Svenska Bankföreningen
Swedish Bankers' Association

Position paper

14/1/2011 CESR/ESMA

Response to CESR Call for Evidence on Implementing Measures on the Alternative Investment Fund Managers Directive

The Swedish Bankers´ Association welcomes the opportunity to comment on the implementing measures on the Alternative Investment Fund Managers Directive (AIFMD).

The Association supports the comments made by the European Banking Federation in its position paper. However, we would like to make these additional comments.

First of all we would like stress that the implementing measures must take into account existing market conditions and practices and thus not trigger structural changes if this is not an explicit aim with an article in the directive.

Issue 11
Questions 1 and 2:
We are of the opinion that CESR should not provide a model agreement evidencing the appointment of a depositary, since this would not be necessary or helpful.

As the situations in which such agreement is to be drafted may differ substantially, it must be possible to adapt the agreement to the situation at hand in each case. The requirements on the contents of the agreements therefore ought to be kept on a general level and does not require a model agreement. With a model agreement, risks arise that the requirements are expressed too much in detail (please compare the level of detail stipulated in MiFID (Art. 19.7 of MiFID and Art. 38 of the implementing directive)).

Issue 12
Question 1
In one of the items it is stipulated that the depositary shall "provide sufficient financial and professional *guarantees*…". The word "guarantees" may be used differently in different countries and legal settings. In order to avoid the risk of having different

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interpretations of “guarantees”, the rule should instead focus on the depositary having sufficient operational and financial resources to “…effectively pursue its business and meet the commitments inherent to that function”.

Issue 13.1

Question 1

The obligation that the depositary shall *in general ensure* that the AIF's cash flows are properly monitored should be limited to the cash flows that are under the control of the depositary. We find it hard to see any possibility for the depositary to ensure that payments made by potential investors could be monitored **other than** when such payments are made to accounts controlled by the depositary (since the depositary has to be aware and in control of the payment). Thus it is critical that the obligation of the depositary to monitor payments to an AIF will only be relevant provided payments have been made to the depositary.

The requirements on the depositary to "in general ensure that the AIF's cash flow is properly monitored" must allow for some flexibility depending on the type of cash flow or situation that is at hand. The assessment ought to be differentiated depending on the type of situation and type of cash flow that is at hand. Reasonably, the requirements must be assessed differently depending on whether it is incoming payments to the AIF, outgoing payments due to redemptions of shares or units of the AIF or other outgoing payments.

The monitoring of cash flows of incoming funds due to subscription of shares or units of an AIF is thus limited to when the funds actually have been received by the AIF/AIFM on behalf of the AIF or the depositary on behalf of the AIF - all under the control of the depositary. It is simply impossible for a depositary to monitor cash flows that it is unaware of.

The context of "cash flows are properly monitored" related to subscription should be to receive the funds and to book such funds on accounts as set out the directive.

The requirement that the depositary's own cash must not be kept in a cash account opened in the name of the depositary on behalf of the AIF must not be an obstacle to the depositary to open a custody account with a sub- or global custodian to which a cash account opened in the name of the depositary is connected. It must be possible for cash belonging to the AIF to be directed into a cash account in the name of the depositary for further transference to a cash account in the name of the AIF.

Issue 13.2

Question 3

The type of financial instruments that shall be included in the scope of the Depositary's custody holding should basically be (i) financial instruments that are registered with a CSD by the issuer and thus kept in book-entry form and (ii) financial instruments that can be physically delivered and that in itself is the sole carrier of the rights attached to the instrument in question (and thus not such physical securities that only evidence a right but is not the sole bearer of the right or when other actions are to be taken in order to legally effectuate any right under the security in question).

Basically all sorts of rights may be registered in the books of a depositary - to interpret the rule of Art 21.7 a (ii) in such way is however wrong. The securities held in custody under Art 21.7 a should only be such securities that are regulated under law which constitutes legal effect under book-entry measures/registration.

A far-reaching responsibility to verify ownership of assets may entail a risk for time-consuming administration and an uncertainty regarding the valuation of the AIF. Far-reaching requirements for verification activities will incur increased costs, which will affect the AIFs and, in the end, the investors.

In relation to the condition upon which the depositary shall verify the ownership of the AIF/AIFM on behalf of the AIF, the depositary can only make a verification of the ownership of assets based on the information received from the AIFM and the verification should only be made on a general level based on such information. The concept that a depositary shall verify ownership of all assets that may come into scope in a manner that even exceeds the power of a legal court (which in principle only has to make a decision based on the evidence presented in the specific matter) seems so far fetched and almost impossible to fulfil that the role of the AIFM depositary seems more like an insurance company calculating the risks but not being able to manage them (outside of their control).

Issue 13.3

The tasks of the depositary in Art 21.8 should be oversight functions as in UCITS. It is not the depositary that shall be responsible for the actions - it is the AIFM. The depositary function is only to ensure that the AIFM have competence, systems and procedures to carry out its tasks. In relation to Art 21.8 (c) the task to carry out instructions of the AIFM unless conflict with national law (AIF) or AIF rules is a task to ensure this on a reasonable level. “National law” should refer to the laws in which the fund is registered. Any strict interpretation of these tasks would basically stop the AIFM from managing the AIFs as well as incur extreme costs. Thus this has to be

taken into consideration when advising the Commission. Further the market practices of markets (e.g. trading and settlement processes) and even each financial instrument as well as any other assets have to be taken into consideration which implies that the rules should be flexible and adjustable.

Issue 14
Question 2
Criteria in a possible due diligence template should be stated in general terms and must not be made too detailed.

In relation to due dilligence of sub-custodians the perodic review should be carried out no more than annually.

Issue 16
It has to be a total loss of the rights to the financial instruments which is unconditional, irrevocable and permanent.

Issue 17
Most countries already have national legislation regulating what constitutes force majeure. It is our understanding that the proposed rules on liability do not aim at taking priority before such national legislation. It is then important to make sure that proposed rules on liability do not come into conflict with national legislation. Rules on liability may therefore not be implemented in a way that would give the competent authorities the authority to issue rules that would affect the concept of liability/force majeure under national legislation.

SWEDISH BANKERS' ASSOCIATION

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