

THE ASSOCIATION OF GLOBAL CUSTODIANS

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22 September 2006

Mario Nava
DG Internal Market
European Commission
B – 1049 Brussels
Belgium

**Re: Comments Following the 15th September Users' Meeting Concerning
the Code of Conduct for European Infrastructures**

Dear Mr. Nava:

This letter is being sent on behalf of the Association of Global Custodians ("Association"),¹ following the Association's participation in the European Commission ("Commission") meeting on 15 September 2006 concerning the Code of Conduct for Market Infrastructures ("Code"). We thank the Commission and its staff for inviting the Association to participate in these discussions.

The Association fully supports the Commission's development of the Code as a means to address the issues without invoking a directive or other legislation. We share your view that this is a more effective and timely mechanism to trigger change. In particular, Association members appreciate the Commission's interest in hearing the views of infrastructure users as the process unfolds, and we fully endorse the creation of a monitoring panel with user representation.

¹ The Association members are listed on the letterhead above.

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The following comments summarize the Association's key views concerning the Code as presented by Association representatives on 15 September.² As the Code is implemented, the Association welcomes the opportunity to provide further and more extensive commentary.

General Comments

The Association fully supports the approach the Commission is now pursuing. In our view, the development of a Code for infrastructure that is based on industry design and leadership, supported by active Commission oversight -- and without directive legislation -- is the right approach. This approach seems more likely to lead to pragmatic and positive near-term changes and is more likely to encourage innovation and promote evolution through market forces than if structural change were dictated by legislation.

We commend the Commission for seeking user participation and for employing consultative processes. In our view, success will depend on continuing interaction and dialogue among the Commission, infrastructure service providers and infrastructure users.

We agree that the scope of the Code should be focused on market infrastructure entities and the cross-border arrangements and issues germane to those entities, and should avoid confusing the centralized roles and functions of infrastructure utilities with the differing, customized roles and functions of intermediaries. We also support an incremental approach beginning with cash equities.

In addition, we strongly concur with the Commission staff views expressed during the meeting that development of the Code should not supplant or delay the crucial efforts to remove the Giovannini barriers, particularly those that fall to the public sector. We firmly believe that these barriers contribute significantly to the inefficiencies and high costs of cross-border activities. The ongoing work to remove barriers needs to be

² The Association was represented by Robert C. Almanas and Amy H. Gutschenritter, both of State Street Bank and Trust Company, and Diana Dijmarescu, of JPMorgan Chase Bank, N.A.

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addressed without interruption or compromise and in parallel with the efforts to develop, refine and implement the Code.

Comments on the Code Elements

Price Transparency. To enable users to evaluate and compare prices and services from entity to entity, information about infrastructure service prices and pricing policies should be disclosed to users by infrastructure providers through use of comparable data presented in a reasonably standardized form. Transparency should include disclosure of the price-setting process and the underlying pricing policy, but the Code should not prescribe what the policy ought to be. We agree that it is essential not to over-engineer the elements of pricing transparency, thereby allowing for innovation.

Interoperability and Open Access. Association members favor open, non-discriminatory access for users, such as custodian banks, to markets and infrastructure service providers. Interoperability linkage arrangements among infrastructure facilities, however -- if too widely mandated -- could introduce unnecessary and expensive redundancy, adding costs to cross-border clearing and settlement.

As discussed at the meeting, interoperability linkages will require that a "business case" be made for a specific link between any two infrastructure entities. We believe the Code should clarify the nature of the "business case" to be made and should require that any given linkage proposal address such matters as risk, standardization, costs, and explicit benefits. In our view, the burden should fall on the entity seeking a link to demonstrate that the benefits and net costs to users justify the potential inefficiencies and added costs associated with the linkage.

Unbundling and Accounting Separation. This element of the Code should be clarified further to make the distinction between core services provided by the infrastructures acting as essential facilities in a monopoly position, and the value-added services, for which a competitive environment may exist. For example, it would be helpful to underscore the strong link between the Unbundling of Services requirements and the Price Transparency requirements. In addition, this section of the Code should make it clear that users are free to purchase only the services they require and that *core* infrastructure services should be priced and sold separately from *value-added* services.

Monitoring Code Implementation and Compliance. We strongly encourage the Commission to engage a limited, but broadly representative, expert users' panel to

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monitor the implementation of the Code. We suggest a panel comparable in composition to the user group that participated in the 15 September meeting. We believe that monitoring the implementation of the Code may be complex, and an expert users' panel approach would provide the Commission with relevant -- and necessary -- experience. In our view this approach would be preferable to placing the monitoring duties and burdens solely on public sector representatives or on a single entity.

As Association representatives noted during the meeting, the Association would be pleased to discuss further our potential participation on such a panel and what role the Association might play in monitoring the implementation of the Code. Association members have direct relevant experience with the sort of monitoring the Code will require. For example, the Association has provided monitoring assistance to the Group of Thirty as part of that organization's efforts to assess the extent to which their recommendations have been implemented. Additionally, each year the Association gathers extensive detailed information concerning the features and practices of more than 130 Central Securities Depositories. This "Depository-Information Gathering Project" assists Association members in meeting their regulatory obligations under United States securities laws governing investment companies' custody of securities assets in non-US jurisdictions. The questionnaire used in the information-gathering process and information about the project is posted on the Association's website, www.theagc.com. As an extension of this project, the Association has worked successfully in the past with the European Central Securities Depositories Association to assess a general disclosure framework for European securities depositories. We would be pleased to explore with the Commission ways to adapt these experiences and processes to assist and support the monitoring of the Code.

Conclusion

In summary, the Association fully supports the Commission's efforts to provide on-going general oversight in this area while calling for private sector leadership in developing and implementing a Code of Practice for European securities market infrastructures. We particularly appreciate the Commission's effort to seek out the views of infrastructure users and to rely on consultative processes in doing so.

The Association believes that the 15 September meeting was very useful and productive, and we welcome continued and ongoing dialogue as the details of the Code evolve. We appreciate the opportunity to participate in these processes and we hope

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the foregoing is useful. If you have questions, would like additional information, or would like further follow-up, please contact either of the undersigned.

Sincerely yours,

Handwritten signature of Dan W. Schneider in cursive, with the initials "MRB" written at the end.

Dan W. Schneider
Baker & McKenzie LLP
Counsel to the Association

Handwritten signature of Margaret R. Blake in cursive.

Margaret R. Blake
Baker & McKenzie LLP
Counsel to the Association

Cc: Commissioner Charles McCreevy