FEDERATION BANCAIRE DE L'UNION EUROPEENNE

European Banking Federation

Le Secrétaire Général

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Friday, 27 January 2006

Mr Fabrice DEMARIGNY
Secretary General of CESR
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Subject: FBE's response to CESR's guidelines for supervisors regarding the notification procedure according to Section VIII of the UCITS Directive

Dear Mr Demarigny,

The European Banking Federation (FBE) welcomes the opportunity to comment on CESR's consultation on the guidelines for supervisors regarding the notification procedure according to Section VIII of the UCITS Directive.

Whilst the proposals put forward by CESR to simplify the notification procedure could be in themselves an improvement on the existing practices, the FBE feels strongly that the Committee's focus needs to be revisited. Whereas CESR's proposals focus on streamlining the process within existing structures, we feel that CESR has a better opportunity to enable the Single Market in UCITS by focussing on the powers of host state authorities. Concretely, the FBE would welcome CESR placing greater emphasis on the country of origin principle, whilst at the same time relying on the UCITS themselves to self certify and provide the requisite documentation.

Authorities and the regulated community alike have sufficient resources at their disposal to ensure information technology replaces hard copy over time. CESR's processes should therefore focus primarily on how to ensure the ease at which notifications can be made cross-border rather than starting from the current requirements. If CESR were to adopt such a starting point, the FBE believes that the shared aims of the Commission and the industry in the current debate around enabling a truly Single Market in investment funds would be more readily realised.

I would be happy to discuss any aspect of this response with CESR in detail and look forward to the Committee taking due account of the recommendations we highlight in this paper. Alternatively, please contact Mr Stephen Fisher, Financial Markets Adviser, (Stephen.Fisher@fbe.be; +32 2 508 37 45).

Yours sincerely,

Guido RAVOET

Enclosure: 1

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Fédération Bancaire Européenne
European Banking Federation

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RESPONSE

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

Ref.: CESR/05-484

1. The European Banking Federation[1] (FBE) welcomes the opportunity to comment on CESR's consultation paper on the guidelines for supervisors regarding the notification procedure according to Section VIII of the UCITS Directive. In light of the FBE's broad membership, we approach this issue from the perspective of both wholesale and retail business whilst at the same time promoting the position of banks in their capacity as asset managers, depositaries, brokers and distributors. Therefore, this response aims to strike the right balance between these often competing interests banks undertake in the investment management business.

2. The FBE understands the efforts CESR has made in this current consultation to be part of a wider package[2] to bring about a more effective legislative framework for UCITS in the future. This particular initiative is supported by the FBE as is our continuing support for CESR to act in the area of investment management to realise the goals of the Commission's Green Paper on enhancing the legislative framework for investment funds in the EU.

I. GENERAL REMARKS

3. In the FBE's response to the European Commission's Green Paper on the enhancement of the EU framework for investment funds we highlighted that the notification procedure is a particular area in which some Member States have exploited the broadly drafted UCITS legislation to effectively protect their national markets. Such a divergence within the EU disturbs any level playing field that would have otherwise been evident and stifles the ongoing cross-border nature of the UCITS market as a whole. First simplifying and then harmonising key elements of the notification procedure is the *conditio sine qua non* to ensure that the passport works effectively across Europe. Therefore, we concluded that this task must assume the highest of priorities for the Commission and CESR alike.

4. CESR's consultation on the simplification of the notification procedure is therefore warmly welcomed by industry as one step of many necessary to enable a Single Market in UCITS in Europe. In light of the importance industry attaches to simplifying the notification procedure we strongly recommend that CESR takes a dynamic approach to the task. This means reviewing in the short to medium term its guidelines in a dynamic process of constantly seeking to streamline and simplify the administrative procedures required to sell UCITS cross-border.

[1] Set up in 1960, the European Banking Federation (FBE) is the voice of the European banking sector. It represents the interests of over 4,500 European banks, large and small, with total assets of more than €20,000 billion and over 2.3 million employees.

[2] Along with its guidelines for supervisors regarding the transitional provisions of the amending UCITS Directives and the recent consultation on the eligible assets for UCITS.

5. CESR's proposals primarily focus on process whereas a good deal of the burden industry currently experiences results from the powers vested in the host state.[3] We understand that CESR is currently testing the limits of comitology powers open to it under the existing UCITS Directive. However, we feel that CESR could have gone further in its current proposals and been more ambitious in seeking to enable a true cross-border market in UCITS, notwithstanding the fact that amending the current UCITS directive would allow CESR to be more ambitious still.

6. The FBE is committed to the ongoing process of liberalisation of markets in products, services and trade in financial services within the European Union. The FBE considers it is highly desirable therefore to have a well functioning, efficient and competitive Single Market in UCITS where innovation flourishes and costs are driven down to the ultimate benefit of the investors in UCITS products. This aim will only be achieved if every Member State regulatory authority buys into and adheres to the common guidelines CESR is to produce in respect of the notification procedure. We fear that the currently widely diverging notification procedures Member States apply in practice is open to abuse for protectionist ends.

7. Therefore, not only do we seek assurances from CESR that its members will adhere to the guidelines by the letter and in spirit, but we reserve the right to call for the Commission to play a role looking into the motivation of those Member States that fail to adhere to the guidelines and take the necessary consequent action. As stated in our response to the Commission's Green Paper, we also reserve the right to propose an amendment to the relevant provisions of the existing UCITS Directive if the limits of possibility are reached without there being any significant movement in respect of the ease at which UCITS can be marketed cross-border.

II. DETAILED REMARKS

A. Procedure

8. Industry believes that electronic submission should always be possible and should, over time, replace the submission of hard copy documentation. We feel that CESR's members ought to have at their disposal sufficient IT resources to enable electronic submission and filing. This way the administrative burden of filing and storing hard copy reports would be reduced whilst at the same time paving the way for a common format and method by which to submit information to supervisory authorities.

Q1: Is the starting of the two-month period dealt with in a practicable way in your view?

9. In respect of starting the two-month period, CESR offers a sound basis for common guidelines. However, industry calls for the following amendments to CESR's proposals:

- CESR to specify what it considers to be a two month period, e.g. two *calendar* months, to avoid different interpretations across the Single Market;

- CESR to confirm that the host state authority is only obliged to verify the completeness of the documentation rather than review the content of the file of the incoming UCITS (which would have been already carried out by the home state authority), unless it directly relates to the marketing of the fund in the host state;

[3] Article 46 of the UCITS Directive.

- CESR to set out guidelines for the competent host state authority to acknowledge receipt of complete notifications sooner than by the one month deadline suggested in paragraph 13. The FBE estimates that it should be possible for the host state authority to perform a completeness check of the information and inform the UCITS in respect of any missing information and/or reach a judgement in no longer than 10 business days. This would allow businesses to start planning earlier and with greater certainty without a significant level of additional burden upon the supervisory authorities.

10. Likewise, the FBE calls for there to be an obligation on host state authorities to confirm the date of receipt of the notification rather than supervisors proceeding on a voluntary basis as proposed, provided that there are not any legal constraints that could prevent authorities from doing so. The receipt of the confirmation[4] that the authorities have received the notification should be the trigger for the two-month period. We feel that the recommendation to confirm receipt of a notification on a voluntary basis would have a negative impact on business' planning and therefore the efficiency of the industry as a whole, whilst at the same time CESR's recommendations would fail to tackle distortions in what ought to be a level playing field in supervisory responses.

11. The two-month period should start immediately on delivery of the documentation (not after the notification is deemed to be complete) and two months should be the absolute maximum length of the waiting period, unless the submission is deemed incomplete and/or further information is required. When the submission is deemed incomplete, the whole file of already delivered information should not been sent back to the requesting authority. In all cases authorities ought to complete the verification of the notification documentation without delay and inform the UCITS at the earliest possible opportunity about when it can start to market the product. Such procedure should not be optional, and contrary national regulations should be amended accordingly.

Q2:	**Respondents are asked to provide their view on the practicability of the proposed approach**

12. The FBE would favour shortening the two-month period. The efficiency of the UCITS industry is to a certain extent dependent upon the efficiency and promptness of supervisors reaching a judgement. Therefore, we would also ask supervisors to have regard to the implications for the efficiency of the industry in the event of the full two-month period being taken for each UCITS notification.

13. The FBE is concerned with a number of aspects in relation to CESR's advice in this area. Firstly, we strongly recommend that the clock should not be stopped for an indefinite period. Industry and its supervisors alike have a shared duty to complete the notification process in a timely and efficient manner. Allowing for stopping the clock is potentially open to abuse from Supervisors who could stall the approval of a notification of a UCITS being sold into the host country for protectionist ends.

14. Secondly, the total time it takes to complete the notification procedure should not exceed two months unless the file is deemed to be incomplete. Where the file is deemed to be incomplete authorities should then only request the additional information required to complete the notification, instead of returning the whole file to the UCITS. Therefore the clock should restart from the point at which it was stopped and last not more than two months in total. In the exceptional circumstances where the notification procedure exceeds the two-month period, a second two-month period

[4] E.g. a courrier receipt for physical delivery or a similar secure document for electronic delivery.

should not be restarted. Given the business imperative UCITS have to have the notification procedure completed without delay, in the case of extension of the notification period beyond two months, due to requests for further information to complete the notification, marketing of the UCITS should be allowed to start one week after the requested information has been provided (unless the host state regulator notifies the UCITS otherwise). As CESR's guidelines are currently drafted they could once more be open to abuse by Supervisors for the motivation outlined above.

15. Thirdly, industry calls on CESR for it to issue specific guidelines in respect of the duty that ought to be on supervisors to ensure that the decisions that are reached are done so in a transparent and open manner. Industry calls for some form of an automatic right to have a dialogue with the authority that looks unfavourably on a notification application. Industry also calls on supervisory authorities adequate resources and processes which should be tailored to quicken the approval process for marketing UCITS cross-border.

Q3: Respondents are asked to provide their view on the practicability of the proposed approach.

16. Whilst we appreciate that under CESR's proposal only the simplified prospectus should be certified, we believe that even for the simplified prospectus a certification by the home state authority is unnecessary. Moreover, CESR's proposal based on national provisions as regards certification would not facilitate supervisory convergence since not all host State authorities consider certification to be necessary.

17. We also believe that UCITS Directors or Agents should be able to self-certify, that is certify that the documents presented are true copies of the latest simplified prospectus filed with the home state regulator. Since some CESR Members already accept the practice, it could be argued that it ought to be sufficient for all CESR Members.

18. The elimination of document certification will result in the easing of a significant administrative burden for CESR Members. As an alternative to the certification of copies by regulators, a document could be transmitted directly from the home to the host regulator (the UCITS taking care only of the translation, if necessary), following the principle already used in MiFID and in the Prospectus Directive.

19. If CESR were to insist on the practice of certification of prospectuses by authorities, a practice applied in some but not all Member States currently, we urge CESR to take into account the following points:

- that the certifications should not have expiry dates;
- that CESR clarifies its proposals as set out in paragraphs 27 to 33. In particular we are concerned that CESR appears to propose that different versions of the same document could circulate in different jurisdictions. This should be avoided at all costs, since it conflicts with the spirit of the European passport and ultimately the objective of the UCITS Directive. We therefore urge CESR to make the distinction between parallel applications for new (sub-) funds, including new applications for new (sub-) funds distributed in the host country and not in the home state, and applications for old (sub-) funds in new countries already approved in another EU jurisdiction; and
- that CESR takes note that its proposed guidelines could cause administrative difficulties in certain Member States. In paragraphs 29 and 31 CESR refers to home and host Member State authorities' role in the certification of the simplified prospectus. However, in certain Member States the certification of prospectuses has been delegated to a third party that is not an authority. We therefore seek

clarification from CESR that it does not intend to restrict the current practices in these Member States and that its guidance refers to the responsibility and not of the entity *per se* which performs the function in practice.

20. Finally, the Hague Convention provides for the simplified certification of public (including notarised) documents to be used in countries that have joined the Convention. The Hague Apostille refers to documents destined for use in participating countries and their territories should be certified by one of the officials in the jurisdiction in which the document has been executed. CESR Members have agreed not to require the use of the Hague Apostille for certification of documents, which is a proposal warmly welcomed by industry on the grounds of pragmatism.

Q4: Do you consider the suggested approach as appropriate?

21. Translation of documentation generates cost and delays to the efficient marketing of a fund cross-border. Therefore, industry takes a pragmatic view and as a starting point believes host state authorities should only require documents mentioned in the Directive to be translated.

22. We suggest that the approach CESR outlines, whereby UCITS must publish a document in the language of the home Member State and in an official language of the host Member State, would become overly burdensome and unwieldy given that UCITS could be marketed in 25 different Member States with 20 different officially recognised Community languages. Therefore, the FBE urges CESR to recommend using the approach close to the one set out in the Prospectus Directive. The approach whereby the issuer publishes prospectus document (required for notification of the host state authority) in the language of the home Member State and in a language customary in the sphere of international finance is a pragmatic one and strikes a good balance between the needs of the investor and the ease at which business can be done cross-border.

23. Recognising the importance of the need to protect adequately investors in the host state and in line with the translation arrangements in the Prospectus Directive, only the simplified prospectus should therefore be required to be translated into the language of the host state. The other documents would be translated into a language customary in the sphere of international finance.

24. Secondly, we recommend that CESR revises its guidelines to supervisors to require a literal translation. An appropriately accurate translation would be more realistic a requirement given that a literal translation of any text from one language into another could well result in misleading information to the detriment of the protection of investors. Practically CESR could recommend that if a translation is certified by the home state then it must be deemed to be acceptable as an accurate translation by the host state. That said, no sworn translations should be mandatory, as they don't necessarily provide any extra investor protection or better language quality. Publication on a website of the translation requirements would be helpful.

Q5: Do you consider the suggested approach as appropriate?

25. The FBE is supportive of the approach CESR has adopted in respect of umbrella and sub-funds. We highlight the importance of having consistent guidance that is upheld by all CESR members in this area in particular in light of current experience with the varying requirements related to the notification of sub-funds.

Marketing of only parts of the sub-funds

26. We fully support CESR's proposal (Para. 43): "CESR Members agree that if a UCITS intends to market actively only part of the sub-funds of an umbrella UCITS in the host state, only those sub-funds proposed to be marketed actively have to be notified."

27. However, CESR's proposals do not address one of the most difficult problems currently encountered in marketing only parts of an umbrella fund: the modifications required to the prospectuses and other documents to be filed. It is our opinion that no modification should be requested to the text of these documents to eliminate the sub-funds not marketed in the host state, as their existence in the prospectus is not equivalent to active marketing. Mention should obviously be made (preferably in a registration table separate from the prospectus) of the countries where each sub-fund is being marketed, or of all UCITS marketed in a specific country, so as to give a clear picture to investors of which funds are available to them. Expunging text and thus creating different national versions is not only costly, but it is also unfair to some investors, who are denied information available to investors in other countries. We appreciate the fact that in section C (Modifications and Ongoing Process) CESR expresses the same opinion: "In CESR's Members' view it is important that the investors in the host state have the same information available as the investors in the home state". Furthermore, it is plainly contrary to the Directive's text as far as the simplified prospectus is concerned (Art. 28(3): "The simplified prospectus can be used as a marketing tool designed to be used in all Member States *without alterations except translation*".

Notification procedure to market new sub-funds

28. We agree with CESR that all sub-funds notified simultaneously should be included in one notification letter simultaneously, but the 'no two-month period' should apply as a rule (not as an option) to the notification of further sub-funds at a later stage (Para 45(2) and (3)), whether they were already included in the original notification or not, as long as the marketing arrangements are the same. The host state regulator's competences are, after all, limited to the marketing arrangements, and if those are the same marketing permission cannot be refused, therefore making a two-month waiting period useless. Two months seem hardly necessary just to examine the translations, especially when it is not deemed to be the task of a host state authority to check the translation for consistency with the original (Para. 35). Only notification of material changes to the articles of incorporation and the common parts of the full prospectus should warrant the application of the two-month period.

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

30. We encourage CESR to develop a standard attestation for the notification of new sub-funds (preferably in English), since there are problems with the mutual acceptance of existing ones.

B. Content of the file

Q6: Do you consider the suggested approach as appropriate?

31. As regards the content of the file we consider that significant obstacles to notification remain, notwithstanding CESR's positive statement that, "UCITS should not be obliged by the host state to send other documents and information than those mentioned […]".[5] Specifically, national requirements under Article 44(1) and 45 are excluded from CESR's proposals and no apparent attempt is made by CESR to simplify procedures or achieve the convergence of practices.

32. The FBE believes that the publication of national rules on the host state authority's website does not go far enough and is not in line with the spirit of the common aim of supervisory convergence. Rather, CESR should proactively work with its members to reduce the number of marketing requirements over time and reduce the band of divergence within supervisory culture within Europe.

33. Specifically, we highlight the following problems with Paragraph 47 of CESR's proposals:

- Point 1: no original attestation by the home state regulator should be necessary. A copy with a self-certification by the UCITS Directors or agents should be sufficient (see also our comments under Certification of Documents);

- Point 4: we ask CESR to note that there is an apparent contradiction between the requirement in point 4 of paragraph 47 to submit a hard copy of the simplified prospectus and the proposals in paragraph 31 where CESR states that it is sufficient for the simplified prospectus to be published on the website of the home state authority; and

- Point 6: we suggest that CESR should be more specific as regards the details that need to be submitted concerning the marketing arrangements. We also feel that there ought to be a limit to the extent to which host country authorities may intervene in this respect. The efficiency of the cross-border UCITS market would benefit from having a form of safe harbour protection from host state authorities refusing the admission of foreign funds if the UCITS fully complied with the document request.

C. Modifications and on-going process

Q7: Do you consider the suggested approach as appropriate?

34. We would welcome a model attestation (preferably in a language customary in the sphere of international finance) from CESR to report modifications. As already discussed under "Marketing of only part of the sub-funds", CESR Members often require modifications to the prospectuses and other documents to be filed, which is contrary to the text in Para. 48. In view of that, and because of the delays experienced during the notification procedure in multiple states, different versions of the full prospectus could be applicable in different jurisdictions. These situations are not only to the disadvantage of investors, but they also cause administrative problems (and possibly extra costs) to the UCITS, which needs to implement special measures to compensate. We strongly encourage CESR to propose the elimination of such national "amendments", and if any differing information is absolutely needed to comply with national regulation it should not be included in the prospectus but rather in a separate document, which could be easily updated.

[5] Covering only Article 46 requirements.

35. We believe that only the home state authority has the right to approve modifications to the prospectus, and the home state regulator should subsequently notify host state authorities directly (as directed by the UCITS), avoiding the problem of certification and of time limits that are impossible to respect. The UCITS should only provide a translation to the host state authority of the modified/added text, and the updated prospectus could be distributed to investors immediately after home state approval, even when new funds are added to the prospectus (an updated registration table would indicate that they are not marketed in the host state).

36. Regarding modifications to other filed documents, CESR should at least agree on common time limits which take into account (if necessary) approval times by the home state regulator. Ideally, however, there should be no time limits for their notification to the host state authority.

37. No new certification of UCITS conformity should be required by the host state regulator when new sub-funds are notified, since the UCITS status of the umbrella is not affected.

D. National marketing rules and other specific national regulations

Q8: Do you agree with the proposals concerning the publication of the information or do you prefer another procedure and if so, which one?

Q9: Do you feel that an issue in this consultation paper should be dealt with in more detail or that other aspects of an issue already contained in the consultation paper should also have been treated?

Q10: Should some additional issues related to the notification procedure have been dealt with on this consultation paper, and if yes, which?

38. As we have previously stated, national marketing rules continue to hinder considerably the establishment of a level playing field for UCITS in Europe. It could be argued that where national marketing rules diverge from those for the marketing of foreign UCITS, it is to the detriment of the foreign and to the advantage of the locally domiciled funds, which raises serious competition issues. Simply stating the national marketing rules on the host state authority website does not address this issue adequately.

39. We therefore urge CESR to take steps to respect the spirit and not just the letter of the Directive to enable a Single Market in UCITS. This could include a review of the impact of the treatment of nominee structures and the non-acceptance of share classes. Establishing commonality for the documentation to market local and foreign UCITS would also be a step in the right direction towards truly simplifying the notification procedure.

Annex I

Q11: Is the model attestation practicable in your view?

40. The FBE welcomes that CESR has set out clearly the model attestation which can be used directly by its members.

41. However, point 8 should be replaced by a self-certification by the UCITS. In any case, the home state authority can only certify to facts in its knowledge, and that would exclude for example which sub-funds are to be marketed in the host Member State.

Annex II

Q12: Is the model notification letter practicable in your view?

42. In Part A, we ask CESR to clarify the meaning of "duration of the company" or delete it to avoid uncertainty.

43. In Part B (point 14) we encourage CESR to delete the reference to "CESR's guidelines" since the information provided should conform only to the requirements set by the Directive and by national regulation.

Annex III

Q13: What would you suggest CESR to do regarding the national requirements to simplify the notification procedure?

44. National marketing rules and other specific national regulations are an important factor to take into consideration when considering simplifying the notification procedure for UCITS. Annex III should therefore be amended in line with our earlier comments on national marketing rules.

45. In point III the following information (to be provided to investors in an extra marketing document) should be sufficient to satisfy the national marketing requirements:

- telephone contact details for local office (if relevant) or for representative in relevant country;
- Local Paying Agent / Information Agent contact details;
- List of sub funds marketed in that specific country;
- List of intermediaries that market units of the fund in the host state;
- Details of how to make an initial subscription (including minimum investment limits);
- Details of how to make subsequent subscriptions (including minimum investment limits);
- Details of how to redeem shares (including minimum investment limits);
- Details of where the statutory documentation is available; and
- Where fund prices may be obtained.

III. CONCLUSION

46. In conclusion, whilst the proposals put forward by CESR to simplify the notification procedure could be in themselves an improvement on the existing practices; the FBE feels strongly that the Committee's focus needs to be revisited. Whereas CESR's proposals focus on streamlining the process within existing structures, we feel that CESR has a better opportunity to enable the Single Market in UCITS by focussing on the powers of host state authorities. Concretely, the FBE would welcome CESR placing greater emphasis on the country of origin principle, whilst at the same time relying on the UCITS themselves to self certify and provide the requisite documentation.

47. Authorities and the regulated community alike have sufficient resources at their disposal to ensure information technology replaces hard copy over time. CESR's processes should therefore focus primarily on how to ensure the ease at which notifications can be made cross-border rather than starting from the current requirements. If CESR were to adopt such a starting point, the FBE believes that the shared aims of the Commission and the industry in the current debate around enabling a truly Single Market in investment funds would be more readily realised.

48. The FBE remains at CESR's entire disposal in the development of its proposals. We look forward to continuing the dialogue between industry and its supervisors and would be happy to elaborate further on the suggestions we set out in this paper.