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The Committee of European Securities Regulators
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RESPONSE TO THE CONSULTATION PAPER ON THE UCITS MANAGEMENT COMPANY PASSPORT

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Dear Sirs, dear Madams

State Street Corporation would like to thank CESR for the opportunity to comment on the consultation on the UCITS management company passport.

We would be happy to discuss with you, in further detail, any comments you may have. Please do not hesitate to contact Gabriele Holstein at 0041 44 560 5101.

Sincerely,

Stefan Gavell
Executive Vice President
Regulatory and Industry Affairs

Dr. Gabriele Holstein
Director of European Regulatory and
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State Street Corporation's Response to CESR's Consultation Paper on the UCITS Management Company Passport (CESR/08-748)

INTRODUCTION

This memorandum contains State Street's response to the Committee of European Securities Regulators' (CESR) consultation paper on the UCITS Management Company Passport of September 2008 ("the Paper"). We appreciate the opportunity to share our views on this important matter. We would like to offer both general observations for CESR's consideration, as well as responses to the specific questions posed.[1]

State Street supports the concept of a Management Company Passport ("MCP") and would welcome its inclusion in the draft UCITS IV Directive, which is currently being discussed in the European Parliament and Council. CESR's Paper is an important step in the right direction and we congratulate it for preparing the draft in such a short time. Encouragingly, this signals the importance which CESR members place on the MCP.

Overall, State Street is in agreement with the main principles outlined in the Paper. To ensure that the MCP brings the envisaged advantages for investors and the European fund industry, we believe, however, that three additional prerequisites have to be met:

First, to avoid an unlevel playing field, all types of UCITS should be treated equally, regardless of whether the UCITS is set up in corporate or contractual form, managed by a remote Management Company ("MC") or a domestic entity. Throughout the Paper, CESR stresses this non-discrimination principle.

[1] Our response to the call for evidence on the request for advice on the UCITS Asset Management Company Passport of 22 August 2008 provides additional details on the questions addressed in the Paper.

There is, however, one instance where this is not the case. In Box 4, Point 6, CESR proposes that implementing measures are needed to spell out special "*measures to be taken by the depositary in order to fulfill its duties in the case of UCITS managed by a management company established in another Member State*". This would establish two different sets of regulatory rules for depositaries, depending on whether the MC is located in or outside the jurisdiction of the fund. Whilst we believe that the roles and responsibilities of depositaries should be aligned across EU Member States, we are not in agreement that there should be substantial discrepancies depending on whether a UCITS is managed domestically or remotely. Given the stark differences in Member States' laws on depositaries, it is unlikely that harmonization can be achieved in the short term. Until then, we believe the roles and responsibilities of the depositary should be governed by the applicable law of the UCITS home Member State, as it concerns the functioning of the UCITS.

Second, in its current form, the MCP would rely heavily on implementing measures. As the MiFID experience has shown, delays in the adoption of implementing measures can lead to substantial uncertainty and operational risk. We therefore call on the Commission and CESR to plan for a realistic Level 2 work programme, ensuring that the measures are adopted in good time before the end of the transposition deadline of the Directive.

Matters which are fundamental for the functioning of the MCP and where agreement can be achieved swiftly should be prioritized. In areas where Member States' rules differ widely, for instance the roles and responsibilities of depositaries, work on a greater degree of harmonization should be deferred to post-UCITS IV discussions. This will prevent the delay of the entire UCITS IV package due to a potential failure to reach agreement. .

Third, whilst we agree that it is necessary for investors and the UCITS competent authority to be able to turn to a local point of contact for certain inquiries and correspondence, we do not believe that such a local point of contact should be required to take on functions which might ultimately put remotely managed contractual funds at a

disadvantage by creating additional cost layers. Specifically, we believe that a local point of contact should take on a "liaison" type role for (i) inquiries from the UCITS competent authority, (ii) providing a legal address for the servicing of legal notices and (iii) providing a local telephone number and address for correspondence with unit-holders on day-to-day matters. The choice of local contact should be a matter for the management company to decide and could include the depositary provided that there was no conflict of interest.

The local point of contact, however, should not be required to perform any transfer-agency related functions, including the maintenance of the unit-holder register (function 3 listed in Box 3). Requiring administrative functions to be conducted at the fund domicile would be a step backward from the goal of a full MCP and cannot be justified based on supervisory need. It is also likely to put remotely managed contractual funds at a disadvantage by creating an unnecessary, additional cost layer. We also note that the Transfer Agency function is a distribution-related activity for which the depositary is not properly equipped. Should CESR decide to include such a function in its final advice to the Commission, we believe that it needs to be clarified that the delegation of such a function to entities in other countries would be allowed. For instance, if the MC appoints the depositary to take on this role, the depositary should be allowed to delegate this function to a transfer agency, regardless of where it is located.

State Street's responses to the specific questions raised in the Paper are set forth below.

CHAPTER 1 – DEFINITION OF DOMICILE

Box 1: Management Company:
Do you agree with CESR's proposal in Box 1?

We agree with the proposal, welcoming efforts to align UCITS with MiFID and other pieces of EU legislation, enshrining, also for UCITS, the principle of home-country authorization of the MC which is valid throughout the EU.

Box 2: UCITS
Do you agree with CESR's proposals in Box 2? Do you consider that additional criteria should be set to define the domicile of contractual funds? Please provide details.

We agree with CESR's proposals and do not believe that any additional criteria are required to define the domicile of contractual funds. To avoid any practical misunderstandings, it might be beneficial to require the UCITS documentation to explicitly state the Member State of the UCITS applicable law.

In particular, we welcome the introduction of a "two-step" authorization process, whereby the MC competent authority grants the general business authorization to the MC, and the UCITS competent authority approves the choice of fund rules, depositary, *and* the MC, based on its suitability for the specific fund in question. This process would ensure that the MC has the necessary expertise on a fund by fund basis.

Box 3: Local point of contact in case of common funds

Do you agree with CESR's proposals in Box 3?

Do you agree that there is an interest for investors and the UCITS competent authority in having the functions indicated in Box 3 performed by an entity located in the same Member State as the UCITS?

Do you believe that there is an interest for investors and the UCITS competent authority in having a legal address in the jurisdiction where the UCITS is located?

Do you consider that the local point of contact should provide additional functions, and namely the maintenance of the unit-holder register?

Referring to our comments made in the introduction, we agree that it is necessary for investors and the UCITS competent authority to be able to turn to a local point of contact for certain inquiries and correspondence. Such a local point of contact, however, should be strictly limited to a "liaison"-type role for (i) inquiries from the UCITS competent authority, (ii) providing a legal address for the servicing of legal notices and (iii) providing a local telephone number and address for correspondence with unit-holders on day-to-day matters. The choice of local contact should be a matter for the management company to decide and could include the depositary provided that there was no conflict of interest.

The role of a local point of contact should exclude any transfer-agency related functions including the maintenance of the unit-holder register (function 3 listed in Box 3). This is true for a number of reasons:

(i) Requiring administrative functions to be conducted at the fund domicile would be a step backward from the goal of a full MCP and cannot be justified by supervisory need.

(ii) It is likely to put remotely managed contractual funds at a disadvantage by creating an unnecessary additional cost layer.

(iii) The Transfer Agency function is a distribution related activity for which the depositary is not properly equipped.

(iv) Such a measure would ultimately turn the local point of contact into a "fulfillment center" in the best case, and a "call center" in the worst case.

Despite the arguments raised, should CESR decide to include such a function in its final advice to the Commission, we believe that it needs to be clarified that the delegation of such a function to entities in other countries would be allowed. For instance, if the MC appoints the depositary to take on this role, the depositary should be allowed to delegate this function to a transfer agency, regardless of where it is located.

Box 4: Depositary

Do you agree with CESR's proposals in Box 4? Do you consider that there is an interest for investor in harmonizing the possible standard agreements to be used by depositary and management company?

We broadly agree with CESR's proposals, with two exceptions:

First, CESR proposes that implementing measures should be defined which spell out special "*measures to be taken by the depositary in order to fulfill its duties in the case of UCITS managed by a management company established in another Member State*". This would establish two different sets of regulatory rules for depositaries, depending on whether the MC is located in or outside the jurisdiction of the fund. Given the stark differences in Member States' laws on depositaries, it is unlikely that harmonization of roles and responsibilities across EU Member States can be achieved in the short term. Until then, we believe that the duties of a depositary should be governed by the law of the UCITS home Member State, as it concerns the functioning of the UCITS.

Second, we believe that the Directive should not require a written agreement between the depositary and the MC regulating the flow of information. Instead, the Directive should impose clear obligations on MCs to deliver adequate information to both supervisory authorities and depositaries. Level 2 implementing measures should define the scope of this information flow, such as the responsibility to promptly report any material breach of

regulations, restrictions imposed by financial regulators or provisions of the prospectus. It should then be up to the depositary and MC to decide if an additional agreement is required. We note that local rules on whether a written agreement is required, and if so what the content should be, already exist today and differ considerably among EU Member States. It would be important to provide clarification in regards to the continued applicability of such local rules.

CHAPTER 2 – APPLICABLE LAW AND ALLOCATION OF SUPERVISORY RESPONSIBILITIES

Box 5: Applicable law and allocation of responsibilities in the case of free provision of services

Do you agree with CESR's proposals in Box 5? Do you agree that further harmonization in the areas indicated in Box 5 above will be beneficial for ensuring a level playing field and adequate investor protection in the European market? Do you suggest other areas that would benefit from further harmonization?

We fully agree with the principle that the MC needs to comply with:

(i) the applicable law of the UCITS home Member State in regards to the constitution and functioning of the UCITS and

(ii) the applicable law of the MC home Member State in regards to organizational requirements, delegation and COB rules, whilst the UCITS home Member State needs to be satisfied that the MC's organizational arrangements are adequate for the UCITS it proposes to manage.

We agree with the need to harmonize the rules on organizational requirements. Instead of introducing transitional measures, however, it would be desirable if harmonization is reached by CESR and the Commission by the implementation deadline of the Directive to prevent MCs from carrying the operational risk of having to comply with a new set of requirements after the transition period.

Finally, we welcome the suggestion that all information on non-harmonized rules should be made available by regulators electronically in a language customary in the sphere of international finance, as an important step towards increased efficiency in the supervision of cross-border funds.

Box 6: Applicable law and allocation of responsibilities in the case of establishment of a branch
Do you agree with CESR's proposals in Box 6?

We agree with the Paper's proposals, in particular the objective to further align UCITS rules with MiFID.

Box 7: Co-operation between competent authorities
Do you agree with CESR's proposals in Box 7?

Cooperation between supervisors is a necessary prerequisite for a well-functioning MCP. We therefore support CESR's proposal giving supervisors the necessary tools to enable their cooperation. Referring to our comments made in the response to CESR's call for evidence on the request for advice on the UCITS Asset Management Company Passport, we would, however, reiterate the importance of ensuring that supervisory responsibilities are allocated in a manner that (i) ensures a clear decision-making process and (ii) ensures the enforceability of regulatory actions. Both criteria are key to ensuring the protection of fund investors by avoiding situations of paralysis where a depositary is unable to react due to a lack of or untimely supervisory guidance and / or remedial action caused by an untimely or imprecise decision-making process. This is particularly important in times of market turbulence and financial crises, when critical decisions need to be made fast.

Whilst the "colleges of supervisor" concept is likely to be beneficial to foster trust and cooperation among supervisors, we question whether such crucial day-to-day decisions can be taken within this framework. Instead, we propose for the UCITS home Member State regulator to act as the single point of contact for the depositary and for all matters

concerning the fund so as to allow the depositary to discharge its responsibility effectively in the interest of the highest level of investor protection.

CHAPTER 3 – AUTHORISATION PROCEDURE FOR UCITS FUNDS WHOSE MANAGEMENT COMPANY IS ESTABLISHED IN ANOTHER MEMBER STATE

Box 8: UCITS authorization

Do you agree with CESR's proposals in Box 8? Do you agree with the role envisaged for the UCITS competent authority in the areas referred to above?

State Street agrees with CESR's proposals, especially the introduction of a "two-step" authorization process, as already noted in our response to Box 2. We agree with CESR that the UCITS competent authority needs to play a role in ensuring that the chosen MC is properly equipped to manage a specific UCITS. The suggestion for the MC home authority to provide an attestation in this respect is an important step towards ensuring the workability of the process.

CHAPTER 4 – ON-GOING SUPERVISION OF THE MANAGEMENT ON THE FUND

Box 9: Information flow to the competent authorities

Do you agree with CESR's proposals in Box 9?

We agree with CESR's proposals. In particular, we welcome the clarification of conditions under which authorities may refuse to act on a request for cooperation, so as to avoid situations leading to a lack of or delay of supervisory guidance.

Box 10: Information flow between the MC, UCITS and depositary

Do you agree with CESR's proposals in Box 10?

Referring to our comments made in Box 4, we believe that the directive should impose clear obligations on MCs to deliver adequate information to supervisory authorities and the depositaries. Level 2 implementing measures should define what such standard information flows would include. It should, however, be up to the depositary and MC to decide if additional written agreements are required. Furthermore the term UCITS should be deleted from the box and explanatory text. It is the responsibility of the MC to ensure the necessary information flows to comply with all relevant laws and requirements. Referring to our comments made in Box 3, the local point of contact should be strictly limited to a "liaison" type role and not be required to carry out any transfer-agency related functions including the maintenance of the unit-holder register. We also would like to reiterate that the Transfer Agency function is a distribution-related activity for which the depositary is not properly equipped. We therefore believe that in addition to changing the wording in Box 10, Paragraph 2, 5 and 6 of the explanatory text should be deleted altogether.

Box 11: Auditors

Do you agree with CESR's proposals in Box 11?

We broadly agree with CESR's proposals, subject to one clarification:

Point 7 of Box 11 states that "*any costs associated with the compliance with paragraphs 4, 5 and 6 should not be charged, either directly or indirectly, to the UCITS or the unit-holders*". Whilst we agree that the costs for the audit of the MC (paragraph 4) should be borne by the MC itself and not be charged to the UCITS, the costs for the audit of the UCITS itself (paragraph 5) should be charged to the fund. A high-quality, independent audit of the UCITS fund is in the interest of its unit-holders and can only be guaranteed if the auditing firm is properly remunerated. When the same auditing firm is acting for both the MC and the fund, it needs to be ensured that mandates are clearly separated and the

auditing costs are allocated accordingly. The allocation of significant additional remunerations for fund auditors in situations of serious breaches should be subject to a case -by-case review of the UCITS home Member State competent authority

CHAPTER 5 – DEALING WITH BREACHES OF RULES GOVERNING THE MANAGEMENT OF THE FUND

Box 12:

Do you agree with CESR's proposals in Box 12?

State Street agrees with CESR's proposals and does not have any specific comments to offer.

Box 13:

Do you agree with CESR's proposals in Box 13?

State Street agrees with CESR's proposals. We particularly welcome the clarification that the MC's and the depositary's liability remain the same, regardless of whether the UCITS is managed domestically or remotely.