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Dear Sir or Madam,

ESMA consultation on the Draft regulatory technical standards on types of AIFMs

Deutsche Bank welcomes the opportunity to comment on the regulatory technical standards proposed by the European Securities Markets Authority (ESMA) for determining the types of Alternative Investment Fund Managers (AIFM) in the Alternative Investment Fund Directive (AIFMD).

We generally agree with ESMA's proposals, but we suggest some clarification to better reflect the differences between "closed-ended" and "open-ended" AIFs. We suggest an enhancement to the conditions to recognise initial long-term lock-up period AIFs which, in the absence of an earlier dissolution of the fund, provide for an annual termination right after a long period, such as 20 years, should not be qualified as open-ended. In addition, we suggest a "fixed time" limitation for initial lock-up periods for open-ended AIFs.

Furthermore, we suggest ESMA considers the impact of a change of the redemption mechanism during an AIF's life may lead to increased complexity for regulators and have unintended consequences to market participants.

Our responses to the specific questions are in the annex. We trust you find these comments helpful. Please let us know if we can provide further information.

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'A. Procter', with a long horizontal stroke extending to the right.

Andrew Procter
Global Head of Compliance, Government and
Regulatory Affairs



Detailed comments on CP questions

Q1: 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 approach suggested by ESMA.

Q2: Do you agree with the proposed definition of AIFMs of open-ended/closed-ended AIFs? If not, do you have any alternative proposal, in particular as regards the relevant frequency of redemptions for the open-ended funds?

The definition of "open-ended" AIFs should be amended to better reflect the typical differences between closed-ended and open-ended structures. To limit the uncertainty entailed by the general exclusion of "suspensions" and "lock-up periods" which ESMA suggest in Annex VI, RTS Article 1 (2) (c), further guidance should be added to the definition of "open-ended". The below example may illustrate the complexity and need for further guidance.

The German closed-end fund market uses the German limited partnership (KG) as the typical investment vehicle. The German Commercial Code (HGB) provides for a statutory right for a limited partner investor to terminate a partnership interest once a year upon 6 months notice with effect to the end of a business year. The consequence of a limited partner's termination can well be interpreted as a "redemption" of the limited partnership interest, as in consideration for his limited partnership interest the investor acquires a claim for cash against the partnership. Thus, in the absence of alterations made by the partnership agreement, a limited partnership would qualify as an "open-ended" AIF under ESMA's assumptions.

In practice however, and to avoid redemption rights during the planned lifetime of a German closed-ended fund with illiquid assets, the KG's partnership agreement would usually provide ordinary termination rights for all limited partners and would only be available for the first time after 10, 15 or 20 years from the fund's set-up i.e. at a point in time, when the initiator expects the fund to be dissolved and the assets to be sold. In our view, such models with "initial long-term lock-up" which, in the absence of an earlier dissolution of the fund, only eventually provide for an annual termination right after a long period should not be qualified as "open-ended".

We suggest that any initial "lock-up period" should not be longer than one would reasonably expect with an "open-ended" fund model. For this purpose we deem it reasonable to provide a "fixed time" limitation for initial lock-up periods for "open-ended" AIFs. In our view, the fixed limitation could be set between 3 and 5 years. In cases where the AIF's rules require a longer initial lock-up period the model should naturally qualify as "closed-ended".

In this context, the AIFMD already contains provisions recognising the existence of "closed-ended" fund structures in which investors *"do not have a redemption right exercisable during the period of 5 years from the date of the initial investments"*. Recital 34 and Art. 21 (3) (c) provide for the introduction of an alternative depositary in the context of *"current practice for*



certain types of closed-end funds" provided that "during the first 5 years no redemption rights are available".

In line with the considerations expressed in the Directive, we believe an appropriate limitation of initial lock-up periods should be inserted to provide for a reliable differentiation between the concepts of "open-ended" and "closed-ended" AIF.

Q3: Please provide qualitative and quantitative data on the costs and benefits that the proposed definition of AIFMs of open-ended/closed-ended AIFs would imply.

No comment.

Q4: 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 AIFM is an AIFM of open-ended or closed-ended AIF(s)? 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 unit holders/shareholders the right to redeem their units or shares out of the assets of this AIF?

The acquisition or sale of units or shares, from or to, other investors on the secondary market is not a useful basis for differentiating between open-ended and closed-ended structures. Trading activities on secondary markets usually bear no relation to the redemption of shares/units to the AIF itself, as the parties to the transaction are independent from the AIF and the AIFM. Secondary market trades and redemptions are not comparable and cannot be deemed equivalent, from a legal or economic point of view.

Any uncertainty as to the regulatory regime applying to a fund structure, which would be a potential consequence of third party activities, is neither in the interest of the AIF and its investors, nor in the interest of the AIFM.

We believe that secondary markets should not be considered for the purposes of assessing whether the AIFM is an AIFM of an "open-ended" or "closed-ended" AIF(s). Any action taken by an AIFM to ensure that the stock exchange value of the units of the AIF it manages does not vary from their net asset value should be regarded as equivalent to granting to unit holders/shareholders the right to redeem their units or shares out of the assets of this AIF.



Q5: Do you agree with the proposed approach as regards the treatment of hybrid structures? If not, please explain why and, if possible, provide alternative proposals.

We do not agree with the proposed approach to the treatment of hybrid structures. A change in the redemption policy during the life cycle of a product from closed-ended to open-ended, or vice versa, should not entail a change in the applicable AIFM transposition regime.

It is crucial that investment products be set up, managed and put into liquidation on the basis of a consistent and reliable regulatory framework. It should also be noted that "a change of the redemption policy" is in most cases not a consequence of management discretion but may gain relevance as a consequence of the statutory framework. A reclassification of the AIF's set up does not produce any benefits nor does it help avoid any adverse consequences. On the contrary, it would support higher complexity both for the national regulator and for market participants.

For open-ended models: even once redemptions would be suspended or excluded for more than one year, we do not see a need to adjust the rules relating to liquidity management and valuation which were implemented for the product under the regime applying to open-ended AIFs.

For closed-ended structures: even if after many years an AIF may, for example under national statutory law, be regarded as providing "at least an annual redemption" right, there is no compelling reason why this should mean the AIF is an "open-ended" fund.

Should ESMA nevertheless see the need to apply specific provisions of the "other system" (e.g. on liquidity management and/or valuation) in those cases, then the demand for changes should be limited to the introduction of such provisions which are deemed necessary to manage the AIF under the new circumstances - rather than demand that the AIF be reclassified to an "open-ended AIF" with far reaching unintended consequences.

We note in particular that national rules - in Germany under the draft "KAGB" - for "open-ended" and "closed-ended" funds vary significantly in many respects: Whereas for example a "closed-ended" AIF must be incorporated as *Investment-AG* or *Investment-KG*, i.e. entities with legal personality, an "open-ended" real estate fund must be structured as *Sondervermögen*, i.e. without legal personality. As a consequence, ceasing to apply the "old redemption policy" would have a detrimental impact on existing products and even entail restructuring needs with respect to the legal form and set-up of the product, license issues for the manager, etc. It should also be noted that under German law, leaving tax implications aside, in the aforementioned example there are even no corporate or regulatory rules available to transform an *Investment-AG* or *Investment-KG* into a *Sondervermögen*, or vice versa.

We suggest the impact of a change of the redemption mechanism during an AIF's life be limited to the demand for an introduction of those specific rules belonging to the "other system" which are deemed mandatory for the AIFM to fulfil duties. For this purpose, ESMA should clarify which rules it deems necessary.



Q6: 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.

We do not see merit in clarifying further the notion of contracts with prime brokers and/or the notion of internally or externally managed.

Q7: Do you consider that there is a need to develop further typologies of AIFMs where relevant in the application of the AIFMD? If yes, please provide details on the additional typologies sought.

We do not see the need to develop further typologies of AIFMs.