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By e mail

The Committee of Securities Regulators
11-13 Avenue de Friedland
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Paris
FRANCE

CESR's guidelines for supervisors regarding the notification procedure according to Section VIII of the UCITS Directive

Dear Sirs

Schroders is a global provider of investment services. We have a globally distributed fund, based in Luxembourg sold into 15 member States and 23 countries worldwide as well as other Luxembourg fund ranges and a suite of UK unit trusts sold to both institutional and retail customers. Please find attached our response to the second consultation.

We have some general comments on the consultation. Firstly we share both EFAMA and IMA's view that the proposals in the second consultation offer only marginal improvement. Secondly, it was apparent from the open hearing that the draft provided in the consultation was open to interpretation. It would be in everyone's interest that any final guidance provided by CESR is clear – in particular the operation of guidelines 4 to 6.

Yours faithfully

Simon Vernon
Schroders

General Commitment and transitional period and Guideline 1

The footnote to guideline 1, which states there is no general commitment to amend national legal/regulatory provisions seems to contradict the commitment provided at the start of the guidelines. Specifically we welcome the fact that CESR members have agreed to implement the guidelines and to act in accordance with them and note that transitional provisions will be required because national implementing legislation may require amendment. But the note to guideline 1 states that there is no general commitment to amend the legislation. This suggests that CESR members will be able to claim that they are following the guidelines produced by CESR but they cannot amend their practises because of national legislation. And if there is no commitment to amend the national legislation, then there will be no improvement on the current situation.

There needs to be an unambiguous statement that national legislation will be amended – perhaps the ESC could provide this statement when the final guidelines appear? Without such a statement there will be continual scepticism that the guidelines are an improvement.

Guideline 2

We would like to see an additional statement in guideline 2 clearly stating that a host State cannot impose additional disclosure requirements on a UCITS which would result in an amendment to its simplified prospectus. This would make clear the point that the simplified prospectus is a maximum harmonised document, the contents of which are covered by the Directive and so is a home State responsibility.

Guideline 3

In the guideline or the explanatory text it would be useful to clearly state that silence from the competent authority means approval.

Guidelines 4, 5 and 6 and question 1 & 2

We accept that the two month period should not begin unless there is a complete notification. At the Open Hearing, it was clearly acknowledged that a straightforward check of receipt of the relevant documents would take minutes and that reference to one month in guideline 4 was not referring to such a check. Rather the one month was referring to the competent authority actually checking the UCITS compliance with the provisions of Article 44 (1) and 45. So, after a month the relevant competent authority would be able to contact the non-complaint UCITS and start the 'reasoned decision' procedure as per guideline 6.

For compliant UCITS the interpretation of the guidelines as stated at the Open Hearing means that the host Competent Authority has two options depending on its domestic legislation. If its domestic legislation so permits, it can 'positively' notify the UCITS that marketing can start forthwith as per guideline 5. If it cannot then there would be no 'positive' notification to the UCITS after one month but the lack of a 'negative' notification can be taken to mean that marketing will be allowed to start immediately the two month period expires.

If this is indeed the correct interpretation of guidelines 4, 5 and 6, it would be useful if guidelines more accurately reflected this interpretation. It is suggested that the explanatory text provides the following examples:

- (1) The timeline for a UCITS that has not provided the relevant documents but subsequently does and which then has no material issues with Articles 44(1) and (5).
- (2) The timeline for a UCITS that has provided the relevant documents but there are material concerns that Article 44(1) and 45 are not being complied with (i.e. the existing explanation in paragraph 23 but with amended dates – but see our comments below).
- (3) The timeline for a UCITS that has provided relevant document and which have been accepted as compliant within a month by a host competent authority that has the power under its legislation to shorten the two month period (i.e. the 'positive' notification)

(4) The timeline as with (3) but where legislation prohibits the shortening of the two month period (i.e. the lack of a 'negative' notification).

Further, we do not think the stop/start procedure needs to be used after the one month period. If our interpretation of what was said at the Open Hearing is correct, then the fact that the Competent Authority will notify non-compliant notifications after one month will mean the previous practise of waiting until the last day of the two month period will, in effect, be outlawed.

In such a case, once a reasoned decision has been issued, it should be possible to rely on both parties to act in good faith to solve any outstanding issues within the month and firms must recognise that failure to do so would mean marketing would not start until such issues have been resolved.

As stated above, from the comments made at the open hearing, if no reasoned decision has been issued - and CESR can accept the comment that silence after a month can be taken by the UCITS as approval - the UCITS can then give a firm date to sales offices to begin marketing, that date being two months after the notification was sent.

Guideline 7 and question 3

Self-certification is welcomed though the guidelines should be clear on who is an acceptable person. It should, for example, be acceptable for the Board of the corporate UCITS or the designated management company if there is one, to delegate the task to a relevant officer.

Guideline 8 and question 4

It would be useful if the guidelines made clear that a legal sign off of a translation is not required. A self-certification by the UCITS operator, as per guidance 7, should be acceptable. It would be up to the operator to decide whether it wished to seek additional comfort by obtaining a legal sign off.

Whilst it is appreciated that language is a matter for each national authority has CESR considered differentiating between UCITS sold to retail investors and those sold to institutional investors only? UCITS are not, contrary to comments made at the open hearing, only sold to retail investors. Schroders has a range of institutional unit trusts for example. A partitioning of UCITS language requirements along the same lines as the Prospectus Directive's treatment of qualified investors would be useful.

It would seem possible under the existing level 1 text (Article 47 paragraph 2 states '...or in a language approved by the competent authorities of the host Member State') for CESR members to agree to do this. Specifically a UCITS that has high subscription levels meaning it is, in effect, aimed at only those participants that fall within Article 2 (1)(e) of the Prospectus Directive, could provide the documents in a language common in the sphere of international finance.

Guidance 9

This guidance does not go far enough in stating that the mere mentioning of sub-funds not being sold in certain States in the prospectus does not amount to 'advertising' under Article 44 (2).

Guidance 10 and question 5

We would urge CESR to reconsider paragraph 2 and to look to interpret the notification rules at the level of the umbrella fund and not the sub-fund level.

Guidance 11 and question 6

In paragraph 1 our comment on guideline 7 (self certification) is also relevant here.

The content of the attestation will no doubt in practise be simplified with those matters that are subject to the transitional guidelines falling away after February 2007.

Guidance 12 and question 7

We agree that documents need to be kept up to date. However at the moment there are differing interpretations of matters that are merely a 'pure' notification and those amendments which appear to require a new two month period to start.

In the latter case a notification will be delayed due to regulatory demands meaning documents are not kept up to date.

At the very least the guidance could produce a non-exhaustive list of changes that CESR members agree can be provided immediately and without delay. A change to the scheme to add a new share class is an example, as would a change of investment adviser. Similarly if there has been a meeting of holders which has duly approved an amendment to the investment objectives of the fund, this needs to be a 'pure' notification. If not, new investors could be misled in purchasing a fund on the last available prospectus and/or simplified prospectus whilst these documents are 'stuck' in the system.

Guidance 13 and questions 8 – 10

Though confirmation of national requirements is useful, the list provided at paragraph 44 essentially means that delay will continue to occur.