Deutscher Derivate Verband

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International Organization of Securities
Commissions (IOSCO)
Calle Oquendo 12
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Spain

Submitted via email to RetailStructuredProducts@iosco.org.

CR05/13

13 June 2013

IOSCO's Consultation Report on the Regulation of Retail Structured Products

Dear Sir or Madam,

Please find attached the formal comments of the Deutscher Derivate Verband (DDV) regarding your consultation report on the Regulation of Retail Structured Products published in April 2013.

We trust you will find the comments useful and encourage you to contact us should further background be needed.

Yours sincerely,

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Deutscher Derivate Verband

RESPONSE

TO

IOSCO'S CONSULTATION REPORT PUBLISHED IN APRIL 2013

ON

THE REGULATION OF RETAIL STRUCTURED PRODUCTS

This position paper constitutes the response by the Deutscher Derivate Verband e.V. (DDV) to the International Organization of Securities Commissions (IOSCO) in connection with the consultation report on the Regulation of Retail Structured Products published in April 2013 (Consultation Report).

The DDV represents 17 issuers of derivative securities in Germany: Barclays, BayernLB, BNP Paribas, Citigroup, Commerzbank, Deutsche Bank, DZ BANK, Goldman Sachs, Helaba, HSBC Trinkaus, HypoVereinsbank, LBB, LBBW, Royal Bank of Scotland, Société Générale, UBS and Vontobel. DDV's members are among the most significant certificate issuers in Germany, representing about 95 per cent of the total market. The DDV was established on 14 February 2008, with offices in Frankfurt am Main and Berlin and its work is supported by ten sponsoring members, which include the Stuttgart and Frankfurt am Main stock exchanges, financial portals and service providers.

The DDV aims to promote the market for and acceptance of certificates, warrants and other structured products in Germany. The objectives of DDV therefore include making the products more understandable and transparent, as well as protecting investors. Together with its members, the DDV advocates the establishment of industry standards and self-regulation. As a political advocacy group the DDV is involved in national and European legislative initiatives by issuing position papers and petitions.

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DDV members have established various issuance programmes for retail structured products targeting not only the German market, but also markets in other EU Member States. In this context, the DDV and its members have a vital interest in the proper functioning of the markets for retail structured products and ensuring retail investor protection while fairly taking into account investor's freedom of choice and individual investor's experience.

Deutscher Derivate Verband

Introduction

We appreciate the opportunity to comment on the Consultation Report on the Regulation of Retail Structured Products published by the International Organization of Securities Commissions (IOSCO). In particular, we appreciate the work undertaken by the Working Group on Retail Structured Products (Working Group) of the Task Force on Unregulated Markets and Products (TFUMP) to "understand and analyse trends and developments in the retail structured product market and related regulatory issues".

In our view, it is important that any regulation of retail structured products creates or maintains a level playing field for the whole range of (financial) products (including bonds, shares and funds). Only a common level playing field for all (financial) products, which have in common that they are offered to retail investors, can ensure a sufficiently homogenous treatment of these products across the IOSCO members, thereby reducing potential product arbitrage and enhancing investor protection.

For the purpose of achieving a common level playing field, we think that the definition of structured products as proposed in the Consultation Report

> "*Structured products are compound financial instruments that have the characteristics of combining a base instrument (such as a note, fund, deposit or insurance contract) with an embedded derivative that provides economic exposure to reference assets, indices or portfolios. In this form, they provide investors, at predetermined times, with payoffs that are linked to the performance of reference assets, indices or other economic values.*"

is too narrow and, by way of example, excludes various (financial) products which are, in particular from a retail investor's perspective, comparable to typical structured products.

Excluding securities with no embedded derivate, for example products tracking in the performance of an underlying 1:1[1], from the scope of the Regulation of Retail Structured Products would not only constitute objectively unjustified unequal treatment of structured products as defined in the Consultation Report compared to other packaged investment products, but would also result in potential product arbitrage through the use of appropriate wrapper structures.

[1] *cf.* FAQs Eligible Assets (as at 15 October 2009) published by the German Federal Financial Services Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* - BaFin) (WA 41 - Wp 2136-2008/0001) according to which "Certificates with a delta not equal to 1 or which do not track the performance of the underlying asset 1:1 or whose performance is linked to a derivative underlying qualify as derivatives or financial instruments embedding a derivative within the meaning of section 51 (1) sentence 2 of the Investment Act."

In our view, the definition of structured products should not focus on the combination of a base instrument with an embedded derivative, but rather cover any investment where, regardless of the legal form of the investment, the amount repayable to the investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets which are not directly purchased by the investor; *cf.* the Proposal for a Regulation of the European Parliament and of the Council on Key Information Documents for Packaged Retail Investment Products (PRIPs).

On a more abstract level, we also see a substantial risk of making structured products subject to stricter rules than are in place for non-structured products with a similar degree of risk. For example, some shares are subject to a level of both risk and lack of transparency (in terms of the capability of investors to understand and follow the factors driving the share price) which far exceeds that of many structured products. In our view, IOSCO should, in its final guidance on the regulation of retail structured products, clearly point to that risk, and ask its members to ensure a level playing field for all products, whether structured or not, and to avoid the creation of rules only governing structured products (as the underlying risk or deficiency also exists for other products).

We would like to comment on the issues for consultation raised by the Board of IOSCO as follows:

Issue 1 for consultation: Do you think the survey results accurately reflect the regulation and markets of the respondent jurisdictions? Are there any other relevant facts, regulations or dynamics that the Working Group should consider?

Comments: In our view, the results of the survey fairly reflect the regulation and markets in a number of countries (including Germany).

It is, however, important for the purpose of the Consultation Report to highlight that Lehman's collapse as driver for regulation should not be overemphasised. In fact, not only structured products, but also most non-structured products include a credit risk with which investors are faced. For example, every investor in a bond bears the credit risk of the respective issuer.

In addition, it is important to recognise, in the context of understanding and analysing the retail structured product markets, the existence of different investor

categories – even within the retail space. Apart from first time investors, which the Working Group seems to regard as typical retail investors, various markets are particularly characterised by including a large group of so-called self-directed investors. These investors are capable and willing, based on their investment experience and knowledge, to make informed investment decisions by themselves. To simply equate these self-directed investors with other (less informed) retail investors would not only mean that retail investors capable of understanding the relevant investment risks may potentially miss relevant investment opportunities, but would also create unjustified obstacles for self-directed investors in accessing structured products and would, as a result, constitute a far-reaching intervention in the decision-making freedom of these investors.

In fact, when regulating structured products, in particular in the context of product bans, each investor category's individual characteristics should be taken into account to ensure thorough and proportionate regulation.

Issue 2 for consultation: Do you believe that inter- or intra-jurisdictional regulatory arbitrage is an issue within the retail structured product market where there is an integrated market? Why or why not? What if there is not an integrated market and different regulators within jurisdictions are involved? If so, do you think that the regulatory tool proposed above will help to address the issue? What alternative measures could IOSCO members consider?

Comments: As described in the introductory remarks, we regard it as important that any regulation of Retail Structured Products creates or maintains a level playing field for all (financial) products (including bonds, shares and funds) across, in particular, the European jurisdictions. This common level playing field may then ensure a sufficiently homogenous treatment of structured products, thereby reducing potential product arbitrage and enhancing investor protection.

Against this background, we regard the harmonisation of European capital markets rules and the integration of European markets, *e.g.* by the Directive 2003/71/EC on security prospectuses and 2004/109/EC on the harmonisation of transparency requirements, as crucial and necessary steps. With regard to legal certainty and transparency, it is important that prescribed information documents on financial products which have been approved by a competent authority have to be recognised by authorities in other jurisdictions where the products are offered.

Only harmonised regulation and consistent regimes across the EEA will, in our view, reduce potential market distortions and ensure proper investor protection.

On the other hand, it is also important that national regulators can carefully consider the characteristics and specifics of local markets, *e.g.* in terms of retail investor categories. Only a combination of a common level playing field with the ability of national regulators to consider local specifics will result in thorough and proportionate regulation.

Issue 3 for consultation: Do you think that it would be useful for IOSCO members to take a *value-chain* approach to retail structured products? What issues do you think members could encounter in pursuing such an approach? How could those issues be overcome?

Comments: In our opinion a *value-chain* approach to retail structured products, "from issuance to distribution to investment", would be oversimplified and even misleading, since it cannot consider any characteristics and specifics of local markets and retail investor categories. As such, and without a case-by-case assessment of the specific regulatory measures proposed as part of such approach, it would result in ineffective regulation based on blanket terms.

It follows from the general principle of proportionality that any regulation of retail structured products – as indeed any regulation – has to be appropriate, necessary and proportionate in light of the purpose pursued. Basing the regulation on a *value-chain* approach, however, and thereby regulating each and any level within such chain without determining whether the regulation of a certain level is necessary, appropriate and proportionate (or e. g. already sufficiently covered by existing rules), would be disproportionate and may result in an unjustified restriction of both the economic freedom of issuers and the decision-making freedom of investors.

Issue 4 for consultation: Do you think that IOSCO members (that have the legal framework that would permit them to do so) could make issuers consider improvements to their market assessment process in light of their findings (where market assessments are required)? What do you consider to be the role of IOSCO members in the development and sale of retail structured products?

Issue 5 for consultation: Could the use of modelling as contemplated by this regulatory tool have an impact on the production of better value products and products that perform as intended or better disclosure? If yes, why? If not, why? What are the risks with using modelling as contemplated by this regulatory tool? Do you think investors would benefit from having access to the results of the modelling? Could IOSCO members require issuers to provide other information on the potential performance of the product? Please explain.

Comments: We agree in principle that issuers of retail structured products should put reasonable emphasis in assessing the appropriate end market for their products, in particular to achieve production of better value products.

Such obligation should however, particularly at the level of IOSCO Principles, be restricted to a general duty to introduce appropriate internal product production procedures and to identify target markets, without determining a list of more detailed steps and procedures which would always have to be included. As part of such procedures, the type and class of investors intended to be targeted by the distributor should then be identified and assessed by the issuer at an abstract level. In addition, elements of (i) developing appropriate systems, procedures and controls for product design, (ii) considering, at an abstract level , customer interests as part of the process and not allowing them to be over-looked as a result of commercial or funding pressures and (iii) avoiding as much as possible or otherwise managing any conflicts between the issuer and the potential investors to avoid detriment to investors, could be made part of such approval procedures.

While we agree that, as stated in the Consultation Report, issuers may, in principle, understand what features of a structured product will be useful or not useful for investors, such findings of the Working Group may only turn out to be helpful in the context of a regulation of structured products if the issuer has detailed knowledge of the actual investor base. The knowledge of the actual investor base usually is, however, not with the issuer, but with the distributors. As a result, any involvement of the issuer can only be strictly limited to a general perspective and a product assessment at an abstract level, *i.e.* without taking into account any potential investor's individual specifics.

We would regard the use of **modelling** to be frequently a part of an appropriate product design process. However, we are not convinced that modelling should be prescribed in each case, as this only makes sense for products with a certain degree of complexity. In addition, issuers should not be obliged to publish their underlying concepts used in the internal product approval procedures. Any such, publication could mislead investors if, as already stated by the Working Group,

issuers intentionally or mistakenly use incorrect assumptions and inputs in their modelling work. Even if issuers perform the modelling correctly, publication of results may result in undue reliance of investors on the results of the modelling. As already stated by the Working Group, investors may believe that the modelled returns will always occur and may fail to analyse the product properly because they believe the modelling means they do not need to do this.

Issue 6 for consultation:
Internal approval process
Do you think that a mandated internal approval process for issuers is warranted, or do most issuers already have this process in place? If the issuers already have such an internal approval process in place, how could it be improved? What should be the key elements in such an internal approval process? How effective are internal approval processes in vetting products before they are issued?

Regulatory pre-approval
Do you think it appropriate that regulators pre-approve products before they can be issued? Does the Consultation Report correctly describe the benefits and risks of such a process? If not, what are the benefits and risks? What do you think should be the criteria, standards and requirements for approval by the regulator? Please provide reasons.

Comments: As regards the introduction of a mandatory **internal approval process**, we think that, at least at the IOSCO level, there should only be a more generic requirement for appropriate internal product production procedures; *cf.* our response to Issues 4 and 5 above. In our view, the vast majority of issuers also already have some form of internal approval process in place.

Regarding a potential regulatory **pre-approval** process, we strongly agree with the statement in the Consultation Paper that any such process would introduce significant risks for both investors and the competent regulatory authority while only providing limited benefit:

- As mentioned in the Consultation Paper, introducing a mandatory regulatory pre-approval process would involve the risk that retail investors capable of understanding the relevant investment risks will miss relevant investment opportunities, constituting a far-reaching intervention in the decision-making freedom of these investors. In addition, investors may also assume that they have less responsibility of informing themselves about a proposed investment if

they believe that this has been vetted or "checked" by the regulator for them. This may lead to less cautious investment behaviour and an increase in the risk of regulatory failure. Moreover, investors relying on such pre-approval may try to hold the competent regulatory authority to be responsible for its assessment.

- In addition, we share the Working Group's finding that the implementation of a regulatory pre-approval process would have significant resources implications on the competent regulatory authorities, since, in particular, such pre-approval processes would need to be administered by individuals who understand how structured products work from a financial perspective, as well which requirements the products need to comply with. Regulatory failure in a pre-approval process would, however, massively jeopardise the intended retail investor protection.

- Last but not least, weighing related risks and potential benefit for retail investors, we would regard a regulatory pre-approval process as disproportionate, resulting in an unjustified intervention in both the economic freedom of issuers and the decision-making freedom of investors.

Issue 7 for consultation: Do you think it appropriate that regulators play a role in setting product standards for retail structured products? If regulators do set such criteria, how should they do this, and what are the risks to the regulator and the market?

Comments: We recognise the important role of regulators in the markets for financial products generally, and particularly in observing, and reacting to, the developments in the retail structured product markets.

In particular, we think that the possibility for regulators to prohibit the offering and selling of products that result in clear investor detriment should be part of the regulatory toolkit available to authorities.

However, in our view, such measures always have to be in line with the general principles for the distribution of financial products, including structured products. To the extent such distribution rules require distributors to assess, on a case-by-case basis, which products are suitable or appropriate for which kinds of investors (as in the EU under the MiFID Directive), we think that neither the possibility of product bans nor abstract product standards should give regulators the right to deviate from such general distribution principles. In particular, as long as certain products still appear suitable or appropriate for certain kinds of investors (even if

sophisticated), we see no room for a general ban of products with certain criteria to retail investors in general. Such measures would not be based on concrete risks and tangible investor detriment, but would be based on generalisations, and be disproportionate by including investors for which they are not required (in many cases, they would also exceed the regulatory powers transferred to authorities).

In this context, we recognise that certain product features make it likely that the respective products would not be suitable or appropriate for large parts of, or even the majority of, retail investors.

In our view, criteria and factors that can be of relevance when assessing the unsuitability or inappropriateness for a substantial part of retail investors include[2]:

a. the degree of complexity of a financial instrument and the relation to the type of investors to whom it is marketed and sold; or

b. the degree of innovation of a financial instrument; or

c. the leverage a structured product provides; or

d. whether the investor's loss is limited to its investment (excluding transactional costs).

Relevant products should then only be offered to the category of experienced retail investors, for example, self-directed investors or other investors capable of understanding the relevant investment risks.

In any case, regulators should not simply equate complexity of a structured product with its riskiness and start to limit product complexity based on, for example, the complexity of the product's calculation formula, overly complex investment strategies or a lack of transparency. Any determination of complexity of a structured product and resulting attempts to limit such complexity would, in addition to having significant resources implications, involve significant risks for the competent regulatory authority as well as for the retail investor; *cf.* our response to Issue 6 above.

Rather, complexity has to be determined based on transparent criteria and in relation to the targeted investor category. In our view, a structured product in itself, *i.e.* without proper consideration of the targeted investor category, can hardly be qualified as being complex or non-complex.

[2] *cf.* Article 32 para. 6 of the Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories (*Presidency compromise*).

Issue 8 for consultation: How prescriptive is it appropriate for IOSCO members to be in setting issuer disclosure standards? What topics or items could benefit from specific explanation requirements? Do you think that risk indicators or minimum information requirements are useful? If so, what should the indicators or requirements be? How else could disclosure to investors on retail structured products be improved? Is there any disclosure that should be prescribed or proscribed?

Comments: We agree with the Working Group that clear, complete and not misleading information about financial products in the pre-contractual phase is an essential precondition for investors being able to make a well informed investment decision.

Existing disclosure standards for structured products set by the European prospectus laws, in particular,

- the Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (and amendments thereto, including the Directive 2010/73/EU), and

- the Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements,

require that in case of a public offering all essential information (including related risks and explanations concerning specific topics) about the relevant security and the issuer is included in a prospectus, which is to be approved by the competent authority and is to be available before the investor decides whether or not to buy the product. Based on this prospectus, the investor is able to make a well informed investment decision.

These disclosure standards, which are consistently applied across Europe, have in recent years proved to provide efficient investor protection.

In the context of disclosure standards, we support the use of risk indicators and/or minimum information about the product in order to ensure comprehensiveness and

to allow for comparability with other products. In particular, risk indicators are in our view very helpful for retail investors, since even inexperienced retail investors are, using these indictors, able to evaluate quickly, but also fairly precisely, the risk of a structured product.

For the purpose of risk indicators being efficient, any risk indicator not only has to be appropriate, but also to reflect all risk factors of structured products (*e.g.* underlying and volatility risks, interest rates as well as credit and potentially currency exchange rate risks). In addition, the standardisation of indicators is an important factor. Although standardisation involves the abstract risk that indicators may be static and not aligned with investors' profiles, even a minimum level of standardisation ensures that investors are capable of easily understanding the indicator and its implications on the product as well as allowing comparability with other products across asset classes.

Issue 9 for consultation: Do you think it appropriate that IOSCO members mandate or encourage short-form or summary disclosure? Would such disclosure be helpful to investors in understanding the products that they are purchasing? What are the risks associated with such disclosure?

At what point in time should investors be provided access to this disclosure and what responsibility should the issuer have with respect to the content of the disclosure?

What information do you believe IOSCO members could require to be included in a short-form or summary disclosure?

If IOSCO members require the use a short form or summary disclosure, should this disclosure allow comparisons across products and, if so, what products should be able to be compared?

Comments: We agree with the Working Group that short-form or summary disclosure on financial products is an essential precondition for investors being able to make a well informed investment decision and, hence, forms an important part of the investment making process. As mentioned in the Consultation Paper, such short-form disclosure is already in force in some countries (e.g. Germany).

In order to be effective and to allow benchmarking or comparison by investors across different products, it is in our view crucial to strictly limit any short-form or

summary disclosure on financial products to the essentials of a structured product. In addition and for the purpose of comparability, the information contained in the short-form or summary disclosure should be strictly limited to the product specifics without consideration of the individual circumstances of the investor.

The more information that is mandatorily required to be disclosed, the more the purpose of a short-form or summary disclosure, *i.e.* to enable the investor to easily analyse and compare, would be jeopardised. In the context of the Consultation Paper, we are concerned that the contemplated disclosure requirements would already be too detailed (*e.g. cf.* our response to Issue 12 below) and would, hence, not achieve the Working Group's intention to the fullest extent. For the sake of effectiveness, we would therefore recommend strictly limiting any short-form or summary disclosure on financial products to the essentials of a structured product.

Issue 10 for consultation: Do you agree that disclosure of disaggregated costs be made public or, alternatively, exchanged between the issuer and the distributor or the IOSCO member? Do you consider there to be an alternative mechanism to make disaggregated costs more transparent for retail investors? Do you think that the disclosure of such disaggregated costs would be useful to retail investors? Please explain.

Comments: Knowledge of costs and fees in connection with the purchase and ownership of any financial product, including structured products, is certainly central to effective investor information. Investors must be able to compare the effective end- price of the product as any expected return can only be calculated and compared on the basis of the end-price. Knowledge about the components included in the end-price is irrelevant.

Any information, however, in particular regarding costs and fees, can only be useful for investors if it is not only accurate, but also presented in a comprehensive way and based on objective criteria. In our view, the specific measures contemplated in the Consultation Paper to achieve cost transparency would not be objective and transparent, but could mislead investors into thinking that they can rely on the detailed figures specified on this basis, particularly for the following reasons:

- In our view, most retail investors in structured products are interested in the idea underlying a product (for example, easy entry in an exotic market), its re-payment product structure (for example, capital protection) and its total costs and fees (*e.g.* upfront premium, index fees) rather than in the components of a

structured product. In fact, a detailed separation of components and disclosure of disaggregated costs at the level of each component would create an overload of information and jeopardise the intended comprehensiveness of disclosure given for a typical investor. In particular, since investors are already well informed about total costs and fees related to the relevant structured product (by disclosure in the prospectus and the product information sheet), any mandatory disclosure of disaggregated costs would be disproportionate.

- Moreover, it needs to be considered that disclosure of disaggregated costs could not be based on objective criteria, since fair model prices (and costs) for single components of structured products cannot be objectively determined. The reason for this is that different issuers have different hedging strategies (*e.g.* macro versus micro hedging). Hence, there is no "purchase price" for specific product components. In addition, estimates for input factors (*e.g.* expectation for implied volatilities or dividends) for a valuation of the components differ across different issuers of structured products. As a result, the assumption underlying the disclosure of disaggregated costs that "costs divided by each component are comparable", thereby allowing investors to compare costs embedded in different products, is not correct. As explained, costs divided by each component are not comparable and in particular do not reflect cost advantages of issuers due to favourable hedging positions. Therefore, a disclosure of disaggregated costs may even be misleading information – not only for retail investors but also for sophisticated investors and even regulators.

We would like to stress that we are not against the introduction of cost disclosure as such. However, we think that the obstacles mentioned above, particularly in terms of subjectivity of any calculations, have not been overcome by any approach we are aware of. We are thus far somewhat sceptical that such approach can be found, but would be very happy to look into this further, and would support any alternative approach to cost disclosure that would overcome the mentioned shortcomings. Furthermore, with regard to the sharing of information on costs between the issuer and the distributor there is even some risk that this might constitute illicit anti-competitive behaviour, as issuers and distributors may be competitors.

Issue 11 for consultation: Do you think disclosing the estimated fair value of a structured product at the time of issuance will be helpful to investors? If so, why? If not, why not? What alternative information could be disclosed?

Comments: As described above (*cf.* our response to Issue 10 above), prices for structured products depend on the hedging strategies, model selection and market expectations of the relevant issuer. Due to these differences, a "fair value" for structured products does not exist. It is possible to calculate a price on the basis of an average market expectation but this price does not reflect the individual situation of the issuer, *i.e.* the difference between market price and calculated price can generally not be assumed to be the overall cost.

Disclosing an alleged "estimated fair value" of a structured product or a price on the basis of an average market expectation would, in our view, be misleading for investors and jeopardise retail investor protection.

Issue 12 for consultation: Do you think it appropriate that IOSCO members prescribe disclosure of scenarios? If so, what should these scenarios be? Do you consider there to be an alternative/simpler method of disclosing scenarios to retail investors? Please explain.

Comments: We agree with the Working Group that the use of different scenarios may increase the likelihood of investors understanding how the product is intended to work.

For the purpose of giving effective explanation to investors is it important to recognise the specifics of a structured product. Not all structured products, for example, will require a scenario analysis providing for the worst, the break-even and the best cases. In case, *e.g.* of a reverse convertible bond, there are only two possible scenarios for the redemption at maturity:

1. In case the price of the underlying on the valuation date **is equal to or above** the strike, the investor will receive per bond a cash amount equal to the denomination,

2. In case the price of the underlying on the valuation date **is below** the strike, the investor will receive per bond delivery of a fixed number of securities.

Accordingly, there should not be a requirement to provide a fixed number of scenarios in all cases.

In addition, we think that scenarios should be made part of short-form or summary disclosure, but not necessarily part of prospectus disclosure.

Issue 13 for consultation: Do you think that disclosure of backtesting is useful to investors? What are the risks associated with such disclosure? Is there any other way to use backtesting to help retail investors?

Comments: We regard disclosure of backtesting as not being useful to investors. In fact, the disclosure of a backtesting result for a structured product may even be misleading for retail investors. Based on positive backtesting results, investors may assume they have less responsibility for informing themselves about a proposed investment if they believe that the product has been "tested" for them – even despite appropriate disclaimers, explicitly stating that past performance is no indicator for future performance. This may lead to less cautious investment behaviour and jeopardise retail investor protection.

Issue 14 for consultation: What education tools could IOSCO members use when educating retail investors on retail structured products? What guidance could IOSCO provide to its members to facilitate better investor understanding of retail structured products?

Comments: We agree with the Working Group's assessment that education tools, for example investor guides and interactive online materials, may be useful to educate retail investors on retail structured products. Investor education tools that facilitate the understanding of investors of structured products can help improve the skillset of investors required to engage with structured products.

We think, however, that providing these education tools should not be the responsibility of IOSCO members. Besides general resources implications for the regulators, developing and establishing appropriate education tools requires intensive know-how regarding how structured products work. We are concerned that IOSCO members may face massive difficulties providing appropriate resources and the necessary ongoing training of the staff responsible for education tools. Any regulatory failure in such context, in particular with relation to necessary updates to comply with latest developments, would, however, massively jeopardise the intended retail investor protection.

Rather, providing appropriate education tools should form part of the obligations of distributors under the "Suitability Principles", in particular the suitability and appropriateness tests under the European MiFID regulation.

Issue 15 for consultation: Do you think it appropriate for IOSCO members to require or encourage issuers to take some form of responsibility for the actions of the distributors that distribute their products? What impediments might IOSCO members face in implementing these type of requirements? Would the requirements have an effect on distributor behaviour?

Comments: We think that issuers should not be mandatorily required to take some form of responsibility for the actions of the distributors that distribute their products. In fact, and as described in our response to Issue 2 above, any involvement of the issuer has to be strictly limited to a general perspective and a product assessment at an abstract level , *i.e.* without taking into account any potential investor's individual specifics.

It should, in this context, be recognised by the Working Group that issuers have a vital interest in their reputation and their products. In case of, for example, a miss-selling of structured products by distributors, it is also the issuer's reputation which is at risk. Since, concurrently, distributors must (economically) make sure to be able to offer an attractive range of products to investors, most issuers do not only exercise commercial pressure on distributors to sell retail structured products in accordance with applicable laws, but also offer training and education tools, such as investor guides and interactive online materials, to distributors.

Against this background, and given the impossibility for issuers to effectively control the distribution by distributors in practice, we would consider any mandatory responsibility of issues for the actions of the distributors that distribute their products as unjustified.

Issue 16 for consultation: What other areas of activity could IOSCO members consider in the post sales period? Please explain. Are there issuers, that are not distributors, that make a secondary market in retail structured products (i.e., would the regulatory tool on secondary market making ever be relevant)?

Comments: In our view, IOSCO members should not consider any other areas in the post sales period. In fact, we already do not agree with, and are highly concerned about, the specific measures envisaged by the Working Group. In our view they would create extensive obligations for issuers in the post sales period, and result in an unjustified intervention in the economic freedom of issuers.