

March 2009



# Information Bulletin



## European Trust & Fiduciary Services

# Contents

Foreword	Tim Gandy	1
	Executive Summary	2
Developments	A Pan Europe	7
	B UK	15
	C Luxembourg	25
	D Ireland	27
	E Germany	29
	F France	30
	G Belgium	32
	H Jersey	33
	I Switzerland	34
Market Awareness	J General	36
General Information	K Contacts	37

## Foreword



---

Tim Gandy

---

Welcome to the March edition of our Client Information Bulletin.

A recurring theme for 2009 is increasing pressure for international co-operation in the search for a solution to the global financial crisis. Inevitably this includes calls for far greater control by governments and regulators in the areas of banking and financial services. Greater transparency and better understanding and appreciation of risk are the primary focus for attention. The challenge will be to achieve this without damaging the process of restoring confidence in the financial system as an effective means of raising capital and generating sensible returns for investors and depositors.

In Europe, the first steps down this road are mapped out in the de Larosière Report which documents the deliberations of an independent High Level Expert Group and which is

now the subject of a formal public consultation exercise launched by the Commission.

Prefaced by an analysis of the causes of the current crisis, the Report sets out a proposed framework for a new regulatory agenda, stronger co-ordinated supervision and effective crisis management procedures. Amongst the detailed proposals for investment funds are recommendations for a common EU definition of money market funds, codified due diligence requirements whenever investment management is delegated and the appointment of a depositary who is independent from the management company.

In the meantime, I am pleased to announce that we continue to expand our own presence in Europe with the establishment of trust and fiduciary services in Scandinavia where we have recently been appointed by clients in Sweden and Finland.



Tim Gandy  
Head of Trust and Fiduciary Services

The main aim of this Bulletin is to provide information on various topics relating to the administration / operation of Collective Investment Schemes ("CISs") after the "point of sale". Other topics may be included, where relevant, if they relate to the regulatory "corporate" requirements of an operator of a CIS. We have not set out to recommend any specific actions that arise from the topics covered. However, in some cases, appropriate general suggestions may be offered.

This document is for the information of JPMorgan clients only and is designed to make you aware of our views regarding recent regulatory changes. It is not intended as a substitute for your own due diligence as to what action should be taken as a result of the regulatory changes described herein. JPMorgan has taken reasonable care in forming its views, however, it cannot be responsible for inaccuracies or misrepresentations in the information furnished hereby.

This document has been issued by JPMorgan Trustee and Depositary Company Limited ("MTDL") which is authorised and regulated by the Financial Services Authority. Registered in England number 2017279 at 125 London Wall, London, EC2Y 5AJ.

## EXECUTIVE SUMMARY

### PAN – EUROPE

#### Prospectus Directive

The EC has taken measures to improve the “single passport” for issuers of securities. (A1)

#### Short Selling

The CESR task force continues to analyse the impact of temporary measures and ways of achieving greater convergence between CESR members. (A2)

#### Valuation of Financial Instruments

Following the Commission's referral last October, CESR has issued a number of statements around some of the issues that have emerged. These relate principally to the application of fair value pricing, splitting of embedded derivatives from the host contract and impairment of 'Available for Sale' items. (A3)

#### Madoff

EFAMA has called for a detailed analysis of the responsibilities of all European parties involved in order to maintain investor confidence in UCITS. In the meantime, CESR continues to co-ordinate the efforts of its members to establish the extent of potential losses. (A6)

The affair has also prompted the Commission to review the responsibilities of the depositaries. (A8)

#### MiFID

Amongst a number of updates on the impact of the Directive, the most significant has been the publication of a protocol regarding the operation of the MiFID database of shares admitted to trading. (A7)

#### Investor Compensation Scheme

The Commission is reviewing the application of the Directive and has invited feedback from interested parties by **8<sup>th</sup> April**. (A11)

#### UCITS IV

As a first step in proceeding to level 2 implementation, CESR has issued a call for evidence. The deadline is **31<sup>st</sup> March**. (A12)

#### CDS Central Counterparty

Market participants have committed to using a EU central counterparty for clearing credit default swaps. (A13)

#### De Larosière Report

As a result of the recent financial crisis, the High Level Expert Group appointed by the Commission has now issued its report on the future of financial supervision in Europe. Feedback is invited by **10<sup>th</sup> April** with a view to introducing legislative measures in the autumn. (A14)

#### Private Equity and Hedge Funds

Charles McCreevy has given a speech in which he outlines lessons to be learnt from the recent financial crisis as a basis for guiding future policy actions. (A15)

#### Risk Management for UCITS

CESR has published guidelines covering the key elements of the risk management process. (A16)

## Short Selling

Further measures are being taken to limit the potential damage from short selling:

1. The minimum period for rights issue subscription periods is being reduced to 10 working days. (B1)
2. The significant holding disclosure rules are being extended to include exposure through contracts for difference or equivalent instruments. (B2)
3. The FSA has issued a Discussion Paper which considers further widening of the disclosure regime. (B7)
4. The current position is clarified with an update to the FAQs. (B10)

## Electronic Communications

The FSA Rules are being updated to facilitate the redemption or transfer of units using electronic communication methods. (B3)

## Share Class Hedging

The FSA has now amended the Rules to enable a scheme with underlying currency exposure to hedge unit classes priced in the scheme's base currency. (B4)

## ISAs

HMRC has published its latest bulletin which includes a relaxation of date of birth requirements (pre 1993 plans), treatment of trail commission and fee reductions and establishment of two databases to assist with cash ISA transfers. (B18).

## Money Laundering

The Counter Terrorism Act includes powers given to HM Treasury to impose requirements in relation to customer due diligence, ongoing reporting and limitations on certain business. (B19)

## Retail Distribution Review

Recent speeches by the FSA have reinforced the message that the days of remunerating advisers through commission are coming to an end. Advisors will also have to face the demands of even more rigorous training and qualification standards. (B20)

## Treating Customers Fairly

In a speech to the ABI, the FSA has highlighted the responsibilities of directors. (B21)

## Structured Products

In a recent conference speech, Dan Waters offered some insights into FSA thinking on the future regulation of structured products, including deposits. He sees CESR's work on competing products as a critical element in making progress. (B22)

## VAT and Management Fees

HMRC has issued revised guidance in relation to fees for managing Special Investment Funds and IMA has issued a circular regarding the pursuit of outstanding claims. (B24)

## Bond Fund Yields

In the light of recent depressed values, the IMA has issued a circular recommending that Managers take care to ensure that a fund's income is not overstated at the expense of capital depletion. (B25)

## **FSA Financial Risk Outlook**

In its latest annual assessment, the FSA has highlighted two particular areas:

- Potential for lower profitability leading to reduced resource to support the control environment
- Market infrastructure issues highlighted by Lehman's collapse. (B8)

## **Banking Reform**

Recent initiatives from a variety of sources are summarised. Although primary focus has been on capital requirements of the banks, in a recent speech Adair Turner suggested that a similar approach may be taken with money market funds and the larger hedge funds. (B11)

(as we go to press the Turner Review has since been published and we will comment on any aspects directly impacting investment funds in our next edition).

## **Financial Education**

Following advice from the Thoresen Review, the Government is piloting a Money Guidance service with a pathfinder programme covering budgeting, saving, borrowing, insurance and retirement planning. (B15)

## **LUXEMBOURG**

### **Madoff**

Following fund suspensions and delisting of 2 funds, both ALFI and the CSSF have published a number of statements since our last edition covering their initial conclusions, role of the depositary bank and areas for further investigation. (C1)

### **Valuation of Money Market Funds**

ALFI has been seeking clarity from the CSSF regarding use of amortised cost as against market value, particularly in relation to securities with a final residual maturity of less than 3 months. (C2)

## **IRELAND**

### **Pricing Correction and Compensation**

The IFIA has issued a revised Guidance Paper. Money market funds will be the subject of a separate paper. (D1)

### **Qualifying Investor Funds**

For funds structured as investment companies or limited liability partnerships, the requirement to produce interim accounts was removed last year. However, when a new fund is launched the Financial Regulator now requires publication of audited accounts or an interim report within the first 12 months. (D2)

### **UCITS Investment Limits**

The FR has retracted its informal policy where a UCITS held less than 100% in securities / instruments of a particular issuer. (D3)

### **Valuation of Money Market Funds**

The FR has withdrawn its derogation in respect of temporary suspension of the weekly mark to market review. (D4)

### **Madoff**

The FR has advised that a number of funds have been affected and in two cases litigation is pending. (D5)

## GERMANY

### Classification of Bank Loans

BaFin has confirmed that Special Fund Financial Market Stabilisation loans and their foreign equivalents are classified as privileged debt securities. (E1)

### Borrowing

BaFin has confirmed that where an overdraft is not charged interest it can be netted against any credit balances in the same currency. (E2)

## FRANCE

### Credit Rating Agencies

The AMF has published a report and focuses in particular on corporate credit ratings and structured finance products. (F1)

### UCITS Prospectus

The AMF has updated its guidance papers on the publication and use of the Prospectus. (F2)

### Short Selling

The AMF has launched a public consultation with a view to adopting the temporary measures in place on a permanent basis. (F3)  
Responses are requested by **10<sup>th</sup> April**.

### Money Market Funds

The AMF has proposed a series of measures to improve the regulation of money market funds based on a more limited universe of permitted investments and enhanced disclosure requirements. (F4)

## BELGIUM

### Prospectus for Undertakings for Collective Investment

The CBFA has published a list of changes which no longer require prior approval. However, the CBFA still require to be notified promptly and a copy of the Prospectus / Simplified Prospectus must be sent to it prior to publication. (G1)

## JERSEY

### Recognised Funds

The FSA has undertaken a review of the Recognised Fund regime and has concluded that it continues to meet equivalent UK standards. Updates to the Rules are the subject of further discussion. (H1)

## SWITZERLAND

### EU Compatible Fund Regulation

Following a decision by the Federal Council at the end of January, FINMA has issued guidelines regarding the removal of elements of the "Swiss finish" in order to align regulation of Swiss investment funds more closely with the rest of Europe. (I1)



## **Hedge Funds – Use of Side Pockets**

FINMA has concluded that whilst creation of side pockets for FoHFs remains a decision for the manager, distribution of funds authorised for public distribution must in principle be suspended although they have indicated willingness to talk to managers on a case by case basis. (12)

## **Withholding Tax and Stamp Duty**

The FTA has issued a circular detailing amendments to the taxation regime and associated reporting. (13)

## **Occupational Pension Schemes**

The Federal Council has updated the regulations to reinforce the principles of corporate governance but at the same time widening the range of permissible investment instruments. (14)

## **Value Added Tax**

The FTA has abolished the requirement for direct representation in relation to the distribution of approved funds. (15)





## A PAN – EUROPE



### 1 Updates on Prospectus Directive

#### Consultation on the review of the Prospectus Directive

- 1.1 On 9 January 2009, the European Commission ("the Commission") launched a consultation on its review of the application of the Prospectus Directive ("the Directive"), including some proposals to improve and simplify this Directive.
- 1.2 The Directive introduced a "single passport for issuers", making securities available to investors either through a public offer procedure or by admitting their shares to trading. Once approved by the regulatory authority in one Member State, a Prospectus then has to be accepted everywhere else in the EU. The Directive aims to ensure that investors are provided with clear and comprehensive information when making investment decisions.
- 1.3 The Commission has identified some elements in the Directive that may create, in practice, unnecessary burdens and unjustified costs for companies and intermediaries. The Commission is very keen to fully understand and assess the financial and other impacts of the proposal as well as any alternative approaches.

Comments were to be received by 10 March 2009.

The press release and the consultation are available at:

[http://ec.europa.eu/internal\\_market/securities/prospectus/index\\_en.htm](http://ec.europa.eu/internal_market/securities/prospectus/index_en.htm)

#### FAQs regarding Prospectuses

- 1.4 On 10 February 2009, CESR published its 8th updated version of its frequently asked questions ("FAQs") regarding Prospectuses.
- 1.5 The Prospectus Directive 2003/71/EC and the Commission's Regulation on Prospectuses (EC

809/2004) became effective on 1 July 2005 and both establish a harmonized format for Prospectuses in Europe and allow companies to use this Prospectus to list on all EU markets without having to re-apply for approval from the local regulator.

#### 1.6 The FAQs document covers:

- information from issuers to host competent authorities;
- notice in the host Member State; and
- employees share scheme prospectuses – short-form disclosure regime for offers to the employees in those cases where a Prospectus is required.

The FAQs document can be found at:

<http://www.cesr.eu/popup2.php?id=5562>

#### Functioning of the passport and clarity regarding the use of languages

- 1.7 In February 2009, CESR published a table containing information on the languages accepted for the scrutiny of the Prospectus and the requirements in relation to the translation of the summary of the Prospectus.
- 1.8 The table should ease the functioning of passport Prospectuses and provide clarity for market participants in relation to the use of languages in the different competent authorities. It has been compiled with information provided by CESR members who are responsible for the content. This document will be updated as required.
- 1.9 For further information see:  
<http://www.cesr.eu/popup2.php?id=5607>

### 2 Updates on Short Selling Measures

#### Updated CESR document on measures adopted by its members

- 2.1 In our January Bulletin, we noted developments about the publication issued by the Committee of European Securities Regulators ("CESR") of measures adopted by its Members on short-selling of securities.
- 2.2 On 6 January 2009, CESR published an updated version containing recent measures taken by its Members on short-selling of securities. This document will be updated on a continuous basis and is available at:  
<http://www.cesr.eu/popup2.php?id=5238>

#### Public statement on CESR's activities in relation to short selling

- 2.3 On 20 January 2009, CESR issued a public statement announcing that it is closely monitoring the current markets and is considering possible actions which might be taken to contribute to their functioning.



2.4 CESR Members have been communicating closely in order to:

- keep each other informed of their intentions regarding the temporary measures that have been adopted; and
- achieve as much co-ordination as is practicable given the nature of the existing measures and the different market conditions that prevail in different jurisdictions.

2.5 A dedicated task-force reported its preliminary enquiries to CESR and, as a result, has been mandated to:

- analyze the impact of the temporary measures introduced by CESR Members;
- conduct further work, taking into account contributions from the market, with a view to developing a range of options for achieving greater convergence between CESR Members.

2.6 The CESR statement can be found at:  
<http://www.cesr.eu/popup2.php?id=5501>

#### Answers received to CESR's Call for Evidence

2.7 On 27 January 2009, CESR published the answers received to its Call for Evidence on the regulation of short selling. The responses are available on the CESR's website ([www.cesr.eu](http://www.cesr.eu)) under the section Consultations, Past Consultations and responses.

#### Global response for a short selling regulatory regime

2.8 On 6 January 2009, the Investment Management Association ("IMA"), the Investment Company Institute ("ICI") and the Investment and Financial Services Association ("IFSA") published a press release for the purpose of reaffirming their support of prudent regulatory oversight of short selling.

2.9 The three associations are committed to supporting regulatory reform designed to enhance investor confidence and combat market manipulation. The development of a practical short selling regulatory regime is a critical matter for securities markets around the world in order to promote confidence and stability. The associations also support timely disclosure directly to the chief market regulator or supervisor of short sale positions above a de minimis amount. However, it is essential that the regulatory regime adequately protects confidentiality of the data provided to the regulators.

2.10 The associations will continue to liaise with government, regulators and the International Organization of Securities Commissions ("IOSCO") regarding the development of a sensible short selling regulatory regime which promotes market integrity and confidence.

2.11 The press release can be found at:  
<http://www.investmentuk.org/press/2009/20090106.asp>

## 3 Financial Instruments

### Reclassification of Financial Instruments and other related issues

3.1 On 15 October 2008, the Commission requested that the International Accounting Standards Board ("IASB") and CESR work to find solutions to some issues associated with:

- the fair value option, which is the option to recognise a financial instrument at fair value through profit and loss if:
  1. this recognition results in more relevant information because it eliminates or significantly reduces a measurement or recognition inconsistency; or
  2. the financial instrument is managed and its performance is evaluated on a fair value basis in accordance with a documented risk management or investment strategy and information about the financial instrument is provided internally on that basis; or
  3. a contract that contains one or more embedded derivatives is designated in its entirety at fair value through profit or loss;
- the issue of convergence between International Financial Reporting Standards ("IFRS") and US Generally Accepted Accounting Principles ("US GAAP") in the area of embedded derivatives; and
- other associated problems.

3.2 On 7 January 2009, CESR issued a statement on the above topic. In response to the Commission's request, CESR's views are:

- **Fair value option:** CESR noted that some parties believe that in order to avoid earnings management, it should not be possible to reclassify financial instruments recognised under the fair value option. Therefore, CESR concluded that there is a need to examine the effects of the use of the fair value option in more detail within a short timeframe;
- **Embedded derivatives:** IFRS and US GAAP differ on whether it is possible to split a host contract and an embedded derivative, and then reclassify the host contract only into the held-to-maturity category. CESR encourages the IASB and FASB ("Financial Accounting Standards Board") to work on further clarification needed on the two issues, but also on which factors are important for issuers in determining whether an embedded derivative exists and if so, whether it should be measured separately;
- **Impairment of Available for Sale items:** the issue raised by the Commission concerns the appropriateness of two requirements contained in IAS 39:
  - For Available for Sale debt items, as soon as any impairment is identified, all of any unrealized reduction in fair value is treated



- as impairment;
- For Available for Sale equity items, any impairment cannot subsequently be reversed.

- 3.3 CESR will recommend IASB to examine these issues and, in rare circumstances, to develop procedures, including public consultation, that enable IASB to amend its standards in response to emergency circumstances.
- 3.4 CESR will continue to monitor future developments in the area of financial instruments and fair value accounting.
- 3.5 The CESR statement can be found at:  
<http://www.cesr.eu/popup2.php?id=5445>

#### **Proposed Amendments to IFRIC 9 & IAS 39 regarding Embedded Derivatives**

- 3.6 On 21 January 2009, CESR published a letter to the European Financial Reporting Advisory Group ("EFRAG") regarding EFRAG's draft comments letter on the IASB's Exposure Draft proposing amendments to IFRIC 9 ("International Financial Reporting Interpretations Committee") – Reassessment of Embedded Derivatives and IAS 9 ("International Accounting Standards") – Accounting for Research and Development activities.
- 3.7 CESR is generally supportive of EFRAG's views as it believes that clarification regarding embedded derivatives is very important in ensuring consistent application of the October 2008 amendment to IAS 39 – Financial Instruments: Recognition and Measurement.
- 3.8 CESR agrees that an entity must assess whether an embedded derivative is required to be separated from a host contract at the time the entity reclassifies a hybrid financial asset out of the fair value through profit and loss category.
- 3.9 As regards the proposed effective date and transition requirements, CESR fully supports the proposal made by EFRAG that, for reasons of consistency, the amendments under consideration should be required in the same manner and under the same timing as the October 2008 amendments.
- 3.10 CESR's comments can be viewed at:  
<http://www.cesr.eu/popup2.php?id=5514>

#### **4 Transparency and Market Integrity in Electricity and Gas Trading**

- 4.1 In our November 2008 Bulletin, we noted developments relating to CESR and the European Regulator's Group for Electricity and Gas ("ERGEG") draft advice to the Commission on market abuse in connection with the Third Energy Package.

- 4.2 On 12 January 2009, ERGEG and CESR published the third part of their advice to the Commission on how fair electricity and gas trading could be achieved.

#### **Recommendation for an EU-wide harmonised post-trade transparency scheme**

- 4.3 The publishers recommend that all EU trading platforms publish harmonised post-trade information, on a trade-by-trade basis and close to real-time for standardised electricity and gas supply contracts and derivatives traded on or cleared through these platforms. This information would provide market participants with timely and important price signals. Furthermore, energy regulators also recommend that aggregate data be published on a daily basis. This information would also help participants to estimate trends and developments for the following trading days.

#### **Practical approach to the third Energy Package's record-keeping obligations**

- 4.4 ERGEG and CESR propose that investment firms should be able, as a minimum, to provide data derived from their records, upon request from a regulator, in an electronic format. On the exchange of information between regulators, ERGEG and CESR recommend that this should be possible on a case-by-case basis so as to ensure a proper oversight of the market.
- 4.5 The final advice can be found at:  
<http://www.cesr.eu/popup2.php?id=5478>

#### **5 Publication of Answers received to the Consultation on the Market Abuse Directive**

- 5.1 In our November 2008 Bulletin, we noted developments about the CESR consultation on Level 3 of the Market Abuse Directive ("MAD") published on 3 October 2008.
- 5.2 CESR is continuing its efforts to prepare the ground for convergent implementation and application of the MAD by ensuring that a common approach to the operation of the Directive takes place throughout the EU.
- 5.3 On 9 January 2009, CESR published the answers received to its consultation on MAD Level 3 – Third set of CESR guidance and information on the common operation of the Directive to the market.
- 5.4 The responses can be found at:  
<http://www.cesr.eu/index.php?page=responses&id=121>



## 6 Updates on the Madoff Affair

### EFAMA press release

- 6.1 On 15 January 2009, EFAMA published a press release on the Madoff affair.
- 6.2 EFAMA is convinced that a detailed analysis of the responsibilities of all European parties involved is essential in order to maintain investor confidence in the UCITS product. It calls for a rapid resolution of the cases currently under investigation by regulators in affected member countries. EFAMA calls upon CESR to ensure that European regulation regarding these duties is interpreted and applied in a consistent manner by all regulators.
- 6.3 EFAMA will actively support all regulatory initiatives destined to enhance investor protection and harmonize European regulation.
- 6.4 The press release can be found at:  
[http://www.efama.org/images/stories/090115\\_press\\_release\\_madoff.pdf](http://www.efama.org/images/stories/090115_press_release_madoff.pdf)

### CESR Information for Investors

- 6.5 On 4 February 2009, CESR provided information for investors affected by the Madoff collapse. CESR wished to draw the attention to the potential actions investors can take, or that can possibly be taken on their behalf. CESR also urged those acting on behalf of investors to proactively communicate the steps they are taking to recover funds and provide any information on next steps.
- 6.6 CESR is organising regular contacts between its Members to establish the extent of potential losses of EU investors and to coordinate the Members' actions. As concerns have been raised in respect of custody and sub-custody arrangements, CESR will focus its efforts on establishing how the various rules on depositary obligations have been implemented in Member States and will seek to establish if further clarity is needed on an EU-wide basis.
- 6.7 CESR is not able to assist investors directly in dealing with their claims, but:
  - wished to assist them in finding the appropriate channel through which to address their concerns or complaints;
  - took the opportunity to provide information on practical steps investors directly investing with B.L. Madoff Investment Securities LLC could undertake; and
  - drew their attention to the deadline of 4 March 2009;
  - provided some guidance to those indirectly affected on how they might proceed.
- 6.8 CESR's public statement can be found at:  
<http://www.cesr.eu/popup2.php?id=5558>

## 7 Updates on MiFID

### Impact of MiFID on Secondary Markets

- 7.1 In our November 2008 Bulletin, we noted developments relating to CESR's consultation regarding the impact of the Markets in Financial Instruments Directive ("MiFID") on secondary markets.
- 7.2 In the secondary markets area, MiFID is designed to foster competition among trading venues on the basis of a regulatory level playing field and in an environment of market transparency aimed at supporting market efficiency and investor protection.
- 7.3 On 21 January 2009, CESR published responses received to its consultation and these can be viewed at:
- 7.4 The responses can be found at:  
<http://www.cesr.eu/index.php?page=responses&id=125>

### CESR reviews some MiFID Powers & Practices

- 7.5 On 16 February 2009, CESR published a review of supervisory powers and practices, as well as administrative and criminal sanctioning regimes across Europe in relation to MiFID.
- 7.6 The report gives a factual overview of the implementation of MiFID by mapping the supervisory powers, practices and sanctioning regimes of CESR Members.
- 7.7 The press release and the full report can be found at:  
<http://www.cesr.eu/popup2.php?id=5568>  
<http://www.cesr.eu/popup2.php?id=5569>

### MiFID database

- 7.8 On 26 February 2009, CESR published a protocol on the operation of the MiFID database. The operation of the MiFID market transparency regime involves making certain information regarding shares admitted to trading available to market participants. The regime requires CESR members to make certain calculations regarding shares admitted to trading. The results of the calculations are published by CESR on the website:  
<http://mifiddatabase.cesr.eu>.
- 7.9 The protocol describes the tasks and responsibilities of CESR members and the CESR Secretariat respectively. It also contains practical guidance on how to conduct the calculations as well as the necessary technical instructions. The protocol can be found at:  
[http://www.cesr.eu/index.php?page=document\\_details&id=5606](http://www.cesr.eu/index.php?page=document_details&id=5606)





## 8 Responsibilities of UCITS depositaries

- 8.1 On 26 January 2009, the EU Commission announced that it intends to review and clarify the responsibilities of UCITS depositaries.
- 8.2 Some UCITS funds have been impacted by the Madoff issue. The depositaries of these funds entrusted fund assets to Madoff entities. Local procedures are underway in the respective countries to determine the responsibilities of the fund depositaries for loss of assets.
- 8.3 The Commission shall, with the support of CESR, review the manner in which Member States have implemented the relevant provisions of the Directive. Based on the findings, the Commission will take the necessary steps to correct shortcomings.
- 8.4 The Commission's publication can be found at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/126&format=HTML&aged=0&language=EN&guiLanguage=en>

## 9 Custodian Banks internalising Settlement Activities or carrying out Central Counterparty Activities

- 9.1 On 2 February 2009, the Committee of European Banking Supervisors ("CEBS") published its call for evidence for custodian banks as part of its follow-up to the request of the European Economic and Financial Affairs Council ("ECOFIN") for a review of the coverage of risks borne by custodians.
- 9.2 Following the delivery of the report on custodian banks to ECOFIN, CEBS has committed to undertake further work to establish the materiality of custodian banks internalising settlement activities or carrying out Central Counterparty ("CCP")-like activities. The report identified certain gaps regarding these activities in the current applicable banking regulations, in comparison to the European System of Central Banks ("ESCB")-CESR draft recommendations.
- 9.3 In order to gather evidence about the extent to which such activities are performed, CEBS published a questionnaire to help assess the materiality of this market practice. The questionnaire is published in relation to a public consultation which ended on 4 March 2009. In parallel, CEBS also asked its members and observers to report their assessment of such practices in a separate questionnaire. CEBS expects to deliver its results by early Q2 2009.
- 9.4 A public hearing took place on 24 March 2009 in order to allow parties to put forward their views.

- 9.5 The CEBS publication and questionnaire can be found at: <http://www.c-ebs.org/News--Communications/Latest-news/CEBS-publishes-a-call-for-evidence-for-custodian-b.aspx>

## 10 CESR Call for Evidence on OTC Derivatives

- 10.1 On 2 February 2009, CESR issued a call for evidence on the technical standards to identify and classify OTC derivatives. According to Article 25(3) of MiFID, investment firms shall report details of transactions executed in financial instruments admitted to trading on a regulated market to their competent authorities.
- 10.2 The aim of this call for evidence is to seek interested parties' views on which classification and identification standards should be used for OTC derivatives. At this stage, CESR is mainly interested in the scope of instruments that are currently reported in the Member States that have used Recital 45 of MiFID to extend the scope of transaction reporting. Therefore, this call for evidence is focused on OTC derivatives where the underlying investments are securities admitted to trading on regulated markets in the European Economic Area ("EEA").
- 10.3 The types of instruments currently collated are, for example contracts for difference, spread bets, credit default swaps, equity swaps, options, futures, warrants, etc.
- 10.4 Contributions to the call for evidence were accepted until 27 February 2009. The CESR publication can be found at: <http://www.cesr.eu/popup2.php?id=5551>

## 11 Investor Compensation Schemes Directive

- 11.1 On 9 February 2009, the Commission launched a call for evidence on the review of the application of the Investor Compensation Schemes Directive (Directive 1997/9/EC). This Directive aims to protect investors against the risk of losses in the event of an investment firm's inability to repay money or return assets held on behalf of their clients. The Commission now wishes to gather information about the application of the Directive.
- 11.2 All interested parties are invited to participate before 8 April 2009.
- 11.3 The consultation document can be found at: [http://www.alfi.lu/fileadmin/files/Member%20Services/NEWSFLASH/2009\\_02\\_13/Comission\\_consult\\_doc\\_en.pdf](http://www.alfi.lu/fileadmin/files/Member%20Services/NEWSFLASH/2009_02_13/Comission_consult_doc_en.pdf)



## 12 Call for Evidence on Implementing Measures concerning UCITS IV

12.1 In our previous Bulletins we noted developments on the amendments to the UCITS Directive (known as UCITS IV). On 13 January 2009, the EU Parliament adopted the proposed reform. On the basis of this, the Commission has requested CESR's assistance on the content of the implementing (level 2) measures to be taken pursuant to the revised Directive. As the Directive imposes a strict deadline (1 July 2010) for adoption of certain level 2 measures, the Commission feels it is important for CESR to start its work now.

12.2 On 17 February 2009, CESR issued a call for evidence and is requesting assistance on the:

- management company passport ;
- key investor information ("KII");
- fund mergers, master-feeder structures; and
- notification procedure.

12.3 CESR's technical advice on the level 2 measures will cover:

### The Management Company Passport

- Prudential rules and conflicts of interest;
- Rules of conduct including conflicts of interest;
- Measures to be taken by the depositaries of a UCITS managed by a management company / investment company situated in another Member State;
- Effective risk management framework;
- On-the-spot verification and investigation by competent authorities;
- Exchange of information between competent authorities.

### KII disclosures

- Content and presentation of KII;
- Specific conditions when providing KII in a durable medium other than paper;
- Specific conditions when providing the prospectus in a durable medium.

### Fund Mergers

Content and format of the information letter and the way to provide the information letter to investors.

### Master-feeder structures

- Content of the agreement / internal conduct of business rules between the feeder and master UCITS ;
- Appropriate measures to avoid market timing;
- Procedures for approvals for the liquidation, merger or division of the master UCITS ;

- Agreement between depositaries;
- The irregularities the depositary of the master UCITS has to report;
- The agreement between auditors;
- The format and the way to provide information on a conversion into a feeder UCITS or on a change of the master UCITS;
- Contribution in kind (i.e. in-specie) when a UCITS converts into a feeder UCITS or when a feeder UCITS wants or has to change the master UCITS.

### Notification procedure

- Scope of the information on national law to be published by UCITS host Member State;
- Facilities and procedures providing for the access of a host Member State to statutory documents of a UCITS and other information;
- Standard model of the notification letter and the attestation;
- Procedure for the electronic transmission of the notification file and the exchange of information between competent authorities for the purpose of the notification procedure.

12.4 CESR has been asked to deliver its advice on these issues by 30 October 2009.

12.5 CESR invites all interested parties to submit their views via CESR's website by 31 March 2009:  
[http://www.cesr.eu/index.php?page=to\\_respond&id=132](http://www.cesr.eu/index.php?page=to_respond&id=132)

12.6 The call for evidence can be found at:  
<http://www.cesr.eu/popup2.php?id=5570>

## 13 Major Firms commit to EU Central Counterparty for Credit Default Swaps ("CDSs")

13.1 In our January 2009 Bulletin we noted developments on the meeting organised by the European Central Bank ("ECB") on 3 November 2008 with stakeholders regarding the establishment of central counterparties for CDSs.

13.2 On 19 February 2009, the International Swaps and Derivatives Association, Inc. ("ISDA") announced that major EU industry participants have committed to the use of central counterparty clearing for CDSs.

13.3 Nine of the leading dealer firms in the CDS industry have signed a letter to the European Commissioner confirming their agreement to use EU-based central clearing for eligible EU CDSs by end of July 2009. The letter also commits the dealers to work closely with infrastructure providers, regulators and the Commission in resolving outstanding technical, regulatory, legal and practical issues. Each firm will make an individual choice on which central clearing house or houses might best meet its risk management objectives, subject to regulatory approval of



any such clearing house in Europe.

- 13.4 The press release can be found at:  
<http://www.isda.org/press/press021909.html>

## 14 De Larosière Report on EU Financial Supervision

- 14.1 In November 2008, the Commission set up an independent High Level Expert Group on financial supervision chaired by Mr. de Larosière. The Group was requested to make proposals to strengthen European supervisory arrangements covering all financial sectors, with the objective to establish a more efficient, integrated and sustainable European system of supervision.
- 14.2 On 25 February, the Group published its report on financial supervision and presented it to the Commission in anticipation of the EU Council of Spring 2009.

The report is structured into 4 chapters:

- Causes of the financial crisis;
- Policy and regulatory repair;
- EU supervisory repair;
- Global repair;

- 14.3 Regarding the operators (management companies / Board of Directors) within the investment funds industry, the report contains the following recommendations:

### Money Market Fund Issues

Need for a common EU definition of money market funds and a stricter codification of the assets in which they can invest in order to limit exposure to credit, market and liquidity risks.

### Depositary issues

Need for better control of the quality of processes and functions – e.g. regarding funds of funds and delegation of responsibilities. The following measures were deemed appropriate:

- Delegation of investment management functions should only take place after proper due diligence. Continuous monitoring would be required;
- An independent depositary should be appointed, preferably a third party;
- The depositary institution, as custodian, should remain responsible for safe-keeping duties of all the fund's assets at all times, in order to be able to perform effectively its compliance / control functions. Delegation to a third party should be forbidden. Nevertheless, the depositary may have to use sub-custodians to safe-keep foreign assets. These sub-custodians must be completely independent of the fund or the manager. The depositary must continue

to perform effective duties as is presently requested. The quality of this duties should be the object of supervision;

- Delegation practices to institutions outside of the EU should not be used to pervert EU legislation.

The full report can be found at:  
[http://ec.europa.eu/commission\\_barroso/president/pdf/statement\\_20090225\\_en.pdf](http://ec.europa.eu/commission_barroso/president/pdf/statement_20090225_en.pdf)

- 14.4 On 10 March 2009, the EU Commission launched a consultation on the improvement of supervision for the financial services sector, following the de Larosière report publication. The Commission intends to set out its proposals by the end of May 2009, followed by specific legislative measures in autumn 2009.
- 14.5 The Commission invites interested parties to submit their comments by 10 April 2009 to DG Internal Market - E-mail: [MARKT-G1@ec.europa.eu](mailto:MARKT-G1@ec.europa.eu)

- 14.6 Further information is available at:  
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/373&format=HTML&aged=0&language=EN>

## 15 EU Commissioner Speech on Private Equity and Hedge Funds

- 15.1 On 26 February 2009, the European Commissioner for Internal Market and Services, Charles McCreevy, gave a speech on the role of private equity and hedge funds in the financial crisis.
- 15.2 The Commissioner proposed six lessons to guide policy action on hedge funds and private equity:

- Any action should make a distinction between hedge funds, private equity and other forms of alternative investment;
- Action should build on the extensive experience with regulation of alternative investment managers and industry in Europe;
- When thinking about protecting investors, it must be remembered that these funds raise the bulk of their money from experienced or institutional investors;
- The first line of defence against undesirable levels of leverage in hedge funds, or excessive lending to private equity companies, is to limit the flow of credit at source;
- Many of the criticisms and accusations levelled at hedge funds are not unique to them. For example, short selling is not only used by hedge funds; and
- There should be recognition of the highly trans-national character of these industries and actions should ideally be supported by international consensus.





- 15.3 The speech can be found at:  
<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/80&type=HTML&aged=0&language=EN&guiLanguage=en>

## 16 Risk Management Principles for UCITS

- 16.1 On 27 February 2009, CESR published guidelines for UCITS in the field of risk management, providing principles and an outline of the key elements in a risk management process.
- 16.2 The principles should apply to both management companies and investment companies that have not designated a management company (self-managed UCITS). They will be complemented by a future paper on the technical and quantitative issues regarding UCITS portfolio parameters to measure global exposure, leverage, and counterparty risk concerning financial derivative instruments.
- 16.3 A feedback statement accompanies the guidelines. This feedback statement provides a summary of the main comments received by CESR along with an explanation of CESR's preferred approach on some of the most significant issues raised.
- 16.4 The Level 3 guidance covers the following:
- Supervision by competent authorities;
  - Governance and organization of the risk management process;
  - Identification and measurement of risks relevant to the UCITS;
  - Management of risks relevant to the UCITS;
  - Monitoring and reporting.
- 16.5 The principles and the feedback statement can be found at:  
[http://www.cesr.eu/index.php?page=document\\_details&id=5620](http://www.cesr.eu/index.php?page=document_details&id=5620)  
[http://www.cesr.eu/index.php?page=document\\_details&id=5621](http://www.cesr.eu/index.php?page=document_details&id=5621)



## B UK

### 1 PS 09 / 02: Rights Issue Subscription Periods

- 1.1 In Summer 2008, the Chancellor established the Rights Issue Review Group ("RIRG") to assess measures which could be used to implement a more orderly rights issue process. The FSA issued CP 09 / 04, in January 2009, to explore the potential for implementing one recommendation of the RIRG: reducing the minimum period for rights issue subscription periods from 21 to 14 calendar days, or a specific ten business days.
- 1.2 The consultation noted that reducing the subscription period would limit the potential for abusive short selling strategies to be implemented and reflected that modern communication methods mean that most shareholders can be contacted at most times. However, reducing the period could have an impact on small investors and might cause difficulties for institutional shareholders if ownership "chains" are long or stock is lent to third parties.
- 1.3 The RIRG review concluded that a ten business day model would be more practical than a calendar day based model, particularly over traditional holiday periods such as Christmas and Easter. However, this could require additional changes to secondary legislation and London Stock Exchange ("LSE") rules.
- 1.4 As the RIRG also consulted widely on this issue, the FSA opted for a short consultation period which closed on the 26th January. Policy Statement 09 / 02 was then released in February, with the FSA opting to reduce the period to 10 business days. Issuers and their advisers remain free to conduct rights issues over a longer period if they choose. The Listing rules will be amended to reflect this decision for non-statutory rights issues, with a separate Dept. for Business, Enterprise & Regulatory Reform ("BERR") consultation required to implement the measures for statutory rights issues.
- 1.5 CP 09 / 04 is available at [http://www.fsa.gov.uk/pubs/cp/cp09\\_04.pdf](http://www.fsa.gov.uk/pubs/cp/cp09_04.pdf), with PS 09 / 02 available at: [http://www.fsa.gov.uk/pubs/policy/ps09\\_02.pdf](http://www.fsa.gov.uk/pubs/policy/ps09_02.pdf). As we go to press, BERR has not yet issued a consultation.

### 2 Policy Statement 09 / 03: Disclosure of Contracts for Difference ("CFDs")

- 2.1 The FSA consulted on expanding the significant holding disclosure rules to include exposure through CFDs or equivalent instruments in CP 07 / 20. This was followed by a policy decision published in July 2008. The FSA then consulted on a number of technical matters in CP 08 / 17, which also included draft rules.

- 2.2 Key elements of the policy decision were to introduce a general disclosure regime for all positions equivalent to 3% or more of issued securities. This would be an aggregated limit, including both share holdings and CFDs (or equivalent products). The Disclosure and Transparency Rules Sourcebook ("DTR") would be updated to reflect this.
- 2.3 In this latest policy statement, the FSA notes that it received broad support for its proposed rules which will be introduced as per the draft text set out in CP 08 / 17, with two exceptions:
- Disclosures should be made on a delta-adjusted basis which is considered a more accurate indicator of exposure level;
  - Reporting will be permitted on either a nominal or a delta-adjusted basis for a transitional period of seven months from implementation.
- 2.4 The FSA also proposes to bring forward the implementation timetable for these new measures, in light of changed market conditions. The new rules will take effect as of 1 June 2009. The policy statement is available at: [http://www.fsa.gov.uk/pubs/policy/ps09\\_03.pdf](http://www.fsa.gov.uk/pubs/policy/ps09_03.pdf)



### 3 Electronic Communications: Handbook Notice 84

- 3.1 The FSA has reintroduced the Electronic Communications Instrument to COLL via Handbook Notice 84. The Instrument, which enables investors to authorise the redemption or transfer of units using electronic communication methods, was initially introduced in May 2008, following consultation in CP 08 / 01. Full details are below. However, the enabling primary legislation was delayed so the FSA withdrew the instrument in July 2008 to reduce the potential for confusion.



- 3.2 The FSA now expects that the required legislation will be passed in the current session of Parliament and has therefore re-made the instrument which takes effect as of February 6 2009. The IMA has provided a summary of the legislative changes, which is available to its members via Circular 064 / 09.
- 3.3 The regulatory text remains unchanged from Handbook Notice 77. Essentially, an electronic signature or evidence of assent will meet any requirement that a document be signed in respect of any transfer, provided that the Prospectus of the fund indicates that transfer of title can be made on the authority of an electronic communication.
- 3.4 An Authorised Fund Manager ("AFM") is required to take reasonable steps to ensure authenticity where electronic communications are used. The FSA previously agreed to allow the industry to issue guidance to define appropriate technical / IT. requirements. The IMA consulted on draft guidance in February 2008 and we understand that, following the consultation, a final version was submitted to the FSA. We understand that the document is likely to be approved by the FSA, under its confirmed industry guidance programme, once it is formally released.
- 3.5 CP 08 / 01 also contained proposals to permit the settlement of transactions in units electronically, for example using systems such as CREST. In the consultation, the FSA stated that this would depend on the introduction of certain changes to secondary legislation. In Handbook Notice 77, the FSA elected to defer providing a response to this aspect of the consultation, stating that it would provide feedback and final proposals when work at HM Treasury is more advanced. There was no update on this work in this latest Handbook Notice.
- 3.6 The Handbook Notice also included a number of minor updates:
- A set of administrative updates to the COLL Regulatory Guide, reflecting recent amendments to COLL itself;
  - A summary of updates to the Market Conduct Sourcebook reflecting amendments to the short selling rules in early January 2009. These were covered in our January Bulletin;
  - Changes to COBS 16.2, 16.3 and 16 Annex 1R; to correct errors when text was transposed from COB into the new COBS, to clarify that CIS operators are permitted to express initial charges in either cash or percentage terms.
- 3.7 Handbook Notice 84 is available at:  
[http://www.fsa.gov.uk/pubs/handbook/hb\\_notice84.pdf](http://www.fsa.gov.uk/pubs/handbook/hb_notice84.pdf)

## 4 Handbook Notice 85: Share Class Hedging and Equivalent Schemes

- 4.1 The FSA has introduced a number of amendments to COLL and other sourcebooks as set out in Handbook Notice 85. The amendments to COLL were effective as of 6 March 2009.
- 4.2 The FSA has extended the provisions relating to currency hedging of unit classes to enable a scheme with underlying currency exposure to hedge unit classes priced in the scheme's base currency.
- 4.3 As an example, an AFM may have a scheme with a GBP base currency share class, and a mixture of Euro and GBP denominated assets. The scheme could also offer a Euro denominated share class for non-UK investors. Under the current rules, the AFM could hedge the GBP exposure in the Euro class to minimise the impact of adverse FX movements on its value. However, the value of the GBP base currency share class would still reflect any FX movements in its price. The new rule would permit the AFM to offer a third share class, denominated in GBP, but with an individual hedge allocated to that share class to hedge the Euro exposure.
- 4.4 The FSA has clarified that only currency risk, as opposed to market risk, can be hedged out.
- 4.5 UK UCITS will be permitted to invest in 2nd schemes based outside the EEA, other than recognised schemes. COLL will be amended to allow non-EEA schemes authorised by the competent authority of an OECD member country. These 2nd schemes must still meet the UCITS equivalent investor protection test and the local regulator must approve the depositary / custody arrangements of the scheme and the relevant "scheme rules".
- 4.6 The FSA has also provided clarity on the application of the 10% circularity limit rule. The FSA will allow AFMs to invest in 2nd schemes, without an explicit rule in the scheme documents restricting investment in other CIS to 10% of Net Asset Value, where the AFM has determined there is no possibility of this rule being breached – e.g. index based funds. However, side letters between the two AFMs cannot be used to make this determination.
- 4.7 The FSA also confirms its previous opinion that the 10% unapproved securities limit can only be used for investments in transferable securities and money market instruments. Investment in unapproved CIS will continue to be prohibited. The FSA believes that it has interpreted the UCITS Directive correctly in this case, but will work with CESR to address the issue.
- 4.8 The Handbook Notice is available at:  
[http://www.fsa.gov.uk/pubs/handbook/hb\\_notice85.pdf](http://www.fsa.gov.uk/pubs/handbook/hb_notice85.pdf)



## 5 CP 09 / 03: Financial Services Compensation Scheme ("FSCS") Reform

- 5.1 In this consultation, the FSA acknowledges that recent events indicate that consumers do not understand the role of the FSCS and that it may not currently meet the needs of all depositors. The FSA proposes to resolve this by facilitating faster payouts when a firm is declared in default and raising the level of awareness of the scheme amongst consumers. The proposals may be impacted by the FSA's wider work on Banking Reform, and the European Deposit Guarantee Schemes Directive ("DGSD") which is currently in draft form.
- 5.2 The DGSD will require Member States to implement a fully harmonised compensation limit of €100,000 by 31 December 2010, with payouts to be completed within 20 working days following a firm being declared in default.
- 5.3 The FSA, together with the FSCS and British Banking Association ("BBA"), commissioned Ernst & Young to undertake research into the fast payout proposals. These are intended to ensure the majority of eligible depositors receive access to funds within 7 days, minimising the amount of time consumers may be unable to obtain access to money. Payments will be made gross, i.e. not offset against credit card or mortgage products, and firms may be required to update IT systems to enable FSCS eligible accounts to be flagged.
- 5.4 With regard to consumer awareness, the FSA has identified three areas for further work:
- The FSCS is to lead a campaign designed to raise awareness of the scheme;
  - Deposit takers will be required to make disclosures to depositors;
  - Firms will be required to ensure their staff are able to provide information on the FSCS.
- 5.5 The current Consultation Paper ("CP") will not address the issue of temporarily high balances, or money held in 'client accounts' by an entity on behalf of an eligible depositor. The FSA also intends to consult further on other types of protected claims, including those in relation to investment firm defaults.
- 5.6 The consultation is available at [http://www.fsa.gov.uk/pubs/cp/cp09\\_03.pdf](http://www.fsa.gov.uk/pubs/cp/cp09_03.pdf) and closes on 6 April 2009.
- 5.7 In a related development, the FSA has written to all UK bank and building society industry groups regarding the impact of the recent banking defaults on the FSCS levies charged to the sector. The FSCS is funded by the industry itself. However, recent payouts have been facilitated by the Bank of England ("BoE") or HM Treasury, who have loaned money to the FSCS. These loans will have to be repaid by surviving firms if recoveries from defaulted firms are insufficient to do so.

- 5.8 It is still too early to estimate what level of shortfall may have to be covered by surviving industry members. For the next three years, firms will only be levied to meet interest payments on the loans. The FSCS has estimated the level of future interest charges and has set caps on the level of its management expenses in this regard. FSCS industry levies will be raised to fund the interest payments and charges, effective 31 March 2009.

- 5.9 The letter is available at:  
[http://www.fsa.gov.uk/pubs/other/fscs\\_levies.pdf](http://www.fsa.gov.uk/pubs/other/fscs_levies.pdf)

## 6 CP 09 / 08: Regulating Reclaim Funds

- 6.1 Although the role of CIS managers is at present limited in respect of reclaim funds, the subject matter may be of general interest. We understand that HM Treasury may review the potential for widening the scope of reclaim funds beyond banking and deposits once the regime for that sector has been established.
- 6.2 The Dormant Bank and Building Societies Act received Royal Assent in November 2008. Participating banks and building societies can transfer their liabilities to dormant account customers to a 'reclaim fund' which would have a statutory liability to repay customers. Surplus money in the fund will be distributed to deserving social or environmental purposes using an existing fund operated by the national lottery.
- 6.3 HM Treasury will introduce an Order requiring the FSA to regulate reclaim funds. The FSA proposes to utilise a principles based approach to regulating reclaim funds, whereby depositors whose money has been transferred to a reclaim fund will not receive a lower level of protection. For example, they will retain rights under the FSCS and Financial Ombudsman Scheme ("FOS"). The FSA notes that reclaim funds will have the characteristics of a bank and an insurance company, as they will hold deposits and be required to estimate the likely proportion of deposits which will be reclaimed.
- 6.4 An alternative local scheme will be available to small regional banks and building societies. The FSA envisages that banks and building societies will continue to manage relevant customer relationships, acting as agents of the fund when reimbursing consumers or handling account data. The Financial Services and Markets Act ("FSMA") and Regulated Activities Order ("RAO") will be amended to include the relevant activities of reclaim funds. Those intending to manage a reclaim fund will be required to seek authorisation from the FSA.
- 6.5 The FSA does not expect many authorisation requests, with perhaps one or two applications. As such, it will use the existing banking authorisation pack and most prudential requirements will be implemented through the relevant fund's Part IV permissions. This will enable the FSA to customise the regulatory regime to suit the needs of individual reclaim funds. Capital requirements will be





based upon BIPRU, with the reclaim risk of a fund captured using individual capital assessments. The FSA will not be providing guidance to applicants on how to model reclaim risks, and the paper does not directly cover what would happen should a reclaim fund default.

- 6.6 The consultation is available at:  
[http://www.fsa.gov.uk/pubs/cp/cp09\\_08.pdf](http://www.fsa.gov.uk/pubs/cp/cp09_08.pdf)

## 7 DP 09 / 01: Short Selling – Enhanced Disclosure on short selling of all stocks.

- 7.1 The FSA committed to undertake a detailed review of short selling and its market impact when it released the first Short Selling Instrument last September. Although the ban on financial sector shorting was revoked in January, disclosure rules remain in force where a firm has significant short positions in an ‘in-scope’ security. This latest discussion paper is set against that backdrop, but explores the role of a more permanent, supranational regime for short-selling.
- 7.2 In the paper, the FSA confirms once again that it believes that short selling is, in the main, a legitimate trading activity that tends to promote market efficiency and liquidity. However, the FSA notes that shorting can be used to facilitate market abuse and recent events would suggest that this can lead to market disorder, particularly in times of market stress. Nevertheless, in the Discussion Paper (“DP”), the FSA rules out using short selling constraints such as circuit breakers or tick rules.
- 7.3 The FSA is, however, in favour of expanding the financial sector disclosure requirements to cover all sectors of the market. The DP considers the possibility of a general aggregate disclosure regime, where the total level of shorting on a particular security would be published by a central body. This would involve marking or flagging all short trades, but the FSA feels that, for both technical and cost / benefit reasons, this would not be workable. Instead, it proposes a model based on the current financial sector provisions, with individual position holders disclosing material short positions to the market as a whole.
- 7.4 A number of market participants have suggested that public disclosure brings its own risks, including “short squeezes” where sellers are unable to close out positions, and “herding” whereby other short sellers mimic influential market participants. Disclosure solely to a regulatory authority would allow shorting to be monitored, and suspect transactions investigated. However, the FSA believes that, on balance, the informational benefits to the market as a whole outweigh this.
- 7.5 The FSA proposes to require disclosure of net short positions equivalent to 0.50% of a company's issued share capital, with further disclosure triggers in 0.1% bands. Exemptions, such as for market makers, would be available. Positions in companies undertaking a rights

issue would be subject to a lower, 0.25%, threshold, as the FSA believes the additional risks at such times justify retaining the recent legislation in this regard.

- 7.6 However, the FSA does not intend to issue detailed proposals at this time, noting that international consensus in this area would be highly desirable. Firms are encountering significant costs in complying with the current international batch of emergency short selling legislation. The FSA is currently contributing to IOSCO and CESR short selling working groups.

- 7.7 The Discussion Paper is available at:  
[http://www.fsa.gov.uk/pubs/discussion/dp09\\_01.pdf](http://www.fsa.gov.uk/pubs/discussion/dp09_01.pdf)

## 8 FSA Financial Risk Outlook 2009

- 8.1 The FSA published its latest annual Financial Risk Outlook in February. The foreword covers the recent international banking bail-outs, noting that the basic ability of banks to lend to the real economy remains impaired. The FSA acknowledges that this, and the unknown time until markets start to recover, has major implications for its work.
- 8.2 The format of the document focuses on individual sectors. The document is lengthy, and so in this Bulletin, we have focused on the FSA's outlook for the asset management sector.
- 8.3 The FSA believes that asset managers are likely to suffer as a result of current market conditions. Lower underlying asset prices will lead to lower ad valorem fees, and the industry may see some outflows as investors move to lower risk products. The FSA expects that firms will respond to this with cost cutting measures.
- 8.4 The paper notes that cost cutting measures could expose consumers to additional risks if this results in a weaker control environment within firms. Some firms may not be able to retain sufficient talent to adequately manage the full range of investments in client portfolios. These could lead to investors holding products which are not suitable for their needs. The FSA suggests that there are particular issues involving OTC derivatives, counterparty risk and risks associated with outsourcing.
- 8.5 The paper recognises that many firms experienced difficulties in concluding or closing out trades after the Lehman Brothers bankruptcy. Many firms did not expect to experience counterparty issues with on-exchange trades, and the FSA notes that some issues will need to be addressed by market infrastructure providers, which it expands upon later in the report. However, it believes the Lehman Brothers collapse is an example of the importance of counterparty diversification. In a general section on Lehman related issues, the FSA also comments on the global impact of bank failures, stressing the need for more international co-operation and ‘colleges of supervisors’.



8.6 The FSA acknowledges that two clear market infrastructure issues were highlighted by the Lehman's collapse: prime brokerage and post-trade infrastructure. The report states that most positions held by Lehman were liquidated via clearing houses or under exchange rules. The FSA believes that these processes were successful, with the direct impact of the failure largely contained.

8.7 We note that many asset managers had a different experience and we understand that the FSA and IMA have exchanged a series of letters to discuss this topic. With regard to prime brokerage, the FSA recognises that there were delays in returning client assets and money, mainly due to the highly complex legal arrangements in place. The FSA is working with market practitioners to consider if any changes to these arrangements are appropriate, and the Chancellor has advised that amendments may be made to the Banking Bill to reform the insolvency regime.

8.8 The Financial Risk Outlook is available via the FSA website at:  
[http://www.fsa.gov.uk/pubs/plan/financial\\_risk\\_outlook\\_2009.pdf](http://www.fsa.gov.uk/pubs/plan/financial_risk_outlook_2009.pdf)

## 9 FSA Business Plan 2008 / 2009

9.1 The FSA believes that 2009 will continue to be a difficult year for the financial sector. The FSA has recognised and publicly admitted certain weaknesses in its supervisory approach and is introducing measures to address this. The Plan notes the global nature of the current crisis and the FSA will increase the resources it allocates to the Financial Stability Forum and the Basel Committee. The following matters may also be of interest to readers of this Bulletin.

9.2 The focus of the FSA for this year will be the continuing credit crisis, as set out in its Financial Risk Outlook, and it will seek to minimise any other new initiatives. It believes principles based regulation will continue, but firms should see this, in practice, as outcome-focused regulation. The current difficulties do not allow firms to neglect their Treating Customers Fairly ("TCF") responsibilities.

9.3 The FSA's budget will be increased by 36.5% to a total of £437.7m. It intends to apportion this to reflect its increased focus on larger firms. As such, it will not increase its minimum fee rates, which will benefit approximately 10,000 smaller firms. The IMA commented on this in a press release at <http://www.investmentfunds.org.uk/press/2009/20090213.asp>, reflecting that, although most of the fee increases will be passed onto deposit takers and other high impact firms, large asset managers appear to have been treated similarly despite them having low-risk levels.

9.4 The Plan covers the FSA's work programme on:

- the Banking Bill – expected to gain Royal Assent in February 2009;
- liquidity – building on an FSA 2008 CP with a further consultation expected later this year;
- capital – supporting the ongoing work of the Basel Committee and implementing amendments to the Capital Requirements Directive ("CRD");
- remuneration;
- the use of supervisory colleges;
- leading work at the Financial Stability Forum ("FSF").

9.5 The Business Plan is available at:  
[http://www.fsa.gov.uk/pubs/plan/pb2009\\_10.pdf](http://www.fsa.gov.uk/pubs/plan/pb2009_10.pdf)

## 10 Short Selling FAQ

10.1 The FSA has updated its short-selling Frequently Asked Questions ("FAQs") to reflect the amended regime following Policy Statement 09 / 01 which lifted the financial sector shorting ban and simplified the disclosure rules. These changes have been reflected in the FAQ, although a number of other changes were made, notably on the rules governing indirect exposure. Previously, a short position in a relevant security through a basket, index or Exchange Traded Fund ("ETF") was only in scope if a UK financial sector security (or securities) was a dominant feature of the product. The revised FAQ states that such wider exposure must now be included.

10.2 As we go to print, the latest FAQ can be found at [http://www.fsa.gov.uk/pubs/other/Short\\_selling\\_FAQs\\_V2.pdf](http://www.fsa.gov.uk/pubs/other/Short_selling_FAQs_V2.pdf).

10.3 On a similar theme, the FSA published a letter from itself to UK MP John McFall, summarising short selling activity since the financial sector shorting ban was lifted. The FSA had not identified any significant new activity, with only three recent disclosures made, one of which related to a technical matter rather than new trading. The letter is available at:  
[http://www.fsa.gov.uk/pubs/other/mcfall\\_letter.pdf](http://www.fsa.gov.uk/pubs/other/mcfall_letter.pdf)

## 11 Banking Reforms

11.1 Although not directly relevant to the authorised fund sector, the following matters may be of interest:

11.2 On 19 January, the FSA issued a statement on the purpose of the Governments bank recapitalisation scheme, noting that it expected that tier 1 capital would be run down as a bank's losses were absorbed. It believes any future regime should include counter-cyclical measures whereby banks would be required to build up a buffer during periods of profitable years. The statement clarifies that the FSA expects banks participating in the



scheme to maintain a minimum core tier 1 ratio of 4%.

11.3 In a speech at The Economist's Inaugural City Lecture, Adair Turner, FSA Chairman, set out the FSA's agenda for the future of financial regulation. The speech noted that regulators had failed to realise the increase in systemic risk and reviewed the current proposals to revise capital adequacy and liquidity rules. The speech also raised two points relevant to the collective investment sector in general:

- Money Market funds offer liquidity but invest in long-term securities. This mismatch may be exacerbated in a crisis, with forced sales required to meet redemption requests. These bank-like characteristics may require a similar regulatory treatment;
- Recent de-leveraging by hedge funds has thrown these investment vehicles into the spotlight. Although most hedge funds are too small to pose a systemic risk, prudential regulators should be able to impose standards for capital, liquidity and risk management on those deemed to be significant in size.

11.4 The Basel Committee of Banking Supervision has issued a consultation proposing a number of amendments to the Basel II framework. In a series of papers, the Committee proposes modifying the regulatory capital treatment of trading book exposures along with some general amendments to the three Pillars, including risk management enhancements in Pillar 2 (supervisory review process). Amendments to the Basel II framework may filter through to the Capital Requirements Directive. The consultation is available at:  
<http://www.bis.org/publ/bcbs/basel2enh0901.htm>

11.5 The Bank of England launched its Asset Purchase Facility ("APF") in mid-February. Concerns have been raised within the industry that the APF focuses on high-grade assets, which could potentially crowd-out investors from these assets and push them into lower grade securities, and that the facility is only open to larger corporations, who are less likely to need assistance.

11.6 On 26 February, the Government announced details of its Asset Protection Scheme, which is expected to improve the Core Tier 1 capital ratio of any participating bank, in order to encourage new lending. The scheme is intended to provide protection against losses on assets exceeding a certain threshold. The risk weighted assets of the protected portfolio will be significantly reduced, with the exact extent depending on the set threshold.

11.7 The FSA provided detailed guidance on the scheme in a statement at:  
[http://www.fsa.gov.uk/pages/Library/Communication/Statements/2009/aps\\_detail.shtml](http://www.fsa.gov.uk/pages/Library/Communication/Statements/2009/aps_detail.shtml)

## 12 Supervisory Enhancement Programme: Closing Summary

12.1 The FSA has issued a statement to conclude its supervisory enhancement programme. This was set up to review the FSA process for the supervision of High Impact Firms ("HIFs"). Key changes have been communicated to in-scope firms, including:

- HIFs will be subject to a 'close and continuous' supervision regime, featuring a non-reducible programme of regular meetings with senior managers, control functions and non-executive Directors;
- ARROW assessments will be conducted at least every two years, with formal six monthly internal 'checkpoints';
- Candidates for significant influence functions will be subject to increased scrutiny, including interviews, focusing on personal accountability.

12.2 The FSA is making good progress in recruiting additional staff to implement these policy objectives, and believes it will have filled all 280 positions by end July 2009.

## 13 Code of Practice on Remuneration Policies

13.1 The FSA has issued a draft Code of Practice covering remuneration. HM Treasury has advised that firms wishing to subscribe to its Asset Protection Scheme will be required to sign up to the Code as a condition of eligibility. The FSA is to issue a formal consultation on the Code in March, but has released an early draft to provide guidance to firms wishing to subscribe to the HM Treasury scheme.

13.2 However, the FSA believes that the principles of the Code will be of relevance to all authorised firms, and the Code may become mandatory for all banks. The Code will not cover the "quantum" of remuneration, which will remain an issue for firms' boards. The Code contains the following general, and specific principles:

- Firms must ensure that their remuneration policies are consistent with effective risk management;
- Boards and relevant remuneration committees should exercise independent judgement and demonstrate that their decisions are consistent with the firm's financial situation and future prospects;
- Procedures for setting compensation within the firm should be clear and documented and they should include measures to avoid conflicts of interest;
- Compensation for staff in the risk and compliance functions should be determined independently of the business areas;
- Assessments of financial performance to calculate bonus pools should be principally based on profits;
- Firms should not assess performance solely on the results of the current financial year;





- Non-financial performance metrics, including adherence to effective risk management and compliance with regulations, should form a significant part of the performance assessment process;
- The measurement of performance for long term incentive plans, including those based on the performance of shares, should also be risk-adjusted;
- The fixed component of remuneration should be a sufficiently high proportion of total remuneration to allow the company to operate a fully flexible bonus policy;
- The major part of any bonus which is a significant proportion of the fixed component should be deferred, with a minimum vesting period;
- It is highly desirable that the deferred element of variable compensation should be linked to the future performance of the division or business unit as a whole.

- 13.3 The FSA statement on the Code includes a full rationale and clarification for each principle. For further details please see:  
[http://www.fsa.gov.uk/pages/Library/Other\\_publications/Miscellaneous/2009/cop\\_remun.shtml](http://www.fsa.gov.uk/pages/Library/Other_publications/Miscellaneous/2009/cop_remun.shtml)

## 14 FSA obtains 'immunity notices' Powers

- 14.1 On 14 January, the Coroners and Justice Bill was published, including provisions to amend the Serious Organised Crime and Police Act 2005 to grant the FSA new statutory powers, including the power to grant immunity when investigating criminal cases such as insider dealing.

## 15 Money Guidance Pathfinder Launched

- 15.1 The Thoresen review of generic financial advice, released in March 2008, concluded with a number of recommendations, including the introduction of a Money Guidance service. The Government accepted this recommendation and a number of partners have been chosen for a pathfinder programme in the North of England, including the Citizens Advice Bureau and regional groups.
- 15.2 The guidance will cover budgeting, saving and borrowing, insurance and retirement planning, along with educating consumers on the tax and benefit systems and 'jargon-busting'. The service is not intended to 'sell' or recommend products, but to ensure consumers are able to make more informed choices on financial matters.
- 15.3 Further details are available at:  
<http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/007.shtml>

## 16 LIST! Issue 20

- 16.1 The January edition of LIST!, the FSA's Listing Authority bulletin, contained two matters which might be of interest.
- 16.2 The bulletin stressed the need for directors of listed companies to bear in mind their obligation to inform the market of material matters, such as those affecting liquidity or 'going concern' statements.
- 16.3 The implementation of the EU Shareholder Rights Directive, effective 3 August 2009, will amend the notice period for calling general meetings for UK listed companies from 14 days to 21. However, the UK will be taking up an option to retain a 14 clear day notice period provided certain conditions apply. Shareholders must approve with an appropriate resolution and electronic voting should be available.
- 16.4 LIST! is available at:  
[http://www.fsa.gov.uk/pubs/ukla/list\\_jan09.pdf](http://www.fsa.gov.uk/pubs/ukla/list_jan09.pdf)

## 17 DMO Consultation on Gilt Distribution

- 17.1 The UK Debt Management Office ("DMO") is responsible for carrying out the UK Government's debt management policies, including issuing gilts on behalf of HM Treasury and conducting money market operations based upon the Government's daily cash requirements or surplus.
- 17.2 In the current market, the Government is issuing a large number of Gilts, primarily via auction, but wishes to explore the use of alternative methods. It will consider methods such as mini-tenders, syndication, and granting underlying investors, such as pension or insurance vehicles, direct access to the primary issuance process via placements. However, direct access to investors would be limited, as the Government does not wish to risk damaging the role of the traditional market makers in this respect.
- 17.3 The consultation is available at:  
<http://www.dmo.gov.uk/documentview.aspx?docname=publications/giltmarket/consultationpapers/cons171208.pdf&page=Gilts/Consultation>

## 18 HMRC ISA Bulletin No 8.

- 18.1 This latest ISA Bulletin provides updates on a number of topics. Key issues include:
- 18.2 Investors who opened PEPs prior to 1993 were not required to provide their date of birth. If, despite best efforts, managers have subsequently not been able to obtain this information, the relevant fields on the managers Annual Return can be left blank.



18.3 HM Revenue and Customs ("HMRC") has been asked to consider a number of issues relating to Managers' charges. It has provided an answer to the scenarios covered below and is willing to consider others before finally updating its guidance:

- If trail commission on ISA investments is passed back to an investor by an Independent Financial Adviser ("IFA"), this cannot be included within the ISA except if considered to be a fresh subscription;
- AFM fee reductions negotiated between the AFM, ISA manager and investor can be paid into an ISA without being considered a fresh subscription, although there are additional notes covering technicalities where wrappers are used.

18.4 HMRC has established two databases to assist with cash ISA transfers. These provide contact details of staff at ISA firms dealing with transfers and of senior managers for escalations. This works on a passcode basis to enable firms to verify callers are genuine.

18.5 The Bulletin is available at:  
<http://www.hmrc.gov.uk/ISA/bullmenu.htm>

## 19 Update to JMLSG Guidance, and other Money Laundering Matters

19.1 The Counter-Terrorism Act 2008 received Royal Assent on 26 November 2008. The Act received considerable media attention, but one matter is specifically relevant to mention in this Bulletin. Schedule 7 gives HM Treasury the power to issue directions to firms in the financial sector. The directions can impose requirements in relation to customer due diligence, ongoing monitoring and reporting and / or requesting firms to limit or cease certain business. However, directions can only be given in respect of a non-EEA country where the Financial Action Task Force ("FATF") has advised that specific measures should be taken, or where HM Treasury believes that specific risks apply.

19.2 The Joint Money Laundering Steering Group ("JMLSG") is to update its Guidance to reflect the new Act. A short consultation was launched, which closed on 20 February 2009. Further details are available via:  
<http://www.jmlsg.org.uk/bba/jsp/polopoly.jsp?d=775&a=15208>

19.3 Under the 3<sup>rd</sup> Money Laundering Directive, firms are able to apply simplified due-diligence procedures to customers whose securities are listed on an EEA "regulated market" or a non EEA market deemed to be "equivalent". For money laundering purposes, an "equivalent market" is one which subjects listed companies to trading disclosure rules "equivalent" to the provisions set out in the European legislation.

19.4 The Money Laundering Directive is silent on the extent to which disclosure rules must be consistent with

Community legislation. The JMLSG has issued a paper to provide clarification on this matter. The JMLSG does not believe it would be practical for firms to ensure that all relevant European provisions are reflected, noting that a workable interpretation would be that the major provisions are satisfied.

19.5 The text of the paper sets out and discusses the relevant factors. It is JMLSG board approved, but is not part of, and does not have the force of, the JMLSG Guidance. Further details are available at:

[http://www.jmlsg.org.uk/content/1/c6/01/52/07/Regulated\\_markets\\_-\\_Board\\_approved\\_version.pdf](http://www.jmlsg.org.uk/content/1/c6/01/52/07/Regulated_markets_-_Board_approved_version.pdf)

## 20 Retail Distribution Review ("RDR"): Speeches by Dan Waters and John Pain

20.1 The FSA's Retail Distribution Review Seminar took place on 15th January. The FSA used the opportunity to remind firms of how the RDR proposals fit into its overall strategy. The FSA's John Pain, Managing Director, Retail Markets, provided a summary of feedback received following the launch of the RDR in November 2008, including:

- The FSA does not expect consumers to become financial experts and sees the continuing need for a market in financial advice;
- Firms may have to increase minimum capital requirements. However, firms should hold sufficient capital to wind down in an orderly manner.

20.2 The FSA proposes to implement a final implementation deadline of end 2012, although firms will be encouraged to implement the RDR measures earlier.

20.3 Dan Waters speech at the ABI's RDR Conference on 16 January set out to reinforce certain aspects of the RDR. Specifically, that the new rules would:

- end the ability of UK product providers to offer adviser firms commission for selling their products; and
- prevent adviser firms selling products which reward them with commissions.

Products will have to be re-priced to account for this, and advisers may be unable to sell some offshore products.

20.4 The speech also noted that the FSA agrees with proposals by the Professionalism Working Group for an overarching Professional Standards Board for advisers. The FSA intends to consult on the formation of such a body in June. The FSA believes firms will benefit from commencing adviser training and qualification programs, in line with the proposed standards, in advance of the 2012 deadline.



## 21 Treating Customers Fairly ("TCF") – Issues at Board Level, a Speech by Sarah Wilson, Director of TCF, FSA, at an ABI Seminar.

21.1 In this speech, the FSA set out its view on the role of non-Executive directors in relation to TCF. Although addressed to an insurance industry seminar, the following matters may be of interest to the asset management sector:

- TCF is now a key aspect of the FSA's supervisory work and will feature in ARROW reviews;
- Senior Managers, including the Board of a firm, are expected to demonstrate to the FSA, and to themselves, that they are able to deliver TCF outcomes to customers;
- Customers in financial markets may not have sufficient capability to identify unfair treatment and firms should not rely solely on market trends to demonstrate compliance;
- Any firm which continues to have a material outstanding issue in any area previously highlighted by the FSA as indicative of poor practice, will be deemed to be at risk of failing its TCF obligations;
- Boards should ensure that they have effective structures in place to set remuneration policies and monitor remuneration levels throughout the firm.

21.2 The speech concluded with a reminder that the FSA, when launching the TCF initiative, intended to achieve a step-change in how firms treat their customers. It intends to take tough action where it sees shortfalls.

## 22 Developments in Structured Products: A speech by Dan Waters, FSA, at the Structured Retail Products Conference ("SRPC").

22.1 In this speech, the FSA notes that 2007 saw a significant increase in inflows into structured products - it understands the appeal of products offering capital guarantees in the current market. However, the FSA believes that consumers may be sold, or may buy, products which are unsuitable, particularly those with long-term investment horizons. There are implicit costs in capital preservation, including possible reduction in total returns.

22.2 It notes that the failure of Lehman Brothers, whose debt assets underwrote some capital protection products, has not had a great impact on the market. The FSA contributed to a CESR taskforce on the Lehman failure and shared the following key recommendations regarding:

- Providing further guidance on whether or not products are non-complex;
- Contributing further to EU work on competing products in the retail market;

- Analysing key elements of the Prospectus Directive.

22.3 CESR is aware that the degree of advice typically given when distributing structured products varies between Member States.

22.4 In the UK, the FSA is collecting data on the quality of risk disclosures and general marketing material used when certain Lehman related products were distributed. Counterparty risk may not have been fully considered.

22.5 The speech also touched on structured deposits. These can be considered investment products or deposits and even the treatment under FSA rules can vary. Structured deposits can be more opaque, utilise off-shore subsidiaries or sister companies and are subject to diminished information disclosure requirements in comparison to investment products.

22.6 The market is divided on how it feels a structured product should be treated. One camp argues that products with similar economic characteristics should be subject to the same regulatory treatment, whilst others argue that the prudential requirements in relation to deposit takers are already significantly higher than those offering investments, and additional product regulation would be unwelcome. This issue may be resolved through CESR's work on competing products.

22.7 The full text is available at:  
[http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/0212\\_dw.shtml](http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/0212_dw.shtml)

## 23 Updates to the IMA Accounting SORP

23.1 The IMA has issued a number of guidance notes following release of the latest SORP in November 2008.

23.2 The revised SORP only requires condensed financial statements to be included within half-yearly long reports. The IMA has issued a guidance note, in the form of a model report, to support managers when preparing these.

## 24 VAT and Management Fees Update

24.1 A number of matters arose this month which may be of interest to our readers:

24.2 HMRC has issued revised guidance on how it will apply the VAT exemption for the management of special investment funds ("SIFs") granted in the Principal VAT Directive. Although the Directive allows Member States to determine what constitutes a SIF, the ECJ has ruled on how this should be interpreted in a number of judgements. HMRC has updated its guidance to reflect this, in particular, stating that it will take a pragmatic approach when dealing with funds that are no longer actively marketed to UK retail investors.



Further details are available via:

<http://www.hmrc.gov.uk/manuals/vatfinmanual/updates/vatfinupdate100209.htm>

- 24.3 We understand that three Ford pension funds have joined, as co-appellants, the Wheels Common Investment Fund ("WCIF") and National Association of Pension Funds ("NAPF") VAT test case. This is now agreed with HMRC and the case will proceed as planned.
- 24.4 The IMA issued a circular to its members in February, noting that members have until 31 March 2009 to submit input VAT claims under the Fleming and Conde Nast Publications cases and to submit output VAT claims under the JP Morgan Fleming Claverhouse and Abbey cases. Further details are available via IMA Circular 090 / 09.
- 24.5 We are also aware that a number of Managers have been successful in recovering Fokus case related tax refunds from the Norwegian authorities, following submission of the relevant tax questionnaire last year.

## 25 Bond Fund Yields and AG8 Adjustments

- 25.1 Recent market events have thrown the bond market under the spotlight. Valuations are significantly depressed, particularly in the high yield sector, which indicates that contractual returns may be at risk. The IMA issued a Circular in February recommending that managers review cash flow estimates to ensure that a relevant fund's income is not overstated at the expense of capital depletion. Any appropriate adjustments should be applied in a timely manner.
- 25.2 The process for these adjustments is set out in FRS 26, and is known as an AG8 adjustment. However, the IMA and industry participants have noted that formal AG8 adjustments involve significant administrative and systems activity to assess and process and adjustments may need to be repetitively revised in volatile markets. Managers and their administration providers should consider whether their current processes correctly recognise an affected fund's income.
- 25.3 The IMA Technical Note is available to its members via Circular 071 / 09.

## C LUXEMBOURG

### 1 Updates on the Madoff Affair

#### ALFI Statements

- 1.1 On 20 January 2009, ALFI issued a public statement on the Madoff affair and its implications for the Luxembourg fund industry.

#### Current situation

On 23 January 2009, the CSSF announced that 17 local funds or sub-funds have been affected and have suspended their activities. The total investments of funds with Madoff amount to EURO 1.7 billion (0.15% of all assets under management in Luxembourg).

#### Potential liabilities under Luxembourg law

The CSSF will check that all concerned parties have acted with the diligence imposed by Luxembourg law. Although many parties are involved in the Madoff affair, the current debate mainly focuses on the depositaries of the funds.

The CSSF considers that the provisions laid down in Luxembourg law offer an appropriate framework in order to ensure adequate protection of an investment fund's assets on behalf of its investors which is in accordance with European standards.

#### Challenges at EU level

The Commission intends to open an enquiry on the transposition of the UCITS Directive in various countries of the EU.

- 1.2 On 15 January 2009, the Chairman of ALFI, Claude Kremer, provided the fund industry with an update on the association's approach to the Madoff affair. He also recommended setting up an ALFI taskforce on this matter.

With regard to the taskforce, it should / will:

- be a small team composed of ALFI Board members with no real or perceived conflict of interest;
- consult widely with recognized experts – members of the Board, ALFI members, Luxembourg and international stakeholders;
- identify all the relevant questions and issues to be addressed;
- commission and analyse the necessary legal or technical advice; and
- produce a first interim report by the end of the first quarter to the Board on its findings and recommendations.

The CSSF press release can be found at:  
[http://www.cssf.lu/fileadmin/files/Publications/Communiqués/Communiqués\\_2009/press\\_release\\_madoff3.pdf](http://www.cssf.lu/fileadmin/files/Publications/Communiqués/Communiqués_2009/press_release_madoff3.pdf)

#### Withdrawal of LuxAlpha SICAV & Herald (Lux) SICAV

- 1.3 The CSSF issued two press releases, the first one on 3 February 2009 and the second one on 11 February 2009 on the decisions to withdraw the LuxAlpha SICAV and the Herald (Lux) SICAV from its official list. These SICAVs have been seriously affected by the Madoff Affair.
- 1.4 The decisions are based on the fact that the SICAVs no longer comply with the provisions regarding the organisation and operation of Luxembourg UCIs and they will be deemed final after a period of one month, unless appealed against.
- 1.5 As soon as the decision is final, the CSSF will apply to the district court for the judicial winding-up of the SICAVs. When ordering the winding-up, the court will appoint a reporting judge and one or more liquidators.
- 1.6 The CSSF press releases can be found at:  
[http://www.cssf.lu/uploads/media/pressrelease\\_luxalpha\\_01.pdf](http://www.cssf.lu/uploads/media/pressrelease_luxalpha_01.pdf)  
[http://www.cssf.lu/uploads/media/press\\_release\\_herald.pdf](http://www.cssf.lu/uploads/media/press_release_herald.pdf)

#### UBS as depositary of the fund LuxAlpha SICAV

- 1.7 On 25 February, the CSSF issued a press release on its decision with regard to the role of UBS Luxembourg as depositary bank of the fund LUXALPHA SICAV. UBS' written position and the documents relating to this affair were examined and further information was gathered by the CSSF during an on-site inspection at UBS' premises.
- 1.8 In order to protect the investors and pursuant to its powers of supervision and sanction, the CSSF has taken the following decision:

The CSSF orders UBS to implement the necessary infrastructure, i.e. sufficient human and technical means and the necessary internal rules in order to carry out all the tasks relating to its functions of depositary bank, and to provide evidence and guarantees to the Commission within 3 months as of the date of the notification of this decision. UBS will have to pay the damages in case of breaches to its supervisory duty subject to the provisions of the Luxembourg law.

If after expiry of the time limit set by the CSSF, UBS does not provide evidence of adequate guarantees, proving that it has implemented the necessary infrastructure in order to fulfil all the tasks relating to its function of depositary bank of a Luxembourg fund, the CSSF reserves the right to take all the measures provided for in Article 53 of the Law of 5 April 1993, dealing with the CSSF powers.



1.9 The CSSF advised that it does not limit its analysis to depositary banks only, but will verify that all the other parties to the funds concerned have acted with the diligent conduct as imposed by Luxembourg law. Finally, the CSSF stressed that when fund's assets are deposited with a third party, these deposits are under the monitoring and supervisory responsibility of the depositary bank, implying that it must know at all times in which manner the assets are invested and where and how these assets are available.

1.10 The press release can be found at:  
[http://www.cssf.lu/uploads/media/press\\_release\\_ubs\\_madoff2.pdf](http://www.cssf.lu/uploads/media/press_release_ubs_madoff2.pdf)



## 2 Valuation of money market funds

2.1 ALFI has been seeking guidance from the CSSF concerning the use of amortised cost as a valuation basis, primarily for local open-ended money market funds.

2.2 In February 2009, ALFI issued a memo highlighting the recommendations in case a fund's Board of Directors wish to apply the calculation of amortised cost versus market value.

2.3 In performing the assessment of market value for the purposes of determining the discrepancy with amortised cost, the current market crisis is causing issues for highly rated paper with a final residual maturity of 3 months or less. Due to the nature of sub-3 month paper, market quotes are not continuously available and, therefore, "deemed" market values are calculated using LIBOR and money market rates for the purposes of the assessment. However, due to the volatility in LIBOR and money market rates, these deemed market values are not representative. The CSSF accepts that a fund's Board may consider, at its own responsibility, that sub-3 month paper can be included in the mark to market assessment at an amortised cost price. In order to achieve this, the fund's Prospectus should permit them to utilise amortised cost as the principle valuation basis for the portfolio as long as amortised cost does not differ significantly from the market value. The fund's Board should comply with the following procedure:

- Only securities with the highest-level credit rating (A1/P1 and A1+/P1 or equivalent) should be deemed to be fair-valued at amortised cost and any downgrade of credit rating would immediately require the inclusion of such assets in the full mark to market calculation;
- Structured Investment Vehicles ("SIVs") should continue to be included in the mark to market exercise;
- The decision to value money market instruments on an amortised cost basis for the mark to market calculation must be approved by the Board of directors of the money market fund. The decision / rationale must be documented and appropriate records maintained in relation to the decision-making process;
- Exclusion of such assets from mark-to-market valuation is based on the presumption that they will be held to maturity or are realisable at par. If the liquidity needs make this unlikely, then such assets or a portion should be reclassified within the mark-to-market analysis. Such reclassification process should be clearly documented, reviewed and approved on a periodic basis by the Board. Any losses or gains arising from such reclassification should be dealt with on a consistent basis that is fair to all the investors in the fund;
- Sub-3 month would mean paper with a final residual maturity of less than 3 months and would, for example, exclude floating rate notes with a re-set falling within 3 months, unless such re-set is the final maturity of the instrument.

2.4 The ALFI memo can be found at:  
[http://www.alfi.lu/fileadmin/files/Member%20Services/NEWSFLASH/2009\\_02\\_13/ALFI\\_PROPOSITION\\_AMORTIZED\\_COST\\_final\\_2\\_.pdf](http://www.alfi.lu/fileadmin/files/Member%20Services/NEWSFLASH/2009_02_13/ALFI_PROPOSITION_AMORTIZED_COST_final_2_.pdf)



## D IRELAND

### 1 Irish Funds Industry Association issues revised Guidance Paper 6

- 1.1 The Irish Funds Industry Association ("IFIA") has issued revised Guidance Paper 6 – Incorrect Pricing of Funds, Correction and Compensation, following considerable review by the Trustee Committee. During the course of this review it was decided that references in the Guidance Paper to materiality levels for pricing errors on money market funds should be removed and a specific paper on money market funds be prepared. This work is ongoing. The revised Guidance Paper is available from your Dublin Trust & Fiduciary contact.

### 2 Provision of accounts for Qualifying Investors Funds

- 2.1 You may recall last year that the Financial Regulator ("FR") introduced a number of amendments to the Qualifying Investor Fund ("QIF") product, which included the removal of the requirement to produce interim accounts for those funds structured as investment companies or investment limited partnerships. See our July 2008 Bulletin for further information.
- 2.2 Following this welcome development to the QIF product, the FR did, however, express a concern that there could be a considerable time before it would receive accounts for new QIFs, especially those with a long first accounting period. The FR engaged in dialogue with the IFIA in an effort to alleviate that concern. As a result, the FR has confirmed that QIFs, established as either investment companies or investment limited partnerships, are now required to provide either audited accounts or an interim report within 12 months of the QIF's launch.
- 2.3 The FR reiterated its position that where a Prospectus refers to the publication of interim reports, but the QIF chooses not to do so, investors must be notified and the Prospectus updated as soon as practical. Also, if a QIF chooses to produce interim reports, these do not have to be filed with the FR.
- 2.4 Finally, reporting requirements for funds established as common contractual funds and unit trusts remain unchanged as this requires a legislative amendment.
- 2.5 Further information can be obtained from your Dublin Trust & Fiduciary contact.

### 3 Financial Regulator withdraws informal policy with regard to UCITS 9, paragraph 13

- 3.1 UCITS 9, paragraph 13 allows a UCITS to invest up to 100% of net assets in transferable securities or money market instruments issued or guaranteed by Member States, their local authorities, certain non-Member States and public international bodies. A UCITS must hold securities from at least six different issues with securities from any one issue not exceeding 30% of the net assets of the UCITS.
- 3.2 The FR had, in the past, adopted an informal policy in cases where the UCITS held less than 100% in securities / instruments of a particular issuer. For example, it would expect a minimum of two issues where the exposure amounted to 36% of the net asset value, six issues where exposure was 100% and on a pro rata level within these limits.
- 3.3 The FR has now advised that this informal policy is no longer available. It is now for the UCITS to decide the amount to be held in a single issue where the aggregate exposures are between 35 & 100%. Further information can be obtained from your Dublin Trust & Fiduciary contact.

### 4 Mark to Market requirement for paper with residual maturity of less than 3 months.

- 4.1 You may recall that in our November 2008 Bulletin we advised of the circumstances where the FR allowed money market funds to temporarily suspend the weekly mark to market review, as required by Guidance Note 1/08, given the increasing volatility in LIBOR / money market rates. The FR stated at the time that it would review its decision on a quarterly basis.
- 4.2 The FR has now confirmed that, with effect from 2 March, this derogation will no longer be available. However, it did confirm that it would be willing to reinstate the derogation 'should circumstances warrant it.'







## 5 Madoff Update

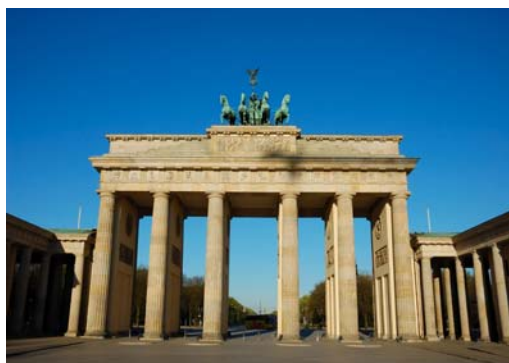
- 5.1 Ireland has not been immune to the effects of the Madoff scandal. The FR has confirmed that a number of Irish regulated funds were affected both directly and indirectly.
- 5.2 JPM is aware of at least two Madoff related litigation actions which have been commenced in Ireland. In one case an Irish custodian of a UCITS regulated fund is being sued by the UCITS for passing assets to a Madoff entity. In another an Irish domiciled feeder fund is being sued by an investor company for failing to pay a redemption request. The Irish feeder fund had invested some of its assets with Madoff and is of the opinion that the NAV on which the redemption request was made was unreliable and hence suspended redemption payments. The investor company is seeking summary judgement for the amount of the redemption request.
- 5.3 JPM will monitor both actions and advise clients accordingly.



## E GERMANY

### 1 Classification of Bank Loans

- 1.1 Loans of SoFFin (Sonderfonds Finanzmarktstabilisierung – Special Fund Financial Market Stabilization) are classified as privileged debt securities within the meaning of section 60, Para. 2, clause 1, German Investment Act due to the government's assumption of liability for all commitments of SoFFin. In addition, the Federal Financial Supervisory Authority ("BaFin") has also confirmed this classification when considering comparable circumstances regarding foreign issuers.
- 1.2 The government's assumption of liability is a guarantee to ensure that the underlying default risk of these bank loans is the same as the default risk of government bonds.
- 1.3 Further information is available via:  
<http://www.soffin.de/index.en.php>



### 2 Administrative practice of BaFin with regard to short-term loans (i.e. borrowing)

- 2.1 With the publication of a new draft FAQ Document the BaFin plans to clarify the scope of section 53 German Investment Act within the context of the administration of investment funds.
- 2.2 Generally speaking, the draft document refers to an already established administrative practice. However, key changes include the following:
  - When an overdraft does not cause any interest to arise for the account of the investment fund, that overdraft can be netted off against other credit balances of the same currency (i.e. "balancing of accounts");
  - The draft document provides a definition of "short-term" by stating in which cases a loan cannot be considered as a "short-term-loan" (remaining term of not more than 1 year).
- 2.3 Further information is available via:  
<http://www.bvi.de/de/index.html>



## F FRANCE

### 1 Report on credit rating agencies

- 1.1 On 22 January 2009, the Autorité des Marchés Financiers ("AMF") published its 2008 report on credit rating agencies ("CRAs"), covering 2007 and the first nine months of 2008.
- 1.2 The report focuses on the:
- impact of credit ratings on the terms and conditions of **corporate financing**;
  - ratings of **structured finance products**, which have experienced harsh, massive, repeated and belated downgrades.
- 1.3 The report's main findings are:
- For **corporate** credit ratings, the AMF urges market participants to proceed with the utmost caution when linking corporate funding conditions to a credit rating. This is particularly the case when loan or issuance covenants contain trigger clauses;
  - Regarding **structured finance products**, the AMF reaffirms the need for CRAs to be more transparent with regard to their individual ratings and the methodological elements and specific assessments that deliver these results, to the statistical data they use, and to the component assets of structured products. This would allow investors to better measure and manage the risks associated with these products.
- 1.4 The AMF publication can be found at:  
[http://www.amf-france.org/documents/general/8696\\_1.pdf](http://www.amf-france.org/documents/general/8696_1.pdf)

### 2 Updated Guidance on UCITS Prospectus

- 2.1 In March 2008, the AMF issued three documents aiming to assist management companies in the preparation of Prospectuses (marketing materials) so that they comply with the local regulations.
- 2.2 The following three documents have been updated on 10 February 2009 and are available on the AMF website ([www.amf-france.org](http://www.amf-france.org)):
- Guide on how to draft a Prospectus for a UCITS;
  - Summary of findings when examining the UCITS behaviour;
  - Practical Guide for preparing marketing materials.
- 2.3 The AMF press release can be found at:  
[http://www.amf-france.org/documents/general/8713\\_1.pdf](http://www.amf-france.org/documents/general/8713_1.pdf)

## 3 Permanent regime on short-selling

- 3.1 On 23 February 2009, the AMF published a working group report and launched a public consultation on a short-selling regime to be adopted on a permanent basis, following the exceptional measures introduced on 19 September 2008.
- 3.2 The measures proposed consist of the following:
- Any person placing an order for a short sale must take the necessary arrangements to be able to deliver the securities within the standard settlement cycle (T+3);
  - Stricter penalties should be imposed on sellers unable to make timely delivery;
  - There is a need to ensure a transparent market is in place by publishing net short positions exceeding a defined threshold;
  - Short sellers should declare to the regulator the volumes and prices of securities loans, so that the regulator is alerted in good time to possible pressures in the securities lending market.

Some of the proposed measures will not be fully effective unless agreed upon by regulators in the main financial centres.

- 3.3 Pending the AMF Board's decision on the outcome of the consultation, the exceptional measures introduced in September are maintained.
- 3.4 The AMF press release and its consultation can be found at:  
[http://www.amf-france.org/documents/general/8774\\_1.pdf](http://www.amf-france.org/documents/general/8774_1.pdf)  
[http://www.amf-france.org/documents/general/8773\\_1.pdf](http://www.amf-france.org/documents/general/8773_1.pdf)

Responses to the consultation should be e-mailed to [contact@amf-france.org](mailto:contact@amf-france.org) by 10 April 2009.





## 4 Regulation of money market funds

- 4.1 On 24 February 2009, the AMF launched a consultation on regulation of money market funds. At the end of 2007, the AMF set up a working group to consider changes to the way that money market funds are regulated.
- 4.2 Based on the group's proposals, the AMF has issued a series of measures for public consultation. These measures aim to:
- maintain a single category "money market fund" and restrict the universe of assets in which these funds can invest;
  - enhance and clarify investor disclosures; and
  - limit the marketing conditions in the context of fair, clear and not misleading information to investors.
- 4.3 Responses to the consultation should be e-mailed to [contact@amf-france.org](mailto:contact@amf-france.org) before 15 April 2009.

The AMF press release can be found at:  
[http://www.amf-france.org/documents/general/8784\\_1.pdf](http://www.amf-france.org/documents/general/8784_1.pdf)



## G BELGIUM

### 1 Changes to the Prospectus of certain Undertakings for Collective Investment ("UCIs")



- 1.1 On 16 February 2009, the Banking, Finance and Insurance Commission ("CBFA") published communication CBFA\_2009\_05 regarding the inventory of changes to the Prospectus that fall within the scope of Article 14, item 15, of the Royal Decree of 4 March 2005 on certain public undertakings for collective investment ("the Decree").
- 1.2 Article 14 of the Decree lists a series of updates to the Prospectus and / or Simplified Prospectus that may be published without prior approval of the CBFA, provided that they do not relate to the type of UCI or its investment policy. In any case, the CBFA must be promptly informed of the change, whilst the amended Prospectus and / or the Simplified Prospectus should be submitted to the CBFA prior its publication. Such changes are the exclusive responsibility of the Board of the UCI.
- 1.3 The changes that do not require prior approval are:
  - Reduction or extension of the initial subscription for an existing sub-fund. However, the CBFA recommends the publication of a press release in order to inform investors of this change;
  - Amendment of the remuneration of the Commissioner or of a member of the Board provided that such amendments have been approved by the Board of the UCI;
  - Changes regarding those responsible for the content of the Prospectus and / or Simplified Prospectus;
  - Changes to the website on which the Prospectus and Simplified Prospectus as well as other published documents, like the articles of incorporation or the annual or semi-annual report, are available;
  - Amended mandates of the Board members of the appointed management company;
  - Changes arising from the requirement of the

supervisory authority of the host country where the UCI is registered (within or outside the EEA) about the following requested wording in the Prospectus for sub-funds:

*"As regards to the investors relationships, each sub-fund is treated as a separate entity. The investor is only entitled to the assets and income of the sub-fund in which he invested. The commitments contracted by the sub-fund are only covered by the assets of the same sub-fund."*

- 1.4 The CBFA communication can be found in Dutch or French at:

[http://www.cbfa.be/fr/cs/icb/circ/pdf/cbfa\\_2009\\_05.pdf](http://www.cbfa.be/fr/cs/icb/circ/pdf/cbfa_2009_05.pdf)

[http://www.cbfa.be/nl/cs/icb/circ/pdf/cbfa\\_2009\\_05.pdf](http://www.cbfa.be/nl/cs/icb/circ/pdf/cbfa_2009_05.pdf)



## H JERSEY

### 1 Recognised Funds

- 1.1 The Jersey Financial Services Commission ("JFSC") has been assessed by the UK FSA in order to establish whether the recognised fund regime continues to meet equivalent UK standards. The results were positive and Jersey's fund regime continues to uphold its equivalent status.
- 1.2 Discussions continue on updating the Collective Investment Funds (Recognised Funds) (Rules) (Jersey) Order 2003 in consultation with the industry and the other designated territories.







## I SWITZERLAND

### 1 EU compatible fund regulation

- 1.1 As of the end of January 2009, the Federal Council decided to amend Article 31 of the Ordinance on Collective Investment Schemes ("CISO") in line with EU law. The changes entered into force on 1 March 2009.
- 1.2 As of the same date, the Swiss Financial Market Supervisory Authority ("FINMA") abolished the elements of the "Swiss finish" for collective investment schemes coming under its area of competence. The abolition should contribute toward repositioning the Swiss funds sector and strengthen the market for Swiss funds. Besides the removal of formal requirements, the abolition of the "Swiss finish" involves, in particular, the amendment of Article 31 IV CISO in line with EU minimum standards. As per the decision of the Federal Council, the amendment of Article 31 CISO came into force on 1 March 2009.
- 1.3 FINMA will also refrain in future from imposing quantitative requirements regarding the naming of collective investment schemes. It will therefore be incumbent upon licensees to ensure that they meet the statutory transparency requirements, in line with financial market developments. Investors must be informed about the investments of a fund in its documents. This information must be transparent and comprehensive and the market participants must ensure that investors are not misled.
- 1.4 Following its decision to abolish the "Swiss finish", FINMA has adapted its Guidelines for Collective Investment Schemes:
  - Annex I "Name and Investment Policy" of the guidelines for applications regarding the approval of a fund contract of an investment fund has been abolished;
  - References to the said Annex I have been deleted from all guidelines pertaining to collective investment schemes under Swiss law.
- 1.5 FINMA points out that the public distribution of foreign EU-compatible collective investment schemes ("UCITS") and foreign non-EU-compatible collective investment schemes ("non-UCITS") in or from Switzerland is subject to the approval of FINMA, as are any amendments to the documents of the said schemes. In this respect, FINMA refers to the following:
  - The guidelines for applications in respect of the approval of UCITS compliant collective investment schemes and of non-EU compliant collective investment schemes, as well as the guidelines in respect of the duties of representatives have been amended in line with the abolition of the "Swiss finish";

- As regards the specific information for investors in Switzerland, the guidelines for applications in respect of the approval of UCITS-compliant collective investment schemes refer to the model document drawn up by the Swiss Funds Association ("SFA"). FINMA recommends that this document be used;
- FINMA informs applicants that due to the abolition of the "Swiss finish", UCITS-compliant collective investment schemes, in future, do not need to be submitted for preliminary approval, as is already the case for non-UCITS.

- 1.6 The guidelines and the declarations of the qualified participants are available only in German or in French, but SFA will provide unofficial translations of these guidelines soon.

To view the guidelines see: [www.finma.ch](http://www.finma.ch) (Institutions / Collective investment schemes)

- 1.7 Further details of the SFA News 1/09 may be obtained from the SFA website:  
<http://www.sfa.ch/?setLN=e>

### 2 Side Pockets for Funds of Hedge Funds

- 2.1 In recent months, funds of hedge funds ("FoHFs") authorised for sale in Switzerland saw themselves confronted with problems stemming from the fact that:
  - FoHFs faced a wave of redemptions;
  - many target funds resorted to extraordinary measures (e.g. so-called side pockets).
- 2.2 This gave rise to situations which could – in the interests of investors – call for the creation of side pockets as an urgent measure not explicitly envisaged in the Swiss CISA.

In the case of foreign FoHFs, the question arose as to whether these could still be distributed following the implementation of side pockets. The SFA therefore submitted corresponding requests to FINMA.

- 2.3 On 23 January 2009, FINMA published a release on this issue on its website. On 24 February 2009, a delegation from the SFA was able to meet with representatives of FINMA to discuss the topic as a whole and, in particular, questions arising from the FINMA release. The key element is that FINMA placed great emphasis on investor protection in its decision, given that in Switzerland, FoHFs are also sold as retail products. However, FINMA is prepared to offer its assistance in finding quick and flexible solutions within the framework of the fundamental decisions it set down. That said, it wishes to refrain from issuing abstract, general rules, and would rather check and discuss the specific problems with applicants on a case-by-case basis.





- 2.4 The creation of side pockets for FoHFs is a decision for the fund management company and cannot be taken by FINMA on the basis of Art. 81 II of CISA. Hence the normal process for amending fund contracts is to be followed. Such a process with the corresponding procedural steps (Art. 27 CISA) is required, in particular, if a new sub-fund is to be created for the illiquid assets.

However, FINMA stated that it would also be open, in individual cases, to the possibility of illiquid assets being split off into a new unit class pursuant to Art. 40 I CISO.

- 2.5 FINMA also refrained from giving a more precise definition of the term "partially illiquid collective investment scheme" (e.g. as a percentage of the fund's assets). It wishes to leave this decision to the market.
- 2.6 FINMA confirmed that in light of the current market situation, in the case of Swiss FoHFs and also foreign FoHFs authorized for public distribution that resort to measures such as side pocketing, the issue of units of the former and distribution of the latter must in principle be suspended, both for the liquid and illiquid segments. At present, FINMA does not want to define for how long this suspension of the issue of units of Swiss FoHFs and distribution of foreign FoHFs will last. Nevertheless, FINMA is prepared to engage with such FOHFs, on a case by case basis, to consider the steps that can be taken.
- 2.7 Finally, FINMA referred representatives and distributors once again explicitly to their duty to observe the code of conduct set down in CISA and in particular their duties in respect of loyalty, due diligence and disclosure of information pursuant to Art. 20 CISA.
- 2.8 Further details of the Swiss Financial Market Supervisory Authority News may be obtained from the FINMA website:  
[www.finma.ch](http://www.finma.ch)



### 3 Collective investment schemes as the subject of withholding tax and stamp duty

- 3.1 At the end of December 2008, the Federal Tax Administration ("FTA") published Circular no 24 entitled "Collective investment schemes as the subject of withholding tax and stamp duty", which has been primarily amended in line with CISA.
- 3.2 Among the elements envisaged by the Circular are the so-called reporting procedure and an expanded group of institutions that may issue declarations of domicile (affidavits). The principle of the authority of supervisory law with regard to tax law is now also codified, specifically with a view to the single investor funds approved by FINMA. The Circular also includes two annexes for the aggregation of taxable values of funds of funds.
- 3.3 For further details see: [www.estv.admin.ch](http://www.estv.admin.ch) (Publikation / Verrechnungssteuer / Kreisschreiben)

### 4 Occupational pension schemes

- 4.1 The investment regulations for pension funds (BVV2) - vested benefits foundations and Pillar 3a foundations - have been amended.
- 4.2 The revision passed by the Federal Council is aimed at placing greater emphasis on the principle of caution and correspondingly independent action, in that the activities, competencies and responsibilities in respect of the asset management of the institutions must be set down in a transparent, understandable and measurable manner.
- 4.3 Meanwhile, the existing system of investment limits has also been simplified, and the investment universe has been expanded with the possibility of investing in well diversified alternative investments. The amendments to the ordinance came into effect on 1 January 2009.
- 4.4 For further detail please see:  
<http://www.admin.ch/ch/d/as/2008/4651.pdf>  
<http://www.sozialversicherungen.admin.ch>

### 5 Value added tax

- 5.1 The draft version of the amended VAT Sector Brochure No. 14 – Financial Industry - was submitted to the VAT consultative body at the end of 2008 and made publicly available at the same time. The Federal Tax Administration ("FTA") now envisages refraining from the requirement of so-called direct representation in the distribution of approved funds. This addresses a key issue for the fund industry.
- 5.2 For further detail please see:  
[http://www.estv.admin.ch/d/mwst/themen/konsultativ/pdf/kg\\_bb14\\_2\\_d.pdf](http://www.estv.admin.ch/d/mwst/themen/konsultativ/pdf/kg_bb14_2_d.pdf)

## J GENERAL MARKET AWARENESS

- 1 **Zimbabwe:** JP Morgan has advised clients that the Zimbabwe Stock Exchange changed its settlement cycle from T+3 to T+7, effective March 2, 2009. The settlement process for USD settlement is still being defined in the market with the Commercial Banking Sector bidding for the USD Settlement Bank tender.
- 2 **Baltics:** J.P. Morgan is closely monitoring market events in the Baltic States of Latvia, Lithuania and Estonia. Market conditions remain unclear in light of deteriorating economic performance, the resignation of the Latvian Government and possible IMF rescue packages.
- 3 **Nigeria:** FX operations remain volatile and repatriation of funds from sales of securities is provided on a best efforts basis.
- 4 **Vietnam:** The official USD / Vietnamese Dong FX rate was revalued in December. However, liquidity may remain constrained and JPM is monitoring the local market situation.
- 5 **US:** The US Treasury Market Practice Group ("TMPG") has announced that from 1 May 2009, penalties may be imposed against parties who fail to complete US Treasury trades. JPM has issued a Newsflash (ref 2009/0090), advising clients to contact their broker to establish procedures should a trade fail.
- 6 **Iceland:** The Central Bank of Iceland has clarified the restrictions imposed on foreign investors in relation to transactions in the Icelandic currency (ISK) and Icelandic securities markets. A summary is available via JP Morgan Newsflash 2009-0230. In the Newsflash, J.P. Morgan notes that liquidity in the Icelandic market is exceptionally poor and FX availability cannot be guaranteed.
- 7 **Tax:** J.P. Morgan Investor Services Global Tax Services has issued the 2009 International Tax Profiles ("ITPs") which is available to all Investor Services Clients. The ITPs cover:
  - Income withholding taxes on dividends and interest, as well as capital gains tax across the various countries that JPMorgan supports; and
  - Relief available under double taxation treaties and domestic law, and procedures for obtaining such.
- 8 **Greece:** The Hellenic Exchanges announced that from 24 February 2009 and up to 29 May 2009, over-the-counter ("OTC") re-registration transactions can be executed on a daily basis rather than at month end. Clients will be able to effect OTC re-registration transactions without the need to affect a crossing on the stock exchange.

## K CONTACT INFORMATION

### CLIENT

#### UK:

Stephen James +44 20 7325 5815  
[stephen.d.james@jpmorgan.com](mailto:stephen.d.james@jpmorgan.com)

David Nicholls +44 1202 341027  
[david.a.nicholls@jpmorgan.com](mailto:david.a.nicholls@jpmorgan.com)

Oliver Blagden +44 1202 342594  
[oliver.blagden@jpmorgan.com](mailto:oliver.blagden@jpmorgan.com)

Andrew Donner +44 20 7742 0238  
[andrew.donner@jpmorgan.com](mailto:andrew.donner@jpmorgan.com)

Damon Eaton +44 20 7742 0235  
[damon.eaton@jpmorgan.com](mailto:damon.eaton@jpmorgan.com)

William Horwood +44 1202 347165  
[william.horwood@jpmorgan.com](mailto:william.horwood@jpmorgan.com)

Sheila Regula +44 20 7742 0236  
[sheila.m.regula@jpmorgan.com](mailto:sheila.m.regula@jpmorgan.com)

Karen Rickard +44 1202 342162  
[karen.rickard@jpmorgan.com](mailto:karen.rickard@jpmorgan.com)

#### Luxembourg:

Ian Barnes +35 246 268 5312  
[ian.d.barnes@jpmorgan.com](mailto:ian.d.barnes@jpmorgan.com)

Guglielmo Manzoni +35 246 268 5354  
[guglielmo.manzoni@jpmorgan.com](mailto:guglielmo.manzoni@jpmorgan.com)

Christian Ridole +35 246 268 5362  
[christian.ridole@jpmorgan.com](mailto:christian.ridole@jpmorgan.com)

#### Ireland:

Tim Markham +353 1 612 3463  
[timothy.j.markham@jpmorgan.com](mailto:timothy.j.markham@jpmorgan.com)

Katherine Harrington +353 1 612 3052  
[katherine.harrington@jpmorgan.com](mailto:katherine.harrington@jpmorgan.com)

Shane Hurley +353 1 612 3075  
[shane.hurley@jpmorgan.com](mailto:shane.hurley@jpmorgan.com)

Tracey Campbell Devery +353 1 612 3051  
[tracey.m.cambelldevery@jpmorgan.com](mailto:tracey.m.cambelldevery@jpmorgan.com)

#### Germany:

Uwe Derz +49 69 7124 4321  
[uwe.derz@jpmorgan.com](mailto:uwe.derz@jpmorgan.com)

#### Belgium:

Aline Thibaut +32 2208 8846  
[aline.l.thibaut@jpmorgan.com](mailto:aline.l.thibaut@jpmorgan.com)

#### Jersey:

Viv McPhee +44 153 462 6413  
[viv.mcphee@jpmorgan.com](mailto:viv.mcphee@jpmorgan.com)

#### Switzerland:

Marcel Theiler +41 44 206 8449  
[marcel.j.theiler@jpmorgan.com](mailto:marcel.j.theiler@jpmorgan.com)

#### Finland:

Olli Pekka Elovainio +358 9 1655 1023  
[ollipekka.a.elovainio@jpmorgan.com](mailto:ollipekka.a.elovainio@jpmorgan.com)

#### Sweden:

Joakim Sjöberg +46 8 402 06 23  
[joakim.v.sjoberg@jpmorgan.com](mailto:joakim.v.sjoberg@jpmorgan.com)

#### Denmark:

Niels Juul Sørensen +45 3333 2714  
[niels.juulsorensen@jpmorgan.com](mailto:niels.juulsorensen@jpmorgan.com)

### TECHNICAL

Chris Oliver (UK) +44 1202 343018  
[chris.s.oliver@jpmorgan.com](mailto:chris.s.oliver@jpmorgan.com)

David Burrows (UK) +44 1202 341724  
[david.burrows@jpmorgan.com](mailto:david.burrows@jpmorgan.com)

Christian Ridole +35 246 268 5362  
 (Luxembourg, France & Belgium)  
[christian.ridole@jpmorgan.com](mailto:christian.ridole@jpmorgan.com)

Sinead McDonald (Ireland) +353 1 612 3102  
[sinead.mcdonald@jpmorgan.com](mailto:sinead.mcdonald@jpmorgan.com)

Stephanie Reiling (Germany) +49 69 7124 4480  
[stephanie.x.reiling@jpmorgan.com](mailto:stephanie.x.reiling@jpmorgan.com)

Alf Belka (Germany) +49 69 7124 4207  
[alf.belka@jpmorgan.com](mailto:alf.belka@jpmorgan.com)

Viv McPhee (Jersey) +44 153 462 6413  
[viv.mcphee@jpmorgan.com](mailto:viv.mcphee@jpmorgan.com)

Thorsten Broeder (Switzerland) +41 44 206 8445  
[thorsten.m.broeder@jpmorgan.com](mailto:thorsten.m.broeder@jpmorgan.com)

### BUSINESS DEVELOPMENT

Peter Nagle +353 1 612 3270  
[peter.nagle@jpmorgan.com](mailto:peter.nagle@jpmorgan.com)

David Painter +44 1202 347836  
[david.j.painter@jpmorgan.com](mailto:david.j.painter@jpmorgan.com)

Mark Sweeney +353 1 402 6250  
[mark.sweeney@jpmorgan.com](mailto:mark.sweeney@jpmorgan.com)