



Ms Helen Roberts
General Counsel's Division
Financial Services Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

31st January 2007

Dear Ms Roberts,

Response to DP06/5: FSA Confirmation of Industry Guidance

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 2006, the members of DATA were responsible for safeguarding £385.9 billion of funds under management.

We welcome the opportunity to comment on the proposals outlined in DP06/5.

DATA is in broad agreement with the FSA's move towards principles-based regulation, which results in greater flexibility and innovation. However, the reduced level of detail in the rules creates greater reliance on guidance produced by industry bodies. DATA is concerned that there has been no proper discussion or definition of "Principles-Based Regulation" and this raises a number of implications for firms, in particular:

- The FSA appears to be passing the burden of regulation onto the industry;
- The result is likely to be a dissipated "rulebook", some of which is neither written by the FSA, DATA or the IMA, nor subject to cost benefit analysis; and
- DATA and its members will have to monitor what other Industry Guidance is produced by other parties, considering its impact on the industry and possibly respond, post FSA confirmation.

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DATA believes that an efficient approach would be for the FSA to consistently apply principles-based regulation but in addition, issue guidance advising what they expect the industry to understand by the principles i.e. expected outcomes from the regulation and outcome of breaches of principles.

We understand that the FSA will be issuing a paper on what is meant by "Principles-Based Regulation" in April, which DATA look forward to receiving. DATA would add the caveat that its responses to DP06/5 may need to be re-considered post issuance of this paper.

Yours sincerely,

David England
Chairman of DATA

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DATA's response to DP06/5: FSA Confirmation of Industry Guidance

Q1. Do you anticipate the demand for "FSA Confirmation" from providers of Industry Guidance will be significant?

Principles-based regulation creates additional responsibility and due diligence for the Depositary. With the funds industry becoming ever more complex, there is a greater reliance from AFMs on the Depositary.

Whilst DATA cannot bind its members, one of its objectives as a trade body is to agree a consistent approach towards industry practice undertaken by its members. In respect to certain rule interpretations, DATA prepares position papers with a view to agreeing a uniform approach to a rule. In the past, DATA has frequently discussed matters with the FSA and would include a statement in the position paper, advising that the FSA were consulted or had input into the discussions, as appropriate. We understand this approach will still be permissible going forward.

However, for certain significant client facing industry issues, DATA would anticipate seeking "FSA Confirmation". This would add credibility to the Depositary's stance, both to AFM's and to the rest of the industry.

DATA members would have to consider each time a position paper arose as to the merits of seeking "FSA Confirmation".

Q2. Do you agree with our proposed parameters for considering whether we should grant "FSA Confirmation"? If not, why not?

Industry Guidance should explain how it relates to a relevant FSA rule and / or principle:

DATA already do this.

Industry Guidance that will directly affect consumers must consider consumer interests and view:

The Depositary is fundamentally responsible for representing the interests of the underlying investors. As part of this responsibility, the Depositary reviews the FSA principles and rules in the context of the funds and its investment objectives and policies. Decisions made for the fund are determined by what is in the best interests of investors, however there may be occasions where the interest of one investor may conflict with that of another holder. The Depositary will always investigate and respond to issues raised by an investor. Should the move to "regulation by industry guidance" result in an increase in the volume of queries raised by consumers and journalists, then resource and cost issues will become a concern for DATA, especially considering the small size of DATA as a trade body.

Other concerns would include:

What would be the implications if non-member or consumer groups disagreed with the content of our proposed guidance?

How would we manage the input of other bodies into our guidance? Who would decide which consumer groups or bodies should be involved?

Industry Guidance must not claim to limit or affect the rights of third parties:

This proposed parameter would only apply where the guidance fell into the “sturdy breakwater” or “implicit recognition” level. Certain guidance would fall into “safe harbour” standard of recognition, and may well affect the right of third parties.

Industry Guidance must be optional and be one way, not the only way, to comply:

Paragraph 3.6 of the discussion paper states that non-compliance with Industry Guidance would create no presumption that rules have been broken. This implies that Industry Guidance can be used as a shield (by firms in their defence) but not as a sword (by FSA enforcement). DATA would like clarification from the FSA that this is the case.

Industry Guidance must not claim to be an exhaustive or definitive statement of what FSA rules or guidance are or require:

DATA would not claim their Industry Guidance to be exhaustive or definitive, instead proposing that this is one way of following FSA rules according to the UK Depository model.

Industry Guidance must be publicly available:

DATA have concerns about public liability – the FSA has statutory immunity, trade bodies do not.

Membership of DATA is not compulsory, therefore, the suggested required publication of Industry Guidance under the auspices of DATA, will give free access to the intellectual capital and resource that is currently voluntarily financed by current and future members.

Industry Guidance must detail who its intended audience is:

DATA Industry Guidance is prepared for its members and may be shared with clients when discussing these issues with them.

Industry Guidance must not be anti-competitive:

DATA guidance is drawn up on this basis already but under these proposals, DATA might have to deal with challenges from others and have to challenge formally others' guidance. Any Industry Guidance, prepared by DATA, would state that this is one way of following FSA rules according to the UK Depository model.

Q3. Do you agree with our proposed approach to facilitate the use of Industry Guidance? If not, why not?

The provision of links to all recognised Industry Guidance on one page of the FSA website seems reasonable.

DATA would find it beneficial for the FSA to indicate estimated timing on how they would review Industry Guidance submitted for "FSA Confirmation". We would recommend that when seeking "FSA Confirmation" the parties involved should meet with the FSA and agree an appropriate turnaround time and this work should be viewed as part of the FSA's regular service to the industry. How will the FSA intend to resource this work which moves away from the "tick box" culture and becomes more outcome focussed?

DATA would also be supportive of the FSA monitoring all "FSA Confirmed" Industry Guidance to ensure that any conflicting guidance is managed efficiently, with the respective parties being notified and with the conflict being addressed in the appropriate manner. We also recommend that as part of the FSA ongoing monitoring, the Industry Guidance documentation confirmed by the FSA should be reviewed regularly, perhaps on an annual basis, as prompted by the FSA.

Q4. Do you have any other comments on our proposals?

DATA believes that an efficient approach would be for the FSA to consistently apply principles-based regulation but in addition, issue guidance advising what they expect the industry to understand by the principles i.e. expected outcomes from the regulation and outcome of breaches of principles. We believe that the majority of Industry Guidance papers should be issued by the FSA, with input from the industry.

We understand that the FSA will be issuing a paper on what is meant by "Principles-Based Regulation" in April, which DATA look forward to receiving. DATA would add the caveat that its responses to this DP may need to be re-considered post issuance of this paper.

DATA values the open dialogue with the FSA and would not wish to lose this. For example, the ability to telephone the FSA to discuss a particular issue, especially in relation to a market driven event for which DATA needs to give immediate guidance to its members.

DATA believes that if the FSA are issuing new or amending rules, this should not be reliant on the provision of Industry Guidance and if the FSA require guidance, the FSA should issue it, with of course, input from the industry and trade bodies.

DATA believes that the FSA should demonstrate the cost benefit analysis of the FSA issuing Industry Guidance on its expected outcomes, as an alternative to delegating this to the industry.

Will existing Industry Guidance be "grandfathered" in its current form or will the FSA need to review and approve again?