

# **THE FUTURE OF MONEY MARKET INSTRUMENTS**

## **A CONSULTATION ON *PRO FORMA* TERMS OF ISSUANCE FOR ELIGIBLE DEBT SECURITIES**



**November 2002**

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## **A: INTRODUCTION**

Work is now in progress to enable money market instruments (MMIs) to be issued in non-material, that is electronic, form and to be settled in the CREST settlement system with title evidenced by names on an electronic register. The aim is for dematerialised equivalents of money market instruments to begin to be issued from July 2003. This will complete the modernisation of the settlement arrangements for UK securities begun after the Bank of England's Securities Settlement Priorities Review in September 1998. It will bring savings in the cost of issuance; it will enable money market securities to be issued as fungible securities, making the markets deeper and more liquid; and it will enable money market securities to be issued rapidly and settled same day in the Delivery versus Payment (DvP) in central bank money environment of CREST, eliminating the current intra-day exposures amongst members in the Central Moneymarkets Office (CMO).

The reform work deals with not only money market instruments but also with other marketable negotiable debt securities, of whatever maturity, including Medium Term Notes and other securities with an original maturity of one year or more. The collective term used for the non-material equivalent debt securities concerned is "eligible debt securities" (EDSs)<sup>1</sup>.

Much of the preliminary work has been completed; but further preparatory work continues.<sup>2</sup> On 13 September 2002, HM Treasury published a consultation document, "Modernising the Settlement of Money Market Instruments" seeking comments on the changes that the Government proposes to make to the Uncertificated Securities Regulations 2001 ("USRs") in order to permit the evidencing and transfer of title of EDSs through the CREST system. The Treasury document seeks comments by 6 December 2002.

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<sup>1</sup> For a security to be an EDS it will have satisfy the requirements for 'eligible debt securities' set out in the regulations to be made by HM Treasury.

<sup>2</sup> Previous consultation documents, the minutes of various working groups and references to the latest consultation papers issued by the Bank, CRESTCo and HM Treasury are available on the Bank's website at [www.bankofengland.co.uk/markets/money/mmfuture.htm](http://www.bankofengland.co.uk/markets/money/mmfuture.htm)

In their consultation document, the Treasury refer to the fact that the Bank of England would be issuing for consultation some draft *standard* issuance terms for the main types of EDS and these are now attached, with a set of accompanying notes, as an appendix to this consultation document. The terms have been issued by the Bank after discussion with CRESTCo and a subgroup of the Money Market Liaison Group including market participants and legal experts.

The *standard* terms have been drafted on the basis of the Government's current proposals for amending the USRs, but may have to be amended to reflect the final form of the USRs.

The Bank would be grateful for comments on the proposals in this paper, and on any points arising, by 20 December. A second stage of consultation is expected in January or February 2003. The aim is to reach a market consensus by March 2003, so that issuers, Issuing and Paying Agents, investors and customers can be familiar with the documentation in good time before issuance begins in July 2003. The Bank will expect to share with CRESTCo and others any comments received as part of the consultation exercise. Responses should be addressed to:

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## **B: SUMMARY OF PROPOSALS**

### **Outline Structure of Terms**

1 The EDS terms are structured as a deed (but see paragraphs 11-13 below) which is intended to be used in respect of the issue of units of a single eligible debt security or a programme of such securities which may include eligible debt securities corresponding to different types of money market instruments, for example, commercial paper, certificates of deposit and bankers' acceptances. The deed has not been prepared with a view to the issue of Treasury bills or local authority instruments (where specific legislative provisions provide for certain matters which need to be specifically reflected in the terms of issue of the security concerned).

2 Where the deed is used for the issue of units under a programme of eligible debt securities, the issuer will not need to enter into a separate deed for each issue but simply complete a notice of issue on each occasion that it proposes to constitute EDSs under the programme. The deed, together with a notice of issue, are the documents which constitute the units of the eligible debt security. It is intended that the deed be issued in conjunction with such other documents as may be customary for a particular type of money market instrument, for example an information memorandum for commercial paper. It is anticipated that existing standard programme documentation could be used, albeit with certain consequential amendments to reflect the issues of EDSs.

3 The terms of the *pro forma* deed include only those terms which are required in order for uncertificated units to be issued. They will need adaptation to include any required commercial terms. In some cases the document contemplates that a particular term will need to be inserted (e.g. to deal with any withholding tax on a payment by the issuer), but in other cases the issuer may need to add provisions to accommodate terms specific to a particular type of security, issue or programme (e.g. a guarantee provision) and other terms which are customary in material money market

instruments (e.g. provisions addressing the manner in which interest is to be calculated).

4 It is intended that the *pro forma* deed be accompanied by a set of explanatory notes. A draft of these notes is attached and consultees are referred to these notes for a more detailed explanation of the provisions of the deed.

5 Views are sought from consultees as to whether the approach described above is suitable. In particular, will one set of terms (under which any type of relevant units can be issued) suffice or might it be preferable if separate terms were produced for different types of unit? If separate terms are thought preferable, then how many are required? One approach would be to have one set of terms for units corresponding to bankers' acceptances and another for units corresponding to other types of debt instrument including CDs and CP – the terms would be substantially identical save that the former would reflect the fact that there would be a second issuer (corresponding to the drawer of a bill).

#### *MTNs*

6 As noted above, the *pro forma* terms have been drafted to reflect the typical structure of terms relating to money market instruments such as CP and CDs. It would in principle be possible to extend the *pro forma* terms to cover the issuance of MTNs into CREST as well. However, MTN terms are typically more complex than those relating to short term instruments such as CP and CDs. For example, MTN terms may include a negative pledge clause and provisions relating to events of default; in addition the IPMA pricing supplement is much more detailed than the corresponding provisions for CP/CDs (as reflected in the draft notice of issue at Exhibit A to the *pro forma* terms).

7 The *pro forma* terms attached do not therefore (for the time being at least) contemplate dematerialised MTNs and views are welcomed as to whether there should be a mechanism for issuing dematerialised MTNs, and if so, whether:

- (a) one set of *pro forma* terms should cover both short term money market instruments and MTNs - this might involve the inclusion of certain terms<sup>3</sup> which would be selected only when required (e.g. a negative pledge) and perhaps a separate notice of issue for dematerialised MTNs; or
- (b) separate terms should be produced for dematerialised MTNs?

8 In relation to longer term instruments such as MTNs, care will need to be taken to ensure that the relevant terms of issue are consistent with the definition of an “eligible debt security” to be included in the Uncertificated Securities Regulations (as amended); and in particular the requirement that such a security must be constituted as a debt security which is payable “at a fixed or determinable future time”.

### **Legal characteristics of uncertificated units**

9 Non-material (uncertificated) units will have different legal characteristics from their paper equivalents. A number of general observations can be made about the draft terms:

- there is no general provision for a paper interface although, in accordance with the CREST Rules, there are provisions to address the situation where a holder ceases to be a CREST member or where the securities cease to be capable of being held in CREST. In either case, compulsory cancellation/transfer provisions apply although, for the reasons explained in the commentary on clause 8 of the deed contained in the Explanatory Notes, use of a compulsory cancellation or transfer procedure is not strictly speaking a requirement of the CREST rules;
- material money market instruments are negotiable (negotiability confers property rights on holders which are superior to those conferred only by contract, in particular the right to take possession free of any preceding equities). However, this concept is not relevant for uncertificated units recorded in CREST in respect

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<sup>3</sup> Which would be likely to increase the length of the document significantly.

of which legal title is provided to the holder by the entry of his name on the relevant CREST records, as the “Operator register of eligible debt securities”. A change in the register represents a change in legal title (i.e. there is electronic transfer of title for uncertificated units);

- uncertificated units of an eligible debt security are capable of being fungible with other uncertificated units of the same eligible debt security but not with their material equivalent (since, although economically equivalent and carrying as far as practicable corresponding rights and obligations, they are different instruments);
- uncertificated units of an eligible debt security are similar to uncertificated units of other debt securities issued into CREST except that there is no provision for the possibility of their being held in certificated form outside CREST (an eligible debt security being a “wholly dematerialised security”) and the issuer has no statutory obligation to maintain a related “record of securities”.

10 The deed contemplates (in clause 6.1) that units are:

- (a) *constituted* by the completion of a notice of issue which forms a schedule to the deed (accordingly, no units are actually constituted by the deed itself until a notice of issue is completed); and
- (b) *issued* when the holder’s details are entered onto the relevant CREST register (i.e. an “Operator register of eligible debt securities”).

### **Use of a Deed**

11 The terms are structured as a deed to ensure that holders of securities issued under it acquire directly enforceable rights against the issuer.

12 The Bank, in consultation with CRESTCo, has however been considering a number of proposed mechanisms for avoiding the use of a deed, including the

possibility of using the Contracts (Rights of Third Parties) Act 1999. At present however, there remain a number of outstanding legal issues in relation to these proposals, and the Bank may consult further on the proposals in due course.

13 If it did prove possible to avoid the use of a deed, this might facilitate the constitution and issue of units entirely by electronic means (see paragraphs 14-16 below). However, even if a deed were required, it would only be the deed itself which, as a result of the formal requirements for the execution of deeds, is likely to be required to be in hard copy form bearing a manuscript signature<sup>4</sup>. In contrast, it is not likely that there would be any legal requirement for the notices of issue completed under the deed (i.e. the means by which securities are constituted under the deed) to be created in hard copy form. On this basis, comments are invited as to whether there would in practice be any significant disadvantage to the use of a deed.

### **Electronic documents**

14 The Bank is aware that some issuers have queried whether it would be possible for the entire process of constituting and issuing EDSs to be carried out electronically. From a legal perspective the answer to this may depend on whether or not a deed is used (as to which see paragraphs 11-13 above).

15 Where a deed is not used, then the position is comparatively straightforward since there is no reason in principle under English law why a simple contract cannot be made in electronic form (without a signature at all)<sup>5</sup>. Alternatively, it would presumably be open to an issuer to authenticate the document containing the EDS terms by means of an electronic signature. Furthermore, as noted in paragraph 13 above, even where a deed is used for the EDS terms, it is not envisaged that notices of

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<sup>4</sup> The Law Commission has, however, expressed the view that, unless the statutory context dictates otherwise, digital signatures, scanned manuscript signatures, typing one's name and clicking on a website are all methods of signature capable of satisfying a statutory requirement for a signature (which would include the execution of a deed by two directors or a director and the secretary of a company) but acknowledges that this view is not universally accepted.

<sup>5</sup> One exception to this is a guarantee, which is still required to be in writing and signed by the guarantor.

issue under the deed would themselves require execution as a deed. Notices of issue could therefore be created and stored in electronic form only (although it may be appropriate in those circumstances for the notices to be authenticated by some form of electronic signature).

16 In any event, and as a practical matter, issuers and holders would have to be satisfied with any evidential implications of relying solely on electronic documents (either for the basic terms or the notices of issue) and the practical implications of providing copies of the terms to holders of the units. While the use of electronic documents should not of itself give rise to admissibility issues, it could give rise to other evidential issues, particularly where there is a dispute as to the terms under which units are issued. Ultimately, this is therefore a question for issuers and holders.

### **Comments on particular provisions of *pro forma* terms**

17 The *pro forma* terms contemplate (see definitions) that there may be separate Issuing and Paying Agents (although there is nothing to prevent the same person fulfilling both functions). The terms assume however that issuers will use the same agents regardless of the type of dematerialised security being issued. Is this appropriate or should separate provision be made for specifying the Issuing and Paying Agents for each issue?

18 Clause 7.1 of the *pro forma* terms makes provision for the redemption of units which are payable on demand. This provision is required for non-material equivalents of bankers' acceptances. However, we have assumed that it is not necessary for the terms to contemplate early redemption at the option of the holder in respect of units for which there is a specified maturity date - i.e. for units corresponding to CP/CD. Views are invited as to whether this assumption is correct.

19 Clause 11 of the *pro forma* terms provides that the Issuing Agent holds a copy of the completed deed (which would include all notices of issue). Is the Issuing Agent the appropriate person to hold the deed as a trusted third party? There might also

presumably be cost implications for IPAs where an issuer produces hard copy, rather than electronic, notices of issue.

### **Notice of issue**

20 General comments are invited on the form of the notice of issue at Exhibit A to the terms. Views are also invited on the following specific issues:

- (a) the notice of issue contemplates a “Unit value” being the smallest possible transferable unit in the specified currency (and might be 1p say). It has been suggested that the terms should provide separately for the concepts of minimum trading amount (e.g. £100,000) and minimum trading multiples (e.g. £10,000 – so in this example, it would not be possible to trade £90,000, but £100,000 or £110,000 could be traded). It does not appear to the Bank or to CREST that this distinction is significant in the context of non-material instruments but views are sought on this;
  
- (c) although some existing CP/CD programmes provide for issues under the programme to have a series number, we have assumed that this is not necessary in the context of EDSs. Comments are invited as to whether this assumption is correct.

### **Summary of questions for consultation**

21 The annex to this document summarises the specific consultation questions raised above.

## **ANNEX 1 - LIST OF SPECIFIC CONSULTATION QUESTIONS**

### **Outline structure of EDS terms (paragraphs 1-8)**

1. Is the general approach to the constitution of eligible debt securities described in paragraphs 1-4 above suitable? In particular:
  - (a) will one set of terms (under which any type of relevant units can be issued) suffice; or
  - (b) might it be preferable if separate terms were produced for different types of unit, and if so how many are required (one approach would be to have one set of terms for units corresponding to bankers' acceptances and another for units corresponding to other types of debt instrument including CDs and CP)?
2. Should there be a mechanism for issuing non-material MTNs and, if so, should:
  - (a) one set of *pro forma* terms cover both short term money market instruments and MTNs (which would involve the inclusion of certain terms to be selected when required and perhaps a separate notice of issue for dematerialised MTNs); or
  - (b) separate terms be produced for dematerialised MTNs?

### **Use of a deed (paragraphs 11-13)**

3. If the EDS terms were contained in a deed, this would probably be required to be executed in hard copy form. However, it is not likely that there would be any legal requirement for the notices of issue completed under the deed (i.e. the means by which securities are constituted under the deed) to be created in hard copy form. On this basis, comments are invited as to whether there would in practice be any significant disadvantage in the use of a deed.

### **Provisions of *pro forma* terms (paragraphs 17-19)**

4. The *pro forma* terms contemplate that there may be separate Issuing and Paying Agents but assume that issuers will use the same agents regardless of the type of dematerialised security being issued. Is this appropriate or should separate provision be made for specifying the Issuing and Paying Agents for each issue?

5. We have assumed that it is not necessary for the terms to contemplate early redemption at the option of the holder in respect of units for which there is a specified maturity date - i.e. for units corresponding to CP/CD. Views are invited as to whether this assumption is correct.

6. Is the Issuing Agent the appropriate person to hold a copy of the completed deed as a trusted third party (Clause 11)?

**Notice of issue (paragraph 20)**

7. Do you have any general comments on the form of the notice of issue at Exhibit A?

8. Should the terms provide separately for the concepts of minimum trading amount (e.g. £100,000) and minimum trading multiples (e.g. £10,000 – so in this example, it would not be possible to trade £90,000, but £100,000 or £110,000 could be traded)?

9. Comments are invited on the assumption that there is no requirement for a series number in the context of EDSs.

**DRAFT**

**ANNEX 2 - DRAFT *PRO FORMA* TERMS**

**[*Pro forma* deed relating to uncertificated units of a CREST eligible debt security (corresponding to commercial paper, certificates of deposit or bills of exchange). The *pro forma* deed is intended in principle only to include those terms which are required in order for uncertificated units to be issued. The terms will therefore need to be adapted to include any required commercial terms relevant to particular types of security.]**

**[*Insert date*]**

**[*Insert details of issuer*]  
as [Primary] Issuer**

**[[*Insert details of secondary issuer (if any)*]  
as Secondary Issuer]**

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**DEED  
relating to a [*insert details*]**

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**Legal notice**

This *pro forma* deed has been published by the Bank of England in consultation with CRESTCo Limited. Whilst every care has been taken in its preparation, neither the Bank nor CRESTCo warrants that the *pro forma* deed is suitable for any particular transaction and accept no responsibility or liability for any loss which may arise in connection with the use of the *pro forma* deed and any person proposing to use the *pro forma* deed should seek separate legal advice.

**THIS DEED** is made on [insert date] by [insert name, place of incorporation/establishment, registered number (if any) and registered address of issuer] (the [**Primary**] **Issuer**)[[and] [for instruments corresponding to bills of exchange insert details of the person who would be the drawer] (the **Secondary Issuer**)<sup>1</sup>] in favour of the persons who are from time to time Holders (as that term is defined in this Deed).

**WHEREAS:**

(A) The [Primary] Issuer [(and where applicable the Secondary Issuer (together the **Issuers** and each an **Issuer**))] proposes, from time to time, to issue units of debt securities which are eligible debt securities the rights and obligations in respect of which correspond, so far as practicable, with those which would arise if the Issuer issued commercial paper, certificates of deposit, bankers' acceptances or other debt instruments in material form on substantially the same terms as those set out in this Deed.

(B) Units of eligible debt securities will be issued only in uncertificated form in the CREST relevant system and only pursuant to an Issuing and Paying Agency Agreement between the Issuer [or Issuers as the case may be] and [identify Issuing Agent and Paying Agent] dated [insert date] (the **Issuing and Paying Agency Agreement**)<sup>2</sup>.

(C) The purpose of this Deed is to provide for the constitution of uncertificated units of eligible debt securities of the Issuer [(or Issuers as the case may be)]. Subject to and in accordance with the terms and conditions of this Deed, each Holder will acquire against the Issuer[, or each Issuer as the case may be,] the rights constituted or acknowledged by and under this Deed.

**NOW THIS DEED WITNESSES AS FOLLOWS:**

**1. INTERPRETATION**

1.1 In this Deed, the following expressions shall have the following meanings:

**Business Day** means any day, other than a Saturday or a Sunday which is both (a) a CREST Business Day and (b) either (i) if the Specified Currency is any currency other than euro, a day on which commercial banks and foreign exchange markets settle payments and are open for general business (including dealings in foreign exchange and foreign currency deposits) in both London and the principal financial centre of the country of the relevant Specified Currency or (ii) if the Specified Currency is euro, a day which is a TARGET Business Day;

**CREST Business Day** means a day on which the CREST relevant system is operational;

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<sup>1</sup> Delete words in square brackets and all subsequent references to 'Issuers' and to the word 'Primary' if programme is not to include 'two name' instruments.

<sup>2</sup> This may need to be amended if there is more than one agency agreement (e.g. where there are separate Issuing and Paying Agents).

**CRESTCo** means CRESTCo Limited, a company incorporated in England and Wales under number 2878738 whose registered office is at 33 Cannon Street, London EC4M 5SB;

**CREST Manual** means the document entitled the “CREST Manual” issued by CRESTCo;

**CREST member** means a person who has been admitted by CRESTCo as a system-member;

**CREST payment** means a payment which is made by means of the CREST relevant system by way of debit to the cash memorandum account of the Paying Agent (and a corresponding credit to the cash memorandum account of the relevant Holder);

**CREST relevant system** means the relevant system of which CRESTCo has been approved under the Regulations as Operator;

**CREST Rules** means rules within the meaning of the Regulations or the Financial Services and Markets Act 2000 made by CRESTCo and any rules made by CRESTCo as Operator of a designated system under or pursuant to the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (SI 1999 No. 2979);

**Holder** means a CREST member whose name is entered in the relevant Operator register of eligible debt securities as holder of units and, where the context admits, a Holder shall include a former Holder;

**interest payment record date** means, in relation to units bearing interest, the CREST Business Day before the relevant Interest Payment Date or, if the relevant Interest Payment Date is not a Business Day, the CREST Business Day before the Business Day on which the payment of interest is to be made under clause 3.4;

**Issuing Agent** means the person appointed from time to time by the Issuer [or Issuers as the case may be] to act as Issuing Agent under the Issuing and Paying Agency Agreement, and is at the date of this Deed, [*insert details of Issuing Agent*];

**Maturity Date** means the date on which units are to be redeemed as specified in a Notice of Issue and, in relation to units which are expressed to be payable on demand, includes the date upon which the units are to be redeemed at the option of the Holder in accordance with clause 7.1;

**Notice of Issue** means a notice given pursuant to clause 6.1 constituting units of an eligible debt security;

**Paying Agent** means the person appointed from time to time by the Issuer [or Issuers as the case may be] to act as Paying Agent under the Issuing and Paying Agency Agreement, and is at the date of this Deed, [*insert details of Paying Agent*];

**Principal Amount** means the principal sum payable in respect of units of an eligible debt security as specified in a Notice of Issue;

**Regulations** means the Uncertificated Securities Regulations 2001 (SI 2001 No. 3755), as amended by the Uncertificated Securities (Amendment)(Eligible Debt Securities) Regulations 2003 (SI 2003 No. [     ]), and such other regulations made under section 207 of the Companies Act 1989 as are applicable to CRESTCo and/or the CREST relevant system and are from time to time in force;

**TARGET Business Day** means a day on which the Trans-European Automated Real-time Gross Settlement Express Transfer (TARGET) System, or any successor thereto, is operating credit or transfer instructions in respect of payments in euro;

**unit** means, in relation to an eligible debt security of the Issuer [(or Issuers as the case may be)], the smallest possible transferable uncertificated unit of the eligible debt security as specified in a Notice of Issue.

1.2 In this Deed, unless otherwise specified:

- (a) headings to clauses are for convenience only and do not affect the interpretation of this Deed;
- (b) references to any statute or statutory instrument or any provision thereof shall be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or re-enacted;
- (c) terms defined or used in the Regulations which are used in this Deed shall have the meanings given to them in the Regulations;
- (d) terms relating to the CREST relevant system which are used in this Deed and which are not defined in this Deed or in the Regulations shall have the meaning given to them in the CREST Manual;
- (e) words importing one gender shall (where appropriate) include any other gender and words importing the singular shall (where appropriate) include the plural and vice versa;
- (f) references to an Issuer include any successor in title to such party;
- (g) any reference to “the CREST Manual” or “the CREST Rules” or any other agreement or document shall be construed as a reference to the CREST Manual or the CREST Rules or such other agreement or document as the same may from time to time be amended, varied, supplemented, novated or replaced and shall include any document which is supplemental to, or is expressed to be collateral to, or is entered pursuant to or in accordance with, the CREST Manual or the CREST Rules or, as the case may be, such other agreement or document; and
- (h) the exhibit to this Deed and any schedules completed pursuant to the provisions of this Deed shall form part of this Deed.

## **2 PAYMENT OBLIGATION OF THE ISSUER**

2.1 Upon the issue of units and subject to the terms and conditions of this Deed, the [Primary] Issuer:

- (a) acknowledges, in relation to units issued in respect of a deposit made with it, that a sum has been deposited with it on terms that the Principal Amount is payable on the Maturity Date and any interest on the units is payable at the rate and at the times (if any) specified in or under this Deed; and
- (b) promises, in relation to any other units, to pay the Principal Amount on the Maturity Date and any interest thereon at the rate and at the times (if any) specified in or under this Deed.

2.2 [In respect of units for which there is a Secondary Issuer:

- (a) the Secondary Issuer promises that, if the Primary Issuer fails to pay the Principal Amount on the Maturity Date in accordance with its obligation under clause 2.1 or otherwise repudiates any of its obligations under this Deed, the Secondary Issuer will perform that obligation in accordance with the terms of this Deed;
- (b) the Secondary Issuer is, as against any Holder (but not as against the Primary Issuer), liable as principal debtor under this Deed; and
- (c) if the Secondary Issuer pays any debt constituted under this Deed in accordance with the terms and conditions of this Deed, it shall be entitled to recover that amount from the Primary Issuer.]<sup>3</sup>

## **3 PAYMENTS**

3.1 All payments under this Deed shall be made in accordance with the Issuing and Paying Agency Agreement and [shall be made in the Specified Currency] subject to and in accordance with the terms and conditions of this Deed and the facilities and requirements of the CREST relevant system. The Issuer [or, as the case may be, the Issuers] shall, or shall procure that the Paying Agent shall, maintain appropriate records of all payments made under this Deed.

3.2 Payment of principal by the Issuer shall be made by means of a CREST payment in respect of each unit to the person who is the Holder immediately before the time at which the unit is credited to the stock account of the Paying Agent in accordance with clause 7.2.

3.3 Payments of interest by the Issuer shall be made on the relevant Interest Payment Date by means of a CREST payment in respect of each unit:

- (a) subject to clause (b), to the person who is identified in the CREST relevant system on the relevant interest payment record date, in accordance with the

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<sup>3</sup> Delete clause 2.2. if instruments corresponding to bills of exchange will not be issued under the programme.

CREST Manual, as the Holder of such unit for the purposes of interest payment;  
or

- (b) to the person to whom the payment of principal is due under clause 3.2 in respect of any interest which is due on an Interest Payment Date which coincides with the Maturity Date,

and for the purposes of this clause 3.3 and clause 3.4 a reference to “Interest Payment Date” includes, in respect of units expressed to be payable on demand, the Maturity Date for those units as determined in accordance with clause 7.1<sup>4</sup>.

3.4 If the Maturity Date or, if applicable and subject to clause 4.2, the relevant Interest Payment Date, is not a Business Day, payment of principal under clause 3.2 and payment of interest under clause 3.3 shall be made by the Issuer on the next following Business Day<sup>5</sup> and no person shall be entitled to any interest or other sums in respect of such postponed payment.

3.5 *[Include any appropriate provisions relating to restrictions on deductions from payments – e.g. set-off, counterclaim etc or deduction for withholding tax (and gross up provision).]*<sup>6</sup>

3.6 Payment by the Issuer in accordance with the provisions of this clause 3 shall discharge all obligations of the Issuer [(or, in relation to units for which there is a Secondary Issuer, of both Issuers)] to the Holder in respect of such payment.

#### **4 INTEREST**

4.1 If units are issued which bear fixed interest, the interest shall be calculated on the Principal Amount (or, in respect of units expressed to be payable on demand, on the outstanding principal) as follows:

*[Insert required calculation provisions using as appropriate terms defined in a Notice of Issue]*

4.2 If units are issued which bear a floating rate of interest, the interest shall be calculated on the Principal Amount (or, in respect of units expressed to be payable on demand, on the outstanding principal) as follows:

*[Insert required calculation provisions]*

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<sup>4</sup> This clause assumes that in respect of units which are payable on demand, any accrued interest will be paid on the redemption of the units.

<sup>5</sup> Include as appropriate provision for adjusting the payment date to the preceding business day where the payment date is not a business day and the next business day would fall in the next calendar month.

<sup>6</sup> Under CREST Rule 7, paragraph 5, provisions as to payment must be compatible with CREST payment arrangements. Such arrangements will not accommodate any right of set-off or counterclaim to be exercised against a CREST payment. Failure to comply with this condition will make the security ineligible for CREST settlement.

## 5 STATUS

5.1 The payment obligations of [the][each] Issuer under this Deed constitute and at all times shall constitute direct and unsecured obligations of the Issuer ranking *pari passu* without any preference with all present and future unsecured and unsubordinated indebtedness of, and including any guarantees given by, the Issuer, other than obligations which are preferred in the liquidation or insolvency of the Issuer by virtue of mandatory provisions of law.

## 6 CONSTITUTION, ISSUE AND TRANSFER OF UNITS

6.1 The constitution, issue and transfer of units shall be in accordance with and subject as provided in the Regulations, the CREST Rules and the terms of the Issuing and Paying Agency Agreement. When the Issuer [(or Issuers as the case may be)] proposes to constitute and issue units it shall:

- (a) constitute the units by completing a Notice of Issue which shall form a schedule to this Deed, such schedule to be substantially in the form of exhibit A to this Deed;
- (b) effect the issue of such units by entering or procuring the entry in the relevant Operator register of eligible debt securities of such particulars as are required by the Regulations and the CREST Rules.

6.2 Holders of units are deemed to have notice of all of the provisions of the Issuing and Paying Agency Agreement a copy of which is available from the Issuing Agent. The Issuer [(or Issuers as the case may be)] reserves the right at any time to vary or terminate the appointment of a person as an Issuing or Paying Agent, provided that there will at all times be at least one person appointed who is permitted by CRESTCo to perform the functions of an issuing and paying agent in the CREST relevant system in relation to units, or to approve any change in the office through which a person acts as an Issuing or Paying Agent.

6.3 Units of eligible debt securities constituted under this Deed:

- (a) may only be held in uncertificated form and title to units shall be transferable only by means of the CREST relevant system in accordance with the Regulations;
- (b) shall be in issue only upon the entry in the relevant Operator register of eligible debt securities of such particulars as are required by the Regulations and the CREST Rules;
- (c) shall be transferable free from any equity, set-off or counterclaim between [the Issuer][either Issuer] and the first or any intermediate Holder provided that any transfer shall be only in amounts which are an integral number of units, in each case in accordance with the facilities and requirements of the CREST relevant system (including those facilities and requirements described and set out in the CREST Manual and the CREST Rules).

## **7 REDEMPTION**

7.1 Upon any Holder giving to the Paying Agent not less than [\*] nor more than [\*] days' notice in respect of units expressed to be payable on demand, the Issuer will in accordance with its obligations under or pursuant to clause 2.1 [(or clause 2.2 as the case may be)] upon the date on which such notice expires (which shall be the Maturity Date in respect of the units to which the notice relates), redeem such units specified in the notice at the Maturity Date.

7.2 The CREST payment made by or on behalf of the Issuer upon the redemption of units may only be made against the system-transfer of those units to such stock account of the Paying Agent maintained in the CREST relevant system as may be specified by or on behalf of the Issuer.

## **8 COMPULSORY CANCELLATION OR TRANSFER**

8.1 If it shall come to the notice of [the Issuer][the Issuer (or, in relation only to units for which there is a Secondary Issuer, either or both of the Issuers)], or if [the Issuer][the Issuer (or either or both of the Issuers)] shall have reason to believe, that any units:

- (a) are held by a Holder who has ceased at any time to be a CREST member for any reason; or
- (b) cease to be capable of being held in the CREST relevant system,

then the Holder or, as the case may be, the Holders concerned shall be deemed as the Issuer [(or the Issuers as the case may be)] shall elect to have requested either:

- (i) the cancellation of his or their units in accordance with clause 8.2; or
- (ii) provided that only clause 8.1(a) applies, their transfer in accordance with clause 8.3.

8.2 On the Holder(s) being deemed, at the election of the Issuer [(or the Issuers as the case may be)], to have requested the cancellation of his or their units pursuant to clause 8.1, the Issuer [(or the Issuers as the case may be)] shall make such arrangements to the extent practicable and permitted by applicable law and regulation for the prompt replacement of the units by a physical instrument or instruments on substantially the same terms and which confer on the Holder(s) materially the same rights against the Issuer [(or Issuers as the case may be)] immediately after such cancellation as were conferred by the units immediately before such cancellation. In particular but without prejudice to the generality of the foregoing, the Issuer [(or the Issuers as the case may be)] shall:

- (a) execute a physical instrument or instruments (which may be in global or definitive form) in the same capacity as that in which it is party to the cancelled units, in such form and complying with such conditions as to material, printing and other

matters as may be reasonably necessary to conform with such requirements as may be specified by any relevant guidance issued from time to time by the Bank of England and/or the British Bankers' Association or other trade association or representative body and in particular:

- (i) in the case of commercial paper, the requirements for "London Good Delivery for the Printing, Issuing and Handling of Commercial Paper" as set out in London Market Guidelines issued from time to time by the British Bankers' Association; and
  - (ii) in the case of certificates of deposit, the requirements for "London Good Delivery for the Printing and Issuing of Certificates of Deposit" as set out in London Market Guidelines issued from time to time by the British Bankers' Association;
- (b) deliver up such physical instrument or instruments to the Holder(s) or to his or their order; and
- (c) maintain an appropriate record of the cancellation.

Upon the execution and delivery of such physical instrument or instruments to the Holder(s) concerned (or to his or their order), the Issuer [(or Issuers as the case may be)] shall have no further obligations under this Deed in respect of the cancelled units.

8.3 On the Holder(s) being deemed, at the election of the Issuer [(or the Issuers as the case may be)], to have requested the transfer of his or their units pursuant to clause 8.1, the Issuer [(or the Issuers as the case may be)] shall arrange for the units concerned to be transferred (or cancelled and re-issued) to a CREST member selected by the Issuer [(or the Issuers as the case may be)] who shall hold the units concerned as nominee for such Holder(s) on such terms as the Issuer [(or the Issuers as the case may be)] or that CREST member shall think fit.

8.4 *[Include appropriate provisions to allocate costs of cancellation or transfer]*

## **9 CONSISTENCY WITH THE REGULATIONS**

9.1 No provision of this Deed (or any other current term of issue of units) shall apply or have effect to the extent that it is in any respect inconsistent with:

- (a) the holding of units in uncertificated form;
- (b) the transfer of title to units by means of the CREST relevant system;
- (c) the Regulations.

9.2 Any unit may be held by one or more persons jointly (who are together the "Holder" of the unit for the purpose of this Deed).

## **10 CAPACITY OF ISSUER**

10.1 [The][Each] Issuer hereby warrants, represents and covenants with each Holder that it has all corporate power, and has taken all necessary corporate or other steps, to enable it to execute, deliver and perform this Deed, and that this Deed constitutes a legal, valid and binding obligation of the Issuer [(or Issuers as the case may be)] enforceable in accordance with its terms subject to the laws of bankruptcy, insolvency, liquidation or other laws affecting generally the enforcement of creditors' rights.

## **11 BENEFIT OF DEED**

11.1 This Deed shall enure to the benefit of the Holders from time to time and for the time being and their (and any subsequent) successors and assigns. This Deed shall be deposited with and held by the Issuing Agent for the time being until all the obligations of the Issuer [(or Issuers as the case may be)] hereunder have been discharged in full and shall be held by the Issuing Agent to the exclusion of the Issuer [(or the Issuers as the case may be)].

11.2 [The][Each] Issuer acknowledges and covenants that the obligations binding upon it contained in this Deed are owed to, and shall be for the account of, each and every Holder, and that each Holder shall be entitled severally to enforce those obligations against [the][each] Issuer.

11.3 *[Insert appropriate provisions for making copy of deed available to Holders].*

## **12 EVIDENCE OF ENTRIES ON CREST REGISTERS**

12.1 A certificate issued by CRESTCo (as Operator of the CREST relevant system) as to any matters which are or were at any one time inserted in an Operator register of eligible debt securities in accordance with the Regulations, shall be conclusive evidence that such matters are or were at that time so recorded save in the case of manifest error. This clause 12.1 is without prejudice to any other means of producing evidence of an Operator register of eligible debt securities.

## **13 BOILERPLATE PROVISIONS**

13.1 *[Include appropriate boilerplate provisions, e.g. notices and cost allocations (including stamp duty)]*

## **14 LAW AND JURISDICTION**

14.1 This Deed and units of eligible debt securities constituted pursuant to it are governed by, and shall be construed in accordance with, English law.

14.2 *[Insert appropriate jurisdiction provisions]*

IN WITNESS WHEREOF this Deed has been executed by [the][each] Issuer and is intended to be and is hereby delivered on the date first above written.

[EXECUTED [and DELIVERED] )  
as a DEED by [Issuer<sup>7</sup>] )  
acting by two directors/a )  
director and the secretary: )]<sup>8</sup>

[EXECUTED as a DEED [and DELIVERED] )  
on behalf of [Issuer ] a company )  
incorporated in [territory in which Issuer )  
is incorporated] by [Insert name] and )  
[Insert name], being [a] person[s] who, )  
in accordance with the laws of that )  
territory, [is or are] acting under the )  
authority of the company )]<sup>9</sup>

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<sup>7</sup> Include separate execution clause for Secondary Issuer as appropriate.

<sup>8</sup> Use this wording when a UK company executes not using a common seal. Amendments to the execution clause will be required if the deed is to be executed in another manner (e.g. under seal or under a power of attorney).

<sup>9</sup> Wording for use by a foreign corporation. The wording should be in a form accepted by the laws of the territory in which the foreign corporation is incorporated.

**Exhibit A - Form of Notice of Issue of units**

**Notice of Issue**

**Dematerialised [Commercial Paper/[London][Non-London] Certificate of Deposit/Bankers' Acceptance]<sup>1</sup>**

This Notice is issued pursuant to clause 6.1 of the Deed dated [insert date] by [insert name, place of incorporation /establishment, registered number (if any) and registered address of issuer(s)].

[Interest bearing][Discounted]<sup>2</sup> units of an eligible debt security are hereby constituted on the terms and conditions of the Deed and of this Notice (which forms a schedule to the Deed). Terms used in this Notice shall be deemed to be defined as such for the purposes of the Deed.

ISIN No. <sup>3</sup> : .....	Unit value <sup>4</sup> : .....
Issued on <sup>5</sup> : .....	Maturity Date <sup>6</sup> : .....
Specified Currency: .....	Calculation Agent <sup>7</sup> : .....
Principal Amount: .....	Interest Payment Date(s) <sup>8</sup> : .....
Fixed Interest Rate <sup>9</sup> :       % per annum	Interest Periods <sup>10</sup> : .....months
Floating Interest Rate <sup>11</sup> : .....	Guarantor <sup>12</sup> : .....

Signed on behalf of<sup>13</sup>

**[Issuer]**

By: .....

*(Authorised Signatory)*

By: .....

*(Authorised Signatory)*

[Signed on behalf of

**[Secondary Issuer]**

By: .....

*(Authorised Signatory)*

By: .....

*(Authorised Signatory)*

<sup>1</sup> Delete as appropriate

<sup>2</sup> Delete as appropriate.

<sup>3</sup> This box can be completed after execution of the notice in the event that the ISIN is not available before execution.

<sup>4</sup> Insert the smallest possible transferable unit in the Specified Currency (e.g. 1p). Not to be less than £100,000 if (i) the maturity date is less than 365 days from the issue date and (ii) it is intended to rely on the commercial paper exemption in article 9(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

<sup>5</sup> Insert date on which Notice is completed.

<sup>6</sup> For dematerialised bankers' acceptances, insert 'On demand'.

<sup>7</sup> Complete for floating rate interest bearing instruments only.

<sup>8</sup> Complete for interest bearing instruments (other than units payable on demand) if interest is payable before and (when applicable) on the Maturity Date. For on demand units, enter "Maturity Date".

<sup>9</sup> Complete for fixed rate interest bearing instruments only.

<sup>10</sup> Complete for floating rate instruments corresponding to CDs.

<sup>11</sup> Complete for floating rate interest bearing instruments only.

<sup>12</sup> Complete where relevant (note that appropriate guarantor provisions will need to be added to main body of the deed if it is envisaged that units will be guaranteed).

<sup>13</sup> Adapt execution clause as appropriate if notices are to be created in electronic form only.

## DRAFT

### **ANNEX 3 – DRAFT EXPLANATORY NOTES ON DEED RELATING TO ELIGIBLE DEBT SECURITIES**

#### **1. Introduction**

1.1 These explanatory notes relate to a *pro forma* deed pursuant to which uncertificated units of CREST eligible debt securities are constituted, the terms of which broadly speaking correspond to certain material money market instruments (commercial paper, certificates of deposit or bankers' acceptances). The deed refers to units of an eligible debt security (a unit being the smallest transferable amount of the security, for instance 1p, as determined in accordance with its terms of issue) and that terminology is adopted in these notes. The term eligible debt security has the meaning given in the amended Uncertificated Securities Regulations 2001 (*USRs*). This is as follows:

““eligible debt security” means a security-

- (a) which is constituted by an order, promise, engagement or acknowledgement to pay on demand, or at a fixed or determinable future time, a sum in money to, or to the order of, a person who holds one or more units of the security irrespective of whether, before the obligation to pay the sum becomes due, the identity of that person is known to, or can be established by, the person who will or may be obliged to pay the sum;
- (b) which is, or is capable of being traded in a market for securities of the same or like kind;
- (c) whose current terms of issue provide that units of the security may only be held in uncertificated form and shall be transferable in no other manner than by means of a relevant system in accordance with these Regulations.”

1.2 The deed is intended to be used in respect of the issue of units of a single eligible debt security or a programme of such securities which may include eligible debt securities corresponding to different types of money market instruments, for example, commercial paper, certificates of deposit and bankers' acceptances. Where the deed is used for the issue of units

under a programme of eligible debt securities, the issuer will not need to enter into a separate deed for each issue but simply complete a notice of issue on each occasion that it proposes to constitute EDSs under the programme. As explained below, the deed together with a notice of issue, are the documents which constitute the units of the eligible debt security. It is intended that the deed be issued in conjunction with such other documents as may be customary for a particular type of money market instrument, for example an information memorandum for commercial paper. It is anticipated that existing standard programme documentation could be used, albeit with certain consequential amendments to reflect the issue of EDSs.

1.3 The *pro forma* deed is intended in principle only to include those terms which are required in order for uncertificated units to be issued. The terms will therefore need to be adapted to include any required commercial terms. In some cases the document contemplates that a particular term will need to be inserted (e.g. to deal with any withholding tax on a payment by the issuer), but in other cases the issuer may need to add provisions to accommodate terms specific to a particular issue or programme (e.g. a guarantee provision).

1.4 Non-material (uncertificated) units will have different legal characteristics from their paper equivalents. A number of general observations can be made about the terms:

- there is no general provision for a paper interface although, in accordance with the CREST Rules, there are provisions to address the situation where a holder ceases to be a CREST member or where the securities cease to be capable of being held in CREST. In either case, compulsory cancellation/transfer provisions apply (see comment on clause 8 below);
- material MMIs are negotiable (negotiability confers property rights on holders which are superior to those conferred only by contract, in particular the right to take possession free of any preceding equities). However, this concept is not relevant for uncertificated units recorded in CREST in respect of which legal title is provided to the holder by the entry of his name on the relevant CREST records (ie the relevant “Operator register of eligible debt securities”). A change in the register represents a change in legal title (i.e. there is electronic transfer of title for uncertificated units);
- uncertificated units of an eligible debt security are capable of being fungible with other uncertificated units of the same eligible debt security but not with their material equivalent;

- uncertificated units of an eligible debt security are similar to uncertificated units of other debt securities issued into CREST except that there is no provision for the possibility of their being held in certificated form outside CREST (an eligible debt security being a “wholly dematerialised security”) and the issuer has no statutory obligation to maintain a related “record of securities”.

## **2. Legal structure**

2.1 The document is structured as a deed to ensure that holders of securities issued under it acquire directly enforceable rights against the issuer.

2.2 The deed contemplates that units are constituted by the completion of a notice of issue which forms a schedule to the deed. Accordingly, no units of a particular eligible debt security are actually constituted by the deed itself until a relevant notice of issue is completed.

## **3. Commentary on the main provisions of the deed**

### **Recitals**

3.1 Where it is intended that the programme should include the issue of units corresponding to bills of exchange with an acceptor and drawer (i.e. two name paper), then the deed should be made by the “Primary Issuer” and the “Secondary Issuer”. Where it is not intended to issue “two name” uncertificated units, then the deed should be made only by the “Issuer” and all references in square brackets which contemplate more than one issuer should be omitted.

### **Clause 2 (Payment obligation of the Issuer)**

3.2 Clause 2.1 contains:

- (a) in respect of units corresponding to CDs, the acknowledgement by the issuer that a sum has been deposited with it on terms that the principal amount is payable at maturity and any interest on the units is payable at the rate and at the times (if any) specified in the terms; and
- (b) in respect of other units, the promise of the issuer to pay the principal amount of the units on the relevant maturity date (or on demand as the case may be) together with any interest at the rate and at the times (if any) specified in the terms.

3.3 Clause 2.2 makes provision for a secondary issuer (equivalent to the drawer of a bill) to make these payments if the primary issuer (equivalent to the acceptor of a bill) fails to do so.

### **Clause 3 (Payments)**

3.4 Clause 3 provides for the mechanics of payments of principal and interest. All payments are required to be CREST payments.

3.5 Clause 3.4 provides for the maturity date and interest payment date to be adjusted if it would otherwise not fall on a business day (generally to the next business day but it may be adjusted to the preceding business day where the next business day would fall in the next calendar month).

3.6 Any required tax provisions (e.g. gross-up) will need to be inserted.

### **Clause 4 (Interest)**

3.7 The method of calculating interest in the case of interest bearing units (whether fixed or floating rate) is left to the issuer to insert.

### **Clause 5 (Status)**

3.8 The deed provides that the payment obligations of the issuer are unsecured obligations of the issuer ranking *pari passu* without any preference with all present and future unsecured and unsubordinated indebtedness of the issuer.

### **Clause 6 (Constitution, issue and transfer of units)**

3.9 Under this clause, when the issuer proposes to constitute and issue uncertificated units of an eligible debt security it:

- (a) constitutes the units by completing a Notice of Issue (in the required form) which then becomes a schedule to the deed and is expressed to be subject to its terms; and
- (b) effects the issue of such units by entering or procuring the entry in the relevant Operator register of securities of the required particulars.

3.10 Exhibit A sets out the form of the Notice of Issue and is structured in such a way so as to allow issuers to customise the terms of issue relating to units as required. For instance, to reflect the terms usually associated with a CD, as well as any other relevant boxes, the maturity date would be inserted in the “Interest Payment Date” box.

3.11 Clause 6 also provides that units may only be held in uncertificated form and are transferable only in CREST and that they are transferable free from encumbrances.

3.12 Any transfer must be in amounts which are an integral number of units. An individual “unit” is the smallest possible unit which, in accordance with the terms of issue, may be transferred by one holder to another (in relation to an uncertificated unit of an eligible debt security corresponding to commercial paper, such a unit may have a nominal value of £100,000 if the issuer seeks to take advantage of the exemption in article 9(2) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 for commercial paper which must be redeemed before the first anniversary of the date of issue).

### **Clause 7 (Redemption)**

3.13 Clause 7.1 makes provision for the redemption of units which are payable on demand (i.e. dematerialised bankers’ acceptances).

### **Clause 8 (Compulsory cancellation or transfer)**

3.14 As noted above, in accordance with the CREST Rules this clause addresses the situation where a holder ceases to be a CREST member or where uncertificated units of the security cease to be capable of being held in CREST. Although the Rules require appropriate provision to be made in these circumstances to protect the rights and interest of holders (and give cancellation or transfer as possible provisions), the Rules are not prescriptive as to the actual steps to be taken and clause 8 could therefore be amended provided that appropriate provision is made, consistent with the Uncertificated Securities Regulations 2001 and the applicable CREST Requirements.

3.15 As drafted, clause 8 provides that the issuer can elect either:

- (a) to cancel uncertificated units and issue a physical instrument on substantially the same terms and which confer on the holder(s) materially the same rights against the issuer

immediately after the cancellation as were conferred by the units immediately before the cancellation; or

- (b) to arrange for the transfer of the units to another CREST member as nominee for the relevant holder (provided that uncertificated units of the security remains capable of being held in CREST).

3.16 Any required provision for the allocation of the costs of cancellation or transfer will need to be inserted.

#### **Clause 11 (Benefit of deed)**

3.17 Clause 11.1 provides that the deed is for the benefit of the holders of uncertificated units from time to time and their successors in title.

#### **Clause 12 (Evidence of entries on CREST registers)**

3.18 Regulation 24 of the USRs provides (insofar as it is relevant to eligible debt securities) that an Operator register of eligible debt securities is prima facie evidence of the matters directed or authorised by the Regulations to be inserted in it (save where any such matters relate to the registration of transfers which were not carried out in accordance with the Regulations).

3.19 Clause 12.1 provides that a certificate from CRESTCo as to the matters which are or were at any one time recorded on such a register (e.g. the details of a holder and of the number of units held in his name) is conclusive evidence that such matters are or were at that time so recorded save in the case of manifest error. The purpose of this provision is to enable a holder to enforce his rights in reliance on a certificate from CRESTCo without the need to produce the register itself in evidence but it does not affect the statutory provision that the register itself is prima facie evidence of the matters recorded in it.

#### **Clause 13 (Boilerplate)**

3.20 Any required boilerplate provisions (e.g. notices) will need to be inserted.

## **Clause 14 (Law and jurisdiction)**

3.21 Any required jurisdiction provisions will need to be inserted.

### **Execution of deed and notices of issue**

3.22 It is advisable that the deed be executed in hard copy form. However, notices of issue may if required be created and stored in electronic form only (although it may be appropriate in those circumstances for the notices to be authenticated by some form of electronic signature).