

**CESR's technical advice to the European Commission on the level 2 measures
related to the UCITS management company passport**

Response to consultation paper, Eversheds LLP - 10 September 2009

Our response focuses on the first two sections of the CESR technical advice (organisational requirements including conflicts of interest and rules of conduct). We have not commented on the final three sections of the technical advice.

Questions for the consultation

- Q1. Do you agree with the general approach proposed by CESR?
- A1. We are broadly sympathetic to the proposal to carry across specific MiFID requirements to UCITS companies and generally to align the two regimes. Provided the two regimes are aligned appropriately, this should enable fund management houses that both operate funds and manage segregated mandates to operate between the two regimes without significant operational difficulties.
- Q2. In your view, does aligning the organisational requirements for UCITS management companies with the relevant MiFID requirements in the areas of
- general organisational requirements;
 - compliance;
 - internal audit;
 - responsibility of senior management;
 - complaints handling;
 - personal transactions; and
 - electronic data processing and recordkeeping
- impose additional costs on UCITS management companies? If so, please specify which areas are affected. If possible, please provide quantitative cost estimates of the additional costs for UCITS management companies.
- A2. No comment.
- Q3. In your view, what are the benefits of aligning the organisational requirements for UCITS management companies with the relevant MiFID requirements?
- A3. The main benefit in our view is that aligning the two regimes allows for firms to adopt a harmonised operational approach where their business (whether in a single firm or in separate firms within the same group) is subject to both UCITS and MiFID.
- For this reason, we would also urge CESR to limit the extent to which the proposals impose additional requirements on UCITS management companies beyond the MiFID requirements, except where those requirements are clearly necessary, given the nature of UCITS.

Box 1

General organisational procedures and arrangements for management companies

1. Management companies should comply with the following requirements:
 - (a) to establish, implement and maintain decision-making procedures and an organisational structure which clearly and in documented manner specifies

reporting lines and allocates functions and responsibilities;

- (b) to ensure that their relevant persons are aware of the procedures which must be followed for the proper discharge of their responsibilities;
- (c) to establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the management company;
- (d) to employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them;
- (e) to establish, implement and maintain effective internal reporting and communication of information at all relevant levels of the management company as well as effective information flows with any third party involved, including the depository, distributors and any other third party which performs activities on behalf of the management company, in such a way that those parties receive all information deemed to be necessary to perform their duties adequately;
- (f) to maintain adequate and orderly records of their business and internal organisation;
- (g) to ensure that the performance of multiple functions by their relevant persons does not and is not likely to prevent those persons from discharging any particular function soundly, honestly, and professionally.

For those purposes, management companies should take into account the nature, scale and complexity of the business of the management company, and the nature and range of services and activities undertaken in the course of that business.

2. Management companies should establish, implement and maintain systems and procedures that are adequate to safeguard the security, integrity and confidentiality of information, taking into account the nature of the information in question.
3. Management companies should establish, implement and maintain an adequate business continuity policy aimed at ensuring, in the case of an interruption to their systems and procedures, the preservation of essential data and functions, and the maintenance of services and activities, or, where that is not possible, the timely recovery of such data and functions and the timely resumption of their services and activities.
4. Management companies should establish, implement and maintain accounting policies and procedures that enable them, at the request of the competent authority, to deliver in a timely manner to the competent authority financial reports which reflect a true and fair view of their financial position and which comply with all applicable accounting standards and rules.
5. Management companies should monitor and, on a regular basis, evaluate the adequacy and effectiveness of their systems, internal control mechanisms and arrangements established in accordance with paragraphs 1 to 4, and to take appropriate measures to address any deficiencies.

Q4. Do you agree with CESR's proposals on organisational procedures and arrangements for management companies? If not, please suggest alternatives.

A4. We agree with these proposals, as they are broadly equivalent to the relevant provisions in the MiFID Implementing Directive. However, we note that 1(e) does not reflect a MiFID requirement and perhaps should be removed unless absolutely necessary.

Box 2

Responsibility of senior management

1. Management companies should, when allocating functions internally, ensure that senior management, and, where appropriate, the supervisory function, are responsible for ensuring that the management company complies with its obligations under the UCITS Directive.

In particular, senior management and, where appropriate, the supervisory function shall be required to assess and periodically to review the effectiveness of the policies, arrangements and procedures put in place to comply with the obligations under UCITS Directive and to take appropriate measures to address any deficiencies.

2. Management companies should ensure that their senior management receive on a frequent basis, and at least annually, written reports on the matters of compliance, risk management and internal audit, indicating in particular whether the appropriate remedial measures have been taken in the event of any deficiencies.
3. Management companies should ensure that the supervisory function, if any, receives on a regular basis written reports on the same matters.

- Q5. Do you agree with the above CESR proposal on the responsibility of senior management of management companies? If not, please suggest alternatives.
- A4. We agree with these proposals, as they are broadly equivalent to the relevant provisions in the MiFID Implementing Directive.

Box 3

Remuneration policy

1. Management companies should establish, implement and maintain a remuneration policy which is consistent and promotes sound and effective risk management and which does not induce risk taking which is inconsistent with the risk profiles, fund rules or instruments of incorporation of the UCITS they manage.
2. The remuneration policy should be in line with principles related to the protection of the interests of clients and investors in the course of collective portfolio management activities provided.
3. The remuneration policy should include measures to avoid conflicts of interest.
4. The remuneration policy should be clear and documented and should be internally transparent.
5. The remuneration policy should be regularly reviewed and be made available on request to the UCITS managed.

- Q6. Do you agree with the above CESR proposal on the remuneration policy of management companies? If not, please suggest alternatives.
- A.6 This is a broader industry issue of relevance to various sectors of the financial services industry - banks, investment banks, intermediaries, insurers etc. In that light, it would seem most appropriate to formulate and implement standards that would apply across all sectors, rather than focusing on UCITS management companies alone through this proposal.

We may have been persuaded to take a different view on this if there was some evidence of a broader failure in this area in relation to UCITS management companies. However, we are not aware of any such failure.

Q7. In your view, should the requirements set out above in relation to senior management be extended to cover all employees of UCITS management companies?

A.7 No comment.

Box 4

Permanent compliance function

1. Management companies should establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by the management company to comply with its obligations under the UCITS Directive, as well as the associated risks, and put in place adequate measures and procedures designed to minimise such risk and to enable the competent authorities to exercise their powers effectively under that Directive.

For those purposes, management companies should take into account the nature, scale and complexity of the business of the company, and the nature and range of services and activities undertaken in the course of that business.

2. Management companies should establish and maintain a permanent and effective compliance function which operates independently and which has the following responsibilities:
 - (a) to monitor and, on a regular basis, to assess the adequacy and effectiveness of the measures, policies and procedures put in place in accordance with paragraph 1, and the actions taken to address any deficiencies in the management company's compliance with its obligations;
 - (b) to advise and assist the relevant persons responsible for carrying out services and activities to comply with the management company's obligations under the UCITS Directive.
3. In order to enable the compliance function to discharge its responsibilities properly and independently, management companies should ensure that the following conditions are satisfied:
 - (a) the compliance function must have the necessary authority, resources, expertise and access to all relevant information;
 - (b) a compliance officer must be appointed and must be responsible for the compliance function and for any reporting on a frequent basis, and at least annually, to the senior management on matters of compliance, indicating in particular whether the appropriate remedial measures have been taken in the event of any deficiencies;
 - (c) the relevant persons involved in the compliance function must not be involved in the performance of services or activities they monitor;
 - (d) the method of determining the remuneration of the relevant persons involved in the compliance function must not compromise their objectivity and must not be likely to do so.

However, a management company should not be required to comply with point (c) or point (d) if it is able to demonstrate that in view of the nature, scale and complexity of its business, and the nature and range of its services and activities, the requirement under that point is not proportionate and that its compliance function continues to be effective.

Q8. Do you agree with the above CESR proposal on the compliance function of management companies? If not, please suggest alternatives.

- A8. We agree with these proposals, as they are broadly equivalent to the relevant provisions in the MiFID Implementing Directive.

Box 5**Internal audit**

1. Management companies should, where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of collective portfolio management activities undertaken in the course of that business, establish and maintain an internal audit function which is separate and independent from the other functions and activities of the management company and which has the following responsibilities:
 - (a) to establish, implement and maintain an audit plan to examine and evaluate the adequacy and effectiveness of the management company's systems, internal control mechanisms and arrangements;
 - (b) to issue recommendations based on the result of work carried out in accordance with point (a);
 - (c) to verify compliance with those recommendations;
 - (d) to report on a frequent basis, and at least annually, to the senior management in relation to internal audit matters, indicating in particular whether appropriate measures have been taken in the event of any deficiencies.

- Q9. Do you agree with the above CESR proposal on the internal audit of management companies? If not, please suggest alternatives.
- A9. We agree with these proposals, as they are broadly equivalent to the relevant provisions in the MiFID Implementing Directive.

Box 6**Complaints handling**

Management companies should establish, implement and maintain effective and transparent procedures for the reasonable and prompt handling of complaints received from investors, whether or not the management company directly sold them units of the UCITS.

The management company shall keep a record of each complaint and the measures taken for its resolution.

An investor should be able to file a complaint free of charge and in an official language of his Member state.

- Q10. Do you agree with the CESR's proposal on complaints handling procedures for management companies? If not, please suggest alternatives.
- A10. We have concerns about these proposals to the extent that they go beyond their MiFID equivalent (Article 10 of the MiFID Implementing Directive) in paragraphs 1 and 3. While there may be justification for the retention of paragraph 1, given the nature of UCITS, we feel that paragraph 3 should be removed as it goes beyond its MiFID equivalent.

Box 7**Meaning of personal transaction**

Personal transaction should mean a trade in a financial instrument effected by or on

behalf of a relevant person, where at least one of the following criteria are met:

- (a) that relevant person is acting outside the scope of the activities he carries out in that capacity;
- (b) the trade is carried out for the account of any of the following persons:
 - (i) the relevant person;
 - (ii) any person with whom he has a family relationship, or with whom he has close links;
 - (iii) a person whose relationship with the relevant person is such that the relevant person has a direct or indirect material interest in the outcome of the trade, other than a fee or commission for the execution of the trade.

Personal transactions

1. Management companies should establish, implement and maintain adequate arrangements aimed at preventing the following activities in the case of any relevant person who is involved in activities that may give rise to a conflict of interest, or who has access to inside information within the meaning of Article 1(1) of Directive 2003/6/EC or to other confidential information relating to UCITS or transactions with or for UCITS by virtue of an activity carried out by him on behalf of the management company:
 - (a) entering into a personal transaction which meets at least one of the following criteria:
 - (i) that person is prohibited from entering into it under Directive 2003/6/EC;
 - (ii) it involves the misuse or improper disclosure of that confidential information;
 - (iii) it conflicts or is likely to conflict with an obligation of the management company under the UCITS Directive or under the MiFID;
 - (b) advising or procuring, other than in the proper course of his employment or contract for services, any other person to enter into a transaction in financial instruments which, if a personal transaction of the relevant person, would be covered by point (a) or Article 25 (2) (a) or (b) of the MiFID Implementing Directive, or would otherwise constitute a misuse of information relating to pending orders;
 - (c) without prejudice to Article 3(a) of Directive 2003/6/EC, disclosing, other than in the normal course of his employment or contract for services, any information or opinion to any other person if the relevant person knows, or reasonably ought to know, that as a result of that disclosure that other person will or would be likely to take either of the following steps:
 - (i) to enter into a transaction in financial instruments which, if a personal transaction of the relevant person, would be covered by point (a) or Article 25 (2) (a) or (b) of the MiFID Implementing Directive, or would otherwise constitute a misuse of information relating to pending orders;
 - (ii) to advise or procure another person to enter into such a transaction.
2. The arrangements required under paragraph 1 must in particular be designed to ensure that:
 - (a) each relevant person covered by paragraph 1 is aware of the restrictions on personal transactions, and of the measures established by the management company in connection with personal transactions and disclosure, in

accordance with paragraph 1;

- (b) the management company is informed promptly of any personal transaction entered into by a relevant person, either by notification of that transaction or by other procedures enabling the management company to identify such transactions. Where certain activities are performed by third parties, the management company must ensure that the entity performing the activity maintains a record of personal transactions entered into by any relevant person and provides that information to the management company promptly on request;
- (c) a record is kept of the personal transaction notified to the management company or identified by it, including any authorisation or prohibition in connection with such a transaction.

3. Paragraphs 1 and 2 shall not apply to the following kinds of personal transaction:

- (a) personal transactions effected under a discretionary portfolio management service where there is no prior communication in connection with the transaction between the portfolio manager and the relevant person or other person for whose account the transaction is executed;
- (b) personal transactions in UCITS or units in collective undertakings that are subject to supervision under the law of a Member State which requires an equivalent level of risk spreading in their assets, where the relevant person and any other person for whose account the transactions are effected are not involved in the management of that undertaking.

Q11. Do you agree with CESR's proposals on personal transactions? If not, please suggest alternatives.

A11. We agree with these proposals, as they are broadly equivalent to the relevant provisions in the MiFID Implementing Directive.

Box 8

Recordkeeping requirements

1. Management companies should for each portfolio transaction relating to UCITS, immediately make a record of information sufficient to reconstruct details on the order and the executed transaction, including:
 - (a) the name or other designation of the UCITS and of the person acting on account of the UCITS;
 - (b) details for instruments identification;
 - (c) quantity;
 - (d) type of the order/transaction;
 - (e) price;
 - (f) date and exact time of the transmission of the order and name or other designation of the person to whom the order was transmitted, or of the decision to deal / execution of the transaction;
 - (g) person transmitting the order/executing the transaction;
 - (h) reasons behind the order revocation (if any);
 - (i) for executed transactions: counterparty and venue identification.

Management companies should retain all the required records for a period of at least five years.

However, competent authorities may, in exceptional circumstances, require

management companies to retain any or all of those records for such longer period as is justified by the nature of the instrument or portfolio transaction, if that is necessary to enable the authority to exercise its supervisory functions under the UCITS Directive.

Following the termination of the authorisation of a management company, Member States or competent authorities may require the management company to retain records for the outstanding term of the five year period or, in the event that the management company transfers its responsibilities in relation to the UCITS to another management company, that arrangements are made that such records for the past five years are accessible to that company.

2. The records shall be retained in a medium that allows the storage of information in a way accessible for future reference by the competent authority, and in such a form and manner that the following conditions are met:
 - (a) the competent authority must be able to access them readily and to reconstitute each key stage of the processing of each portfolio transaction;
 - (b) it must be possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained;
 - (c) it must not be possible for the records otherwise to be manipulated or altered.
3. The competent authority of each Member State shall draw up and maintain a list of the minimum records management companies are required to keep according to the UCITS Directive and its implementing measures.

Ability to process data electronically

1. Management companies should avail themselves of suitable IT systems which permit a timely and proper recording of each portfolio order/transaction carried out on behalf of each UCITS and client.
2. Management companies should ensure a high level of IT security and integrity and confidentiality of the recorded information.

Recording of subscription and redemption orders

1. Management companies should record in electronic form the UCITS subscription and redemption orders received from investors and the relevant terms and conditions immediately after receipt of any such order. The procedures put in place in order to avoid malpractices as late trading or market timing should rely on those recordings.
2. The recording should include:
 - (i) a specific identification of the unitholder and the relevant UCITS;
 - (ii) the identification of the persons receiving the order from the unitholder;
 - (iii) order related information, namely date, time, terms and means of payment, type, execution date, total consideration, amount of each single fee and expense with relevant qualification, and
 - (iv) indication of relevant liquidated/subscribed NAV and the relevant number of subscribed/redeemed units/shares.

Q12. Do you agree with CESR's proposals on electronic data processing and recordkeeping requirements? If not, please suggest alternatives.

A12. We agree with these proposals, as they are broadly equivalent to the relevant provisions in the MiFID Implementing Directive.

Box 9
UCITS accounting principles

1. The management company should employ accounting processes and procedures ensuring the protection of unitholders. The UCITS accounting should be kept in such way that at all time all assets and liabilities of the UCITS can be directly identified. If a UCITS has different investment compartments, the accounting books of those investment compartments should be fully segregated.
2. The management company should establish, implement and maintain accounting processes and procedures to ensure that the calculation of the NAV can be accurately effected on the basis of the accounting and that the orders of subscriptions and redemptions can be properly executed at that NAV.
3. The management company should establish appropriate procedures to ensure proper and accurate valuation of the assets and liabilities of the UCITS in accordance with the applicable valuation rules, including - where relevant - rules mentioned in the prospectus and/or in the instruments of incorporation or the fund rules of the UCITS. The management company should have sufficient resources, expertise and knowledge of the valuation rules.

Q13. Do you agree with CESR's proposals on UCITS accounting principles? If not, please suggest alternatives.

A13. No comment.

Q14. Does this proposal lead to additional costs for UCITS management companies? Please quantify your cost estimate. What are the benefits of this proposal?

A14. No comment.

Box 10
Implementation of the general investment policy

1. The responsibility for the implementation of the general investment policy defined in the relevant prospectus and/or articles of incorporation or fund rules should rest with the senior management of management companies. To this purpose, the senior management should approve the investment strategies of each UCITS they manage. The investment strategies are understood as a set of general indications concerning the strategic asset allocation of the UCITS and the investment techniques which are needed to adequately and effectively implement the investment policy.
2. The senior management should ensure and verify periodically that the general investment policy and the investment strategies as well as the risk limits of each managed UCITS are properly and effectively implemented and complied with. Senior management should also approve and periodically review the adequacy of the internal procedures for undertaking investment decisions in order to ensure that these decisions are consistent with the approved investment strategies.
3. Management companies should ensure that senior management receives on a regular basis written reports on the implementation of investment strategies and of the internal procedures for the undertaking of investment decisions.
4. Management companies should keep evidence on the provision of collective portfolio management activities and of the analyses and monitoring performed.

Q15. Do you agree with CESR's proposals on investment strategies? If not, please suggest alternatives.

A15. No comment.

Q16. Does this proposal lead to additional costs for management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

A16. No comment.

Box 11

Implementation of strategies for the exercise of voting rights

1. Management companies should apply adequate and effective strategies to ensure that the voting rights attached to the instruments held in the managed portfolios are exercised to the exclusive benefit of unit-holders.
2. The strategy should define the measures and procedures to:
 - (a) monitor the relevant corporate events; and
 - (b) evaluate timing and modalities for the exercise of the votes, on the basis of the investment objectives and policy of the relevant UCITS;
 - (c) prevent or manage conflict of interest arising from the exercise of voting rights.
3. An updated summary description of these strategies and of the way they were actually implemented should be made available to the investors.

Q17. Do you agree on the proposed requirements relating to the exercise of voting rights? If not, please suggest alternatives.

A17. We are uncertain as to whether this proposal is intended to make it mandatory for management companies:

- to exercise voting rights (whether completely or only to some degree);
- to have a strategy on whether/how such rights are exercised (with this being disclosed to investors); or
- to merely manage any relevant conflicts arising in relation to the exercise of voting rights (when and if these are exercised).

This should be clarified.

We would have concerns about any mandatory obligation to exercise voting rights. This should be left to the discretion of the relevant management company, taking into account what it considers to be the best interests of the fund and the relevant costs of active engagement (these being costs that, directly or indirectly, may be passed on to investors).

We do not have a particularly fixed view as to whether a firm's strategy on voting should be required to be disclosed in a prospectus. We do consider, however, that the perceived benefits of any such disclosure should be weighed against the fact that, the longer a document is, the more likely that material points are "buried" and provides a disincentive to ordinary retail investors reviewing the document. The disclosure certainly should not be included in the KID.

Q18. What are the additional costs of this proposal for management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

A18. No comment.

Q19. Do you agree with the proposed approach? Is there any additional adaptation you would suggest?

A19. We agree with the proposed approach on conflicts.

Q20. In your view, does aligning the requirements for conflicts of interest for UCITS management companies with the relevant MiFID requirements impose additional costs on UCITS management companies?

- procedures for conflict identification and management,
- independence of the persons managing conflicts,
- recordkeeping for collective portfolio management activities, and
- management of non-neutralised conflicts.

If so, please specify which areas are affected. If possible, please provide quantitative cost estimates of the additional costs for UCITS management companies.

A20. No comment.

Q21. In your view, what are the benefits of aligning the requirements for conflicts of interest for UCITS management companies with the relevant MiFID requirements?

A21. No comment.

Box 12

Conflicts of interest potentially detrimental to a client of a management company or to an investor.

1. For the purposes of identifying the types of conflict of interest that arise in the course of providing services and activities and whose existence may damage the interests of a UCITS, management companies should take into account, by way of minimum criteria, the question of whether the management company or a relevant person, or a person directly or indirectly linked by control to the management company, is in any of the following situations, whether as a result of providing collective portfolio management activities or otherwise:
 - (a) the management company or that person is likely to make a financial gain, or avoid a financial loss, at the expense of the UCITS;
 - (b) the management company or that person has an interest in the outcome of a service or an activity provided to the UCITS or another client or of a transaction carried out on behalf of the UCITS or another client, which is distinct from the UCITS interest in that outcome;
 - (c) the management company or that person has a financial or other incentive to favour the interest of another client or group of clients over the interests of the UCITS;
 - (d) the management company or that person carries on the same business as the UCITS;
 - (e) the management company or that person receives or will receive from a person other than the UCITS an inducement in relation to the collective portfolio management activities provided to the UCITS, in the form of monies, goods or services, other than the standard commission or fee for that service.
2. When taking into account the situations possibly giving rise to a conflict, the management companies should consider:
 - (i) the interests of the management company, including those deriving from its belonging to a group or from the performance of services and activities, the

interests of the clients and the duty of the management company towards the UCITS;

(ii) the interests of two or more managed UCITS.

3. Management companies should comply, mutatis mutandis, with the above requirements in connection with conflicts of interest which may arise towards investors when the management company directly sales units of managed UCITS.

Q22. Do you agree with CESR's proposals on the criteria for identifying conflicts? If not, please suggest alternatives.

A22. No comment.

Box 13

Conflicts of interest policy

1. Management companies should establish, implement and maintain an effective conflicts of interest policy set out in writing and appropriate to the size and organisation of the management company and the nature, scale and complexity of its business.

Where the management company is a member of a group, the policy should also take into account any circumstances, of which the company is or should be aware, which may give rise to a conflict of interest arising as a result of the structure and business activities of other members of the group.

2. The conflicts of interest policy established in accordance with paragraph 1 shall include the following content:
 - (a) it must identify, with reference to the specific collective portfolio management activities carried out by or on behalf of the management company, the circumstances which constitute or may give rise to a conflict of interest entailing a material risk of damage to the interests of the UCITS or one or more other clients or investors;
 - (b) it must specify procedures to be followed and measures to be adopted in order to manage such conflicts.

Q23. Do you agree with CESR's proposals on the identification and management of conflicts? If not, please suggest alternatives.

A23. We agree with these proposals, as they are broadly equivalent to the relevant provisions in the MiFID Implementing Directive.

Box 14

Independence in the conflicts management

1. The procedures and measures provided for the management of conflicts of interest should be designed to ensure that relevant persons engaged in different business activities involving a conflict of interest carry on those activities at a level of independence appropriate to the size and activities of the management company and of the group to which it belongs, and to the materiality of the risk of damage to the interests of clients or investors in the case of direct sale.
2. The procedures to be followed and measures to be adopted shall include such of the following as are necessary and appropriate for the management company to ensure the requisite degree of independence:
 - (a) effective procedures to prevent or control the exchange of information between relevant persons engaged in collective portfolio management activities involving a risk of a conflict of interest where the exchange of that

information may harm the interests of one or more clients or one or more investors;

- (b) the separate supervision of relevant persons whose principal functions involve carrying out collective portfolio management activities on behalf of, or providing services to, clients or to investors whose interests may conflict, or who otherwise represent different interests that may conflict, including those of the management company;
 - (c) the removal of any direct link between the remuneration of relevant persons principally engaged in one activity and the remuneration of, or revenues generated by, different relevant persons principally engaged in another activity, where a conflict of interest may arise in relation to those activities;
 - (d) measures to prevent or limit any person from exercising inappropriate influence over the way in which a relevant person carries out collective portfolio management activities;
 - (e) measures to prevent or control the simultaneous or sequential involvement of a relevant person in separate collective portfolio management activities where such involvement may impair the proper management of conflicts of interest.
3. If the adoption or the practice of one or more of those measures and procedures does not ensure the requisite degree of independence, management companies should adopt such alternative or additional measures and procedures as are necessary and appropriate for those purposes.

Q24. Do you agree with the CESR's proposals on the independence of the persons managing conflicts? If not, please suggest alternatives.

A24. We agree with these proposals, as they are broadly equivalent to the relevant provisions in the MiFID Implementing Directive.

Box 15

Record of collective portfolio management or activities giving rise to detrimental conflict of interest

1. Management companies should keep and regularly update a record of the kinds of collective portfolio management activities carried out by or on behalf of the management company in which a conflict of interest entailing a material risk of damage to the interests of one or more UCITS or other clients, or investors in case of direct sale, has arisen or, in the case of an ongoing collective portfolio management activity, may arise.

Q25. Do you agree with CESR's proposals on records of activities giving rise to conflicts of interest? If not, please suggest alternatives.

A25. We agree with these proposals, as they are broadly equivalent to the relevant provisions in the MiFID Implementing Directive.

Box 16

Management of non-neutralised conflicts

1. Where the organisational or administrative arrangements made by the management company to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of UCITS or of the relevant unitholders will be prevented, the senior management or other competent internal body of the management company should be promptly informed in order for them to undertake any necessary decisions to ensure that in

any case the management company acts in the best interests of the UCITS and relevant unitholders.

The concerned UCITS should report those situations to investors by any appropriate durable medium and explain the decision taken by the management company.

2. In case of direct sale of UCITS to investors, where the organisational or administrative arrangements made by the management company to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of investors will be prevented, the management company should clearly disclose the general nature and/or sources of conflicts of interest to the relevant investor before selling the UCITS units.

Q26. Do you agree with CESR's proposals on management of non-neutralised conflicts? If not, please suggest alternatives.

A26. A sufficient and proportionate response to circumstances where "non-neutralised" conflicts arise in relation to an existing UCITS (ie, which has existing investors) is:

- to require the situation to be dealt with by a disclosure to the relevant depositary;
- to also require an update of the prospectus going forward and the inclusion of the issue in the next periodic report required to be prepared and provided to investors.

We think it should be clarified that a management company in this situation would not be required to conduct a mail out to existing investors, containing the disclosures.

We also have concerns that firms may be encouraged to take too generous a interpretation of the relevant rules if the alternative is too commercially onerous (ie, bearing the cost and inconvenience of a mail out to all existing investors). On the other hand, taking a more proportionate view may be likely to encourage compliance.

Q27. Are there any other issues you feel should be considered in addition to those already mentioned in this paper?

A12. No comment.

Questions for the consultation

Box 1

Duty to act in the best interests of the UCITS and its unitholders and to ensure market integrity

1. Management companies should ensure that unitholders of managed UCITS are treated fairly and should refrain from undue treatments of one group of unitholders over others.
2. Management companies should apply appropriate policies and procedures reasonably designed to prevent late trading, market timing and other malpractices liable to affect the stability and the integrity of the market.
3. Without prejudice to specific national law requirements, management companies should apply fair, correct and transparent pricing models and valuation systems for the UCITS they manage, in order to comply with the duty to act in the best interests of the unitholders. Management companies should be able to demonstrate that they have accurately valued the UCITS portfolios.
4. Management companies should act in a way to prevent undue costs being charged to the UCITS and unit-holders and should avoid churning in the management of their portfolios.

Box 2

1. Management companies should ensure a high level of diligence in the selection and ongoing monitoring of investments, in the best interests of the investors and the integrity of the market.
2. Management companies should ensure they have adequate knowledge and understanding of the assets in which the UCITS are invested and ensure that UCITS are only invested in financial assets whose risks can be adequately assessed, monitored and managed by the risk management process adopted by the company.
3. Management companies should establish written due diligence policies and procedures and implement effective arrangements for ensuring that investment decisions on behalf of the UCITS are carried out in compliance with the objectives, investment strategy and risk limits of the UCITS.
4. Before carrying out investments, management companies shall, where appropriate taking into account the nature of the foreseen investment, formulate forecasts and perform analyses concerning its contribution to the UCITS' portfolio composition, liquidity and risk and reward profile. These analyses should be supported by reliable, updated and meaningful information, both in quantitative and qualitative terms.

- Q1. Do you agree with CESR's proposals on the duty of management companies to act in the best interest of UCITS and their unitholders and on due diligence requirements? If not, please suggest alternatives.

A1. We have no concern with this as a high level principle, and agree that it is a sensible starting point in relation to the analysis of a myriad of issues affecting UCITS and their investors.

We do have some concerns, however, as to how this is proposed to be interpreted in certain contexts as above.

For example, it is appropriate in some contexts to say that some investors should not be given favourable treatment over others - eg, as regards the applicable of a dilution levy or adjustment, as regards an in specie transfer of assets by a third party into a fund in exchange for shares/units, as regards dealing cut off times etc.

In other contexts, however, the different treatment of unitholders may not raise broader regulatory concerns. For example, it is common practice in the UK for institutional investors to negotiate with a management company to receive more frequent and/or detailed reports, rebates etc. These are often commercially justified by the particular position of a platform, their operational requirements, and the service they provide on a back to back basis to underlying clients.

As regards the reference above to management companies being required to apply "fair, correct and transparent" pricing models:

- we would support the point as to transparency;
- we are less certain as to how the references to a "fair" or a "correct" pricing model would mean in practice. Does this refer to "pricing" or to the definition of fees and expenses (as suggested in paragraph 2 in the explanatory notes)?
 - o We can envisage that this would be interpreted by different regulators differently, which would be contrary to the objectives of the UCITS Directive overall in achieving a harmonised European regime in relation to this type of fund.
 - o We consider that this is inherently subjective, and investors are ultimately best placed to determine whether a pricing model, disclosed in a fair and transparent way in relation to a particular fund, is acceptable to them commercially or not.

We therefore have concerns about regulation being introduced on this area.

Q2. What are the additional costs of this proposal for management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

A2. No comment.

Box 3

Management companies shall, in case of direct sale of UCITS to investors, act honestly, fairly and professionally in accordance with the best interest of the client and comply, in particular, with the principles set out in boxes 4 to 11.

Q3. Do you agree with this general approach proposed by CESR for conduct of business rules relating to direct selling? If not, please suggest alternatives.

A3. No comment.

Q4. What are the additional costs of this proposal for management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

A4. No comment.

Box 4

Appropriateness test and execution only

1. Management companies should ask the investor to provide information regarding his knowledge and experience in the investment field relevant to the envisaged UCITS so as to enable the management company to assess whether this UCITS is appropriate for this investor.
2. When assessing whether the UCITS is appropriate for an investor, the management company should determine whether that investor has the necessary experience and knowledge in order to understand the risks involved in relation to the purchase of units of the concerned UCITS.

For those purposes, a management company shall be entitled to assume that a professional client has the necessary experience and knowledge in order to understand the risks involved in relation to the envisaged UCITS.
3. The information regarding an investor's knowledge and experience in the investment field relevant to the concerned UCITS includes the following, to the extent appropriate to the nature of the client and the type of UCITS envisaged, including their complexity and the risks involved:
 - (a) the types of financial instrument with which the investor is familiar;
 - (b) the nature, volume, and frequency of the investor's transactions in financial instruments and the period over which they have been carried out;
 - (c) the level of education, and profession or relevant former profession of the investor.
4. A management company shall not encourage an investor not to provide information referred to under paragraph 1.
5. A management company should be entitled to rely on the information provided by its investors unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.
6. In case a management company considers, on the basis of the information received from the investor under paragraph 1, that the envisaged UCITS is not appropriate for the investor, the management company shall warn the investor. This warning may be provided in a standardised format.
7. In cases where the investor elects not to provide the information referred to under paragraph 1, or where he provides insufficient information regarding his knowledge and experience, the management company shall warn the investor that such a decision will not allow the management company to determine whether the envisaged UCITS is appropriate for him. This warning may be provided in a standardised format.
8. Management companies can provide the services of execution and/or the reception and transmission of orders to investors without the need to obtain the information or make the determination provided for in paragraphs 1 and 2 when all of the following conditions are met:
 - the distribution of the concerned UCITS is provided at the initiative of the investor;
 - the investor has been clearly informed that in the distribution of the concerned UCITS, the management company is not required to assess the

appropriateness of the UCITS offered and that therefore he does not benefit from the corresponding protection of the relevant conduct of business rules; this warning could be provided in a standardised format;

- the management company complies with its obligations regarding conflicts of interest.

Box 5

Handling of subscription and redemption orders of investors

Management companies should handle and process the orders from investors, including subscription and redemption orders, in accordance with the relevant provisions of the fund rules or the instruments of incorporation and/of the prospectus.

Box 6

Reporting obligations in respect of execution of subscription and redemption orders

1. Where management companies carry out an order from an investor, they should take the following action in respect of that order:

- (a) the management company should promptly provide the investor, in a durable medium, with the essential information concerning the execution of that order;
- (b) the management company should send the investor a notice, in a durable medium, confirming execution of the order as soon as possible, and no later than the first business day following execution or, if the confirmation is received by the management company from a third party, no later than the first business day following receipt of the confirmation from the third party.

Point (b) should not apply where the confirmation notice would contain the same information as a confirmation that is to be otherwise promptly dispatched to the investor by another person.

In the case of orders for an investor which are executed periodically, management companies either take the action specified in point (b) or provide the investor, at least once every six months, with the information listed in paragraph 3 in respect of those transactions.

2. In addition to the requirements under paragraph 1, management companies shall supply the investor, on request, with information about the status of his order.
3. The notice referred to in point (b) of paragraph 1 shall include such of the following information as is applicable:
 - (a) the management company identification;
 - (b) the name or other designation of the investor;
 - (c) the date and time of receipt of the order and method of payment;
 - (d) the date of execution;
 - (e) the UCITS identification;
 - (f) the nature of the order (subscription or redemption);
 - (g) the venue identification;
 - (h) the number of units involved;

- (i) the unit value at which the units were subscribed or redeemed, and the reference value date;
- (j) the total amount;
- (l) a total sum of the commissions and expenses charged and, where the investor so requests, an itemised breakdown;
- (l) the investor's responsibilities in relation to the settlement of the transaction, including the time limit for payment or delivery as well as the appropriate account details, where these details and responsibilities have not previously been notified to the investor.

Q5. Do you agree with CESR's proposals on conduct of business rules relating to direct selling? If not, please suggest alternatives.

A.5 We have concerns about what is proposed in relation to the importing of the MiFID appropriateness requirements in this context.

In practice, the exception explained above (paragraph 8 of Box 4) should logically apply to all or almost all direct sales. It seems disproportionate and seems to make this regime unduly complex, to apply a requirement and then provide for an exception that seems likely to apply in all relevant cases. A more straight forward approach would seem to be:

- to not apply the appropriateness requirements at all in this context;
- but to require direct sales to be accompanied by a warning that no advice has been provided and any relevant regulatory rules on advice, appropriateness or suitability have not been complied with.

If this recommendation is not accepted, it would be necessary for management companies to accommodate the circumstances where the appropriateness requirements apply by putting in place systems and processes to gather information on prospective investors as to their knowledge and experience. This would seem highly disproportionate in the context of funds that are specifically structured for the retail market.

We also note that, in Box 6 (para 1(b)), there is a requirement to send "the investor" a notice, while the MiFID equivalent (Article 40(1)(b) of the Implementing Directive) only applies to retail clients. For consistency between the two regimes, it would be appropriate to limit this requirement to retail clients only.

Q6. What are the additional costs of this proposal for UCITS management companies? If possible, please quantify your estimate. What are the benefits of this proposal?.

A6. No comment.

Box 7

Duties of management companies to act in the best interests of the UCITS when executing the decisions to deal on behalf of the managed UCITS in the context of the management of their portfolios.

1. Management companies should act in the best interests of the UCITS they manage when executing the decisions to deal on behalf of the managed UCITS in the context of the management of their portfolios.

2. To this purpose, management companies should take all reasonable steps to obtain the best possible result for the UCITS taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. The relative importance of these factors should be determined by reference to the following criteria:
 - (a) the objectives, investment policy and risks specific to the UCITS, as indicated in the prospectus or as the case may be in the fund rules or articles of association of the UCITS;
 - (b) the characteristics of the order;
 - (c) the characteristics of financial instruments that are the subject of that order;
 - (d) the characteristics of the execution venues to which that order can be directed.
3. Management companies should establish and implement effective arrangements for complying with the obligation in paragraph 2. In particular management companies should establish and implement a policy to allow them to obtain, for the UCITS orders, the best possible result in accordance with paragraph 2. Management companies should obtain the prior consent of the UCITS on the execution policy and make available appropriate information to the unitholders on the policy established in accordance with this Box and on any material changes to their policy.
4. Management companies should monitor on a regular basis the effectiveness of their order execution arrangements and execution policy in order to identify and, where appropriate, correct any deficiencies.
5. Management companies should review annually the execution policy as well as their order execution arrangements. Such review should also be carried out whenever a material change occurs that affects the management company's ability to continue to obtain the best possible result for the managed UCITS.
6. Management companies should be able to demonstrate that they have executed orders on behalf of the UCITS in accordance with the company's execution policy.

Q7. Do you agree with CESR's proposals on direct execution of orders by management companies? If not, please suggest alternatives.

A7. We have a concern as to the merits of including information on best execution in a firm's disclosure documents to investors:

- We are not certain that this would "add value" in terms of assisting investors to make a more informed decision in relation to their investment.
- We also consider that any perceived benefits of any such a disclosure should be weighed against the fact that, the longer a document is, the more likely that material points are "buried" and provides a disincentive to ordinary retail investors reviewing the document.

In our view, it should be sufficient for a disclosure to be made to the relevant fund's depositary. If it is considered necessary to go further, a copy of the relevant disclosure (and any updates) could be made available for inspection at the management company's office.

Q8. What are the additional costs of this proposal for UCITS management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

A8. No comment.

Box 8

Duties of management companies in the context of the management of UCITS portfolios. to act in the best interests of the UCITS when placing orders to deal on behalf of the UCITS with other entities for execution.

1. Management companies should act in the best interests of the UCITS they manage when placing orders to deal on behalf of the managed UCITS with other entities for execution, in the context of the management of their portfolios.
2. Management companies should take all reasonable steps to obtain the best possible result for the UCITS taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. The relative importance of these factors should be determined by reference to the requirements in Box 7.
3. Management companies should establish and implement a policy to enable them to comply with the obligation in paragraph 2. The policy should identify, in respect of each class of instrument, the entities with which the orders are placed. The entities identified should have execution arrangements that enable the management company to comply with its obligations under this Box when it places orders with that entity for execution. Management companies should make available appropriate information to the unitholders on the policy established in accordance with this paragraph and on any material changes to their policy.
4. Management companies should monitor on a regular basis the effectiveness of the policy established in accordance with paragraph 3 and, in particular, the execution quality of the entities identified in that policy and, where appropriate, correct any deficiencies.

In addition, they should review the policy annually. Such review should also be carried out whenever a material change occurs that affects the management company's ability to continue to obtain the best possible result for the managed UCITS.
5. Management companies should be able to demonstrate that they have placed orders on behalf of the UCITS in accordance with the company's policy.
6. This Box should not apply when the management company also executes the decisions to deal on behalf of the UCITS. In those cases Box 7 applies.

Q9. Do you agree with CESR's proposals on the placement of orders with or transmission to other entities for execution? If not, please suggest alternatives.

A9. We agree with these proposals, as they are broadly equivalent to the relevant provisions in the MiFID Implementing Directive.

Q10. What are the additional costs of this proposal for UCITS management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

A10. No comment.

Box 9

General principles

1. Management companies should implement procedures and arrangements which provide for the prompt, fair and expeditious execution of portfolio transactions on

behalf of the UCITS.

2. To this purpose, management companies should satisfy the following conditions:
 - (a) they must ensure that orders executed on behalf of UCITS are promptly and accurately recorded and allocated;
 - (b) they must carry out otherwise comparable UCITS orders sequentially and promptly unless the characteristics of the order or prevailing market conditions make this impracticable, or the interests of the UCITS require otherwise.
2. Management companies should take all reasonable steps to ensure that any UCITS financial instruments or sums of money, received in settlement of the executed order, are promptly and correctly delivered to the account of the appropriate UCITS.
3. A management company should not misuse information relating to pending UCITS orders, and should take all reasonable steps to prevent the misuse of such information by any of its relevant persons.

Box 10

Aggregation and allocation of trading orders

1. Management companies should not be permitted to carry out a UCITS order in aggregation with an order of another UCITS or another client or with an order for own account, unless the following conditions are met:
 - (a) it must be unlikely that the aggregation of orders will work overall to the disadvantage of any UCITS or clients whose order is to be aggregated;
 - (b) an order allocation policy should be established and effectively implemented, providing in sufficiently precise terms for the fair allocation of aggregated orders, including how the volume and price of orders determines allocations and the treatment of partial executions.
2. Where a management company aggregates an UCITS order with one or more orders of other UCITS or clients and the aggregated order is partially executed, it should allocate the related trades in accordance with its order allocation policy.
3. Management companies which aggregate transactions for own account with one or more UCITS or other clients' orders may not allocate the related trades in a way that is detrimental to the UCITS or another client.

If a management company aggregates an order of a UCITS or another client with a transaction for own account and the aggregated order is partially executed, it allocates the related trades to the UCITS in priority to the management company. However, if the management company is able to demonstrate on reasonable grounds that without the combination it would not have been able to carry out the order on such advantageous terms, or at all, it may allocate the transaction for own account proportionally, in accordance with the policy as referred to in paragraph 1 (b).

- Q12 Do you agree with CESR's proposals on the handling of orders? If not, please suggest alternatives.
- A12. We agree with these proposals, as they are broadly equivalent to the relevant provisions in the MiFID Implementing Directive. However, we welcome the decision not to carry across the MiFID disclosure obligations.

Q13. What are the additional costs of this proposal for UCITS management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

A13. No comment.

Box 11

Inducements

1. Management companies should not be regarded as acting honestly, fairly and professionally in accordance with the best interests of the UCITS or an investor (the latter in case of direct sale) if, in relation to the provision of a collective portfolio management activity to the UCITS or the investor, they pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit, other than the following:
 - (a) a fee, commission or non-monetary benefit paid or provided to or by the UCITS or an investor or a person on behalf of the UCITS or an investor;
 - (b) a fee, commission or non-monetary benefit paid or provided to or by a third party or a person acting on behalf of a third party, where the following conditions are satisfied:
 - (i) the existence, nature and amount of the fee, commission or benefit, or, where the amount cannot be ascertained, the method of calculating that amount, should be clearly disclosed to the UCITS or the investor, in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant collective portfolio management activity;
 - (ii) the payment of the fee or commission, or the provision of the non-monetary benefit should be designed to enhance the quality of the collective management portfolio activity and not impair compliance with the management company's duty to act in the best interests of the UCITS or investors;
 - (c) proper fees which enable or are necessary for the provision of the collective portfolio management activity, such as custody costs, settlement and exchange fees, regulatory levies or legal fees, and which, by their nature, cannot give rise to conflicts with the management company's duties to act honestly, fairly and professionally in accordance with the best interests of the UCITS or investors.
2. A management company should be permitted, for the purposes of point (b)(i), to disclose the essential terms of the arrangements relating to the fee, commission or non-monetary benefit in summary form, provided that it undertakes to disclose further details at the request of the unitholder and provided that it honours that undertaking.

Q13. Do you agree with CESR's proposals on inducements? If not, please suggest alternatives.

A.13 We support CESR's proposals on inducements, with the qualification that the commentary in paragraph 50 of the explanatory text concerning the timings of disclosures should be incorporated in the implementing measures, rather than remaining as guidance. (Paragraph 50 proposes that disclosures to existing unitholders may be made after the event, potentially in the next periodic report.)

Q14. What are the additional costs of this proposal for UCITS management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

A14. No comment.