

Comment

on „ESMA’s Consultation paper: Draft regulatory technical standards on types of AIFMs“

Register of Interest Representatives

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The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 2,000 banks.

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1. Do you agree with the approach suggested above on the topics which should be included in the draft regulatory technical standards? If not, please state the reasons for your answer and also suggest an alternative approach.

We agree with the suggested approach. In our view, it is especially important that a clear distinction is made as to when in a given situation an AIF is to be considered as “open-ended” or “closed-ended”, thus also implying which regulations are to be applied to the AIFM. By doing so, a uniform application of the AIFM-Directive can be ensured, which seems to be especially important when considering that a failure to comply with such regulations may constitute an administrative or criminal offence.

2. Do you agree with the proposed definition of AIFMs managing AIFs of the open-ended / closed-ended type? If not, do you have any alternative proposal, in particular as regards the relevant frequency of redemptions for the open-ended funds?

We regard the criterion for distinguishing between open-ended and closed-ended AIFs on the basis that a redemption is possible at least annually to be generally suitable for achieving a uniform application of the AIFM-Directive.

However, we would like to point out that Art. 1 as drafted is, in our opinion, ambiguous. For example, the draft standard prefaces the requirements under Article 1(1) with: “An AIFM may be **either** of the following: (...)”, thus implying that an AIFM manages either solely open-ended or closed-ended AIFs. However, an AIFM can and may in principle manage both, open-ended and closed-ended AIFs. This should therefore be clarified in Article 1 para. 1, e.g. with the wording:

An AIFM may be:

- an AIFM of open-ended AIF(s) **and / or**
- an AIFM of closed-ended AIF(s).

The content of the Guidelines that an AIF is either open-ended or closed-ended remains unchanged and thus the scope of the AIF is fully covered; further, the insertion of the words “and/or” brings about the necessary clarity that both management types are in general possible under the AIFM at the same time.

3. Please provide qualitative and quantitative data on the costs and benefits that the proposed definition of AIFMs managing AIFs of the open-ended / closed-ended type would imply.

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4. Do you consider that any possibility to redeem the AIF’s units / shares on the secondary market and not directly from the AIF should be taken into consideration when assessing whether an AIF is open –ended or closed-ended? Or do you consider that, as within the UCITS framework, only any action taken by an AIFM to ensure that the stock exchange value of the units of the AIF it manages does not significantly vary from their net asset value should be regarded as equivalent to granting to unitholders / shareholders the right to redeem their units or shares out of the assets of this AIF?

In our view, focusing on a possible redemption on the secondary market is no appropriate means for distinguishing whether an AIF is open-ended or closed-ended. The specific regulations of the AIF in question are meant to exclude the special risks inherent in the pertinent fund type (open-ended or

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closed-ended). These risks are thus in essence fund-related and do not have any immediate connection with redemption possibilities on a secondary market, should there be one.

By introducing such a criterion, the distinction would be based on market factors which are beyond the AIFM's scope of influence. This can lead to legal uncertainties, the avoidance of which is the aim of the framework.

5. Do you agree with the proposed approach as regards the treatment of hybrid structures? If not, explain why and, if possible, provide alternative proposals.

We agree that if the liquidity policy changes, the regulations to be fulfilled by the AIFM in question would have to be changed as well. This follows directly from the fact that investor protection or the intended standardization could otherwise easily be undermined simply by the AIFM changing its liquidity policy once it has met the approval requirements.

6. Do you see merit in clarifying further the notion of contracts with prime brokers and / or the notion of internally or externally managed? If so, please provide suggestions. In particular, if your answer is yes for the notion of internally or externally managed, please indicate which of the criteria already in recital (20) of the AIFMD need additional clarifications.

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7. Do you consider that there is a need to develop further typologies of AIFM's where relevant in the application of the AIFMD? If yes, please provide details on the additional typologies sought.

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