DFIA RESPONSE TO CESR'S SECOND CONSULTATION PAPER "CESR'S GUIDELINES TO SIMPLIFY THE NOTIFICATION PROCEDURE OF UCITS"

The Dublin Funds Industry Association (DFIA) is the representative body of the international investment fund community, representing the custodian banks, administrators, managers, transfer agents and professional advisory firms involved in the international fund services industry in Ireland. Given that as at end of April 2006 there were 3,757 Irish domiciled funds, including sub-funds, with a Net Asset Value in excess of €621 billion, (2,138 Irish domiciled UCITS funds, including sub-funds with a Net Asset Value in excess of €492 billion), all developments in the European investment funds arena are of particular interest and relevance to the Irish industry. As such, we appreciate the opportunity to respond to CESR's 2nd Consultation Paper on the enhancement on the UCITS notification procedure.

General Comments - A step in the right direction – but only a small one

CESR's approach, whilst offering some welcome benefits, has missed an opportunity to significantly improve the ability of funds to distribute/passport freely cross-border. The proposals, for example, would still allow a period of between three to five months to elapse from the initial notification to regulatory clearance (see response to guideline 4). It is hard to acknowledge this as material progress but rather an opportunity lost.

The fact remains that many Regulators, who are members of CESR, regularly meet the industry's need for simple and streamlined processing of notifications in a constructive and efficient manner. It is perplexing that others find it apparently so difficult to accept the underlying requirements of the Directive.

Indeed the misconception that we are dealing with a simple notification process rather than an unnecessary and duplicative *de facto* re-registration process with some Regulators undermines the ability of these proposals to effect the required change in processes and procedures to create a true Single Market. These proposals will do little to reduce costs for investors and management companies, and barely scratch the surface of those barriers to the single market that it is acknowledged exist and perpetuate the potential for differing investment products of different provenance to be discriminated between.

It seems evident therefore that the objectives that CESR itself sets out for the guidelines have not and will not be achieved by the guidance as it stands.

Other General Comments

Article 45 states the UCITS must take the measures necessary to ensure that facilities are available in that State for making payments to unit-holders, re-purchasing or redeeming units and making available the information which UCITS are obliged to provide.

The CESR guidelines do not acknowledge the use of electronic payment facilities. Electronic dealing facilities ensure that there are facilities in the State for making

payments to unit-holders, re-purchasing or redeeming units and making available the information which UCITS are obliged to provide. Online and electronic dealing means that a unit-holder in any Member State can deal in a given Fund. The recommendations should acknowledge the developments in electronic dealing at least in relation to institutional investors even if they are not prepared to do so for retail investors.

The interpretation of Article 45 by some member states means that a paying agent must be appointed in the host member State, while this is an interpretation issue of the UCITS regulations it does lead to significant inefficiencies in the structuring of cross border marketing operations which this paper could address.

Definition of Marketing

We acknowledge the fact that CESR has not yet dealt with the harmonized definition of the terms "marketing" and "proposes to market," as the interpretation of these definitions is being considered by the EU Commission. We welcome the EU Commission's efforts and hope that a definition can be agreed prior to the completion of the CESR Notification Guidelines to simplify the notification procedure for UCITS. As long as the issue remains outstanding, the definition of "marketing" remains a matter of national discretion. The different requirements in relation to "marketing" from one country to another are likely to cause significant uncertainty and delays within the approval process. We believe this issue is core to the process of harmonisation and must be addressed prior to the completion of the CESR Notification Guidelines.

Need for a further review

We therefore propose that CESR commit to a review of the guidelines within two years. That review should consider:

- whether the authorities have implemented the guidelines;
- whether fund passportability has objectively improved; and
- what steps can be taken to improve further their freedom of movement.

Two years should allow time for Regulators to see the effects of the greater harmonisation of eligible assets criteria and to feel more comfortable that the system is working as envisaged.

Implementation deadline required

There is no formal deadline set out by which competent authorities need to have implemented the guidelines. While we appreciate that some authorities will have a more complex implementation path we feel the discipline of a deadline will help add clarity and focus to the process of implementation.

Standard Format for marketing information

EFAMA's response to the first consultation suggested that there be a standard template for the provision of information regarding marketing intentions. It is disappointing that this has not been taken up as we believe it would streamline the process significantly in respect of the one area where the host authority has a clear

locus for involvement. We believe that a high level summary of the distribution channels to be used, budgeted sales for the first 12 months, and likely use of media for promotion should prove sufficient for a Regulator to review the marketing proposals.

DFIA supports the objectives CESR has set out and acknowledges the difficulty of the task facing CESR in broking a consensus across the different interest groups.

Comments on specific guidelines

Guideline 1.
The use of a standard letter is welcomed as is the flexibility re language. However, we have two concerns:

- the use of "a language common in the sphere of finance" is subject to any local rules or regulations to the contrary with no indication that authorities should seek to have such provisions amended. We would suggest that authorities are tasked with initiating change in any local regime to facilitate this; and

- while the guideline state the authorities "agree to facilitate electronic filing" this is weaker than the statement in the commentary that "Where the notification documents are provided in electronic form it shall not be necessary to submit hard copies". We would prefer this latter statement be included within the Guideline.

Guideline 2
This is a very important part of the jigsaw and is welcome. It would be helpful if further comfort could be provided that in the case of a dispute, the use of the CESR mediation mechanism will not delay approval for a fund.

Guideline 3
No comment.

Guideline 4
We have some suggestions as to how the guideline may be improved to better meet CESR's objectives for this process:

- we feel that one month is sufficient to check both formal and material completeness, particularly as documentation is being standardised through other proposals in this paper; and

- the wording regarding the assumption that an application is complete after the deadline has passed that is set out in the last sentence of paragraph 13 should usefully be included within the Guideline.

Using the deadlines set out here and elsewhere it is clear that an authority can take up to three months to approve, not allowing for the time required for a fund to supply omitted information and not allowing for the "stopped clock" time. This implies a

notification process can take over four months before it is regarded as excessive in timescale under these Guidelines.

Guideline 5
We would propose that where local legal counsel provides a certification that the Fund documentation is complete and compliant with Article 44 and 45 the notification period should be capable of being shortened to a period of no greater than 2 weeks.

Where notification is approved within the two-month window we would prefer that the advice to the fund be issued "without delay".

Guideline 6
What this guideline does not address is the situation where a Regulator waits until the end of the two-month period to raise a fundamental question, thereby increasing the time to market. We think this Guideline is workable only so long as there is an obligation on the part of the Regulator to raise any issue that might affect the notification's acceptability as soon as identified. This should help ensure that most applications are dealt with within the already generous two-month timeframe.

Guideline 7
This is a welcome and helpful improvement.

Guideline 8
The Simplified Prospectus (SP) is now the key client document produced by funds in a marketing context and requests for other formal documentation of the fund is very rare. Accordingly, we feel that while a version of the SP should be provided in the local language to enable the host authority to evaluate the marketing plan, there is no need for the other materials (such as the full prospectus) to be translated.

In line with the self-certification permitted under Guideline 7 we feel it might be helpful to confirm within this Guideline that any translation need not be sworn or otherwise certified except by the fund.

Guideline 9
This is helpful as far as it goes, but it needs to go further. Some Regulators ask that any references at all to sub-funds not registered for sale are removed from the prospectus materials. We believe that it should be sufficient that the prospectus make clear if a sub-fund is not available for sale in a particular jurisdiction and that this will not prejudice investor protection, especially as the prospectus is so little called for by investors.

Guideline 10
We agree that the addition of a single sub-fund to an established umbrella should result in a shortened process and believe that the Guideline should specify one month as the maximum required or permitted.

Guideline 11
We feel that the Guideline should be explicit in saying that a notification including the materials set out here is *de facto* a complete notification and that therefore a Regulator may not claim such an application incomplete under the one month rule, nor request

further documents unless there is a "reasoned decision" for requiring the production of non-standard documentation.

Guideline 12
We agree with the desirability of keeping all documentation up to date, but it should be clear that the provision of such documentation should not constitute a notification requiring approval.

Guideline 13
We believe it might be helpful if Regulators were required, alongside the details of any "non-harmonised national provisions", to include a reasoned statement as to why such provisions are not a breach of the Directive or other applicable EU legislation. Then the database process could be used as a catalyst to remove further those barriers to the single market, which aim CESR sets out as an objective for these Guidelines.

In addition, and in line with Guideline 1, we believe it would be of great benefit for these details to be required to be posted on the host Regulators website "in a language common in the sphere of finance".

Annex II – Model Notification Letter
Under item 5 we think it should be made clear that the fund names to be included should relate only to those funds/sub-funds which are the subject of the notification.

Dublin Funds Industry Association
1st June 2006