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The European Commission,

Directorate-General for Financial Stability,
Financial Services and Capital Markets
Union

Public Consultation on the Review of the Alternative Investment Fund Managers Directive (AIFMD)

- Swedish Bankers' Association's Response

Section II b) depositary regime

Question 25. Is it necessary and appropriate to explicitly define in the AIFMD tri-party collateral management services?

Yes

Question 25.1 Please explain your answer to question 25:

Given the different structure of third party collateral management services compared to ordinary delegation and custody through a chain of custodians where the AIFM instructs the depositary, it seems appropriate to explicitly define the AIFMD tri-party collateral management services taking into account these differences.

Question 26. Should there be more specific rules for the delegation process, where the assets are in the custody of tri-party collateral managers?

Yes

Question 26.1 Please explain your answer to question 26, presenting benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible:

The specific circumstances have to be addressed through rules adjusted to the situation where the assets are in the custody of tri-party collateral managers. Third-party collateral agents, holding the AIF's assets as collateral in connection with transactions such as derivatives, securities lending etc., are appointed by the investment manager as well. In the latter cases, the AIFM will enter into

arrangements by which they are required to instruct third-party collateral agents directly.

Question 27. Where AIFMs use tri-party collateral managers' services, which of the aspects should be explicitly regulated by the AIFMD?

Please select as many answers as you like

- the obligation for the asset manager to provide the depositary with the contract it has concluded with the tri-party collateral manager
- the flow of information between the tri-party collateral manager and the depositary
- the frequency at which the tri-party collateral manager should transmit the positions on a fund-by-fund basis to the depositary in order to enable it to record the movements in the financial instruments accounts opened in its books
- other: clarity on how the reconciliation in Article 98, paragraph 2a (iii) should be performed in the situation where the positions in the financial instruments account in the books and records of the depositary are based on reporting from the delegate (third party collateral agent)

Question 28. Are the AIFMD rules on the prime brokers clear?

No

Question 28.1 Please explain your answer to question 28, providing concrete examples of ambiguities and where available suggesting improvements:

Given the different structure of prime broker services compared to ordinary delegation and custody through a chain of custodians where the AIFM instructs the depositary, it seems appropriate to explicitly define the prime broker services taking into account these differences.

Question 31. Does the lack of the depositary passport inhibit efficient functioning of the EU AIF market?

No

Question 31.1 Please explain your answer to question 31:

The current regime works well as there are a number of domestic and non-domestic (through branches and subsidiaries) depositaries offering the provision of depositary services to AIFs established in the Swedish market. Although the intention of the passport is to enhance competition, we believe there might be a risk that a passport

could have the opposite effect. The main concern is that a depositary passport would create increased risks for the investors.

Question 32. What would be the potential benefits and risks associated with the introduction of the depositary passport?

Please explain your position, presenting benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible:

An introduction of a depositary passport might provide the benefit of broadening the choice of depositary for the fund management companies. It would in our opinion however also increase the investors' risks, and we consider limiting such risks more important than the potential benefits regarding choice of depositary.

In case the AIF and the depositary are domiciled in different jurisdictions this would mean that different material laws are applicable to the assets held in custody by the depositary on behalf of the AIF and the AIF. This leads to legal uncertainty in several areas. Since the rules on conflict of laws also differ between member states this may also create legal uncertainty (one example is rights in rem). A future change of an AIF's depositary domiciled in a different jurisdiction compare with the former depositary would furthermore lead to a change of material law applicable to the AIF's assets, which are difficult to handle and with negative implications for the investors, which are outside of their control. It will also have implications on the managers inter alia in relation to their information obligations to the investors. The supervision of the AIF and the depositary by the relevant NCA would potentially be carried out in different member states, creating challenges and risks.

Further, in order to perform the depositary duties it is important for the depositary to be well informed about all local market regulations and market practice related to e.g. payment infrastructure, clearing, settlement and safekeeping processes, and also to have well established contacts with market infrastructures and NCA and we believe this would best be achieved with local presence.

There are a number of aspects applicable to the fund that are governed by the national rules which the fund has to comply with such as subscription and redemption.



Question 33. What barriers are precluding introducing the depositary passport?

Please explain your position providing concrete examples and evidence, where available, of the existing impediments:

The fact that conflict of laws for intermediated securities held in custody as well as the member states material laws are not fully harmonized creates risks if a depositary passport were to be introduced.

Question 34. Are there other options that could address the lack of supply of depositary services in smaller markets?

Please explain your position presenting benefits and disadvantages of your suggested approach as well as potential costs of the change:

The current regime already caters for this. To our understanding there is no lack of supply of depositary services in Sweden.

Question 35. Should the investor CSDs be treated as delegates of the depositary?

Don't know / no opinion /not relevant

Question 35.1 Please explain your answer to question 35, providing concrete examples and suggesting improvements to the current rules and presenting benefits and disadvantages as well as costs:

If investor CSDs were to be treated as delegates of the depositary and adhere to the reasons put forward by Esma in the Opinion from 2017 on Asset segregation and application of depositary delegation rules to CSDs, we think that there are a number of practical implications that need to be considered further and thoroughly thought through, before treating the investor CSD as a delegate of the depositary.

By making an investor CSD a delegate they would be seen as a sub-custodian to whom a custodian has delegated the safekeeping (for foreign securities), this would imply that the investor CSD would have to take on liability and thus also the custody duties. In the light of the wording of the AIFMD/UCITS V further clarified in the ESMA opinion from July 2017, issuer depositaries are already today exempted from delegation clauses whereas the investor CSD-s are not and with these normal delegation/liability requirements apply. We do agree to this differentiation as "investor CSDs" are in commercial competition with other global custodians and



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must compete on equal terms. But in reality, such differentiation does not work since the Issuer CSD part and the Investor CSD part of a CSD are usually commingled. So, although the custodians need to perform due diligences on the investor CSDs and set-up custody agreements in order to be in line with UCITS/AIFMD requirements, this is something that the CSDs are widely reluctant to participate in. Also, it is not clear how the delegation rules should be applied with the T2S set-up and the ICSD who are built on the architectural structure of having accounts directly with other CSD or reaching markets through other markets sub-custodians.

We believe the aim of safeguarding the clients' assets throughout the custody chain up to the issuer CSD is of importance.

SWEDISH BANKERS' ASSOCIATION

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