ESMA Call for evidence: Request for technical advice on possible delegated acts concerning the Prospectus Directive (2003/71/EC) as amended by the Directive 2010/73/EU.

Response of the Company Law Committee of the Law Society of England and Wales and the City of London Company Law Committee

The Law Society of England and Wales is the representative body of over 140,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representations towards regulators and government in both the domestic and European arena.

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees.

This response has been prepared on by a working party comprising members of the Company Law Committee of the Law Society and the City of London's Company Law Committee. The Law Society's committee is made up of senior and specialist corporate lawyers.

This response comprises the views of the Committees on key issues which should determine the approach of ESMA in formulating the advice requested by the Commission. We look forward to responding on more detailed points when the consultation paper is published in July.

Our response is informed by our work in relation to equity issues and with a view to ensuring that the equity capital markets in Europe are fair, efficient and competitive.

1. 3.2 Format of the summary of the prospectus and detailed content and specific form of the key information to be included in the summary (Article 5(5)).

1.1 The Commission ask:

> "ESMA, when delivering its advice in respect of the possible content and format of the summary including key information, should also take into account the objectives of the Communication on Packaged Retail Investment Products (PRIPs) and the work undertaken under this initiative. In particular, in relation to PRIPs within the scope of the Prospectus Directive, the summary should take into account eventually

the "key investor information" as developed under the PRIPs initiative in order to avoid any duplication of disclosure requirements and thus any additional costs and liability for PRIPs' offerors."

We note that the market for Packaged Retail Investment Products is different from the market for equity securities in several respects. It is possible to construct a formulaic comparison for a PRIP, largely due to the nature of the product (for example giving product life, return, withdrawal penalties) which is not possible in relation to equity securities. Also, due to the nature of PRIPs, comparison of such features can perhaps be expected to feature more highly in decisions of retail investors to invest in particular products than it can in relation to investment decisions concerning equity securities.

Providing a fixed template for an equity summary document may simplify preparation of that summary for an issuer but there is a risk it may do so at the expense of the investor, as the focus will no longer be on considering what information is most significant for the reasonable investor who wishes to make an assessment of the shares.

1.2 The Commission's request refers to "key information in order to facilitate comparability among summaries of similar products and to ensure that equivalent information always appears in the same position in the summary document."

However, in our view the summary cannot feasibly deal with comparability of a an equity security in an issuer with equity securities in other issuers, given that equity securities are an investment in a particular business and, as each business is unique, there cannot be any standard measures for comparison. Furthermore the attempt to impose standard points of comparison would be likely to distract the focus from what is most significant to investors. So, any building blocks or schedules should be drafted to meet the requirements of the Article 2(1) definition of "key information" and therefore should provide "essential and appropriately structured information which is to be provided to investors with a view to enabling them to understand the nature and the risks of the issuer, guarantor and the securities that are being offered to them or admitted to trading on a regulated market and, without prejudice to Article 5(2)(b), to decide which offers of securities to consider further".

1.3 It would be helpful to clarify whether the word limit in relation to the summary has been retained or removed. The confusion arises from its inclusion in recital 21 to the Directive 2003/71. We assume that, as the word count has not been specifically removed, it would still have effect, but it is unclear whether a recital to an original directive which is not restated on amendment continues to apply.

1.4 We think it is important for ESMA to consider what is to be produced in terms of additional building blocks or schedules. Is it one schedule for debt securities and one for equity? Are there to be different blocks for retail and wholesale offerings for primary and secondary offerings? In moving away from an overarching content requirement to specific contents requirements we consider that the need for a number of differentiated schedules will arise (as evidenced by the number of building blocks in the current Prospectus Regulation). Given that there will then be different templates for different securities, we query whether there will be any standardisation benefits. In order to produce a template summary which can be homogeneous, we believe the level of detail will need to be reduced from the PRIPs example.

1.5 If there are to be substantive contents requirements for a summary, we think that it would be helpful to set out the type of financial information to be included.

1.6 We do not think that it would be correct or practicable for summaries of selling restrictions to be produced. In any situation where a summary was to be circulated separately from the registration document, then the selling restrictions would need to be included in a wraparound document.

1.7 We think that it would also be helpful if ESMA, when delivering its advice, could produce an example of a summary which satisfies its proposed requirements, based on an actual recent prospectus for the offering of shares.

2. 3.3 Proportionate disclosure regime (Article 7).

(a) Offers of shares by companies whose shares of the same class are admitted to trading on a regulated market or a multilateral trading facility, which are subject to appropriate disclosure requirements and rules on market abuse, provided that the issuer has not disapplied the statutory pre-emption rights

In relation to the adaptation of the contents requirement of Article 7 of the Directive, we would generally endorse the views of the Rights Issue Review Group (RIRG), set out in A Report to the Chancellor of the Exchequer: by the Rights Issue Review Group November 2008 (http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr08_rightsissue_3050.pdf) which sets out in Annex E their views on the appropriate adaptations to Annex 1 of the PD regulation in relation to rights issues generally.

In contrast with the RIRG, we do not however hold the view that there would be merit in requiring summaries of material contracts to be included in the relevant disclosure document. Such contracts should in any case have already been disclosed to the market.

We query whether there would be some benefit in retaining paragraph 18 requirements in relation to major shareholders. Although there is continuous transparency in relation to notifiable interests, it can be difficult to obtain an overview other than through the company's annual report which may not be up to date at the relevant time.

We would view the proportionate regime as a minimum disclosure standard and would expect issuers and their financial advisers (sponsors in the UK) to consider in any event whether further information should be included. In practice, we would expect that underwriters would expect to see some form of current trading statement.

(b) Offers by SMEs, by issuers with reduced market capitalization, and by credit institutions issuing non-equity securities referred to in Article 1(2)(j) of the Prospectus Directive within the scope of the Directive.

We do not offer any views on how a proportionate regime of disclosure for smaller issuers wishing to join/remain on EU regulated markets might be constructed.

3. 3.5 The consent to use a prospectus in a retail cascade (Articles 3 and 7).

We do not think that it is helpful for ESMA to attempt to give advice which may restrict the freedom to contract between parties. In our view, issues such as the duration of a consent and the conditions attached to it should be left to the issuer and the intermediary to agree.

We think that it would be helpful for ESMA to clarify that a written agreement for the placing or resale of securities by an intermediary can be made by the inclusion by the issuer of an appropriate statement in the prospectus which can then be relied on by the intermediary. We cannot see that it would serve any purpose to require a private agreement to be concluded in writing.

4. Review of the provisions of the Prospectus Regulation (Articles 5 and 7).

We consider that the removal of the requirement to publish accountants' reports on profit forecasts may have the positive effect of resulting in companies providing fuller information as to their expectations of future performance and thereby keeping investors better informed. We believe that the current requirement for such a report inhibits many issuers from providing such forecasts due to the fact that auditors will often adopt what issuers consider to be an excessively conservative approach and due to the costs related to the production of an auditors' report. The removal of the requirement should therefore be of benefit to investors if the result is that they will receive more extensive information on which to base their investment decisions.

In relation to the reduction of audited historical financial information we note that issuers looking to include a US element of their deal may not be able to take advantage of this relaxation. In a US registered deal there is a requirement for 3 years of full financial information. By analogy, for a European issuer looking to issue shares on a 144A basis, the market standard is to follow the registered requirement of 3 years.

