European Securities and Markets Authority (ESMA)
103 Rue de Grenelle
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France

Submitted electronically

30 March 2012

Dear Sirs,

The Alternative Investment Management Association (AIMA)[1] welcomes the opportunity to submit its comments on the European Securities and Markets Authority (ESMA) Consultation Paper (ESMA/2012/44) ESMA's guidelines on ETFs and other UCITS issues ('the consultation paper').

UCITS are highly regulated investment products with strong investor protection which has worked well over a number of years. AIMA believes that any substantial changes to the current framework should only be made where there is market failure, evidenced by a thorough economic impact assessment.

Although AIMA shares many of ESMA policy concerns, we are of the opinion that, in a number of areas and in particular in relation to strategy indices, certain changes of the nature proposed would be more appropriate to be introduced through legislation than in guidelines as currently put forward in the consultation paper ('the guidelines'). In our view, the guidelines often go beyond what has been an accepted authorisation and supervisory practice in a number of Member States as part of the UCITS implementation.

If ESMA guidance would, in effect, result in a validly authorised investment strategy to be discontinued, this would be at odds with the requirements for due process. It is difficult to see how economic actors would be able to form reasonable expectations in the future if the system which is based on the rule of law may be substantially changed without following the required legislative route.

To date, we are not aware that the European Commission has brought any cases before the European Court of Justice either for incorrect transposition of the UCITS Directives or for persistent misapplication of Union law in the areas dealt with in the guidance. We would therefore strongly urge ESMA to reconsider the guidance especially in areas where it is likely to change the core of the business practices on the basis of which valid authorisations have been granted.

[1] AIMA is the trade body for the hedge fund industry globally; our membership represents all constituencies within the sector – including hedge fund managers, fund of hedge funds managers, prime brokers, fund administrators, accountants and lawyers. Our membership comprises over 1,300 corporate bodies in over 40 countries.

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AIMA fully supports increased transparency both to competent authorities as well as investors. We provide more detailed proposals to that effect in our responses below. However, as currently drafted, the guidelines on strategy indices would result in prohibiting the use of a significant number of those indices which are provided in UCITS. Prohibiting these funds would deprive investors from access to investment strategies which have been constructed by managers in reliance on the interpretation of the UCITS Directive by the individual home regulators and which have received regulatory approval on that basis.

AIMA does not agree with ESMA's reasoning in relation to UCITS which gains exposure to strategy indices. The purpose of these funds is to provide investors access to an index in a cost-efficient and transparent way. The vast majority of investors will not be able to reproduce any index, strategy or otherwise, without incurring significant licensing and other costs. Full real time replication of an index on the basis of freely available information should not be a requirement under UCITS. To require this would defeat the purpose of investing in the fund in the first place.

Second, it is not clear how the criterion of the frequency of rebalancing of an index has been chosen as a proxy for the ability for an investor to replicate such an index. It is fully possible to have an index which is rebalanced more frequently than daily with easy replication. Conversely, there may be indexes that are not capable of replication or at least easy replication by investors even if they are rebalanced on a less frequent basis. The rebalancing frequency should therefore be appropriate to the index and the market it seeks to represent. In general we believe that tailored disclosure should be the primary tool rather than prohibitions.

We therefore strongly believe that the guidelines should be amended to allow UCITS to continue to access strategy indices. If the guidelines are not amended in that respect then appropriate grandfathering must apply to indices that have been approved or cleared by supervisors, and to UCITS which have gained exposure to those indices, prior to the implementation of the guidelines. Grandfathering only in relation to existing investors would not be sufficient and could result in effective or gradual closure of the affected UCITS as they will not be able to replace investor outflows. This could also have unintended consequences in terms of deteriorating investor protection.

Additionally we believe that guidelines in relation to collateral should focus on the quality and liquidity of the collateral rather than diversification and type of assets used as collateral, as the purpose of the collateral is to mitigate counterparty exposure. Further, we do not believe that the counterparty of total return swaps should be considered as an investment manager as the counterparty does not normally have discretion over the UCITS portfolio.

AIMA has more detailed comments in relation to the effects of the guidelines and the problems in relation thereto, on which we elaborate below.

Yours sincerely,

Jiří Król

Director of Government and Regulatory Affairs

Annex

Index-tracking UCITS

Q1: Do you agree with the proposed guidelines?

Yes, in principle we agree with the proposed guidelines. However, we have some concerns.

We would appreciate further clarification on the scope of the guidelines and a clear definition of "index-tracking UCITS". It is our belief that the use of an approved financial index within a UCITS product does not necessarily make the UCITS an index-tracking UCITS. A number of funds that make extensive (almost total) use of financial derivatives based on approved indices do not have an explicit objective of tracking the index. This, and that the associated guidelines only apply to funds which are true index-tracking UCITS, should be made clear.

As regards guideline 1.c) a target level for the tracking error will be very difficult to estimate and may as such be misleading to investors.

Q2: Do you see merit in ESMA developing further guidelines on the way that tracking error should be calculated? If yes, please provide your views on the criteria which should be used, indicating whether different criteria should apply to physical and synthetic UCITS ETFs.

Yes, the French regulator is already imposing its own calculation of tracking error when issuers market ETFs in France. As a result, to avoid issuers having to calculate tracking error in a different manner for each Member State, a harmonised approach should be taken. We are of the view that the French methodology has the benefit of being relatively straightforward and is already used by a large number of ETFs.

Q3: Do you consider that the disclosures on tracking error should be complemented by information on the actual evolution of the fund compared to its benchmark index over a given time period?

No, we believe that the information provided in the KIID is sufficient.

Index-tracking leveraged UCITS

Q4: Do you agree with the proposed guidelines for index-tracking leveraged UCITS?

Yes, however, as stated under Q1, a clear definition of index-tracking UCITS is needed.

Q5: Do you believe that additional guidelines should be introduced requiring index-tracking leveraged UCITS to disclose the way the fund achieves leverage?

No.

Definition of UCITS ETFs and identifier

Q6: Do you agree with the proposed definition of UCITS ETFs? In particular, do you consider that the proposed definition allows the proper distinction between Exchange-Traded UCITS versus other listed UCITS that exist in some EU jurisdictions and that may be subject to additional requirements (e.g. restrictions on the role of the market maker)?

No, we believe that there should be a reference to its objective to track an index, thereby excluding actively managed funds from the ETF label.

Q7: Do you agree with the proposed guidelines in relation to the identifier?

We have no comments.

Q8: Do you think that the identifier should further distinguish between synthetic and physical ETFs?

No, this information is better described in the prospectus. Including it in the identifier could be misleading since most investors would not know how to interpret this information.

Q9: Do you think that the use of the words 'Exchange-Traded Fund' should be allowed as an alternative identifier for UCITS ETFs?

No, investors may think that there is a difference.

Q10: Do you think that there should be stricter requirements on the minimum number of market makers, particularly when one of them is an affiliated entity of the ETF promoter?

No, we do not think that there should be stricter requirements. The issuer should determine what measures are appropriate to maintain liquidity and it can be hard to find market makers if a minimum of two market makers are required.

Actively-managed UCITS ETFs

Q11: Do you agree with the proposed guidelines in relation to actively-managed UCITS ETFs? Are there any other matters that should be disclosed in the prospectus, the KIID or any marketing communications of the UCITS ETF?

Yes, but, as stated under Q8, there should be a separate identifier. Further, we do not see the merit for investors in disclosing how the iNAV is calculated.

Secondary market investors

<u>General comments</u>

Paragraph 39 of the explanatory text states that "adequate contractual arrangements" should be entered into "with each market maker, so that the market maker may not withdraw from its activities in the secondary market until a replacement market maker has been appointed". We cannot see that the text corresponds to any of the provisions included in the box. To avoid misunderstanding this text should not be included in any explanatory text.

Q12: Which is your preferred option for the proposed guidelines for secondary market investors? Do you have any alternative proposals?

We support Option 1 as Option 2 would be extremely difficult from an operational point of view. Please further see Q14.

Q13: With respect to paragraph 2 of option 1 in Box 5, do you think there should be further specific investor protection measures to ensure the possibility of direct redemption during the period of disruption? If yes, please elaborate.

No, we believe the suggested measures to be sufficient.

Q14: Do you believe that additional guidelines should be provided as regards the situation existing in certain jurisdictions where certificates representing the UCITS ETF units are traded in the secondary markets? If yes, please provide details on the main issues related to such certificates.

Direct redemption will be extremely difficult from an operational point of view, as (generally speaking) only the various nominees and intermediaries will know who the underlying investors are. It would perhaps be more useful if (in such circumstances) the nominees and intermediaries could act as agents for the underlying investors and carry out the primary market redemptions required to meet redemption requests by the investors. Redemptions would be at NAV on the relevant dealing day.

Q15: Can you provide further details on the relationship between the ETF's register of unit-holders, the sub-register held by the central securities depositaries and any other sub-registers held, for example by a broker or an intermediary?

The ETF will only know who is registered as its own shareholder and may have no access to the central securities depositary (CSD) registers.

Efficient portfolio management techniques

Q16: Do you agree with the proposed guidelines in Box 6? In particular, are you in favour of requiring collateral received in the context of EPM techniques to comply with CESR's guidelines on Risk Measurement and Calculation of Global Exposure and Counterparty Risk for UCITS?

To a large extent we agree with the guidelines and we agree that there should be greater disclosure to investors on the use of collateral, however we have the following comments.

In general we believe that guidelines in relation to collateral should focus on high quality and liquidity of the collateral rather than diversification and type of assets used as collateral as the purpose of the collateral is to mitigate counterparty exposure.

The text on fees split between securities lending agent and the UCITS in paragraph 44 needs to be further clarified. It is not clear in which cases the securities lending agent may be a related party to the UCITS or, when relevant, the investment manager.

In relation to guideline 5, it should be clarified that this does not prevent UCITS from entering into fixed term security lending arrangements. Limiting the use of such arrangements would not be in the best interest of the investors.

Guideline 6 would undermine cash as collateral and guideline 7 would lead to significant operational burdens, please see further Q17, 19 and 20 below.

Q17: Do you think that the proposed guidelines set standards that will ensure that the collateral received in the context of EPM techniques is of good quality? If not, please explain.

No, the suggestion would prevent the use of cash collateral by equity funds and could lead to managers (of equity funds as well as other funds) being forced to hold lower quality collateral than they would otherwise want to which would be detrimental to investors. If anything, we would favour guidelines on minimum levels of the quality of collateral.

Q18: Do you see merit in the development of further guidelines in respect of the reinvestment of cash collateral received in the context of EPM techniques (the same question is relevant to Box 7 below)?

Yes, parallels could be drawn to OTC derivatives.

Q19: Would you be in favour of requiring a high correlation between the collateral provided and the composition of the UCITS' underlying portfolio? Please explain your view.

No, we would not be in favour of requiring a high degree of correlation between the collateral provided and the composition of the UCITS' underlying portfolio. The purpose of collateral is simply to ensure that risks are supported by liquid assets of sufficient value. There is no need to link them to the value of the portfolio.

The suggestion would also prevent the use of cash collateral by equity funds and could lead to managers (of equity funds as well as other funds) being forced to hold lower quality collateral than they would otherwise want to which would be detrimental to investors. If anything, we would favour guidelines on minimum levels of the quality of collateral.

Q20: Do you agree that the combination of the collateral received by the UCITS and the assets of the UCITS not on loan should comply with the UCITS diversification rules?

No, the rules on assets and on collateral serve different purposes.

Q21: With regards to eligibility of assets to be used as collateral, do you have a preference for a list of qualitative criteria (as set out in CESR's guidelines on risk measurement) only or should this be complemented by an indicative list of eligible assets?

We have no preference, a list of eligible assets should however not be made exhaustive.

Q22: Alternatively, do you see merit in prescribing an exhaustive list of assets eligible for use as collateral? If so, please provide comments on whether the list of assets in paragraph 52 is appropriate.

No, we do not see merit in providing an exhaustive list of eligible assets as this again may force managers to hold lower quality collateral than they would otherwise want to. If anything, we would favour guidelines on minimum levels of quality of collateral.

Q23: Do you believe that the counterparty risk created by EPM techniques should be added to the counterparty risk linked to OTC derivative transactions when calculating the maximum exposure under Article 52(1) of the UCITS Directive?

We have no comments.

Q24: Do you agree that entities to which cash collateral is deposited should comply with Article 50(f) of the UCITS Directive?

We have no comments.

Q25: Do you believe that the proportion of the UCITS' portfolio that can be subject to securities lending activity should be limited? If so, what would be an appropriate percentage threshold?

No, rather than setting a threshold for securities lending the focus should be on counterparty risk and the quality of collateral.

Q26: What is the current market practice regarding the proportion of assets that are typically lent?

In France a high percentage is lent out.

Q27: For the purposes of Q25 above, should specific elements be taken into account in determining the proportion of assets (e.g. the use made by the counterparty of the lent securities)?

Please see Q25.

Q28: Do you consider that the information to be disclosed in the prospectus in line with paragraphs 1 and 2 of Box 6 should be included in the fund rules?

No, a breach of a prospectus obligation should be sufficient to justify redress for shareholders.

Q29: Do you see the merit in prescribing the identification of EPM counterparties more frequently than on a yearly basis? If yes, what would be the appropriate frequency and medium?

No, we do not see merit in a more frequent identification.

Q30: In relation to the valuation of the collateral by the depositary of the UCITS, are there situations (such as when the depositary is an affiliated entity of the bank that provides the collateral to the UCITS) which may raise risks of conflict of interest? If yes, please explain how these risks could be mitigated? The question is also valid for collateral received by the UCITS in the context of total return swaps.

Yes, there are potential conflicts. However, if independent teams are responsible for the different activities, this should be manageable.

Q31: Do you think that the automation of portfolio management can conflict with the duties of the UCITS management company to provide effective safeguards against potential conflicts of interest and ensure the existence of collateral of appropriate quality and quantity? This question is also relevant to Box 7 below.

We believe that “automation of portfolio management” needs to be further clarified.

Total return swaps

Q32: Do you agree with the proposed guidelines?

It would be useful to obtain clarification with regards to the underlying to the swap and the requirement for diversification, i.e. does this mean that the underlying to the swap must meet the requirements in Article 9(2) of the UCITS Directive regarding diversification limits or if the underlying is an index, does the eligibility of the index satisfy the requirements. It would further be useful to obtain clarification as to whether or not the text on TRS’also applies to synthetic ETFs. Aware that this is not within the scope of the consultation paper we would like to draw ESMA’s attention to the fact that in many cases swaps may be used due to the fact that commodity futures are not eligible assets and that UCITS may benefit from reconsidering this.

In relation to guideline 5.a), we agree with the guidelines and welcome the additional broad disclosure requirements in the prospectus. However, we would like to ensure that any disclosure requirements do not overly restrict a UCITS’ ability to enter into new transactions with additional counterparties in a timely fashion. This would be in specific (and likely unusual) circumstances for example where a counterparty no longer meets the UCITS criteria, defaults in contractual obligations to the UCITS, is at risk of insolvency or increases its fees. If the fund is unable to enter into new transactions in order to meet the investment objective, this could harm investor returns.

In relation to guideline 5.d) we do not believe that the counterparty should be considered as an investment manager as the counterparty does normally not have discretion over the UCITS portfolio. Is some cases the counterparty may also act as the calculation agent and in these cases the counterparty may have some influence over the portfolio, but this would be very limited and of a very technical (algorithmic) nature. It does not amount to providing investment management services. The ultimate responsibility for the portfolio management would always remain with the manager. If the concept is included in the guidelines "any other discretionary decision" needs further clarification, it cannot be considered to include any type of decision.

Q33: Do you think that the proposed guidelines set standards that ensure that the collateral received in the context of total return swaps is of good quality? If not, please explain your view.

Please see Q17.

Q34: Do you consider that the information to be disclosed in the prospectus in line with paragraph 5 of Box 7 should be included in the fund rules?

Please see Q28.

Q35: With regards to eligibility of assets to be used as collateral, do you have a preference for a list of qualitative criteria (as set out in CESR's guidelines on risk measurement) only or should this be complemented by an indicative list of eligible assets?

Please see Q21.

Q36: Alternatively, do you see merit in prescribing an exhaustive list of assets eligible for use as collateral? If so, please provide comments on whether the list of assets in paragraph 73 is appropriate.

Please see Q22.

Q37: Do you agree that the combination of the collateral received by the UCITS and the assets of the UCITS not on loan should comply with the UCITS diversification rules?

Please see Q20.

Q38: Do you consider that the guidelines in Box 7 and in particular provisions on the diversification of the collateral and the haircut policies should apply to all OTC derivative transactions and not be limited to TRS?

Strategy indices

Q39: Do you consider the proposed guidelines on strategy indices appropriate? Please explain your view.

No, we do not agree with the proposed guidelines on strategy indices. In general we believe that it should be clarified that these guidelines only apply to strategy indices.

<u>Guideline 6</u>

We do not agree that an intra-day or daily rebalancing frequency is inconsistent with the UCITS requirements in terms of replication and transparency. Whilst we agree that UCITS should disclose the rules in relation to rebalancing, the focus should be on transparency, and not on actually being able to physically replicate the index. We believe that the index criteria are sufficient in determining the eligibility of an index.

Many standard indices cannot be replicated by (retail) investors in practice. Highly diversified indices with a thousand or more components (e.g. Russell 1000 or 3000) are likely to be much more difficult to replicate than an index of, say, 25 components with daily rebalancing (for the avoidance of doubt, daily general rebalancing frequency does not mean that the entire index composition is changed daily). Market features and liquidity and transaction costs also affect ability to replicate. The focus should be on investor transparency, rather than the ability to replicate an index or introducing a fixed maximum rebalancing frequency for all types of markets. The rebalancing frequency should be appropriate to the index and the market it seeks to represent. Excluding all indices where replication by (retail) investors is difficult or impracticable would unnecessarily limit the investment universe of UCITS funds and seem contradictory to the aim of many such funds to provide efficient access to the respective markets (where exposure may be difficult to generate/replicate by investors individually). Further, the purpose of the fund is to provide access to the index in a cost-efficient and transparent way. To require that the index is possible to replicate would defeat the purpose of investing in the fund in the first place. At the same time it is fully possible to have an index which is rebalanced more frequently and which can be replicated. Rebalancing and replication does not necessarily correspond to each other.

The rebalancing frequency does not indicate how much of index composition is turned over. The impact of rebalancing is a function of market liquidity and transaction costs, factors which differ significantly between different markets. It is important for investors to understand the cost impact of the turnover frequency of the index, but a general prohibition of daily rebalancing does not appear justified. It is also important to note that frequent rebalancing is an important risk control feature of investment management and is beneficial to investors. This can help prevent losses for investors during significant market movement.

Indices are not uniform. While it may be appropriate for an equally weighted index to only infrequently rebalance, this may be less so for a market capitalisation based index, and even less in a strategy based index such as value or growth or momentum, where input parameters used for index composition change much more frequently. Ignoring such changes in parameters may not be in line with the index mandate and it should be up to investors of the UCITS funds to determine whether the rebalancing frequency as disclosed (including the costs or benefits of such rebalancing) fits their purpose or not.

We think the disclosure requirement relating to the effect of rebalancing frequency is unfairly biased. The proposal prevents efficient risk management tools on indices such as stop loss mechanism in case of loss in value of index components. The required restriction would require index sponsors to wait to decrease a weight until the next rebalancing date instead of immediate action.

Many standard market indices do not provide full public disclosure of every detail of the index calculation methodology. Often, some index data is available to subscribers only. Prohibiting exposure of UCITS funds to all such indices would disadvantage UCITS funds against other investment products.

We agree that investors should be provided with useful information about a strategy index to help them make an informed investment decision. However we do not feel that this requires full provision of index constituents or weights at each rebalancing. This level of disclosure is far higher than required for funds that do not make use of strategy indices that typically only provide investors with holdings information on a semi-annual basis. This level of disclosure would actually be detrimental to investors as regular public availability of this information could lead to front-running of a successful investment strategy. Arbitrage is likely to occur e.g. with standard commodity indices such as GSCI since the entire market knows their rebalancing date. Also, this requirement discriminates against funds investing in strategy indices compared to other funds, which do not have to publish their full holdings after each dealing day.

We would propose that further detailed disclosure of current index constituents and weights could be made on a semi-annual basis to provide a similar level of information to that, which would be provided if the UCITS held a direct investment in the index constituents. In addition, to aid transparency, further specific risk disclosure statements could be added to the prospectus and KIID or equivalent. These could warn the investor that the UCITS product makes use of strategy indices;

that the use of indices does not necessarily imply a passive investment strategy; that indices can include ineligible instruments and that investors should carry out sufficient due diligence on the indices used. Again we would also welcome clarification that the use of a strategy index does not imply that the UCITS is a passive index-tracking UCITS.

The index concept as used by the financial industry has evolved over the recent years. While originally indices were static and simple measurements, a new generation of indices has been developed in order to measure performance of a variety of risk return profiles in all possible asset classes. For example, certain investment banks offer and calculate in excess of 4000 indices alone. These modern indices are much more sophisticated than the traditional indices and require, in order to not be vulnerable to arbitrage, a lesser degree of transparency.

We are concerned that the guidelines taken as a whole are too restrictive and would in fact be detrimental to investors. Many investment strategies which can currently be accessed via strategy indices would cease to be viable in a UCITS-compliant form, limiting investor choice considerably. Others would have to adapt their investment strategy in a way that could in fact reduce returns and increase risk, which is clearly not the intention of the guidelines.

Guideline 3

Guideline 3 states that “Commodity indices must consist of different commodities which respect the 20%/35% limit in order to be considered an eligible index”. We do not believe that it is sufficiently clear what constitutes “different commodities” and this would need to be further clarified.

ESMA further states that “Brent and WTI contracts should be considered as being the same commodity i.e. oil”. We would strongly oppose classification and further welcome clarification from ESMA as to whether this treatment of commodities would be applied to strategy indices which include both commodities and other underlyings. Brent and WTI contracts cannot be assimilated to be the same commodity to the same extent that two companies producing the same product, e.g. a car cannot be considered the same issuers.

We would also propose that commodity futures that are traded on different exchanges are treated as different given that they display different performance characteristics. A useful approach might be for commodities which can be traded via their own separate exchange traded futures contract to be treated as "different". For example, the coffee "C" contract traded on ICE (Bloomberg ticker KCA Comdty) should be treated as different to the robusta coffee (10 tonne) contract that is traded on LIFFE (Bloomberg ticker DFA Comdty); equally the wheat contract that is traded on the Chicago Board of Trade (Bloomberg ticker W A Comdty), the hard red spring wheat contract that is traded on the Minneapolis Grain Exchange (Bloomberg ticker MWA Comdty), the hard red winter wheat contract that is traded on the Kansas City Board of Trade (Bloomberg ticker KWA Comdty) and the milling wheat contact No. 2 that is traded on Euronext (Bloomberg ticker CAA Comdty) should be treated as different from one another.

Guideline 4

We do not agree that an index must have a clear single objective as stated in guideline 4.a), multiple objectives should also be accepted.

Guideline 7

Guideline 7 states that “The index provider should disclose the full calculation methodology to, inter alia, enable investors to replicate the strategy”. There are two principal reasons why it is not possible to disclose the full calculation methodology for a strategy index. First, in many cases the "full calculation methodology" will comprise a highly complex, systematic investment programme that is expressed in thousands of line of computer code. Describing this in words would simply not be practical and would be of no use to investors. Second, each manager will have its own bespoke, proprietary investment programme which will have been developed by each manager over a number of years and at great expense. This is highly sensitive commercial information which, if made public, would seriously erode the value of the manager's business as it would allow third parties to replicate the manager's strategy. We propose, instead, that a high level description of the methodology is included in the information documents provided to investors.

Guideline 14

In relation to guideline 14 we do not believe that it is sufficiently clear what would constitute an independent valuation, especially in relation to entities within the same group. AIMA believes that belonging to the same group as the manager should not prevent an entity from being able to perform an independent valuation.

Q40: Do you think that further consideration should be given to potential risks of conflict of interest when the index provider is an affiliate of the management company?

No, we believe that the existence of a conflicts of interest policy is sufficient.

Transitional provisions

Q41: Do you consider the proposed transitional provisions appropriate? Please explain your view.

The date “XX 2012” implies that such provisions will not apply retrospectively and it is our view consistent with this, that full grandfathering should be available for products that are already approved by the relevant European regulators. Where an existing fund's investment objective or policy is related to the use of a strategy index which has previously been approved or cleared, grandfathering provisions should permit such funds to continue to make use of that strategy index and to be marketed. Investments in such funds should be allowed during the life time of the fund. These funds that have been constructed by managers and in reliance on the interpretation of the UCITS rules of the individual home regulators and have received regulatory approval on that basis should be allowed to continue marketing and accepting further subscriptions. Existing business strategies should be allowed to be carried out. Grandfathering in relation to existing investors would not be sufficient.

A change in the interpretation of the rules at this stage, which would have negative consequences for the existing portfolio of an existing UCITS which has been authorised, marketed in and invested in in good faith, might well prejudice the investors in existing products and complete grandfathering of such products should be confirmed at least until such time as the Level 1 text of the UCITS Directive may itself be amended following appropriate consultation and the procedural fairness associated with changes to the rules at that level. Moreover, we are of the view that it is extremely doubtful whether courts would sanction any enforcement action against pre-existing funds not complying with the new guidelines in the absence of changes to the eligible asset provisions in the UCITS Directive itself. Accordingly, we strongly recommend the guidelines make clear that they apply to funds authorised after their adoption and, in relation to pre-authorised funds, each UCITS management firm should endeavour to ensure compliance to the extent reasonably practicable and as they judge in investors' interests.

Given the quite significant and meaningful change in scope of this consultation paper, relative to the discussion paper, the guidelines should not be introduced in the second quarter. Further time, e.g. 12 months, should be provided to consider the responses and concerns raised by stakeholders.