

03 August 2007

Tom Springbett
Savings and Investment Team
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

Dear Tom

**Consultation on better regulation measures for the asset management sector -
Introducing a protected cell regime for OEICs**

The Depositary and Trustee Association (DATA) promote the role of trustees and depositaries in providing consumer protection to investors in authorised collective investment schemes (unit trusts and OEICs) in the UK.

We are very grateful for the opportunity to comment on the Treasury's proposals on this particular subject and we look forward to receiving your response on the feedback received.

If you have any questions regarding this response, or require any further assistance on this matter, please do not hesitate to contact me.

Yours sincerely

John Cargill

DATA Chairman

Facilitating paperless settlement

2. Do you agree that the law should be changed to allow paperless settlement of trades in OEIC shares and AUT units?

Yes. We believe that allowing for the transfer and renunciation of title by electronic means will remove a significant legal/regulatory barrier to the industry's efforts to improve its efficiency and cost effectiveness for investors.

3. If paperless settlement is to be allowed, what standards should be applied to ensure investor protection is maintained? Is the proposed requirement to "take reasonable steps" appropriate and sufficient?

We support the Treasury's proposal to set the high-level requirement in the legislation, leaving the industry to determine what "reasonable steps" should be taken by the person responsible for the units/shares register to be satisfied that the person giving the instruction has the necessary right or authority. The modifications proposed will apply only to authorised investment funds and the activities of the operators and depositaries of such funds, all of whom are regulated closely by the Financial Services Authority.

On its own, such regulation would require them to exercise a high level of integrity in ensuring that investors are duly protected. Nonetheless, we intend to work with the IMA, and in consultation with their members and the FSA, to develop guidance as to how firms may comply with the proposed legal requirement in association with their existing regulatory obligations.

4. Would it be appropriate for provision to be made to allow electronic transfer of OEIC shares by a duly authorised agent but to make no provision for paper transfer of OEIC shares by an agent?

The capability for a regulated firm to effect the transfer of a client's units/shares in order to carry out their wishes is an important objective if the benefits of automated processing and electronic messaging are to be maximised. It is, therefore, essential that any revision to the legislation permits the electronic transfer of both AUT units and OEIC shares by an agent acting on behalf of the legal holder.

While such a capability exists in relation to the paper transfer of AUT units, we do not believe that it is ever used in practice. To alter the Act to permit the same for OEICs, which we understand may require a more complex legal solution, may represent an unnecessary application of the Treasury's resources. If however, such a complex legal solution does not exist then we would encourage the Treasury to consider introducing such flexibility.

5. Do you think the draft statutory instruments provide adequately for the possibility in the context of an electronic communication of more than one person having the right to transfer the legal title to the AUT units or OEIC shares?

Given the nature of electronic communications, we believe there are limited circumstances in which it would be possible for a registrar to act upon an electronic instruction in relation to units/shares that are held in joint names. We believe the proposed legal requirement to take "reasonable steps" to be satisfied as to the legitimate authority of such an instruction would be sufficient to provide for such situations in the legislation, and we intend to develop such reasonable steps as part of the industry guidance we plan to develop with the IMA.

6. Do you agree that adequate provision for paperless transfer and settlement of OEIC shares and AUT units can be made without modification of the Stock Transfer Act 1963?

We would have to defer to the legal experts at HMT in respect of this matter.

7. Do you agree that a general provision for paperless settlement of transfers of OEIC shares and AUT units could be an effective complement to the more specific provisions for electronic transfer under the USRs?

Our response to this question should be viewed in conjunction with those to questions 8 and 9.

We believe the USRs meet a specific purpose in relation to securities that are dealt principally on secondary markets, and the registers for which are not the responsibility of persons that are regulated and supervised under the Financial Services and Markets Act 2000. They were constructed with that environment and the specific role of an infrastructure such as CREST in mind.

We are aware that institutional investors would prefer to settle all their UK securities transactions, including investment funds, in CREST. Indeed, the sixth of the IMA's Fund Processing Principles¹ advocates CREST as the future of fund order settlement for such investors. However, we do not believe it would be desirable or appropriate to impose the same infrastructure requirements on fund operators as a prerequisite to paperless settlement when dealing direct with retail investors or their financial advisers.

We believe the two regimes would be complementary and, if changes were made separately to permit full participation of fund units/shares in CREST, would provide a choice of processes to suit the different types of investor.

8. Are there legislative barriers to electronic transfer of OEIC shares and AUT units under the terms of the USRs? What action would be needed to remove them?

We understand that Euroclear UK & Ireland has identified various technical changes that may be required to the USRs, the Open-ended Investment Companies Regulations 2001 and to the FSA's COLL Sourcebook in order to align them with the model operated by the CREST system. We stand willing to support any such changes, provided they do not interfere with the progress of the Treasury's current proposals and would not impose upon the operation of authorised collective investment schemes other than to the extent that an operator may elect for units/shares in its funds to participate in CREST.

9. Would the potential for differential treatment of electronic settlement and transfers of AUT units and OEIC shares under these proposals and electronic transfers of equities and bonds under the USRs raise any concerns?

We believe the capability that would be provided under the Treasury's proposals is essential for the many retail investors and distributors for whom the USRs and CREST would not provide a suitable settlement/transfer mechanism.

Institutional investors need currently to maintain different processes for settling transactions in funds and other securities. The proposals would, however, remove some of the present burden of fund settlements for institutions that do not support the "coverall" solution and for

others would provide a proper legal basis for paperless settlement. We do not see any conflict with the USRs.

Furthermore, if the necessary changes were also made to facilitate the full transfer and settlement of AUT units and OEIC shares in CREST, fund managers would be able to offer CREST settlement to institutional investors that wanted to integrate their settlement processes across the various asset classes. We believe, therefore, that the two mechanisms should complement each other.

10. Do you have any other comments on the draft Statutory Instruments?

We are very grateful to the Treasury and its staff for their time and effort in bringing these proposals to the market and look forward to their implementation in due course.

Introducing a Protected Cell Regime for OEICs

11. Do you support the proposal to develop a protected cell regime for UK OEICs?

Yes. We believe the introduction of this regime will increase the competitiveness of UK funds for cross-border marketing.

12. Should protected cell status be compulsory or voluntary for new OEICs? Should there be any differentiation in the rules between schemes aimed at the retail and wholesale markets?

The protected cell status should be compulsory for all new OEICs. We do not believe that there should be any difference between retail and wholesale markets as this would create a dual system which would increase the costs to implement and run.

13. Do you agree that provision should be made to allow existing OEIC umbrellas to convert to protected cell status?

Yes. In order for the UK to fully benefit from the increased competitiveness of this regime, it is important that the regime is allowed for existing OEIC umbrellas.

14. Do you agree that unanimous creditor approval should be required for conversion to segregated liability?

Yes. We believe that since AFMs will have the ability to renegotiate credit terms, unanimous consent should be achievable.

15. Do you agree that prior shareholder approval should not be required for conversion?

Yes. We do not believe that shareholders would oppose this regime as it is in their interest.

16. What impact would conversion to protected cell status have on creditors? Would creditors be likely to oppose conversion or demand compensation from OEIC borrowers in order to permit conversion to a protected cell?

We believe that there would be very little impact to creditors due to the nature of the creditors involved and their ability to renegotiate credit terms. It would therefore be very unlikely, ultimately, that creditors would oppose conversion.

17. Do you agree that assets in individual sub-funds should not be protected in the event that the umbrella becomes insolvent?

No – this would go against the principles of the protected cell regime.

18. Do you agree that the assets of the umbrella should be protected where one or more subfunds becomes insolvent?

Yes. This would ensure that the other unaffected subfunds are able to function normally.

19. Do you agree that protection from cross-liability should not apply in cases of fraud?

No – again this would go against the principles of the protected cell regime. Furthermore, we believe that cases of fraud should be paid for by the fund manager.

20. Do you agree that the existing procedure for winding up OEICs could be applied to winding up individual OEIC sub-funds? What modifications might be needed?

We would have to defer to a legal opinion with regard to the detailed application of articles 31 to 33 but we would envisage modifications being necessary in order to accommodate individual sub funds.

We would however, comment that certain provisions for the winding up of individual sub funds is provided for by the FSA's rules under COLL, in particular COLL 7.3 and 7.5. We would encourage consideration of these rules in the context of determining a suitable procedure to be applied.

21. Do you agree that if a protected cell regime is introduced, OEIC umbrellas should be required to disclose their status clearly to actual and potential investors and creditors? How should such a requirement be specified and enforced?

This should be made a requirement of the prospectus for potential investors. For existing investors, the information should be disclosed in the reports and accounts to make clear whether or not the protected cell is in place.

22. Are there other measures that could be pursued to address issues around this transition period?

We believe the transitional timeframe for the industry should be set by the AFMs as this is a commercial decision to be made by them as to whether they should convert or not.

23. Is there a significant risk that segregated liability might not be enforceable in the event of a sub-fund insolvency where the umbrella continued to operate? How could that risk be minimised?

We accept there may be minimal risks and it would still be an improvement over not having the protected cell regime, however, we would have to defer to the legal and regulatory experts at the FSA to ensure such risks are minimised and their rules are enforceable.

24. Do you believe that any further legislation would be needed to ensure effective segregation of liability between sub-funds in AUT umbrella arrangements?

As above, we would have to defer to the legal and regulatory experts at the FSA on this point.

25. Do you have any further comments on the most desirable approach to developing a protected cell regime?

We have no further comments.

Reforming Notification Rules for Non-UK UCITS

26. Do you agree that FSMA should be amended to allow incoming UCITS to begin marketing as soon as they have received approval from the FSA?

No comment.

27. Do you have any comments on the draft Statutory Instrument?

No comment.