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24 October 2014

European Securities and Markets Authority
103 Rue de Grenelle
75007 Paris
France

Re: ESMA Undertakings for Collective Investment in Transferable Securities (UCITS) V Delegated Acts (ESMA/2014/1183)

CFA Institute appreciates the opportunity to respond to Consultation Paper ESMA/2014/1183 following the request of the European Commission to ESMA seeking technical advice regarding the sections of the UCITS V Directive that will be implemented by means of delegated acts.

CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion for ethical behaviour in investment markets and a respected source of knowledge in the global financial community. The end goal: to create an environment where investors' interests come first, markets function at their best, and economies grow. CFA Institute has more than 127,000 members in 150 countries and territories, including 120,000 Chartered Financial Analyst® charterholders, and 144 member societies.

By reason of the technical input sought by ESMA, CFA Institute has responded to selected sections of the consultation paper, in relation to the topics of (a) the insolvency protection of UCITS assets when delegating safekeeping, and (b) the independence of the management/ investment company and the depositary.

Please find our detailed responses in the attached reply form.

Yours faithfully,

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esma European Securities and Markets Authority

Reply form for the Technical Advice the on delegated acts required by the UCITS V Directive

26 September 2014

European Securities and
Markets Authority

Date: 26 September 2014

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper - ESMA's technical advice to the European Commission on delegated acts required by the UCITS V Directive, published on the ESMA website (here).

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

i. use this form and send your responses in Word format;

ii. do not remove the tags of type < ESMA_UCITS_QUESTION_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and

iii. if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

i. if they respond to the question stated;

ii. contain a clear rationale, including on any related costs and benefits; and

iii. describe any alternatives that ESMA should consider

Given the breadth of issues covered, ESMA expects and encourages respondents to specially answer those questions relevant to their business, interest and experience.

To help you navigate this document more easily, bookmarks are available in "Navigation Pane" for Word 2010 and in "Document Map" for Word 2007.

Responses must reach us by **24 October 2014**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input/Consultations'.

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Disclaimer'.

III. Advice on the insolvency protection of UCITS assets when delegating safekeeping (Art. 22a(3)(e)[1] and 26b(e) UCITS V)

Q1: Do you agree that the steps to be taken by the third party are ultimately intended to ensure that the level of segregation foreseen under 22a(3)(d) of the UCITS Directive is recognised in the context of an insolvency proceeding involving the third party?

<ESMA_UCITS_QUESTION_1>
TYPE YOUR TEXT HERE
<ESMA_UCITS_QUESTION_1>

Q2: Do you consider that the level of segregation foreseen under Art 22a(3)(d) of the UCITS Directive should protect UCITS assets from claims by creditors of an insolvent third party which had been delegated the safekeeping of the assets by the UCITS' depositary?

<ESMA_UCITS_QUESTION_2>
TYPE YOUR TEXT HERE
<ESMA_UCITS_QUESTION_2>

Q3: Are there other measures which could also help achieve this objective?

<ESMA_UCITS_QUESTION_3>
TYPE YOUR TEXT HERE
<ESMA_UCITS_QUESTION_3>

Q4: Do you agree with the steps to be taken by the third party as identified above? If not, please explain the reasons.

<ESMA_UCITS_QUESTION_4>
CFA Institute considers that, as a general principle, in cases of sub-delegation, the original depositary should bear full responsibility for the sub-delegates. We do not think there should be an exhaustive list for what is necessary to fulfil this fiduciary duty. In this context, CFA Institute agrees that it is reasonable for the third party to seek independent legal advice to confirm that UCITS assets are recognised as separate from the third party's estate under applicable local insolvency laws. Further, this requirement need only be necessary for third parties operating under a jurisdiction outside of the European Union since UCITS assets are implicitly off-limits in the case of insolvency proceedings within the European Union. The depositary should also have the responsibility of ensuring that the conditions under which UCITS assets are segregated are met at all times. In cases where safe-keeping is delegated to a third party, we agree that the third party should be required to immediately notify the depositary of any changes in conditions or applicable insolvency laws.
<ESMA_UCITS_QUESTION_4>

Q5: Do you consider that there are any specific difficulties that may arise in verifying the applicable insolvency regime that makes the proposed rules difficult to be complied with? In particular, do you consider the requirement for the third party located in a jurisdiction outside the Union to obtain independent legal advice could give rise to specific issues?

<ESMA_UCITS_QUESTION_5>
TYPE YOUR TEXT HERE
<ESMA_UCITS_QUESTION_5>

[1] Article 22a(3)(d) in the text of UCITS V published in the Official Journal.

Q6: Do you expect a significant increase in terms of costs that would be faced by the third party delegated entities located in jurisdictions outside the Union in order to obtain independent legal advice on the applicable insolvency regime? If yes, please provide any available data and/or estimation.

<ESMA_UCITS_QUESTION_6>
TYPE YOUR TEXT HERE
<ESMA_UCITS_QUESTION_6>

Q7: Would you suggest requiring the third party to take any further steps which are not foreseen in the draft advice?

<ESMA_UCITS_QUESTION_7>
TYPE YOUR TEXT HERE
<ESMA_UCITS_QUESTION_7>

Q8: Should any specific consideration be given to the scenario where the third party further sub-delegates the safe-keeping of the UCITS' assets in accordance with Article 22a(3), last sub-paragraph of the UCITS Directive (as inserted by UCITS V)? Should the third party take any additional/different steps or measures in this case?

<ESMA_UCITS_QUESTION_8>
CFA Institute believes the same measures should be taken irrespective of the chain of delegation. If additional standards are applied this may create opportunities for regulatory arbitrage.
<ESMA_UCITS_QUESTION_8>

Q9: Do you agree with the steps to be taken by the depositary as identified above? If not, please explain the reasons.

<ESMA_UCITS_QUESTION_9>
CFA Institute agrees that the depositary should exercise due skill, care and diligence in the selection and appointment and periodic review of the third party as well as the arrangements for safeguarding client assets. This includes understanding the relevant insolvency laws as they relate to the segregating of UCITS assets from the estate of the third party in the relevant jurisdiction. Further, CFA Institute agrees that it should be possible to have contractual provisions allowing the termination of any agreement with a third party operating in a jurisdiction outside of the European Union in the case of insolvency or any other event that causes the segregation of UCITS assets to be no longer guaranteed.
<ESMA_UCITS_QUESTION_9>

Q10: Do you expect any significant one-off and ongoing compliance costs for depositaries in order to take the steps identified above? If yes, please provide any available data and/or estimation.

<ESMA_UCITS_QUESTION_10>
TYPE YOUR TEXT HERE
<ESMA_UCITS_QUESTION_10>

Q11: Would you suggest requiring the depositary to take any further steps which are not foreseen in the draft advice?

<ESMA_UCITS_QUESTION_11>
TYPE YOUR TEXT HERE

<ESMA_UCITS_QUESTION_11>

Q12: Which measures do you think should be taken by the depositary and/or the investment company/management company in the best interest of the investors once the depositary has informed the investment company or the management company on behalf of the UCITS that the segregation of the UCITS' assets in the event of insolvency of the third party is no longer guaranteed in a given jurisdiction located outside the Union? Would the transfer of the relevant UCITS' assets held by the third party in a non-EU jurisdiction to another (EU or non-EU) jurisdiction which recognises the segregation of the UCITS' assets in the event of insolvency of the third party/depositary be a possible measure?

<ESMA_UCITS_QUESTION_12>
CFA Institute considers acceptable the possibility for UCITS assets to be transferred from an entity in a non-EU jurisdiction that can no longer guarantee segregation of UCITS assets to an entity in another jurisdiction where such guarantees are possible, be it in the EU or elsewhere. However, we do not approve of this being the only or the default course of action. The depository has the responsibility for safeguarding the UCITS assets and should have scope to take the most appropriate decision. An alternative course of action could, for example, be the return of the UCITS assets to the depository in instances where the segregation of UCITS assets can no longer be guaranteed.
<ESMA_UCITS_QUESTION_12>

IV. Advice on the independence requirement (Art. 25(2) and 26(b)(h) UCITS V)

Q13: Do you agree with the identified links that may jeopardise the independence of the Relevant Entities? If not, please explain the reasons.

<ESMA_UCITS_QUESTION_13>
CFA Institute agrees that common management/ supervision and cross-shareholdings/group inclusion are both links that may jeopardise the independence of the management/investment company and the depositary.
<ESMA_UCITS_QUESTION_13>

Q14: Do you consider that any additional links should be taken into account such as, for instance, the existence of any contractual commitment or other relationship which would affect the independence of the Relevant Entities? If yes, please provide details.

<ESMA_UCITS_QUESTION_14>
TYPE YOUR TEXT HERE
<ESMA_UCITS_QUESTION_14>

Q15: Do you consider that the cumulative presence of all or some of the identified links is necessary to jeopardise the independence of the Relevant Entities or the presence of any of these links is sufficient to determine a lack of independence?

<ESMA_UCITS_QUESTION_15>
CFA Institute believes that the existence of either of the identified links is sufficient to determine a lack of independence.
<ESMA_UCITS_QUESTION_15>

Q16: Do you agree with the proposed option to ensure the separation of the management bodies/bodies in charge of the supervisory functions of the Relevant Entities?

Do you have any alternative options to suggest, taking into account those identified under paragraph 47?

<ESMA_UCITS_QUESTION_16>
CFA Institute agrees that the first option of prohibiting any member of the management body of one of the Relevant Entities (i.e. the management/investment company or depository) from also being a member of management body of the other, is the simplest and most robust way to ensure protection for the investors of the UCITS. Therefore, we do not see the need for any alternative options to be agreed.
<ESMA_UCITS_QUESTION_16>

Q17: Do you consider that the cap of one third of members of the body in charge of the supervisory functions of one of the Relevant Entities to also be members of the management body, the body in charge of the supervisory functions or employees of the other Relevant Entity is appropriate? Would you suggest any alternative percentage? If yes, please provide the reasons why.

<ESMA_UCITS_QUESTION_17>
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<ESMA_UCITS_QUESTION_17>

Q18: Do you have knowledge of any restructuring in the composition of the management bodies/bodies in charge of the supervisory functions of any Relevant Entities that would be triggered by the identified option? If yes, please provide data and an estimation of the one-off and ongoing costs that would be incurred.

<ESMA_UCITS_QUESTION_18>
TYPE YOUR TEXT HERE
<ESMA_UCITS_QUESTION_18>

Q19: Which of the two identified options do you prefer? Would you suggest any alternative option? If yes, please provide details.

<ESMA_UCITS_QUESTION_19>
CFA Institute considers that the first option presented – to define a qualifying holding of 10% or more of the capital or voting rights as the hurdle beyond which the related entities are not independent – may not necessarily address weaknesses in organisational structure that give rise to conflicts of interest. CFA Institute believes the best way to address conflicts of interest is to do so directly through effective governance arrangements that tackle the conflict in question, rather than specify arbitrary thresholds.

If we take as given this qualifying holding threshold, then CFA Institute prefers the second option which allows measures to be put in place to ensure the independence of the Relevant Entities in cases where they are linked by a qualifying holding or are part of the same group. This option is preferable to defining a numerical threshold as it provides more flexibility for the related entities to better resolve potential conflicts of interest.
<ESMA_UCITS_QUESTION_19>

Q20: Under the second option, do you consider that it would be appropriate to require that – whenever the Relevant Entities are part of the same group – at least one third of the members of the management body of the management company/investment company and depositary should be independent? Would you suggest any alternative percentage? If yes, please provide the reasons why.

<ESMA_UCITS_QUESTION_20>

TYPE YOUR TEXT HERE
<ESMA_UCITS_QUESTION_20>

Q21: Do you agree that the concept of independence should be understood as requiring that independent directors should not be member of the management body or the body in charge of the supervisory function nor employees of any of the undertakings within the group?

<ESMA_UCITS_QUESTION_21>
CFA Institute agrees with this concept.
<ESMA_UCITS_QUESTION_21>

Q22: Do you have knowledge of the impact that each of the two options identified would have in terms of restructuring the shareholding of any Relevant Entities or finding alternative service providers? If yes, please provide data and an estimation of the one-off and ongoing costs that would be incurred.

<ESMA_UCITS_QUESTION_22>
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<ESMA_UCITS_QUESTION_22>

Annex III

Cost-benefit analysis

Q23: Do you agree with ESMA's approach to discard the second and third options described above?

<ESMA_UCITS_QUESTION_23>
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<ESMA_UCITS_QUESTION_23>