CPSS-IOSCO's approach and would lead to inconsistent standards across global markets. Such a result would be costly, counterproductive and contrary to the best interests of European investors.
5. CPSS-IOSCO clearly identified the very narrow and limited circumstances in which consideration might be given to the application of appropriate requirements to certain custodians. ESCB-CESR has instead chosen to include all major custodians within the potential ambit of its Standards, without regard to the function they perform.
6. ESCB-CESR by the same token seeks to justify the inclusion of custodians in its Standards by pointing to the identification of custodians as important market participants in the US Interagency report on strengthening market resiliency in the face of disruption. That report, however, focused exclusively on enhanced contingency planning and business recovery programs, and provides no justification for addressing matters such as legal framework, governance, access, collateralization, transparency, etc.



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7. ESCB-CESR has articulated a functional approach to the application of its proposed Standards, but has failed to identify the specific functions of custodians which it seeks to address, or how these functions resemble aspects of the role of CSDs or ICSDs so as to warrant the regulation of custodians as CSDs or ICSDs.
8. By the same token, ESCB-CESR has asserted its desire to address risk in the clearing and settlement systems, but has failed to identify the risk that custodians contribute to the system or to explain how such risk may not already be subject to ample regulation by sophisticated bank supervisory authorities.
9. It has been said that the blurring of roles between CSDs/ICSDs and custodians makes common regulation desirable. There is no confusion in the roles played by these different participants except to those participants whose interests are served by promoting such confusion.
10. CSDs and ICSDs benefit from an advantageous regulatory position and represent a de facto market monopoly in most markets in which they operate. They are not subject to the full panoply of regulation that covers custodian banks nor to the competitive pressures that drive the manner in which commercial undertakings provide services. Yet, particularly ICSDs have been allowed to leverage their privileged regulatory and market vantage point to provide commercial intermediary services, under conditions and terms that commercial ventures would not be in a position to extract from its clients.
11. Unsatisfied with their infrastructure role but constrained by their operating framework, however, CSDs and ICSDs now claim that they need to be able to operate on a level playing field with other intermediaries, and ESCB-CESRs appears to be ready to accept such claims without any consideration of (i) whether it is in the best interests of investors and the market for utilities to be providing intermediary service, and (ii) the implications of market utilities providing such intermediary services in competition with their own participants.
12. To support the level playing-field argument, it has been asserted that custodians are increasingly competing with CSDs and ICSDs. This assertion is as empty and unfounded as a claim that commercial banks compete with central banks. Since CSDs and ICSDs occupy exclusive market positions, sometimes even mandated by law, it would be interesting to understand exactly with what functions custodians may be competing, notwithstanding the laws or market exclusivity that give CSDs and ICSDs de facto monopolies in the markets in which they operate.
13. To counter the entry of CSDs and particularly ICSDs into the intermediary provider arena, a small number of local agents may be in a position to transfer securities on their own books, rather than arrange for those securities to be transferred at the CSD. In reality, because of the nature of the underlying client transactions, no transfer is needed at the CSD/ICSD, and the securities nevertheless remain on the books of the CSD or ICSD. However, CSDs and particularly ICSDs have taken great objection to this activity as potentially impacting their revenue. If this activity causes legitimate concern to regulators, then it should be subject to a full review and assessment and, if deemed appropriate, to specially tailored recommendations. The custodian industry should not, however, become subject to a whole new layer of rules because of this limited activity.
14. It has been asserted that 90% of all cross-border transactions "settle" through agent custodian banks. The precise meaning of the assertion is not explained or substantiated, but the clear implication is that this somehow supports the need for treating custodians as settlement systems. The assertion is, however, without merit. As already noted, custodians do not "settle" securities



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transactions, they merely facilitate receipt and delivery of cash and securities to facilitate the actual settlement process at the CSD. To go back to an earlier analogy, this assertion is equivalent to saying that all checks clear through commercial banks, with the consequence that commercial banks should be regulated as central banks. The logic is critically defective.

15. The ESCB-CESR Working Group has expressly abrogated responsibility for understanding the competitive implications of its proposed Standards, and yet it is clear that the application of the Standards to custodians would have a major competitive impact which would reshape the European financial markets. Within the context of the European governmental framework, it is not clear that ESCB-CESR is the appropriate body to compel or even initiate such a drastic market restructuring.
16. Rather than address specific recommendations to specific industry segments that reflect identifiable needs for integration, efficiency or risk reduction, ESCB-CESR has instead cast a broad net that fails to take into consideration the extensive and sophisticated regulation already applicable to custodian banks. The adoption of such a broad brush and impractical approach by any regulator inevitably calls the validity of the exercise into question, and can only result in inefficiency, increased cost and burdensome over-regulation.
17. Finally, we understand that the Standards Report was formulated with the assistance of an "expert group" formed to advise ESCB-CESR. Although the composition of this group seems less than transparent, we have nevertheless learnt that while CSDs and ICSDs are represented among its members, global custodians are not so represented. Regardless of the technicalities of how such representation comes about, we would expect that a regulator with the standing of ESCB-CESR would wish to ensure that the balance of interests represented on any such group was impeccable.

## **II. Discussion**

While we generally agree with many concepts in the Standards Report as applied to CSDs, ICSDs and CCPs – utilities, not intermediaries – we feel that the currently drafted scope of application will have a significant, and most certainly negative, impact on the European financial markets which cannot be overlooked. With this by way of an overarching State Street Europe position, we wish to reemphasize that:

- activities and functions of CSDs and global custodians are fundamentally different with regard to clearing and settlement, and in particular, with respect to global custodians such as State Street Europe, they are entirely different;
- CSDs and global custodians like the State Street European Banks are licensed and supervised differently;
- certain activities in the area of clearing and settlement, and the handling of book-entries are in fact restricted by local statutes to CSDs, meaning that global custodians are excluded from providing such activities and functions;
- consequently, identical treatment of CSDs/ICSDs and global custodians under the Standards is not justified and would entail substantial negative impact on the clearing and settlement structure in Europe; and



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- similarly, identical treatment of CSDs/ICSDs and global custodians under the Standards is not required, because global custodians like State Street Europe are already sufficiently supervised by local banking regulators and regulated by safecustody regulation and general banking regulation.
1. **Distinguishing unique roles and activities of market participants in clearing and settlement services**

Market participants perform different roles. The ESCB-CESR Working Group has expressed difficulties with the scope of application of the ESCB-CESR Standards, in particular with respect to the inclusion of "systemically important" custodian banks. Application of these Standards to intermediaries and market utilities is fundamentally inappropriate and unworkable and will radically alter the European securities industry.

Such an approach fails to make the necessary distinction between the responsibilities and practices of intermediaries versus market utilities, nor does it consider the different regulatory regimes either that currently exist or that would be appropriate for the functions performed by each. Furthermore, as already stated, ESCB-CESR has relied upon a flawed combination of industry papers and recommendations as the basis for applying its Standards to custodian banks, with the predictable result that many of the proposed Standards simply could not be applied to custodial functions.

The Standards should be addressed exclusively to the market utility functions performed by CSDs, ICSDs, and CCPs. The treatment of large custodians as de facto monopolistic utilities would merely promote to the further blurring of the distinct roles and functions of market utilities with those of custodian banks, and will lead to improper regulation and distorted competition.

2. **Intermediaries versus market utilities: different activities and functions in clearing and settlement**

Custodian banks are licensed banks and service investors with a broad range of safekeeping and related services, including the handling of cash deposits, the granting of loans, the safe custody and administration of securities for the account of others including accounting, the facilitation of cash and securities settlement, corporate action processing, proxy voting, and tax-related services. In contrast, the function of CSDs and ICSDs as market utilities is not to accept any principal risk. Most CSDs, for instance, typically do not accept deposits, but clear cash settlements through central bank accounts of the participants of the infrastructure.

The potential client base of custodian banks is not limited, as every private or public, retail or institutional investor may in theory contract with a custodian bank. A custodian bank, consequently, may service the financial market with an "open" client base. In contrast, CSDs only accept licensed banks or other specific financial service providers as "participants". CSDs service a restricted market of financial institutions as a "closed shop".

Investors who select a custodian bank do so in a competitive framework by selecting a service provider from a range of competing custodian banks. In contrast, CSDs are not selected by participants, but are rather – since they typically enjoy a monopoly position in the markets in which they operate – no financial service provider has any realistic alternative but to enter into a relationship with the local CSD.



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Custodian agreements between custodian banks and their clients are individually negotiated based on the client's particular service requirements. Fees for custodial services are negotiated and agreed individually, and contracts and fees are kept confidential as required by bank secrecy and client confidentiality obligations. In contrast, as is typical for a monopoly infrastructure, agreements (including fees) between custodian banks and CSDs or ICSDs are not negotiated and are not subject to competitive pressures. Instead of operating in a competitive environment, subject to client service, efficiencies and costs demands, CSDs and ICSDs offer a "take it or leave it" product, which most intermediaries must take in order to participate in the market. Custodian banks are competitively selected, and their market share is tied to their ability to satisfactorily meet the expectations of existing and potential clients. The investor-servicing role of custodians is simply not equivalent to the market-servicing functions of infrastructure utilities.

Finally, but most pertinent is that custodian banks do not perform or effect the clearing and settlement of securities, nor do they operate clearing and settlement systems, but they typically only facilitate such services. In contrast, the clearing and settlement of securities is technically and legally affected by CSDs, ICSDs or CCPs.

### **3. The settlement facilitating activities of global custodians**

The functions that global custodians perform to facilitate the settlement of securities need to be understood and clearly distinguished from a CSD or ICSD activity. Global custodians such as State Street Europe participate in and facilitate the settlement process by directly or indirectly communicating settlement instructions they receive from their clients (or their clients' investment adviser) to the relevant CSDs, in order to provide the CSDs with the necessary settlement details. Additionally, global custodians will validate for the account of their clients whether there is sufficient cash available for CSDs to clear, and sufficient securities available for CSDs to settle, the transactions in accordance with instructions. Global custodian banks, in their strict capacity as custodian and agent, typically restrict their services to the custody business and do not participate in any securities trading activities. Consequently, no internalization of trades is offered to clients. Only trades, executed by the clients or their brokers through a stock exchange or OTC will be cleared and settled with the assistance of the global custodian.

State Street Europe as a global custodian, for instance, does not settle securities transactions between a client and its counterparty, but only facilitates such settlements directly or indirectly through the CSD or ICSD. In legal terms, in all jurisdictions where the State Street Europe offers custodial services to investors, State Street Europe does not effect the transfer of title of securities on its books, but only provides the necessary settlement instructions – indirectly – to the CSD or ICSD, in order to enable them to effect the legal title transfer. Since State Street Europe as a global custodian does not participate in a CCP-scheme and does not internally settle transactions (even if executed between two clients), it cannot settle securities transactions in the sense clearly contemplated by ESCB-CESR. State Street Europe, like all global custodians, is in receipt of only the settlement instruction from its client, not the settlement instruction of the client's counterparty. Even if the counterparty were coincidentally also a client of the global custodian, the settlement location would be clearly identified in the settlement instruction.

As is typical for CSDs or ICSDs since they operate as part of the market infrastructure, they receive two settlement instructions from two different custodians for the same transaction, enabling them to "match" these instructions and to "effect" the settlement with the relevant book entries in the accounts at the CSD or ICSD of the relevant custodian banks, as well as the clearing with the relevant crediting or debiting of funds received or owed. CSDs and ICSDs serve as necessary links between custodian banks to effect settlement with interfaces to both parties.



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Global custodians like State Street Europe serve only as intermediaries between their clients and the CSDs or ICSDs to facilitate settlements; settlement is performed by the CSDs.

**4. Different licenses/approvals; custodians are statutorily excluded from certain securities activities**

A manifest difference between CSDs/ICSDs and custodians is the manner in which each is currently licensed and regulated, and the different functions that they are authorized to perform. In Germany, for instance, State Street Bank GmbH, Munich is a deposit taking credit institution pursuant to sect. 1, 32 German Banking Act (KWG), with passported branches in Austria and Italy according to art. 20 para 1 of the EU Directive 2000/12/EG dated 20 March 2000. In contrast, the CSD in Germany, Clearstream Banking AG, is licensed as a deposit taking credit institution pursuant to sect. 1, 32 German Banking Act (KWG) and specially approved as Central Securities Depository ("Wertpapiersammelbank") pursuant to Sect. 1 Para. 3 of the Safe Custody Act by the regulatory body as specified in the law of the relevant "Bundesland" (Federal State). Clearstream is approved as the CSD by the Ministry of Finance of the Bundesland Hessen). Clearstream performs activities of a clearing and settlement system according to sect. 24b German Banking Act under EU Directive 98/26/EU. Custodian banks and CSDs/ICSDs are thus regulated, licensed or approved and supervised vastly differently.

Certain local securities laws in Europe provide that certain securities settlement and book entry functions are restricted to CSDs or ICSDs as market utilities, and cannot be performed by custodian banks as intermediaries. For instance, local laws provide that securities in "global certificate form" or in dematerialized registered form may only be held or registered at a CSD. Since these types of securities constitute the vast majority of market-traded securities, it is compulsory law that provides that those securities must be kept and consequently settled at CSDs or ICSDs. Settlement of transactions in such securities can only occur through the CSDs. This affords CSDs additional business opportunities without being subject to competition in the relevant local markets. (In this regard, see for instance Sect. 9a Para. 1 of the Safe Custody Act in Germany that requires securities to be maintained at CSDs).

We emphatically state that the different functions attributed to custodians on the one hand and to CSDs on the other hand by the local laws must be carefully recognized in setting up the Standards.

**5. Custodians banks are already amply regulated**

Custodian banks are already subject to extensive and sophisticated regulation by banking and financial services regulators. Again, by way of example, the State Street Europe entities are all subject to strict supervision pursuant to the local banking or financial services regulation, including under the EU Directive 2000/12/EG dated 20 March 2000. In particular, strict and specific supervision of custodial activities already exists. State Street Europe is subject to specific custody audits and to specific administrative practices of local regulators to ensure compliance with local custody laws. Some Standards such as the segregation of the clients' from the bank's own assets in accounting and bookkeeping are already legal requirements (see, for instance, in Germany, sect. 4 para. 1 safe custody act and no. 3 para 3 of the BaFin requirements on lawful safe custody business, dated 21/12/1998). The State Street Europe entities are already fully obliged:

- to fulfill all regulatory liability and capital requirements set out in the aforementioned directives;
- to fully comply with adequate risk managements systems; and



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- to provide for a lawful business organisation, adequate internal controls and adequately safe systems for electronic data processing.

For these reasons, additional regulation and supervision of custodial activities is not required. It is always open to local bank regulators to adjust the existing regulatory regime and market practices to adapt to new management techniques. However, it is incumbent on regulators like ESCB-CESR to establish the need for such adjustments. On this occasion, no such justification or analysis has been given. An additional layer of regulation and supervision is not required, and would only trigger a substantial increase in the costs of securities transactions that precisely would undermine one of the core objectives of the Standards.

## 6. Inapplicability of ESCB-CESR Standards to custodians

The ESCB-CESR Working Group's failure to recognize the clear distinction between the functions of custodian banks and CSDs, ICSDs and CCPs result in many of the Standards having no realistic or workable application to custodians:

- *Standard 1 (Legal Framework)* would require public access to contractual provisions governing operational arrangements. While the relationship between a participant and an exclusive market utility is governed by a non-negotiable participation agreement or a predetermined set of rules and regulations, custodian banks operating in a competitive commercial environment assume servicing obligations via negotiated agreements with its clients which reflect each custodian bank/client relationship. As framed, Standard 1 is contrary to the confidential nature of contractual relationships between a custodian bank and its clients, and would constitute an unjustifiable interference with the parties' freedom of contract.
- *Standard 3 (Settlement cycles)* fails to recognize that custodian banks are not in a position to mitigate risks through shorter settlement cycles, but rather must accommodate each market's specifications and practices as established by the exchange, CSD, CCP and applicable laws and regulations.
- Similarly, in *Standard 7 (Delivery versus payment)* market participants, such as custodian banks and brokers, regardless of size, are subject to the settlement standards established by the market infrastructure and do not directly control those standards.
- The application of *Standard 8 (Timing of settlement finality)* again does not make sense in the context of the services provided by custodian banks. Custodian banks simply record and facilitate the settlement of client transactions, whereas market utilities such as CSDs, ICSDs and CCPs perform the actual settlement function.
- The collateral requirement discussion in *Standard 9 (Risk controls in systematically important systems)* disregards the age-old function of the banking industry to extend credit in accordance with established regulatory requirements and proprietary risk assessments based on overall client relationships. While full collateralization may be appropriate for market utilities with thinly capitalized balance sheets, it is not appropriate or necessary with respect to the highly regulated and supervised credit activities of custodian banks with their clients in a well-capitalized environment.
- As stressed in *Standard 14 (Access)*, it is right to expect that market utilities permit reasonable and equitable access to market participants since they serve as de facto monopolies.



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However, the application of this Standard to custodian banks, regardless of the number of clients they service, is contrary to the functions custodians perform to the competitive environment in which clients select custodians and negotiate the terms of the services. Inclusion of custodian banks in this Standard would, in fact, impair open competition.

- With respect to the public disclosure requirements set forth in *Standard 17 (Transparency)*, it is important for ESCB-CESR to recognize that the informational needs of market utility participants are very different from those of investors assessing custodian banks. Banks must adhere to the public disclosure requirements of their corporate domicile as well as the markets in which they offer services. Public disclosure by custodians of negotiated fees and the proprietary servicing structures would significantly degrade the competitive environment in which they operate.

## 7. Serving the market prudently and equitably

As mentioned earlier, State Street supports greater efficiency and risk mitigation in the European financial market, provided that the market is served prudently and equitably. Understandably, we are deeply interested in any market and regulatory developments that may adversely impact a custodian's ability to effectively service clients in the European Union. At the same time, we wish to ensure that regulation of market participants takes place on a level playing field and is based appropriately on the well understood functions and services that are performed.

In developing Standards presumably intended to enhance the protections afforded to investors, ESCB-CESR has neglected to address the issue of the desirability of market utilities engaging in commercial services, particularly when this is in direct competition with their participants. Increasingly, certain CSDs, and in particular ICSDs, are leveraging their advantaged regulatory and market positions to blur their core utility role with the role of intermediaries.

In *Standard 6 (Central securities depositories)*, ESCB-CESR stresses that CSDs should "avoid risks to the greatest extent possible." It stands to reason that the commercial expansion of for-profit utilities into the realm of intermediaries will have the opposite effect, by elevating risks for users and investors.

Additionally, with the inclusion of custodians within the scope of the Standards, European utilities also providing intermediary services would acquire an extraordinary competitive advantage. Custodians would be held to the same legal, regulatory and prudential requirements to which utilities are subject, while these utilities would be shielded from the full array of regulation and intense competitive pressures that exist for custodian banks.

It is State Street's view that commercial functions must be separated from utility functions as a means of minimizing risk, and ESCB-CESR must address this significant trend of utilities providing intermediary services in the European securities market.

## 8. Additional commentary on the Standards Report

We have set out below additional commentary relative to the regulation of market participants on a level playing field and on an appropriate functional basis:

**Indirect versus direct market participants** - In *Standard 2 (Trade confirmation and settlement matching)*, the Standards Report states that indirect market must confirm trades no later than T+0. ESCB-CESR must recognize that indirect market participants face practical issues in completing



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the confirmation process on T+0, including complexities arising from time zone differences. These issues will continue until the development of efficient and interoperable cross-market matching utilities are developed, followed by the development of suitable straight-through-processing technology.

Equitable securities lending practices: In *Standard 5 (Securities Lending)*, ESCB-CESR states that "the arrangements for securities lending should be sound, safe and efficient." State Street feels that lending programs offered by CSDs and ICSDs should, at a minimum, be held to the same standards such services offered by banking institutions, including risk management and capital requirements.

As presented, *Standard 10 (Cash settlement assets)* would have custodian banks responsible for protecting clients from "potential losses and liquidity pressures arising from the failure of the cash settlement agent" when central bank money is not used. However, the decision whether or not to settle in central bank money does not rest with custodians, nor do the custodians control a CSD's selection of a cash settlement agent. For this reason, it is wholly inappropriate to include custodians in the scope of applicability of this Standard, and this would additionally add risk to the process.

### III. Conclusion

As already expressed, State Street supports greater efficiency and risk mitigation in the European financial market. We support the concepts in the CPSS/IOSCO recommendations as a starting point for the Standards. We believe, however, that it is critical for ESCB-CESR to distinguish between the differing functions of the various market participants. The inclusion of custodians, regardless of size, within the scope of the Standards Report is inappropriate and unworkable. The Standards should be addressed exclusively to CSDs, ICSDs, and CCPs.

Finally, the Standards should also serve the market prudently and equitably. Regulation of market participants must take place on a level playing field and should be appropriately based on the functions and services that are performed. State Street would appreciate the opportunity to hold further discussions with the ESCB-CESR Working Group and to participate on its expert advisory group as it begins to reformulate and refine the Standards. Please do not hesitate to contact us.

Sincerely,  
State Street Bank GmbH

Stefan Gmuer

Yoram Matalon