

MEMO# 18146

November 2, 2004

COMMITTEE OF EUROPEAN SECURITIES REGULATORS ISSUES CONSULTATION PAPER ON UCITS IMPLEMENTATION ISSUES

ACTION REQUESTED [18146] November 2, 2004 TO: INTERNATIONAL COMMITTEE No. 49-04
RE: COMMITTEE OF EUROPEAN SECURITIES REGULATORS ISSUES CONSULTATION PAPER ON UCITS IMPLEMENTATION ISSUES The Committee of European Securities Regulators (CESR) has asked for comment on issues relating to the transitional provisions and implementation of the UCITS Directive.¹ The paper covers: (1) the marketing of funds and the simplified prospectus; (2) the scope of permissible activities of grandfathered management companies; (3) UCITS launched after February 2002 that benefit from a “grace period;” and (4) the scope of the European passport and problems resulting from the relationship between the management company’s passport and the fund’s passport. The outcome of CESR’s work will be common guidelines that will be introduced by CESR members into their regulatory practices on a voluntary basis. Comments on the consultation paper are due on December 8, 2004. The Institute plans to comment on the consultation paper. We have flagged several issues below on which we would like your views. In addition, if you have any concerns about the CESR’s consultation paper, please let us know. Please contact us no later than November 17, 2004 at jchoi@ici.org or at (202) 326-5810.

Transitional Issues

1. UCITS I Management Companies CESR proposes to allow a grandfathered UCITS I management company (i.e., authorized before February 13, 2004) to launch “passportable” UCITS III funds only until April 30, 2006. After that date, the management companies must comply with UCITS III. Moreover, to launch passportable UCITS III funds until that date, a grandfathered UCITS I management company has to comply with the requirements of Article 21 concerning an appropriate risk-management process. The authorities of the home Member State of the management company also must provide a written attestation that a management company is allowed to launch passportable UCITS III funds in the host Member State until April 30, 2006.
2. UCITS I refers to the 1985 Directive, and UCITS III refers to the 2002 amendments to the UCITS Directive.
3. UCITS I Umbrella Funds CESR proposes to provide a period until December 31, 2005 for

UCITS subfunds to be launched in a grandfathered UCITS I umbrella fund. By this date, the UCITS I umbrella (regardless of whether the umbrella fund was authorized before February 13, 2002 or between February 13, 2002 and February 13, 2004) must be converted to UCITS III. Moreover, CESR takes the view that a passportable UCITS III subfund cannot be launched in a grandfathered UCITS I umbrella fund because the whole umbrella fund must be submitted to the amended UCITS Directive or the old UCITS Directive.

4. Simplified Prospectus

According to CESR, UCITS I funds (launched before February 13, 2004) should have available a simplified prospectus as soon as possible but no later than September 30, 2005. Host Member States would no longer be obliged to accept UCITS I funds without simplified prospectuses after this date. In addition, CESR “strongly” recommends that funds marketed to host Member States that already have implemented the UCITS amendments with respect to simplified prospectuses provide information according to the requirements included in Schedule C of the Annex I of the UCITS amendments. It appears that funds are requested to voluntarily comply with the information requirements of the simplified prospectus before the deadline.

European Passport

1. Distribution through or without Branches

CESR takes the position that the product and the management company passports are issued separately from each other. With respect to the issue of whether a management company needs both a product passport and a management company passport to distribute UCITS funds in a host Member State without the establishment of a branch, CESR requests comment on two options. Option A would require both the product and management company passports. Under this option, however, both passports are needed only in a case where a management company wishes to market, for the first time, the units of its funds in a Member State. A management company that was already marketing its funds in another Member State before February 13, 2004 would only need the product passport for that Member State. Under Option B, only a product passport would be required if a management company only wishes to distribute UCITS managed by itself in a host Member State. Do members believe Option B would be the preferable approach? CESR asks to what extent the distribution of third party funds by a third party is relevant to this issue. CESR believes that both the product passport and the management company passport are needed to distribute UCITS funds in a host Member State through a branch of a management company. When a management company, however, wants to provide in a host Member State only the services listed in Article 5, paragraph 3 of the UCITS Directive (individual portfolio management, investment advice, safekeeping, and administration), only the management company passport is needed. Both the product passport and the management company passport are needed if a management company wishes to provide the services listed in Article 5, paragraph 3 of the UCITS Directive and the cross-border distribution of UCITS shares.

2. Designation of and Delegation to Management Companies

With respect to the designation of a management company, CESR members take the view that they will only permit an open-ended investment company to designate a management company in the same EU jurisdiction. CESR believes that the European Commission should consider an amendment that would clarify the position on this issue under the UCITS Directive. In effect, this interpretation means that a management company and its UCITS funds must be located in the same Member State. Would members have concerns with this position or would delegation (discussed below) alleviate any problems? On outsourcing the portfolio of an open-ended investment company or of an investment company domiciled in another EU jurisdiction, CESR takes the view that a bilateral delegation agreement subject to Article 5g of the UCITS Directive is sufficient. If a UCITS fund appoints a management company in another Member State to carry out investment management activities, the management company is not carrying out services in the Member State of the UCITS and therefore not required to have a passport. To receive an outsourcing mandate, an investment manager established in the EU must be authorized under the Investment

Services Directive or the UCITS Directive. Third country investment managers providing services to UCITS funds do not need to have a EU passport but must be subject to prudential supervision according to Article 5g of the UCITS Directive. CESR also takes the view that the distribution of third party funds is included in the scope of activity of a management company. Finally, a management company must manage at least one harmonized UCITS fund as the designated management company to use the EU passport; CESR does not believe it is sufficient that a management company has been appointed solely as the investment manager of UCITS by delegation. 3. Product Passport A foreign UCITS fund may continue to distribute its shares in the host Member State without interruption after adapting its registration to UCITS III. If the fund rules and the 4 prospectus of the UCITS are amended as a consequence of the new registration, the new documents must be delivered to the host Member State authorities as an update accompanied by an attestation by the home Member State authority that the conditions imposed by the Directive are fulfilled. Jennifer S. Choi Associate Counsel Attachment (in .pdf format)

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