

MEMO# 31264

June 27, 2018

EU Commission Proposals on the Safe-Keeping Duties of UCITS and AIF Depositories

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June 27, 2018 TO: ICI Global Regulated Funds Committee
International Operations Advisory Committee RE: EU Commission Proposals on the Safe-Keeping Duties of UCITS and AIF Depositories

On 29 May 2018, the European Commission (“the Commission”) published proposed Commission Delegated Regulations to amend the safe-keeping duties of depositaries for UCITS[\[1\]](#) and AIF[\[2\]](#). If adopted, the proposals would amend the existing Commission regulations under the UCITS V[\[3\]](#) and AIFM[\[4\]](#) Directives respectively. ICI Global will monitor the development of the proposed regulations.

Background

On 20 July 2017, the European Securities and Markets Authority (ESMA) published an opinion[\[5\]](#) to the European Commission suggesting possible changes to UCITS Directive[\[6\]](#) and AIFMD[\[7\]](#) provisions relating to:

- the asset segregation requirements in case of delegation of safe-keeping duties by the appointed depositary of a fund (UCITS or AIF); and
- the application of depositary delegation rules to CSDs.

ESMA stated that the purpose of its opinion was twofold:

- to provide an EU framework with strong client asset protection, especially in insolvency, for the safe-keeping of assets which are, in accordance with both UCITS Directive and AIFMD, required to be held in custody, and
- to provide clarification in the UCITS Directive and AIFMD regarding the application of the relevant depositary rules in the case of CSDs, ensuring a consistent approach across the EU.

Prior to the publication of the opinion, ESMA had published a consultation paper[\[8\]](#) and call for evidence.[\[9\]](#)

EU Commission Proposals

The Commission’s proposals for UCITS and AIF depositaries cover the following areas:

- **Reconciliations** – depositaries would be required to conduct reconciliations “as frequently as necessary” between the depositary’s internal accounts and records and those of a third party to whom safekeeping has been delegated, taking into account various factors.[\[10\]](#) The current requirement is for reconciliations to be conducted on a “regular basis”;[\[11\]](#)
- **Oversight** – depositaries would be required to ensure that financial instruments are properly registered, including where custody has been delegated to a third party.[\[12\]](#) This obligation is not currently explicitly applied to depositaries in the case of delegation.[\[13\]](#)
- **Information flow** – various enhancements are proposed to the flow of information between the depositary and a third party to whom custody has been delegated,[\[14\]](#) to enable the depositary to “identify the nature, location and ownership” of assets.[\[15\]](#)
- **Segregation** – various enhancements are proposed to the segregation of assets through the custody chain to enable the depositary to distinguish assets among its clients and any assets held for the depositary’s own account.

The Commission’s proposal for Alternative Investment Funds contains similar proposals and copies across some obligations that already exist for UCITS, including the depositary obtaining independent legal advice on relevant insolvency laws where custody is delegated to a non-EU third party.[\[16\]](#)

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endnotes

[\[1\]](#) “UCITS proposal”,
https://ec.europa.eu/info/law/better-regulation/initiative/239546/attachment/090166e5bb099998_en

[\[2\]](#) “AIFMD proposal”,
http://ec.europa.eu/info/law/better-regulation/initiative/239521/attachment/090166e5bb099d62_en

[\[3\]](#) Commission Delegated Regulation 2016/438, *available from*
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2016.078.01.0011.01.ENG

[\[4\]](#) Commission Delegated Regulation 231/2013, *available from*
<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:083:0001:0095:en:PDF>

[\[5\]](#) ESMA Opinion on asset segregation and application of depositary delegation rules to CSDs, *available from* <https://www.esma.europa.eu/file/22661/download?token=1TztYI4a>

[\[6\]](#) UCITS V Directive
(<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0091>)

[\[7\]](#) AIFM Directive
(<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0061>)

[8] ESMA Consultation on Guidelines on Asset Segregation Under the AIFMD, *available from* <https://www.esma.europa.eu/press-news/consultations/consultation-guidelines-asset-segregation-under-aifmd>

[9] ESMA Call for evidence, Asset segregation and custody services, *available from* https://www.esma.europa.eu/sites/default/files/library/2016-1137_call_for_evidence_asset_segregation.pdf

[10] Article 1(1), UCITS proposal.

[11] Article 13(1)(c), Commission Delegated Regulation 2016/438

[12] Article 1(1), UCITS proposal would subject a depositary to the obligation in Article 13(1)(a) of Commission Delegated Regulation 2016/438, to ensure that financial instruments are properly registered.

[13] Current Article 13(2), Commission Delegated Regulation 2016/438

[14] Article 1(2), UCITS proposal

[15] Recital 6, UCITS proposal

[16] Article 99, AIFMD proposal