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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 registered throughout 15 member States and 23 countries worldwide. We have a wealth of experience of your members' practices, some of which we believe, and the comments made at your open hearing inferred, have not respected the legislation in the past. We sincerely hope that this will not be the case in the future.

We have worked extensively in our trade bodies on this issue and therefore support the responses of EFAMA IMA and ALFI

As with the consultation on Eligible Assets, this consultation is undertaken with 20 years of 'history' attached to the subject. It is welcome that the consultation specifically refers to the procedure as a notification procedure. All parties have been guilty, in the past and present, of using the words 'notification' and 'registration' interchangeably[1]. Whilst it seems rather pedantic to make a difference, it is important to keep reminding ourselves of the Directive's requirements – that the process is one of notification. Registration implies something more, perhaps the need for formal approval or verification which is what the notification process has developed into and how it is now viewed.

So, whilst the objectives of the guidelines seem at first glance to be reasonable, we believe they are fundamentally floored. Whilst some parts of the guidelines are indeed improvements on the current state of play (and could no doubt be employed by regulators now), other parts are not. They seek to codify and legitimise gold-plated registration procedures rather than ensure procedures are agreed that reflect the notification process. If the objectives and the proposals were amended to reflect the notification process foreseen by the Directive, this would put beyond doubt suggestions that the Investment Management Expert Group is not meeting parts of its mandate for 'promotion of the single market'[2]. .

Our comments are therefore made with this in mind.

Yours faithfully

Simon Vernon
Schroders

[1] See for example the EFAMA/IMA document titled 'A harmonised, simplified approach to UCITS **Registration'** and even the Mandate for the Expert Group on Investment Management, Heading to section 3.1 'Simplification of the **registration** procedure for UCITS'.
[2] Mandate for the Expert Group on Investment Management, part 1, paragraph 2

A Procedure

We welcome the comment that are in bold and underlined type in paragraph 4 where CESR members are clear on where home & host State responsibilities lie in relation to authorisation of the UCITS product. Presumably all CESR members are now operating under this statement – since there is no need to wait until the consultation is ended to abide by this procedure- and in any event it is a fundamental requirement of the Directive. For our part, we will continue to provide the Commission with relevant evidence where any CESR member is not respecting this statement.

In terms of mechanisms to solve disputes, there seems to be a number of issues with what is stated. The Directive, quite rightly, is silent on the matter of resolving disputes, since the authorisation of a UCITS is the sole responsibility of the home State's Competent Authority – is it a matter for the Commission to start infraction proceedings should the home State appear to exceed the Directive's boundaries.

The proposed use of the mechanism being created by CESR needs to bear this in mind. In any event the proposals contained in the CESR consultation on the mechanism seems too long winded to provide a swift resolution of disagreements between regulators and any dispute that occurs after a decision has been made is rather like 'shutting the door after the horse has bolted'.

Any mechanism should be used before home State authorisation and should work regardless of whether the fund is marketed cross-border or not. Given the close co-operation of the regulators in CESR, is does not seem to be require a great deal of work for CESR to agree between themselves a protocol where innovative structures are being considered for authorisation. Furthermore, the decision cannot be binding on the host State Competent Authority; any questionable decision is for the Commission to consider.

I The two month Period

It is appreciated that CESR needs to make reference to the requirements of Article 6b so as to ensure Competent Authorities are complying with the Directive. We also accept that CESR's transitional guidelines are the most pragmatic way of dealing with the Directive's double notification requirement and make some general comments on contents of Annex 1 below. We have the following other comments:

1. Starting the two-month period (Response to Question1)

Key to the discussion will be when the two-month period begins. We accept that failure to provide all the relevant documentation means the period does not start but allowing one month for the Competent Authority to carry out such a cursory check seems excessive. CESR now accept this is a notification process and not a registration process, - the home State's attestation cannot be second guessed, so the period should be able to be dramatically shorted to a two week period at most.

2. The two-month period can be shortened

We believe that each CESR member should look at its legislation with a view to interpret it with a view to allowing a shortening of the period as set out in the consultation paper. We would suggest, in particular, that Article 46 can (and is in certain member States) interpreted at the umbrella fund rather than sub-fund level. Such an interpretation means that the two month period only occurs where a brand new scheme seeks notification. An existing scheme can then add additional sub-funds without the need to wait the two month period. In such a way the process would become purely a notification process once an initial 'registration' procedure is made.

We appreciate the point that there is national legislation that has implemented the Directive. But in some cases our legal advisers have suggested the legislation might be able to be interpreted in the way suggested above. Thus it may not be the legislation, but the interpretation of that legislation by national regulators that is the obstacle to overcome. And in cases where legislation in unable to be interpreted in such a way, it may be that the national regulator has the appropriate power to amend the implementing legislation – rather than a primary legislative change requiring Parliamentary time.

Article 6b(1) refers to notification only on the 'first time' the freedom to provide services is undertaken. Interpreting Article 46 in the way indicated would be entirely consistent with the UCITS Directive and other financial services directives.

3. Managing the two-month period (Response to Question 2)

Whilst we can see that under the Directive there is a presumption of a 'silence procedure' – thereby allowing the marketing of units to begin without formal approval, this is not the case in practise as firms will seek formal approval in most cases. We do not think that the stop-start approach will be necessarily helpful except in those Member States where refusal is provided at the very end of the two month period and a new two-month period started. We have had experience of regulators refusing the application under Article 46 at the very end of the two month period, only for a fresh two month period to be imposed.

We would suggest that a duly motivated communication should be communicated to the UCITS within one month of the end of the two-month period. That document could state that if the relevant matters were not sorted out by the end of the two-month period, the UCITS could not start marketing on that date, but could do so immediately once the outstanding matters were resolved, and there was a duty on both sides to act in good faith to expedite the matters outstanding.

II Certification of documents (response to Question 3)

We consider that the continual requirement to provide additional assurances that the latest copy of the prospectus and simplified prospectus provided to the Host State is the correct copy is an example of gold-plating. With the UCITS Amending Directives bringing in additional rules on conduct of business and with the fiduciary duties already imposed on the Directors of a UCITS, the management company, their auditors and other advisers, such additional filings and confirmations are unnecessary.

The Directive is clear that once notification that the UCITS is marketing in a host State has been made, only updated prospectus and simplified prospectus needs to be filed thereafter. Any developments concerning the UCITS must be notified via the report and accounts (Schedule B Section V) and it is also likely that significant changes will need to be informed to unitholders at the time, or in advance of, any such change.

Will the certification of documents protect investors? Surely a UCITS operator intent on deception and fraud would merely provide a different set of document to its distributors to give to unitholders than it does to the regulators. As a result regulators would be in possession of a 'perfect' set of documents which could provide it with a false sense of security. Is this simpler, better regulation?

III Translation (response to Question 4)

We fully support both ALFI and IMA's comments in this area.

IV Umbrella Funds (response to Question 5)

1. Marketing of only part of the sub-funds

We welcome the agreement between CESR members that where only certain sub-funds are to be marketed, then only those sub-funds need to be notified and that reference in the prospectus and report & acoounts to sub funds that are not being sold does not constitute marketing. Presumably if there is agreement now, processes can change now and not wait until finalisation of the consultation period.

2. Notification procedure for new funds

Please see our response to shortening the two-month period with regard to the treatment of additional sub funds. At the very least the addition of a sub fund where there is no material difference in the facilities required to support the sale of such a fund, need not result in a two month delay. Some regulators may argue that such an approach would lead to a lessening of investor protection. But there are examples of regulators who have always considered notification only applies at the Umbrella level, with a lodging of a prospectus thereafter. The absence of any market failure would seem to refute the claim of a reduction in investor protection.

B *Contents of file*

Response to Question 6

We question the necessity for an original home State attestation. We would suggest that such a requirement might have been needed in the early 80s in the absence of e-mail and other communications. It also casts doubt on the fitness and properness of the fund provider.

C Modifications and on-going process

Response to Question 7

We agree with CESR member's views that investors in the host State should have the same information as those in the home State. However, the current process means that this cannot be achieved. Only a pure notification process will achieve this.

D. National Marketing rules and other specific national regulations

Response to Question 8

We support the comments made by ALFI and IMA in their response

Responses to Questions 9 & 10.

We repeat our general comment that the purpose of the consultation should look to make the process one of notification, and not one of making a complicated, time consuming and costly registration process slightly less so.

Annex 1

The proposed attestation seems rather long winded, mainly due to the fact that each one will repeat basic information on the Competent Authority and on transitional provisions which will cease in a year. It is suggested that:

Items 1 to 7 are not necessary; surely CESR knows its own membership and details of address etc are usually contained on headed paper.

In item 8, why not refer just to the Directive generally than specify each part? – Article 6b(5) notification is only required initially anyway.

Items 13 and 14 should be an either/or on the form. If production is electronically, the choice of one should eliminate the other.

Items 15-21 should be appended, the appendix can then be discarded in February 2007.

Yours faithfully

SIMON VERNON
Schroders