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APG Asset Management

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Subject: **Response ESMA Consultation AIFMD**

1. Introduction

APG¹ is one of the world's largest administrators of group pension schemes and administers the pensions of over 4 million pension participants in the Netherlands. The Dutch pension system is based on collectivity and solidarity. By making comprehensive, collective agreements, millions of Dutch employees have more financial security when they retire. The solidarity provides stability and spreads costs as well as risks. The pension system also provides financial security for future generations through long-term investment horizons.

APG exclusively provides services to pension funds (and pension funds only) and is owned by ABP, the largest pension funds in Europe. APG manages pension assets of approximately 270 billion euros for pension funds through a variety of equity, fixed income, cash management, alternative investment and real estate.

2. General remark

Regardless the answer to the question whether the Alternative Investment Funds Managers Directive (AIFMD) is applicable to APG or its activities, we welcome the opportunity to respond to the European Securities and Markets Authority's (ESMA) consultation on the possible implementing measures of the AIFMD. Please note that we have responded to the consultation primarily from an end users perspective and that our remarks stem from the fact that APG and its clients are very large institutional investors acting in the interest of pensioners.

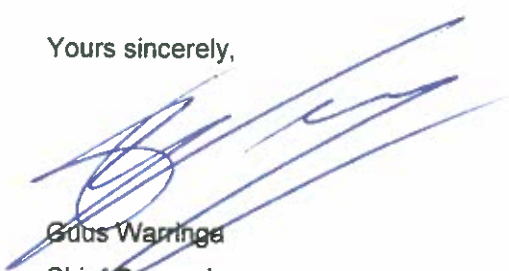
¹ APG Algemene Pensioen Groep NV.

3. Key remarks

- From a pension funds perspective as end user and investor in AIFs, the vast majority of the ESMA proposals/advice as proposed in this consultation should be welcomed, because they are in line with what may (or should) be expected from a professional manager or because they have added value. Examples are the general principles regarding the manager's organisation and the disclosure obligations towards investors. Therefore, in general we appreciate ESMA's extensive advice on Level 2 regulations.
- However, we would also like to express our concerns regarding the proportionality of two specific aspects of the Consultation, which are the proposals regarding the role and tasks of the depository and the requirements regarding delegation.
- It should be secured that the requirements regarding the Depository should not interfere with the current existing national practice in the Netherlands, where in the FGR-structure specific legal entities are incorporated for the purpose of segregation of the FGR's assets from the assets of the FGR manager, which might be managing more than one FGR. This Legal Owner Entity solely holds the assets and liabilities on behalf of the FGR and it is not allowed to conduct any commercial activities. This Entity cannot be considered a Depository within the meaning of the AIFMD and can therefore co-exist alongside the Depository as defined in the AIFMD.
- The proposed responsibilities of the manager in case of professional negligence of the Delegates should not lead to a situation in which a manager is held responsible for acts /negligence that are beyond its control. Instead liability in case of delegation should be limited to the observance of a reasonable standard when appointing and monitoring such delegates. Of course the agreement with the delegate should provide for a reasonable liability of the delegate itself.

Please find below in the attached Annex to this letter our specific and more technical comments on certain elements of this consultation. We hope that our response is of assistance. Should you have any (remaining) questions or would like additional clarification, please do not hesitate to contact us.

Yours sincerely,



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Legal, Tax, Regulations & Compliance



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ANNEX: Specific remarks

IV.I Possible Implementing measures on Additional Own Funds and professional Indemnity Insurance

We expect that the requirements covering risk arising from professional negligence will force AIFM into large amounts of additional own funds or excessive costs for professional indemnity insurance. Especially, the liability in case of delegation may have such an effect. Liability in case of delegation therefore should be limited to the observance of a reasonable standard when appointing and monitoring such delegates. Of course the agreement with the delegate should provide for a reasonable liability of the delegate itself.

Page 36, Box 8

We prefer option 1, because there is no evidence that the level of the income of the manager is related to the risks taken by the manager.

IV.II. Possible Implementing Measures on General Principles

Page 43, Box 11

The reference to a business plan seems to be somewhat confusing, because business plans usually refer to the way AIFs are run and requirements with respect to resources and development plans are not primarily focused on the AIF's investment strategy. Instead, we recommend the definition and implementation of an investment strategy paper per AIF in conjunction with its terms and conditions including its investment specifics.

Page 44, Section 15

The obligation to maintain evidence of significant investment opportunities might need further clarification in the explanatory text. We assume ESMA means that an AIFM needs to be able to demonstrate that it considered more than just one investment opportunities (which did not necessarily lead to an investment decision). It should suffice to document that other investment opportunities were examined, but were less interesting to consider.

Page 51 – 52, Box 18-19

We prefer option 1. It is important that it has been made clear that preferential treatment of certain client (s) over others is allowed, as long as those other clients may not find any material disadvantage. The challenge of the AIF will be how to define, identify and disclose such situations.

IV.IV. Possible Implementing Measures on Risk Management

In general, we support the advice given by the ESMA. The strengthening and clarification of the role of the risk management function is an important element that will help establishing a strong risk culture within an AIFM.

P72, Box 29

Quantitative risk limits on operational risks are not very meaningful given the specific nature of operational risks. Therefore, the explanatory text of Section 28 may give an undue work load to explain every operational risk mitigant not being quantitative to the competent authorities.

IV.V. Liquidity Management

Page 78, Box 32

AIF's are often de-facto-open-ended. Nevertheless, they can invest in illiquid assets. Clients often have accepted such illiquid investments and understand their less liquid nature. However, theoretically, when an AIFM does not have firm commitments on a minimum level of investments in an AIF from all investors, it should manage the liquidity as if the whole AIF could be liquidated (see Box 32, 3d). However, this is neither practical nor feasible: an AIFM will often have specific commitments to external managers, managing many investments in those illiquid funds that prevent an AIFM from withdrawing investments. Also cash limits are often contractually limited in the rules of the AIF to a relatively small amount.

Page 84, Q20

ESMA's definition of 'specific arrangements' is very helpful to ensure that the illiquid nature of assets is properly reflected in the contractual arrangements between the AIFM and the investors.

We do not agree with Q20's hypothesis and we believe that special arrangements are necessary even in normal liquidity management in relation to some AIF's (notably in illiquid assets, such as infrastructure, private equity, real estate, hedge funds, opportunity fund and commodities). We would like to stress that the existence and use of arrangements like side pockets and gates are useful instruments and should be acceptable as long as properly disclosed to the investors. Such arrangements contribute to a fair treatment of the investors.

IV.VI. Possible Implementing Measures on Investment in Securitisation Positions

The proposed measures seem far reaching. The requirements for the AIFM should not lead to a replication of the due diligence activities of the originator or sponsor of the securitisations. This would be unfeasible.

IV.VIII. Possible Implementing Measures on Valuation

Page 113-121

In our opinion there is an important difference in the valuation control process of fund investments and of direct investments. The first is process oriented, while the second is asset oriented. This implies that as an AIF is just one of the participants in another fund, it should ensure and monitor that in the pre-investment phase all necessary processes are in place with the manager of that other fund to ensure a proper valuation of its assets. In respect of direct investments, the AIFM will have to perform valuation of the assets itself or by an external valuer.

IV.IX. Possible Implementing Measures on Delegation

Page 127, Box 65

We would opt for a combination of both options as this provides a high-level principle and room for the AIF to manoeuvre, while it also gives some guidance as to what constitutes objective reasons for delegation.

Page 131, Box 68

Sub section 1(a) should be interpreted in the light of a contractual (and often international) relationship between the AIF(M) and the delegate. If the AIFM is required to establish an agreement that allows the competent authority unlimited access to all relevant details and access to a delegate's premises, this will be very hard to realize. We would rather opt for a workable practice in which delegates agree to provide specific information at set times and in which they engage independent third party assurance, such as independent audit firms, administrators, custodians and external appraisal firms, which contribute to a controlled relationship between AIFM and the delegate. We would recommend ESMA to include a section about the use of external assurance agencies.

Regarding ad hoc access to data and premises, it should be noticed that the delegate should be able to ask for reasonable restrictions, such as access after written notice, access during normal working hours, restrictions on the number of individuals that will be allowed access and the frequency and length of such thereof. An AIFM should be in a position to negotiate with the delegate on such restrictions as long as effective supervision remains possible.

V. Depositaries

General remarks

AIFs can be investment companies which are legal entities. However, in The Netherlands many collective investment undertakings are established in the form of funds for joint account ("*fondsen voor gemene rekening*", in short "FGR"). An FGR is not a legal entity, but solely a contractual arrangement among the parties involved.

Therefore, an FGR itself can not enter into agreements or hold assets or assume obligations in its own name. The legal title to the assets and the liabilities assumed by an FGR are held by and in the name of a

specific legal entity established for this purpose (the "Legal Owner Entity"). The Legal Owner Entity provides also for segregation of the FGR's assets from the assets of the FGR manager, which might be managing more than one FGR. The Legal Owner Entity solely holds the assets and liabilities on behalf of the FGR and it is not allowed to conduct any commercial activities.

The AIFMD applies to an AIFM irrespective whether the AIF is constituted under the law of contract, under trust law, under statute, or has any other legal form.² Hence it applies to both collective investment undertakings which are legal entities as well as those without corporate personality.

This Legal Owner Entity is part of the internal AIF-structure and can not be considered as a Depositary as defined in the AIFMD. . The Legal Owner Entity can therefore co-exist alongside the Depositary as defined in the AIFMD. This can be explained as follows.

The Legal Owner Entity is the ultimate legal owner of the AIF assets, which are held in custody by the Depositary .³ The Legal Owner Entity is also the legal owner of "other assets" for which the Depositary does not perform custody, but verifies the ownership of the AIF.⁴ Such other assets are, amongst others, listed derivatives, OTC derivatives and other contracts, which can entail obligations on the side of the AIF. Because only a legal entity can enter into such contracts the Legal Owner Entity would be the eligible party to such contracts in the FGR-structure.

Although an AIF is only allowed to engage one single Depositary, under the AIFMD it is not prohibited that one Depositary performs its activities for more than one AIF. It would be extremely cost saving when a Depositary indeed is engaged for more AIFs. In such a situation, full segregation of each AIF assets that are held in custody with the Depositary has to be guaranteed. Also non-custody assets such as derivatives and other contracts, which entail obligations as well, need not be commingled among AIFs. The Depositary cannot therefore be the counterparty to such contracts. For AIFs with corporate personality this is not an issue as each AIF itself can enter into the relevant (derivatives) agreements. To assure segregation of obligations deriving from non-custody assets for AIF without corporate personality however, it is necessary for each AIF to have its Legal Owner Entity acting as the counterparty in the relevant (derivatives) contract, such as FGRs.

The term "AIF" as used in the AIFMD comprises the current Legal Owner Entity acting on behalf of FGRs in The Netherlands. This should be taken into account and the application of the AIFMD to AIFs being investment companies with corporate personality and those without should be aligned, without creating material differences or unintended consequences for specific existing national structures.

² Article 2, subsection 2(c) of the AIFMD.

³ Section 21, subsection 8 of the AIFMD "The assets of the AIF or the AIFM acting on behalf of the AIF shall be entrusted to the depositary (...)" provides for two options for ultimate ownership. The AIF itself is not a legal entity. The fund manager is according to Dutch Law not eligible for reasons of non-segregation from its own assets.

⁴ Article 21, subsection 8(b) of the AIFMD.

Our answers and comments to the ESMA Consultation paper should therefore be read in this context. Any references below to the "Depositary" should be seen as references to the Depositary within the meaning of the AIFMD and not to the Legal Owner Entity of the FGR.

Specific remarks

Page 139 – 140, Box 74

We appreciate that the elements as set forth in this box are not limitative and they provide for sufficient flexibility. However, as effective asset segregation is an extremely important concept for effective safekeeping, we consider it necessary that the agreement between the AIF(M) and the Depositary comprises an obligation of the Depositary to provide (and to update from time to time) an external legal opinion regarding the position of the AIF in the event of bankruptcy of the Depositary. The legal effectiveness of asset segregation at the Depositary level should be assessed independently from the Depositary.

Page 142, Section 12

We endorse the view that a model agreement would restrict commercial freedom and could cause difficulties given the variety of jurisdictions involved and therefore should not be developed.

Page 147, Box 75

The Depositary should not only be informed prior to the effective opening of any cash account, but also prior to the closure of existing accounts to ensure an up to date overview of all operational cash accounts without any redundancy.

Page 153, Q25

We neither see any additional value in opening specific cash account with the Depositary itself, nor in treating cash flows related to subscriptions or redemption differently from other cash flows. It should also be taken into account that a Depositary is not always a bank or credit institution and therefore might not have the necessary infrastructure in place for holding cash accounts for the AIF. Furthermore it seems that holding of cash with non banking institutions (even being the Depositary itself) causes some tension with the requirements of article 21(7) of the AIFMD.

Page 153, Q26

Cash flows reconciliation strongly depends on the type of assets.

Page 153, Q28

We do not expect additional issues regarding information flows between the Depositary and a prime broker. However, a more general issue is that prime brokers (as well as clearing brokers for futures) hold cash as margin or excess margin in accounts held in the name of the AIF. Although prime brokers are not necessarily banks, this should be allowed as the cash is transferred and held as collateral. Such cash can no longer be regarded as cash of the AIF to be held in accordance with article 21 (7) of the AIFMD

although such cash may be visible in accounts held in the name of the AIF with the prime broker. Such cash holdings should be regarded as "other assets" as meant in Article 21(b) of the AIFMD.

The same goes *mutatis mutandis* for securities held in prime broker accounts of the AIF. Such holdings are not assets in custody with the Depositary in accordance with Article 21(8) (a) of the AIFMD but these holdings are "other assets" as meant in Article 21(b) of the AIFMD.

Page 153, Q29, Q30, Box 76

We strongly prefer option 2. Given the huge volume of daily cash flows management, cash flows management is a basic task and responsibility of the AIFM. This task needs to be executed smoothly and swiftly to support the investment process without delays. Therefore cash flow management should not be hampered by unnecessary procedures or interventions by other parties. A Depositary should therefore not replicate the functions of the AIFM. Having a Depositary operating as a central hub for all cash movements would be disproportionate. A check of adequacy of existing processes and procedures with the AIFM would provide for sufficient oversight and protection of investors. Cumbersome procedures could even create more risks for the investors as payment defaults caused by such procedures could lead to severe consequences. Although costs are difficult to estimate, we would consider the costs of option 1 to be substantially higher than the costs related to option 2, although the costs of option 1 are not easy to quantify. Operating a position keeping system, making reconciliations and sending instructions to third parties will require a staff of personnel comparable to the staff of the AIFM charged with cash flow activities with the AIFM itself.

We would like to ask for clarification of the concept of cash flow monitoring. Given the diversity of investments, we strongly prefer the AIFMD not to imply the full look through from allocation to an underlying investment and collective investment funds and beyond. Such approach would require full transparency from the investment firms in all underlying assets, accounts and entities and might lead to divesting if those firms could not comply. Therefore cash flows should be followed from AIF to the underlying investment and vice versa, however, not beyond. We would appreciate if the regulations provide additional guidance about the level of the monitoring task regarding cash flows.

We trust that there will be sufficient room for proportional implementation and reasonable freedom regarding the time line and the specifications of the reconciliations as each type of assets demands a different treatment.

Page 157, Box 78, Q32

The question whether financial instruments are held in custody is closely connected to the liability regime, which should apply in the event financial instruments are lost. The highest level of investor protection (obligation of restitution) should in our opinion apply in a situation in which the ultimate investor, being the AIF, is not disclosed in the entire chain of intermediaries up to the issuer. In these circumstances the assets are often held at an omnibus level and the AIF needs to fully rely on the Depositary acting correctly as safe keeper. The AIF has neither a direct relationship with nor direct claims towards any other

parties in the holding chain. In order to ensure the claim of the investor towards the Depositary, the Depositary should, as a rule, be liable for its own defaults as well as for "upstream" issues in the holding chain. Financial instruments registered directly with the issuer or its agent in the name of the Depositary on behalf of unidentified clients should have the same protection as book-entry securities. Therefore we prefer option 1.

Page 157, Q33

Under current market practice the following financial instruments are eligible to be held in custody: common stock and other equity securities, depository receipts, interests in limited partnerships and limited liability companies, bonds, debentures and other debt securities, notes or other obligations, and any instruments representing rights to receive, purchase, or subscribe for the same, or representing any other rights, distributions or interests therein.

Page 158, Box 79, Q34

We prefer option 2. The Depositary's liability should end, when the Depositary has no longer control over the relevant assets. When assets are transferred from the Depositary to another party (or its depository), they are held by the other party for its own risk and account. This applies to the transfer of title arrangements and security collateral arrangements at the moment that the financial instruments are transferred from the AIF or the Depositary. For example, assets subject to a security collateral arrangement may, depending on such arrangement, be used by the secured party which leads to a transfer of the assets to the secured party. In our view, the AIF has no longer any claim against the Depositary for transferred assets. Instead, it has a contractual right on its collateral receiving counterparty (subject to the terms of the collateral arrangement) for redelivery of the relevant financial instruments. It would make no sense to hold the Depositary responsible (or liable) for acts or omissions of assets, which are in custody with third parties. Conversely an AIF, which receives transferred collateral, will be responsible (subject to the terms of the collateral arrangement) for possible redelivery of the assets to the other party. If financial instruments are lost, the Depositary of the AIF should as a rule be liable and return a financial instrument of identical type to enable the AIF to meet its potential contractual redelivery obligations to the collateral provider. In our view, there should be no substantial differences in treatment between title transfer financial collateral arrangements and security financial collateral arrangements as of the moment that the assets are transferred to the secured party.

Page 159, Box 80

When financial instruments are physically delivered to the Depositary, they should be held in custody on a segregated basis. In order to be protected, this could, depending on the bankruptcy laws applicable to the Depositary, mean that such financial instruments have to be separated physically in the depository's vault and have to be clearly identified as belonging to the AIF and not to the Depositary.

Page 162, Section 41

Article 21(8)(b) of the AIFMD does allow the Depositary to be the owner of "other assets". This article only recognizes the ownership of the AIF or the AIFM acting on behalf of the AIF. If those assets are registered in the name of the Depositary itself (on behalf of unidentified clients) such assets should not be regarded as "other assets". They should be regarded as assets held in custody in accordance with Option 1 defined in Box 78. As a result they benefit from the liability regime applicable to assets in custody.

Page 163, Q36

Assets registered in the name of the Depositary provide optimum control from the Depositary's perspective while assets registered in the name of the AIF provide for optimal AIF control. In our opinion the first approach deals with "assets in custody" and the second approach with "other assets" as described in the AIFMD. Registration in the name of the Depositary on behalf of the AIF would be an in between approach, which in our opinion causes some tension with the wording of article 21(8)(b) of the AIFMD. We refer to our remarks regarding Page 162, Section 41 above.

Page 163, Q37

This would depend on market practice and regulations in the jurisdiction of the relevant prime broker.

Page 163, Q38

We appreciate that the AIFMD requires the Depositary to maintain records of other assets and to verify the ownership of such assets on the basis of information and documents provided by the AIF or the AIFM and, where available, on external evidence. The consultation paper expands on this by requiring the AIF to ensure that third parties provide the Depositary with evidence every time there is a sale, an acquisition or a corporate action. However, we feel that this requirement should not lead to Depositaries having to fully re-perform the position record keeping task of the AIFM. Especially, verification of transactions entered into with high frequency, such as futures and other derivatives transactions, should be approached pragmatically. We suggest that the Depositary obtains the information regarding such frequent trade positions directly from the AIFM and verifies these positions on less frequent basis by means of external account information. Without observing sufficient flexibility, we fear that the costs of redoubling the AIFM activities would outweigh the benefit of additional investor protection.

Page 163, Q39

This will depend on the nature of the assets and the jurisdictions involved. The Depositary's obligations to verify ownership should at all time remain within reasonable boundaries and should not extend beyond what is reasonably to achieve.

Page 164, Box 82

Regarding the oversight duties of the Depositary, we would like to stress that this function of the Depositary should not lead to the re-performance of tasks of the AIFM. In Box 82 reference is made to processes and procedures that are under the responsibility of the AIFM, which in our opinion should at all

times stay under the AIFM's responsibility. Oversight procedures with the Depositary in respect of these AIFM tasks should in practice indeed be proportionate, remote, ex post and second level verification procedures. Furthermore, we would appreciate it if for the avoidance of any doubt the general requirements for oversight duties in Box 82 explicitly refer to the five oversight duties as set for in Article 21 (9)(a) through (e) of the AIFMD. Only in relation to the performance of these specific functions of the Depositary the Depositary needs to define controls and verifications of the AIFM's processes and procedures.

Page 170, Q40

Taken into account our comments above related to Box 82, oversight functions could be counterproductive as the AIFM or third parties could easily judge the activities of the Depositary as obstructive and hampering day to day activities. Proportionality and ex post verification should be closely observed.

Page 170, Q43

It is unlikely that the requirement extends beyond the sales of units or shares by the AIF or the AIFM as the object of the oversight tasks of the Depositary zoom in on the activities of the AIF and the AIFM itself.

Page 171, Q44

We appreciate the view of ESMA that ex ante controls related to the Depositary carrying out AIFM instructions are as a rule considered to be impossible. This view can be confirmed given the existence of "straight through processing" procedures, which are nowadays implemented as common market practice. Moreover, ex ante controls tend not to comply with the Level 1 regulations.

In addition, we do not consider the scope of the proposed ex post duties to be appropriate. In our opinion, this specific oversight task should (as well as all the others) be explicitly placed in the context of the general requirements as stipulated in Box 82. The AIFM is responsible for compliance with (AIF) rules including investment restrictions and leverage limits. Given this responsibility of the AIFM and the tenor of Box 82, the Depositary should not be required to set up its own procedures in order to verify the AIFM's compliance. The Depositary should rather establish an oversight function which verifies that the AIFM has appropriate procedures implemented that ensure compliance with the relevant rules.

Page 171, Q45

We prefer option 1 and refer mutatis mutandis to our response to Page 171, Q44 above. The Depositary should not set up a detection procedure itself, but should ensure that the AIFM has appropriate detection procedures implemented and has these procedures frequently reviewed.

Page 176, Q46

The effectiveness of alternative or additional measures to segregation will highly depend on local law, legal opinions of local counsels and also on the nature of the assets involved. A possible measure could be (if locally feasible) to circumvent custody chains completely (and thus to avoid segregation issues regarding any intermediaries) by having the assets registered in directly in the name of the AIF at the level of the issuer or its registrar. By doing so, the assets will no longer be assets in custody but "other assets" as meant in Article 21(8)(b) of the AIFMD. If registrar companies operate centralised for a number of issuers, additional protection could be achieved by getting contractual arrangements in place between such registrars and the Depositary or its sub custodians. Such contractual arrangements could provide for prompt registration obligations, regular audit verification of books and agreements in respect of responsibilities and liabilities of the registrar company. This approach would only work in jurisdictions where more or less centralised registrar companies are active (e.g. Russia). If there is any doubt regarding segregation at the level of the sub custodian but the relevant CSD does operate on a sufficiently segregated basis, an option could be to establish a separate AIF account directly at CSD level. However, local law has to allow such an approach and provides for direct client access to CSDs.

As a rule the laws of developed markets as well as the laws of the major emerging markets recognise the effects of the segregation requirements and provide for protection against bankruptcy of CSD and sub custodian. Only in less commonly used jurisdictions this might not be the case and it might also be questionable whether additional measures would be effective in such jurisdictions. In these circumstances, the Depositary will have to advise the AIFM about the custody risks connected to investing in such markets. Notwithstanding the existing custody and legal risks, such investments could (up to a certain amount) still be prudent, in compliance with the AIF rules and attractive for an AIFM taking into account the existing risks and expected returns. If we read Section 2 of Box 89 literally, such investments would lead to non compliance with Section 21(11)(d)(iii) of the AIFMD as the Depositary will not be able not ensure protection from insolvency and it cannot provide for additional arrangements reaching such protection. We feel that section 2 of Box 89 should address this situation explicitly and additionally should provide for the obligation of the Depositary to duly inform the AIFM in circumstances that the necessary protection can not be reached due to local law (or such protection is highly questionable) although all the segregation requirements are met. This would also be in line with page 185, Section 32, which designates similar circumstances as an external event for the purpose of assessing liability. Informing the AIFM should in our opinion lead to a discharge of the Depositary as the Depositary has taken reasonable action (in this case towards the AIFM) in order to prevent the external event to cause damage.

Page 182 – 183, Box 91

It should be noted that the liability for sub custodian defaults as described in this box leads to a high responsibility and risk for the account of the Depositary. Although a Depositary observes a high level of care in the selection and monitoring of the sub custodian, it will be liable for a sub custodians fault in the exercise of its sub custodian duties.

It is questionable whether this is reasonable. It is also questionable whether a contractual transfer of liability to the sub custodian with a direct claim on behalf of the AIF against such sub custodian will be valid and effective in the light of local laws which will be involved.

Page 186, Sections 38 and 39

A Depositary should not be the party to decide whether financial instruments should be disposed. As mentioned in our answer to page 176, Q46 above, the investments could (up to a certain amount) still be prudent, in compliance with the AIF rules and attractive for an AIFM taking into account the potential risk of an external event and expected returns. The issue that matters is whether the AIFM is able to take an informed decision. The responsibility of the Depositary should therefore be limited to alert the AIFM adequately about potential external events. If the AIFM despite the actions of the Depositary continues to hold the relevant asset, the Depositary should be discharged as it has taken the appropriate action. The AIFM would be responsible for disclosing and identifying material changes in risks to the investors. The termination of the Depositary's contract as ultimate means of recourse seems to be too far reaching in its consequences and it might not be a realistic option. The fact that the Depositary can discharge its liability by informing the AIFM provides in our opinion sufficient incentive for the AIFM to take an informed decision.

Page 188, Q49

We refer our answer to Page 176, Q46.

Page 188, Q52

It could be useful to transfer liability from the Depositaries to sub custodians as this creates an optimal incentive down the custody to comply at all levels with contractual obligations that reflect the requirements of the AIFMD. Especially, if the Depositary transfers all of its safekeeping tasks to a single third party it should be in a position to transfer its liability to such party as well. However, it could be questionable in the light of the jurisdictions involved whether such transfer of liability creates a legally valid claim for the AIF directly against the third party.

Regarding objective reasons for contracting a discharge, we prefer Option 2 as described in Box 92 as this option provides for optimal flexibility. Nevertheless there seems to be a certain tension between this option and the wording of Article 13(b) of the AIFMD.

VIII.I. Possible Implementing Measures on Annual Reporting

Page 218, Box 101

The definition is in accordance with the definition used in accounting and auditing.

Page 221, Box 104

Valuation should be based on fair value. As a consequence, the difference between realised gains and unrealised gains has no meaning. Therefore, we suggest including when valuations are at fair value one line item revaluation gains on investments instead of two line items realised gains and unrealised gains.

VIII.III. Possible Implementing measures on Reporting to Competent Authorities.

Page 237-238, Box 109 and 110

A huge amount of information is requested. The requirements are comparable to the obligatory reports for pension funds towards their supervisory authority. However, the AIF reports contain more and earlier deadlines. The impact on the AIF will be important and projects will be necessary to be able to deliver these reports in time. It will ask a lot of discipline and information-analysis to implement the new rules. Together with all other reporting obligations of the AIF it will be heavy and can only be done when the reports are automated and the data in the source systems are complete and valid. The frequency of quarterly delivery is reasonable. Therefore, we would like to suggest extending the period for reporting to 30 workdays instead of one month.
