



21 November 2005

Committee of European Securities Regulators  
11-13 Avenue de Friedland  
75008 Paris  
France

Dear Sirs

**CESR's Advice on Clarification of Definitions concerning Eligible Assets for Investments of UCITS – Consultation Paper**

As the representative body for depositaries of UK-based authorised collective investment schemes, DATA are grateful for the opportunity to comment on "CESR's advice on clarification of definitions concerning eligible assets for investments of UCITS".

The Depository and Trustee Association (DATA) represents all depositaries and trustees of UK-based authorised unit trusts and open-ended investment companies (OEICs). At the end of September 2005, the members of DATA were responsible for safeguarding £324.4 billion of funds under management.

DATA welcomes CESR's attempt to resolve a number of differences in implementation of the UCITS Directive across the EU jurisdictions. DATA believes that standardising the interpretation of the Directive will remove a number of difficulties arising when our clients attempt to passport their funds into other EU jurisdictions. That said, DATA does have a number of issues regarding CESR's advice.

CESR's Advice – Level 2 or 3

There has been a great deal of discussion as to whether CESR's advice should be level 2 (measures implementing Directives and adopted by the Commission after advice from CESR and the European Securities Regulators) or level 3 (co-operation amongst regulators). We note that CESR have now split their advice between level 2, which is high level principles, and level 3, which provides details of complying with

65 KINGSWAY LONDON WC2B 6TD TEL: +44 (0)20 7831 5873 EMAIL:  
data@investmentuk.org

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level 2. There is a concern amongst a proportion of DATA membership that with level, 3 co-operation there is a significant risk that some jurisdictions may take a more restrictive or liberalised approach to implementation of guidelines. This could lead to the continuance of the current position of regulatory arbitrage between Member States and retain the difficulties in the notification process. DATA recommends that CESR monitor the implementation process of this advice to ensure a reasonable level of symmetry between Member States.

#### Consultation process

DATA welcomed the extension of the deadline for CESR to provide advice to the Commission, but is disappointed that the industry and its representatives have had only one month to consider the revised advice. This short consultation period could give rise to unidentified, unintended consequences. DATA has identified a number of, what we believe to be, unintended consequences, which are documented in the enclosed paper. As an example, the redefinition of “embedded derivative” would appear to include close-end funds that invest in derivatives.

#### Ineligible UCITS

DATA members remain concerned that CESR’s advice will disallow investment in certain assets which have to date been eligible since the implementation of the 1985 Directive.

Where a UCITS’ objective and policy is, for example, to invest in hedge fund indices, this fund in totality would no longer comply with the UCITS Directive. We note that it is CESR’s opinion that such funds were never UCITS compliant, but this raises concerns whether the fund has a UCITS passport. Will investors who invested in the fund via the passport be able to continue to retain their investment or will the host regulator deem the investment to be illegal? Specifically with regard to funds that invest in hedge fund indices, will these funds lose their UCITS status but potentially regain it again at some point in the future?

**DATA recommends that CESR give full consideration to all the legal and ethical implications of a UCITS, in compliance with CESR’s advice, no longer being able to retain UCITS status.**

#### Transitional provisions

CESR’s advice, as currently drafted, may require radical changes to managers’ and depositaries’ processes and procedures for determining the eligibility of assets. In a number of cases the implementation of this advice will also require the reallocation of assets to comply with the new requirements, which will potentially incur significant costs that will be charged to the fund and thus, ultimately borne by the investor.

**DATA recommends that to reduce the significant disruption and, hopefully, to reduce the costs of reallocation, CESR provide a transitional period, at the end of which all UCITS must comply with the new requirements.**

If you wish to discuss any of the points raised in our response please do not hesitate to contact me.

Yours faithfully

Ros Clark  
Technical Adviser

Enc: DATA's detailed response