SJ/CJ

Mr Fabrice Demarigny
Secretary General
Committee of European Securities Regulators (CESR)
11-13, Avenue de Friedland
75008 Paris

Paris, June 1, 2006

AFG RESPONSE TO CESR SECOND CONSULTATION ON NOTIFICATION PROCEDURE

Dear Mr Demarigny,

The Association Française de la Gestion financière (AFG)[1] welcomes CESR's second consultation paper relating to CESR's guidelines to simplify the notification procedure of UCITS.

[1] The Association Française de la Gestion financière (AFG)[1] represents the France-based investment management industry, both for collective and discretionary individual portfolio managements. Our members include around 400 management companies and investment companies. They are entrepreneurial or belong to French or foreign banking, insurance or asset management groups. AFG members are managing around 2200 billion euros in the field of investment management - making in particular the French industry the leader in Europe in terms of financial management location for collective investments, with more than 1200 billion euros i.e. 20% of EU investment funds assets under management) and the second at global level. In the field of collective investment, our industry includes – beside UCITS – the employee savings schemes funds and products such as regulated hedge funds and a significant part of private equity funds. AFG is of course an active member of the European Fund and Asset Management Association (EFAMA).

In January, we answered to the first consultation paper on notification procedure. We will not repeat the comments made then, which are still valid, but will focus our comments on specific issues.

Before entering into the details of our comments, we also want to mention that we agree with EFAMA's comments on the second consultation paper.

First of all, we thank CESR for having made so many efforts and delivered **a very good document taking into account many comments from the industry**. We particularly appreciate the efforts made by the members of the CESR working group regarding the objectives of the guidelines, and in particular the "General commitment" in the Preamble. The introduction and the Preamble contain much of what the investment management industry wishes to see implanted to enhance the notification process. In this regard, the current Consultation Paper is a clear improvement over the first version.

However, per se, **the numerous guidelines that would represent an improvement over the current situation are not legally binding on CESR members**. As professionals, we will have to rely on the good will of each CESR member to apply those guidelines, which is not completely satisfactory.

In addition, many guidelines consist of provisions which only offer faculties for CESR members to apply them –or not (e.g. use of "may' or "to facilitate"). We strongly wish CESR to obtain a wider scope for mandatory provisions that should be applied by CESR Members.

Moreover, we reaffirm the efforts by CESR members to implement these guidelines will have to go in practice beyond the mere implementation of the drafted requirements.

Still regarding the implementation of such guidelines by CESR members, where amendment of national regulations or improvements in human or IT resources are necessary, CESR states that transitional periods will be required. But **there is no open commitment to seek such legislatives changes or to get increased resources**. In addition, no maximum length is mentioned for the transitional periods. AFG strongly **encourages CESR to set a deadline to review the implementation of the new guidelines, to encourage compliance and convergence of practices and to try to put pressure on national legislators to amend the laws accordingly.** As part of the review, we suggest the publication of a list of national legislation/regulation that hinders the implementation of CESR's recommendations.

Moreover, we wish CESR **to integrate many statements drafted in the 'explanatory texts' into the 'guidelines' boxes** to ensure that those statements – clarifying most of the time the principles of the guidelines - become part of the guidelines potentially more binding that the 'explanatory texts'.

Last, we wish to stress that an underlying idea of the CESR paper is that UCITS are dedicated to retail investors, who would therefore need a high degree of protection. We agree that retail investors are a significant part of the business, but they deserve access to innovative products and thus be protected against the risk, which is currently the main one they are experiencing, of over exposure to low yield, too conservative investments. Moreover, another significant part of the business is dedicated to professional investors (either taking the risks and reaping the corresponding yield on behalf of retail investors, but with professional skills – like insurance companies – or investing their cash, for commercial private companies). If these elements are not taken into account, the level of requirements will always stay higher for UCITS as compared to competitive products, and will therefore orientate more and more investors (in particular professional investors) towards **competitor products covered by the Prospectus Directive** that they can get on a cross-border basis in a very faster way as compared to UCITS. It would be a paradox to impose more obligations on the UCITS, when these products are obviously more transparent and less complicated than their competitor products.

Below are our specific comments.

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SPECIFIC COMMENTS ON CESR'S CONSULTATION PAPER

A Procedure

Guideline 1

AFG welcomes the fact that the standardized notification letter may be submitted "*in a language common in the sphere of finance*", although this concession is significantly weakened by the limitation "*if it is not contrary to the domestic legislation or regulations of the host Member State*". CESR should take into account the approach followed by the Prospectus Directive in this view (where such a limitation is not set up) to ensure a more binding effect. Or CESR members should commit themselves to put pressure on their national legislators..

As we have already mentioned in our response to the previous consultation, electronic submission of documents should <u>always</u> be possible, and the statement that "*CESR Members agree to facilitate electronic filing of documents*" is quite vague, far from a real commitment. We do not agree with para. 8 where it reads: "*…the notification letter as well as…**may** also be submitted electronically*", as it will depend on each country in practice.

Furthermore, standards for electronic filing should be harmonized through CESR, to avoid incompatibility. The final goal should be the creation of a common supervisory database such as EDGAR in the US.

Guideline 2

AFG fully agrees that the passport must be respected, but encourages CESR to take into account the Commission's forthcoming interpretative communication on marketing, for example to define what would constitute 'non-compliance' within the scope of Art. 44(1) and 45.

I-The two-month period

Guideline 3

To avoid any differences in interpretation, it should be clearly stated that the notification period is two <u>calendar</u> months. Although it is confirmed by the example provided in Para. 23, we would prefer to have it included in guideline 3 for legal certainty.

In addition, it is crucial that the last sentence of para. 10, explanatory text, ("*…makes a separate notification procedure regarding the management company unnecessary"*) be integrated in the box of Guideline 3, in order to get a clearer commitment of CESR members to comply with this statement.

Guideline 4

We disagree with the current wording of the Guideline in two respects.
Regarding the starting date of the two-month period, this starting point should be harmonized among CESR members, and should not depend on "*national law*", as stated in the 4th sentence of Para 12.

Regarding the deadline to notify incompleteness of the file to the UCITS, AFG believes that the host State regulator - given its limited competences - should only perform a formal verification of the documentation, not a material one. One month is therefore excessively long for the host State authority to check the information submitted for completeness, and two weeks should be sufficient.

From the Open Hearing on 23 May we understand that CESR actually intends the one-month period to be a deadline not just for a completeness check, but rather for a "material" or "substance" check. Within one month – according to Mr. Biancheri's statement at the Hearing – the host State regulator would not only determine whether any information was missing, but also complete a "material" check of the submissions (as is already the case in Germany in 95% of the cases, according to Mr. Neumann). We strongly support CESR's intentions, but must point out that the current text of Guideline 4 does not support such interpretation. We therefore urge CESR to redraft the text in line with the statements at the Hearing and believe it should be possible to do so within the framework of the existing UCITS Directive.

AFG welcomes CESR's statement in Para. 13: "*if all the information and documents are complete and the latter contain all information, the two month period starts from the date of the receipt of the notification. If there is no communication after one month by the competent authority of the host Member State to the UCITS, it is assumed that the notification is complete since the date of the receipt by the host Member State authority*." However, for a higher degree of probability of enforcement of this statement, it – in particular the last of the two sentences – has to be included within the text of the Guideline itself, as a new sentence at the end of the Guideline.
Similarly, the whole Para 14 has to be included in the Guideline, to make the rule of the process clearer.

Guideline 5

As a rule, we believe that CESR Members should clearly commit to notify the UCITS as soon as the notification has been checked before the end of the two-month period, so as to enable the UCITS to start marketing immediately. In most cases, this would be possible after one month, if the file is complete and the "material" check has been completed as discussed at the Hearing.

Guideline 6

AFG believes that when the notification period will unfortunately have to be extended beyond two months in case of requests for further information, marketing should be allowed to start one week after the requested information has been provided (unless the host State regulator notifies the UCITS otherwise).

Furthermore, we wish to point out that the dates mentioned in the example in Para. 23 are inaccurate: according to Guideline 4, non-compliance with Art. 44(1) and 45 should be communicated to the UCITS by the host State authority not later than 7 August (one month later), not on 12 August.

Certification of documents

Guideline 7

We are really grateful to CESR for allowing the UCITS to self-certify the documents they must submit to the host authorities. We would however suggest replacing the expression '*UCITS' authorised directors*' by "*UCITS' duly appointed legal representatives*".

We also thank CESR for having obtained from its Members not to require the use of the Hague Apostille but would appreciate if the statement of Para.20 "*CESR Members have also agreed not to require the use of the Hague-Apostille for certification of documents*" were integrated in Guideline 7 instead of in the explanatory text.

Translations

Guideline 8

We appreciate the possibility to submit both the UCITS attestation and part of the notification letter in a language common in the sphere of international finance (the text of the first sentence in Guideline 8 should amended to include a reference to the notification letter and to Guideline 1).

However, AFG believes that the UCITS should be able to use the same possibility – as allowed by the Prospectus Directive – for other documents such as the full prospectus and the financial reports, except for the simplified prospectus. **It should be sufficient to translate only the simplified prospectus into the official local language, as it is the single document usually offered to investors**, and to make the other documents available in a language common in the sphere of international finance. In our opinion, it is not correct to state in Para. 27 "*.... since UCITS investors are mainly retail investors, CESR decided for the sake of investor protection to leave such an assessment to the host country authorities.*": in our view, retail investors never make use of documents other than the simplified prospectus. **Therefore, it should be left to fund producers to choose which documents should be translated beyond the simplified prospectus, on the basis of business reasons – documents would certainly be translated if investors demanded them in the local language.**
Guideline 8 should be amended accordingly. The second sentence of the box should be completed by the following: "*Regarding all documents except the simplified prospectus, the competent authorities of the host Member State shall accept also the use of a language customary in the sphere of international finance.*"

We would have hoped that CESR would comment on the requirement of sworn translations, since they do not provide for any extra investor protection or better language quality, but lead to substantially higher costs. We do not believe the requirement derives from Level 1 legislation, and urge CESR Members to agree to eliminate this requirement.

Furthermore, AFG urges CESR Members to allow the use of a language that is customary in the sphere of international finance also for all correspondence with host State regulators.

Umbrella funds

Guideline 9

AFG fully agrees with this Guideline, but the Consultation Paper does not address one of the most difficult issues currently encountered in marketing only part of an umbrella fund: the modifications required to the prospectuses and other documents to be filed. In such cases CESR Members often require modifications to the prospectuses and other documents to be filed (usually involving the deletion of information relating to funds not marketed in the host Member State), causing administrative problems and extra costs to the UCITS.

We believe that no modification should be requested to the text of these documents to eliminate the sub-funds not marketed in the host state, as their existence in the prospectus is not equivalent to active marketing and the fact can be clearly indicated to investors. Mention should be made (preferably in a table separate from the prospectus) of the countries where each sub-fund is being marketed, or of all UCITS marketed in a specific country, so as to give a clear picture to investors of which funds are available to them. Expunging text and thus creating different national versions is not only costly, but it is also unfair to some investors, who are denied information available to investors in other countries.

Para. 38 of the Consultation Paper states the same principle: "*In CESR's Members' view it is important that the investors in the host member State have the same information available as the investors in the home State*". Furthermore, it is contrary to the Directive's text as far as the simplified prospectus is concerned (Art. 28(3)): "*The simplified prospectus can be used as a marketing tool designed to be used in all Member States <u>without alterations except translation</u>*".

We urge CESR to clearly state that host Member States may not request modifications to the documents filed.

Guideline 10

Point 1 – We appreciate very much the fact that a similar treatment has been extended to the notification of umbrella funds in contractual and unit trust form.

Point 2 – The two-month period should neither apply in case of the addition of new sub-funds to an existing umbrella, nor in case of a decision to start marketing already existing sub-funds belonging to an umbrella that was previously partially notified (as per guideline 9). We do not understand why the second case – previously mentioned in the first round of consultation – has disappeared from the guideline text.

CESR agrees that the time necessary should be significantly less than two-months since most of the notification material is likely to be already familiar to the host State authority. In particular, it is unlikely that the sub-funds will "have different own characteristics", as the marketing arrangements are likely to be the same for all funds, and they will be already known to the host State regulator. The host state regulator's competences are limited to the marketing arrangements, and if those are the same, marketing permission cannot be refused - therefore making a two-month waiting period useless. Nonetheless, there is still no strict commitment from CESR to reduce the time necessary to check the notification.

Regarding the documentation to be provided, in the case of the notification of further sub-funds already included in the original prospectus, only the simplified prospectus (and translation) for the new sub-funds should be provided. In the case of new sub-funds added to the umbrella fund, besides the simplified prospectus for the new sub-funds also the relevant changes to the full prospectus should be communicated to the host state regulator, together with translations.

Regarding Para. 3, we believe the text of the guideline should be modified to eliminate the statement "*Basically, the whole umbrella should have one full prospectus…*". There is at least one country (Belgium) where separate full prospectuses are available for each sub-fund (as requested by the national regulator), and CESR should not imply that such system is unacceptable because it complicates the notification procedure (there are arguments in favour of a full prospectus for each sub-fund, as a more efficient system both for the investor and for the fund producer). A self-certification by the UCITS' "*duly appointed legal representatives*" (here a modification in the language is also necessary, just like in Guideline 7) will obviate to the lack of a single full prospectus.

B. Content of the file

Guideline 11

AFG appreciates the efforts made by CESR in Para. 34 of the explanatory text, where CESR lists some documents that host State authorities are not allowed to request. However, it is also stated that "*if documents are appropriate to streamline the notification process, they might be requested*", and this paragraph seems to leave the door wide open to State regulators' documentation requests and will hardly reduce national requirements.

Regarding point 6 of the Guideline, it should be sufficient to notify that the UCITS is distributed through regulated agents (as is almost always the case), and give name and contact information for distributors and paying

C. Modifications and on-going process

Guideline 12

The requirement to submit the documents "*without delay*" after they are available to the home Member State regulator might be problematic, given the delays that filings often incur in the home State.

No new certification of UCITS conformity should be required by the host State regulator when new sub-funds are notified, since the UCITS status of the umbrella is not affected. Furthermore, no certification of UCITS conformity should be required by the host State regulator if the prospectus of the fund has been amended, since the home State regulator will in no case approve an amendment of a UCITS that results in non-conformity with the Directive.

AFG would welcome a model attestation (preferably in languages that are customary in the sphere of international finance) from CESR in order to report modifications.

D. National Marketing rules and other specific national regulation

Guideline 13

We would welcome CESR's commitments towards simplification. Listings of national requirements on several websites might be helpful, but to be fully efficient, a thorough review of the current accumulation of regulations, in order to eliminate all those not providing any added investor protection and those contrary to the wording and/or the spirit of the Directive, is necessary. In this respect, we hope that CESR Members will start such a review after the publication of the Commission communication on marketing of UCITS.

Furthermore, the supporting documentation requirements should also be harmonized, in order to really simplify the notification procedure.

Annex I

In the Model Attestation the home State authority can only certify to facts in its knowledge, and that would exclude for example which sub-funds are to be marketed in the host Member State (points 13 and 14). In any case, from now on it is likely that a copy of the original attestation would be submitted by the UCITS, together with a self-certification by the UCITS, and that could not possibly include such information. Point 21 should also be deleted for the same reason. The latest version of the fund rules/instruments of incorporation as self-certified will be part of the notification documentation in any case.

Annex II

The mention "*Duration of the company*" should be either eliminated or clarified.
The reference to the *UCITS' authorized directors* should be changed in the "*UCITS' duly appointed legal representatives*', in Para 8. (under '*attached documents*').

Annex III

This Annex should be modified according to our previous comments, particularly under national marketing rules.

Point III: The following information (to be provided to investors in an extra marketing document) should be sufficient to satisfy the national marketing requirements:

- Telephone contact details for local office (if relevant) or for representative in relevant country.
- Local Paying Agent / Information Agent contact details
- List of sub funds marketed in that specific country
- Details of how to make an initial subscription (including minimum investment limits)

- Details of how to make subsequent subscriptions (including minimum investment limits)
- Details of how to redeem shares (including minimum investment limits)
- Details of where the statutory documentation is available.
- Where fund prices may be obtained

Issues not mentioned by CESR

We would like CESR once again to address the lack of harmonisation for maintaining registration and de-registration.

The treatment of share classes (and the fact that they are not accepted in some countries) has not been considered by CESR. AFG believes that there should be consistency in their treatment, and that they should not be considered comparable to sub-funds. The introduction of a new share class should be treated as an update to the prospectus not requiring a new notification, in line with the position that CESR already took in the Transitional Guidelines for UCITS III.

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If you wish to discuss the contents of this letter with us, please contact myself on 00 33 1 44 94 94 14 (e-mail: p.bollon@afg.asso.fr), our Head of International Affairs Stéphane Janin on 00 33 1 44 94 94 04 (e-mail: s.janin@afg.asso.fr) or his deputy Catherine Jasserand on 00 33 1 44 94 96 58 (e-mail: c.jasserand@afg.asso.fr).

Yours sincerely,

(signed)

Pierre Bollon