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	BSBV 68/Dr.Ru/Na	3137	9 September 2011

Alternative Investment Fund Manager – Consultation Paper

The Bank and Insurance Division of the Federal Economic Chamber appreciates the possibility to comment on the consultation paper regarding "Alternative Investment Fund Manager" (AIFM).

I. General Remarks

In general, we would like to point out that these Level II measures, are well drafted.

The implementing measures to the AIFM directive will be crucial for the shape of the investment fund industry in the future because since the scope of the Level I Directive is so broad, it is crucial that in particular the needs of "UCITS-like" funds are properly reflected in the new AIFMD framework.

Moreover, since a product-specific approach is not yet reflected in the AIFMD framework, we would like to underline that the principle of proportionality is of utmost importance in order to robustly cover the various types and structures of funds in the scope of the AIFMD.

In line with the necessity of applying the principle of proportionality, we are in favour of an appropriate differentiation of standards depending on the type of AIF and possibly also the type of AIFM is being acknowledged at some very granular points, but not perceived as a general guideline for the AIFMD implementation notwithstanding the explicit request to this respect in the Commission's mandate. Consequently, it appears to be necessary that a differentiation in terms of AIF types is particularly relevant in order to warrant a commensurate approach to the reporting obligations towards the authorities. It must be recalled that the reporting standards for AIFM have been introduced for the purpose of identifying "potential sources of risk to the stability of financial markets in the Union". Thus, while acknowledging that the applicable requirements must be sufficiently detailed to allow for detecting and monitoring of such systemically relevant risks, we pledge for an adoption of

a more differentiated view on the AIF vehicles bearing the potential for such risks in the first place. ESMA itself suggests specifying the predominant investment strategy depending on the type of AIF as initial part of the reporting. We are convinced that this specification represents an appropriate basis for differentiating the reporting duties, with the comprehensive requirements applying in particular to the hedge fund category of AIF. On the other hand, the "other fund" cluster comprising UCITS-like securities funds and real estate funds should qualify for significant reliefs in terms of frequency and possibly also details of reporting.

II. Consistency with the existing EU frameworks

We welcome ESMA's efforts to adopt an approach ensuring the greatest possible convergence of the AIFMD framework with the current UCITS and MiFID standards. A consequent alignment of the relevant EU regimes is certainly the only feasible way to provide for a consistent framework for fund managers offering a full range of asset management solutions. Moreover, it is most helpful for the management of open-ended AIFs in general which in many events is already being performed under specific national legislation based on the UCITS Directive. Against this background, some 40% of are such UCITS-like funds in Austria.

III. Costs and benefits analysis

Due to the fact that the AIFMD constitutes such a comprehensive framework, it is important to assess the costs and benefits of possible solutions for implementation of AIFMD. In this regard, we ask ESMA to clearly state why it prefers certain implementing options which incur more costs for AIFM or managed AIF than other possible approaches to Level 2 regulation. In this regard, Box 109 is a good example.

IV. Specific remarks

Part IV. General operating conditions

Possible Implementing Measures on Additional Own Funds and Professional Indemnity Insurance

Box 6: Potential risks arising from professional negligence to be covered by additional own funds or professional indemnity insurance

We don't agree with the view that treating risks in relation to fraud is a category of professional negligence. Acts of fraud are criminal offences which are committed deliberately, not negligently. Therefore, they do not form part of relevant liability risks which must be covered either by additional own funds or indemnity insurance. It should also be noted that damages resulting from willful intent are in general non-insurable. If fraud was actually meant to be a variety of "professional negligence" in the meaning of Art. 9 para. 7 (b), it would then be virtually impossible to provide the required indemnity insurance coverage, leaving the corresponding Level 1 provision obsolete. This outcome appears clearly not the intention of the Level 1 legislator.
Consequently and contrary to para 8 of the explanatory text, the AIFM is only under the obligation to implement and monitor effective internal control systems. Therefore, it is incorrect to assume that fraudulent behaviour within the AIFM organisation can be generally prevented. Even though it is part of the AIFM duties in terms of business organisation to make adequate arrangements in order to minimise the risk of fraud, dishonest or fraudulent conduct by individuals can never be effectively erased.

Additionally, we reject the undifferentiated inclusion of liability risks by relevant persons in the consideration of relevant risks. The risk assessment to be performed by the AIFM should account for capitalisation or indemnity insurance in place at the level of the delegate in order to prevent double coverage of liability risks.

***Q9**: The risk to be covered according to paragraph 2 (b) (iv) of Box 6 (the improper valuation) would also include valuation performed by an appointed external valuer. Do you consider this as feasible and practicable?*

Due allowance should be made for adequate capital backing or insurance coverage provided by the external valuer. There is no necessity to require a double layer of safeguards for the same liability risk.

Box 8: Quantitative Requirements

***Q10**: Please note that the term "relevant income" used in Box 8 includes performance fees received. Do you consider this as feasible and practicable?*
***Q11**: Please note that the term "relevant income" used in Box 8 does not include the sum of commission and fees payable in relation to collective portfolio management activities. Do you consider this as practicable or should additional own funds requirements rather be based on income including such commissions and fees ("gross income")?*
***Q12**: Please provide empirical evidence for liability risk figures, consequent own funds calculation and the implication of the two suggested methods for your business. When suggesting different number, please provide evidence for this suggestion.*

We have no clear preference in terms of the options for calculation of own funds presented by ESMA. This is mainly due to diverging business models of Austrian funds which entail different levels of margin in relation to the managed assets. As it stands, option 1 is certainly easier to implement as its calculation base conforms with the own capital rules currently in place according to the UCITS Directive.

However, we want to point out that – in particular for "UCITS-like" funds, these provisions bear a significant risk of over-capitalization in relation to potential liability risks resulting from their operational activities. Consequently, it might be useful, if ESMA would distinguish between "UCITS-like" funds and hedge funds in this regard.

***Q13**: Do you see a practical need to allow for the "Advanced Measurement Approach" outlined in Directive 2006/48/EC as an optional framework for the AIFM?*

We do not necessarily see the need to implement a complex approach stemming from the EU framework for banks and hence designed for different business models to the capital calculation by asset managers.

***Q14**: Paragraph 4 of Box 8 provides that the competent authority of the AIFM may authorise the AIFM to lower the percentage if the AIFM can demonstrate that the lower amount adequately covers the liabilities based on historical loss data of five years. Do you consider this five year period as appropriate or should the period be extended?*

In our opinion, the period for consideration of historical loss data is too extensive and should be shortened to three years. Requiring a minimum observation period of five years would prevent many AIFM from being able to apply for reduction of capital requirements because they either have a shorter track record as a company or lack records retracing historical loss data for such a long time.

Box 9: Professional Indemnity Insurance

***Q15**: Would you consider it more appropriate to set lower minimum amounts for single claims, but higher amounts for claims in aggregate per year for AIFs with many investors (e.g. requiring paragraph 2 of Box 9 only for AIFs with fewer than 30 investors)? Where there are more than 30 investors, the amount in paragraph 3 (b) would be increased e.g. to €3.5 m, while for more than 100 investors, the amount in paragraph 3 (b) would be increased e.g. to € 4 m.*

The approach with regard to the professional indemnity insurance is very ambitious. This is due in part to the extensive interpretation of relevant liability risks, in part to the minimum coverage for claims to be provided for by the indemnity insurance being stipulated at a very high level.
From a practical point of view, it seems to be very unlikely that an insurance policy based upon these conditions would represent an economically attractive alternative to the provision of own funds, especially given the fact that insurance of deliberate criminal acts is extremely expensive or even not at all available.

Possible Implementing Measures on General Principles

Box 10: Duty to act in the best interests of the AIF or the investors of the AIF and the integrity of the market

We are in line with the ESMA proposal.

Box 11: Due diligence requirements

***Q16**: Paragraphs 4 and 5 of Box 11 set out additional due diligence requirements with which AIFM must comply when investing on behalf of AIFs in specific types of assets e.g. real estate or partnership interests. In this context, paragraph 4 (a) requires AIFM to set out a business plan. Do you agree with the term "business plan" or should other term be used?*

Referring to para. 15 of the explanatory text, we understand that evidence of significant investment opportunities shall be maintained with regard to specific types of assets such as real estate and in any case, does not concern investments in financial instruments. This requirement should also apply only from the entry into force of national rules implementing AIFMD as some contracts currently commit fund managers to erase the recorded data on potential investments.

Box 12 (Reporting of subscription and redemption orders), Box 13 (Selection and appointment of counterparties and prime brokers), Box 14 (Execution of decisions to deal), Box 15 (Placing of orders to deal with other entities for execution), Box 16 (Handling of orders), Box 17 (Aggregation and allocation of trading order)

Despite broadly agreeing with the approach proposed by ESMA in respect of the above mentioned issues which is largely based on the prevailing standards of the UCITS Directive, we would like to point out that subscription and redemption orders are not necessarily carried out by the AIFM itself but by a third party, such as the depositary bank. Consequently, in such cases, it shall not be the AIFM's obligation to provide the investor with the essential information concerning the execution of that order and, upon request, with information about the status of the order, but the obligation of the third party.

Moreover, we welcome the approach suggested in Boxes 14 to 17 to exempt some AIF investments (e.g. investment in real estate) from the provisions on best execution and order handling. We understand that for this reason, the requirements for specific due diligence in Box 11 para. 4 and 5 shall apply to this type of investment activities.

Box 18: Inducements

Application to intermediated sales of AIF

We support the inclusion of the MiFID / UCITS standards on inducements in the Level 2 measures to the AIFMD as it ensures consistency in the EU financial market regulation. However, we reject the proposed extension of the inducement rules to all activities of collective portfolio management, should this mean also application to indirect marketing because ESMA's appraisal that distribution via intermediaries constitutes part of the fund management services as specified in Annex I to the AIFMD is not correct in our view. External intermediaries who are not tied agents to the fund manager conduct their business in their own right and under their own responsibility. Their relations to the fund provider are based upon distribution agreements which set out the duties and obligations of both parties in order to ensure compliance with their respective legal framework.
In addition to this, it is erroneous to assume that the PRIPs initiative currently in the pipeline is aimed at covering marketing fees paid for third-party distribution by an inducement test from the asset management perspective. Until now, the PRIPs agenda comprises extension of MiFID standards to intermediaries not yet subject to the EU framework as well as to direct distribution by fund managers. While the second case is irrelevant to the inducement problematic, the assessment of quality enhancement in the first case would take place from the intermediary's standpoint and thus is not comparable to the discussed suggestions for AIFMD implementation. Moreover, the implementing provisions to UCITS IV cannot have accounted for the PRIPs initiative as at the time of their adoption PRIPs had not even entered the first phase of consultation. Even today, it is difficult to claim that a clear-cut concept for regulating distribution of PRIPs at EU-level exists.

Means of inducement disclosure

In line with UCITS and MiFID requirements, disclosure of inducements should take place ex-ante by adequate means of investor information and in accordance with Art. 23 para 1 AIFMD. For this purpose, AIFM should be able to avail themselves of any appropriate durable medium, such as AIFM's website.

Box 19: Fair treatment by an AIFM

***Q17**: Do you agree with Option 1 or Option 2 in Box 19? Please provide reasons for your view.*

We are in favour Option 2 for flexibility reasons.

Possible Implementing Measures on Conflicts of Interest

Box 20 (Types of conflicts of interest), Box 21 (Conflicts of interest policy) Box 22 (Independence in conflicts management), Box 23 (Record keeping of activities giving rise to detrimental conflicts of interest and way of disclosure), Box 24 (Strategies for the exercise of voting rights)

We support ESMA's suggestion to align conflicts of interest provisions for AIFM with the established standards of MiFID and UCITS Directive and agree in principle with the detailed

recommendations in Boxes 20 to 24. However, we believe that the reference to Art. 14 para 1 of AIFMD should be deleted from the text in Box 23 as it is not necessary to inform investors of all conflicts of interest identified for the purpose of internal arrangements in line with this provision. According to Art. 14 para 2 of the Level 1 Directive, the AIFM disclosure duties encompass solely conflicts of interest which cannot be reasonably solved by way of organizational measures.

Possible Implementing Measures on Risk Management

Box 25 (Permanent Risk Management Function), Box 26 (Risk Management Policy), Box 27 (Assessment, monitoring and review of the risk management policy), Box 28 (Measurement and Management of Risk), Box 29 (Risk Limit)

We support ESMA's approach to refer to UCITS risk management provisions with focus on governance structures in its work on AIFMD implementation. As a minor remark in this regard, referring to the notification of material changes to the risk management process, suggest aligning para. 2 of Box 27 with the wording of Art 39 para 2 of UCITS Implementing Directive in the following manner:

"AIFM shall notify the competent authorities of their home Member State of any material changes to the risk management process."

In line with this, we also suggest further alignments with Art 40 para 2 (b) and (c) of UCITS Implementing Directive in para 3 (b) and (c) of Box 28 as follows:

(a) *"conduct, where appropriate, periodic back-tests in order to review the validity of risk measurement arrangements which include model-based forecasts and estimates;*
(b) *conduct, where appropriate, periodic stress tests and scenario analyses, on the basis of reliable and up-to-date information (…)"*

Box 30: Functional and Hierarchical Separation of the Risk Management Function

In principle, we support providing more clarity to the question how the risk management function shall be functionally and hierarchically separated from the operating units, including the portfolio management function.

***Q18**: ESMA has provided advice as to the safeguards that it considers AIFM may apply so as to achieve the objective of an independent risk management function. What additional safeguards should AIFM employ and will there be any specific difficulties applying the safeguards for specific types of AIFM?*

***Q19**: ESMA would like to know which types of AIFM will have most difficultly in demonstrating that they have an independent risk management function? Specifically what additional proportionality criteria should be included when competent authorities are making their assessment of functional and hierarchical independence in accordance with the proposed advice and in consideration of the safeguards listed?*

In general, it appears reasonable to clarify that the obligation for implementing an independent risk management function should be proportionate to the nature, scale and complexity of the AIFM business and the AIF they manage. According to this principle of proportionality, AIFM should justify the decision of not establishing an independent risk management function in a documented manner. In our view, this documentation should be

provided to the competent authorities for the purpose of assessing independence of the risk management function.

Possible Implementing Measures on Investment in Securitisation Positions

Box 35: Requirements for retained interest

We have reservations towards modifying the reference to securitisation positions in the CRD by introducing a new phrase. The term "tradable securities and other financial instruments based on repackaged loans" used by ESMA displays some important differences compared to the CRD wording as it lacks any reference to tranching and appears to limit the relevant securitisation underlying to loans. In our view, such modification of terms might rather create legal uncertainty than contribute to "the avoidance of doubt" as claimed by ESMA in para. 9 of the explanatory text.
Therefore, and for reasons of a level playing field across financial sectors, we are in favor of applying the relevant CRD phrase ("exposure to the credit risk of a securitisation position") when referring to securitisation in Box 35 and Boxes 36 to 43 as discussed below.

Box 36: Requirements for sponsors and originator credit institutions

We disagree with the requirement for AIFM in Box 36 to ensure compliance by sponsors, originators or original lenders with the quality criteria for securitisation. The relating CRD provision is addressed directly to sponsoring and originating credit institutions who shall be obliged to maintain adequate standards in their credit policies. It appears utterly inappropriate to impose the same obligations upon AIFM who have no effective enforcement means in this regard, but must rely upon contractual commitments made by a party to the securitisation transaction.

Box 38: Requirements for risk and liquidity management

In our opinion, this Box merely reflects the general principles of risk management and therefore, should be deleted or at least tied in with the proposed implementing measures for risk management in section IV.IV of the consultation paper.

Box 39: Requirements for monitoring procedures

The last sentence in the Box 39 is incorrectly worded. "Issuer name and credit quality" are certainly no categories of securitisation tranches as implied by ESMA. If at all, these details should be deemed relevant information in relation to securitisation tranches and listed in the text above.

Box 40: Requirements for stress tests

The provisions in Box 40 should be tied in with the general requirements for risk measurement and stress testing proposed in Box 28 in order to ensure a consistent approach to the AIF risk management.

Box 42: Grandfathering provisions

ESMA's suggestion for grandfathering provisions in Box 42 concerns only holdings in securitisation positions that were issued before 1 January 2011. Hence, it remains an open question what shall happen at the entry into force of the AIFMD with investments in securitised loans issued after 1 January 2011 which do not fulfill all of the proposed

requirements relating to substance or transparency of the retained interest. This issue is particularly pertinent with regard to securitisation positions issued outside the EU where the CRD requirements directed at originators and sponsors of securitisations do not apply and hence the investing AIFM is not in the position to enforce compliance with the EU standards.

Box 43: Investments by UCITS

As regards the requirements for risk and liquidity management as well as performance of stress tests, adequate modifications taking up the AIFMD standards should be suggested to the UCITS Implementing Directive and CESR Guidelines for Risk Measurement in order to ensure consistency in the UCITS approach to risk management.

Possible Implementing Measures on Organisational Requirements

Box 44 (General requirements on procedures and organisation), Box 45 (Resources), Box 46 (Electronic data processing), Box 47 (Accounting procedures), Box 48 (Control by senior management and supervisory function), Box 49 (Permanent compliance function), Box 50 (Permanent internal audit function), Box 51 (Personal transactions), Box 52 (Recording of portfolio transactions), Box 53 (Recording of subscription and redemption orders), Box 54 (Recordkeeping requirements)

We welcome ESMA's approach to align these issues with current UCITS and MiFID standards.

***Q23**: Should a requirement for complaints handling be included for situations where an individual portfolio manager invests in an AIF on behalf of a retail client?*

The asset manager itself being a professional client under MiFID does not need specific procedures in order to contact the AIFM and to express its views on the fund management. Consequently, granting retail clients of a portfolio manager the right to complain directly with the AIFM managing their portfolio assets appears far too excessive. The interests of retail clients are already protected in a twofold manner by both the possibility to issue complaints towards the asset manager being their contractual counterparty and the asset manager's fiduciary duty to interfere with the management of the investee funds if the investors' interest so requires.

Possible Implementing Measures on Valuation

Box 55: Policies and procedures for the valuation of the assets of the AIF

It is not appropriate to require written valuation policies and procedures being established for each and every single AIF. AIFM managing several funds should be allowed to introduce sound valuation processes for specific types of assets at the management company level. The fund rules or instruments of incorporation of individual AIFs could refer to this company-wide policy while stipulating which particular valuation procedures and methodologies should apply to the assets held by the fund.

Box 56 (Models used to value assets), Box 57 (Consistent application of the valuation methodologies), Box 58 (Periodic review of the appropriateness of the policies and procedures including the valuation methodologies)

We are in line with ESMA's recommendations.

Box 59: Review of individual values

While agreeing with the recommendations in Box 59 as such, we have significant reservations against the interpretation of "material risk of inappropriate valuation" proposed by ESMA in para. 18 of the explanatory text. Perceiving such material risk in any valuation influenced by parties related to the AIFM (letter c) or other entities that might have a financial interest in the fund's performance (letter d) appears to blatantly disregard the approach adopted by the Level 1 Directive. Art. 19 para. 4 (b) expressly allows for the valuation function to be performed by the AIFM itself who has certainly the highest interest in achieving a positive performance, provided that the functional independence of the valuation task is ensured and appropriate measures are taken in order to mitigate conflicts of interest. A consistent view must be taken on the involvement of third parties in the valuation process. Hence, para. 18 of the explanatory text should be supplemented by a new last sentence in order to clarify the following:

"In cases (c) and (d) above, no material risk of inappropriate valuation shall be assumed if the third party involved in the valuation process functionally separates its valuation task from other operating functions and the potential conflicts of interests are properly identified, managed, monitored and disclosed towards the AIF."

Box 60: Calculation of net asset value per unit or share

We ask ESMA to give due consideration to the question whether the third party is in the position to determine values for the portfolio assets or whether this decision is reserved for the AIFM or an appointed external valuer. In our view, the entitlement to stipulate valuations in a legally binding manner should be deemed an essential feature of the external valuer's activity. Therefore, we would like to suggest amending para. 24 as follows:

"A third party which carries out the calculation of the net asset value for an AIF is not considered to be an external valuer for the purposes of Article 19 of the Directive, so long as this entity does not determine final valuations for individual assets (…)."

Box 61 (Professional guarantees), Box 62 (Frequency of valuation carried out by open-ended funds)

We are in line with ESMA's recommendations.

Possible Implementing Measures on Delegation

Box 63 (Delegation) and Box 64 (General principles)

We are in line with ESMA's recommendations.

Box 65: Objective Reasons

***Q24**: Do you prefer Option 1 or Option 2 in Box 65? Please provide reasons for your view.*

We have a preference for Option 1 which is consistent with the UCITS approach.

Box 66: Sufficient resources and experience and sufficiently good repute of the delegate

As regards the evaluation of a delegate's good repute in accordance with the proposed para. 4, AIFM should be allowed to rely upon a formal confirmation by the delegate concerning the absence of negative records relevant for the proper performance of the delegated tasks.

Box 67 (Types of institution authorised or registered for asset management and subject to supervision), Box 68 (Circumstances preventing effective supervision), Box 69 (Sub-delegation - General principles), Box 70 (Evidence to demonstrate the AIFM's consent to sub-delegation)

We are in line with ESMA's recommendations

Box 71: Criteria for considering whether a delegation/sub-delegation would result in a material conflict of interest and for ensuring that portfolio or risk management tasks are functionally and hierarchically separated

We are in line with ESMA's recommendations

Box 72 (Form and content of notification), Box 73 (Letter-box entity)

We are in line with ESMA's recommendations

Part V: Depositaries

Appointment of a depositary

Box 74: Particulars to be included in the written agreement

We support ESMA's suggestions for elements to be included in the depositary contract in line with the current UCITS standards and share ESMA's view not to provide a model agreement which could be hardly expedient to the wide range of situations covered by the AIFMD.

Depositary functions

Box 75: Cash monitoring - general information requirements

As regards the third bullet point, the requirement to provide the depositary with "all information related to the cash accounts opened at a third party" appears too extensive, especially as the regulatory purpose is not to deliver all information on the accounts, but to enable timely access to the accounts by the depositary.

Box 78: Definition of financial instruments to be held in custody

The definition of financial instruments to be held in custody is of key relevance for the question which instruments are subject to the extensive due diligence and separation duties to be performed in relation to sub-custody of assets and in particular, can benefit from the high liability standards introduced by the AIFMD.

***Q32**: Do you prefer option 1 or option 2 in Box 78? Please provide reasons for your view.*
***Q33**: Under current market practice, which kinds of financial instruments are held in custody (according to current interpretations of this notion) in the various Member States?*

In our opinion, both options presented by ESMA in Box 78 display significant shortcomings. Nevertheless, if making a choice, we would prefer Option 2.

Box 81: Safekeeping duties relating to "other assets" – ownership verification and record keeping

***Q36**: Could you elaborate on the differences notably in terms of control by the depositary when the assets are registered directly with an issuer or a registrar (i) in the name of the AIF directly, (ii) in the name of the depositary on behalf of the AIF and (iii) in the name of the depositary on behalf of a group of unidentified clients?*

In line with our comments on Box 78 above, we deem it inacceptable to leave the decision on whether assets shall be registered in the depositary's name or in the name of AIF/AIFM to the depositary's disposition. Having regard to the significant consequences of such registration in terms of the corresponding legal duties under option 1 presented by ESMA in Box 78, we strongly believe that the depositary must be under the general obligation to register the fund assets in its own name.

Box 89: Segregation obligation for third parties to which depositaries have delegated part or all of their safekeeping functions

As explained in our comments on Box 78 above, ESMA's views in respect of segregation in para. 1 (a), albeit compatible with the current market practice, do not fit into the definition of asset to be held in custody. In our view, this implies the indisputable necessity for a proper adjustment of the latter.

***Q46**: What alternative or additional measure to segregation could be put in place to ensure the assets are "insolvency-proof" when the effects of segregation requirements which would be imposed pursuant to this advice are not recognized in a specific market? What specific safeguards do depositaries currently put in place when holding assets in jurisdictions that do not recognize effects of segregation? In which countries would this be the case? Please specify the estimated percentage of assets in custody that could be concerned.*

Currently, we are not aware of any jurisdictions which do not recognize the effects of asset segregation. However, should ESMA obtain knowledge of such circumstances, it would be very helpful to make these findings public in order to facilitate adequate management of related insolvency risks by both the depositary and AIFM.
As regards para. 2, second sentence, the depositary should be bound to notify the fund manager when it becomes aware that segregation of assets is not sufficient to ensure protection from insolvency of a sub-custodian in a specific jurisdiction. Such information should enable the AIFM to take appropriate measures in order to account for the enhanced custody risk in the risk management process. In case no adequate notification has been made, the loss of assets as a result of such insolvency should not be considered an external event in accordance with Box 91.

The depositary's liability regime

Box 92: Objective reasons for the depositary to contract a discharge

We reject option 2 presented by ESMA as it is incongruous with the provisions of the Level 1 Directive. According to Art. 21 para. 13 (c) of AIFMD, the written contract between the depositary and the AIF/AIFM shall establish the objective reason to contract a discharge of the depositary's liabilities. Consequently, the existence of a contractual discharge in itself can never be deemed a sufficient objective reason for this purpose and the interpretation proposed by ESMA in option 2 would result in inacceptable legal uncertainty for AIFM agreeing in discharging the depositary from its liabilities.

Part VIII: Transparency Requirements

Possible Implementing Measures on Annual Reporting

Box 101: Annual Report Definitions

We ask for a clarification that the proposed definition of "material changes" is relevant only to specific transparency requirements and without prejudice to other AIFMD provisions containing references to material changes.

Box 104 (Primary Financial Statements) and Box 105 (Content and Format of the Report on Activities for the Financial Year)

***Q66**: Do you agree with ESMA's proposed definition of special arrangements? What would this not capture?*

Please refer to our comments on Box 31 above.

***Q67**: Which option for periodic disclosure of risk profile under Box 107 do you support? Please provide reasons for your view.*
***Q68**: Do you think ESMA should be more specific on how the risk management system should be disclosed to investors? If yes, please provide suggestions.*

We have a preference for Option 1 which gives AIFM more flexibility in providing an adequate depiction of the current risk profile for the purpose of periodic reporting. This approach entails also enhanced responsibility on the part of AIFM for the proper fulfillment of the disclosure obligation.

Box 108: Regular Disclosure to Investors

We support the proposed approach requiring timely disclosure only in respect of "material changes" to the maximum leverage level and permitting inclusion of information on the actual total amount of leverage in the AIF annual report. The term "material changes" should be subject to further clarification preferably with reference to Box 101 which takes the perspective of a reasonable investor for assessing the materiality of events.

Possible Implementing Measures on Reporting to Competent Authorities

Box 109: Format and Content of Reporting to Competent Authorities

***Q69**: Do you agree with the proposed frequency of disclosure? If not, please provide alternative suggestions.*
***Q71**: Do you agree with the proposed reporting deadline i.e. information to be provided to the competent authorities one month after the end of the reporting period?*

We cannot accept ESMA's recommendations for reporting obligations towards supervisory authorities. ESMA proposes quarterly reporting for all AIFs on the basis of the extensive template provided in Annex V. Information on particulars of risk and liquidity management may be even required in a more frequent cycle by the competent authority of the AIFM. Many Austrian managers would then face the challenge to prepare quarterly reports for several dozens, or even hundreds, of AIF. This task will involve high operational costs on a permanent

basis as it will not be possible to fully automate the computation of the reporting items according to the reporting template in Annex V. Such significant costs must be considered a continuing factor to drag down the fund performance to the detriment of AIF investors. Nevertheless, we are fully aware of the fact that reporting to authorities is considered one of the cornerstones of the Directive for detecting potential systemic risks. However, in defining the applicable requirements ESMA must pay due regard to the proportionality principle as a general guideline for its recommendations.

***Q70**: What costs do you expect completion of the reporting template to incur, both initially and on an ongoing basis? Please provide a detailed analysis of costs and other implications for different sizes and types of funds.*

According to our evaluation, reporting upon the template proposed in Annex V would incur very high initial and ongoing costs. The high level of ongoing expenses must be assumed due to the suggestion to require quarterly reports for each and every AIF and the obvious necessity to perform manual computation of certain reporting items.

Kindly give our comments due consideration.

Yours sincerely,

Dr. Herbert Pichler
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