

AIFMD – Consultation Paper ‘Guidelines on asset aggregation under the AIFMD’



On 1 December 2014 ESMA issued a Consultation Paper on [‘Guidelines on asset segregation under the AIFMD’](#).

It outlines two alternative proposals for possible guidelines regarding asset segregation when the depositary of an AIF delegates its safe-keeping duties.

1. The account on which the AIF’s assets are to be kept by a delegated third party depositary may only comprise assets of the AIF and assets of other AIFs of the same delegating depositary. Assets of AIFs of other depositaries would be considered as assets of the third party’s “other clients” for the purpose of the Level 2 Regulation.
2. The delegated third party holding assets for multiple depositary clients would not be required to have separate accounts for the AIF assets of each of the delegating depositaries. (For an illustration, see appendix 1&2).

The Director of Markets Supervision of the Central Bank of Ireland (CBI), Mr. Gareth Murphy, noted in his speech to the UK Symposium of the Irish Funds Industry Association (IFIA) that this topic was the most contentious during his tenure as chairman of ESMA’s Investment Management Standing Committee. He reasoned that this was due to ‘insufficient exploration and clarity around the costs and benefits of extra segregation of accounts at a depositary and throughout the depositary chain’.

Background:

On 11 November 2011 ESMA delivered technical advice to the European Commission on the depositary rules under the AIFMD. Based on this advice, the European Commission adopted the Level 2 Regulation on 19 December 2012. ESMA's Q&A of 30 September 2014 clarifies some of the depositary provisions under the AIFMD regime such as the depositary's cash monitoring duties, the delegation of tasks by the depositary and the scope of the custody duties. Additional clarifications on the depositary provisions are included in the European Commission Q&A on AIFMD.

The consultation paper acknowledges that the guidelines primarily impact depositaries, who are not subject to authorisation under AIFMD. It therefore proposes to apply the proposed guidelines to AIFMs, depositaries of AIFs and competent authorities. Appendix 3 summarises the current depositary requirements under AIFMD.

Rationale for the guidelines

The guidelines concern the rules on asset segregation in Article 21 AIFMD and Article 99 of the AIFMD Level 2 Regulation.

Key to AIFMD is the obligation for an AIF to entrust its assets to a depositary for safe-keeping. The safe-keeping function may be delegated by the depositary to third parties under certain conditions. One condition is for the depositary to ensure that the third party segregates the assets of the depositary's clients from its own assets and from the assets of the depositary, in such a way that they can at any time be clearly identified as belonging to clients of a particular depositary.

The Commission's Level 2 Regulation expanded upon this segregation obligation and requires the delegating depositary to verify that the third party:

"Keeps such records and accounts as are necessary to enable it at any time and without delay to distinguish assets of the depositary's AIF clients from its own assets, assets of its other clients, assets held by the depositary for its own account and assets held for clients of the depositary which are not AIFs".

ESMA produced the draft guidelines to clarify whether the assets held by the third party consist solely of the delegated assets of one depositary, or whether the third party's omnibus account can include assets of various delegating depositaries.

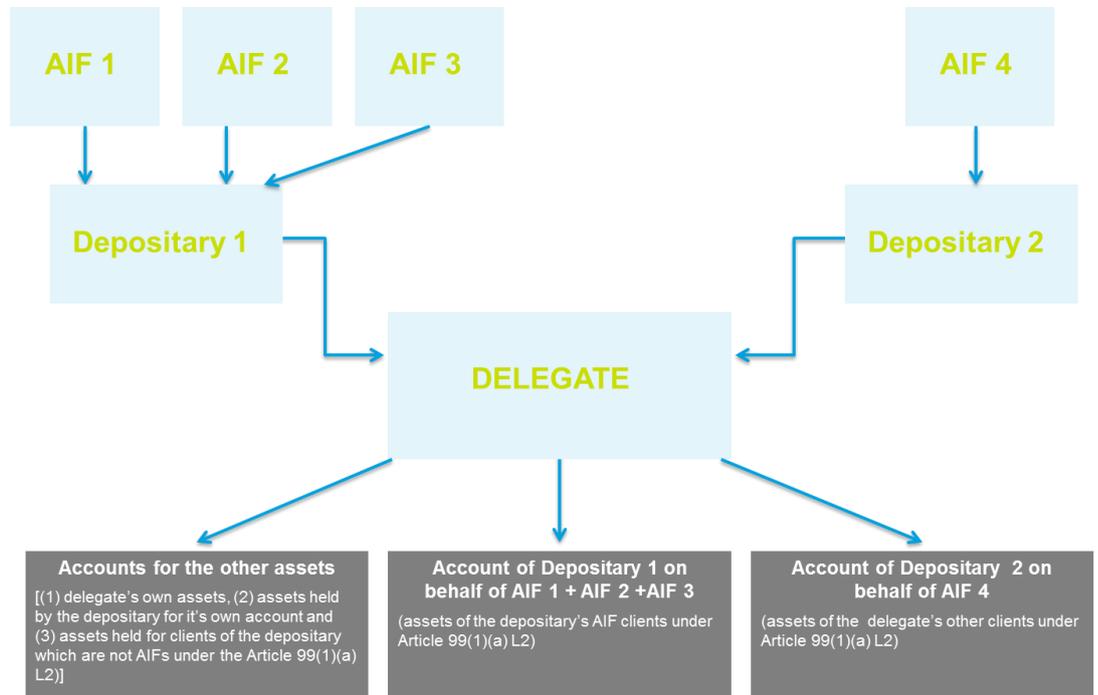
The options in the Consultation Paper

The Consultation Paper outlines both ESMA's alternative proposals for possible guidelines regarding asset segregation when the depositary of an AIF delegates its safe-keeping duties to a third party, as illustrated in Appendix 2 and 3.

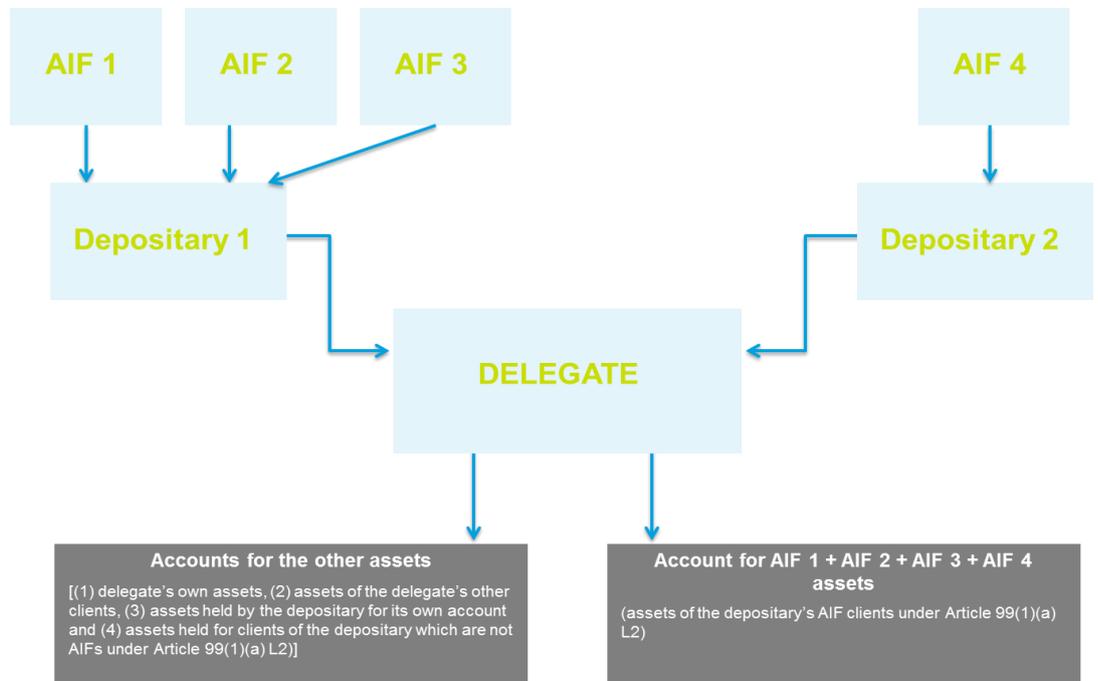
Next steps:

The consultation closes on 30 January 2015, following which ESMA will consider the feedback it receives with a view to finalising the guidelines and publishing a final report in Q2 2015.

Appendix 1



Appendix 2



Appendix 3: Current AIFMD depositary requirements:

- » AIFMD requires AIFMs to appoint a single depositary to each AIF they manage, as follows:
 - i. for financial instruments that can be held in custody:
 - 1. the depositary shall hold in custody all financial instruments that can be registered in a financial instruments account opened in the depositary's books and all financial instruments that can be physically delivered to the depositary;
 - 2. for that purpose, the depositary shall ensure that all those financial instruments that can be registered in a financial instruments account opened in the depositary's books are registered in the depositary's books within segregated accounts in accordance with the principles set out in Article 16 of Directive 2006/73/EC, opened in the name of the AIF or the AIFM acting on behalf of the AIF, so that they can be clearly identified as belonging to the AIF in accordance with the applicable law at all times;
 - ii. for other assets:
 - 1. the depositary shall verify the ownership of the AIF or the AIFM acting on behalf of the AIF of such assets and shall maintain a record of those assets for which it is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership of such assets;
 - 2. the assessment whether the AIF or the AIFM acting on behalf of the AIF holds the ownership shall be based on information or documents provided by the AIF or the AIFM and, where available, on external evidence;
 - 3. the depositary shall keep its record up-to-date.
- » The depositary may delegate the safe-keeping duties to third parties if the third party at all times segregates the assets of the depositary's clients from its own assets and from the assets of the depositary in such a way that they can at any time be clearly identified as belonging to clients of a particular depositary.
- » A third party to whom the safe-keeping of assets is delegated should be able to maintain a common segregated account for multiple AIFs, a so-called 'omnibus account'.
- » Where safekeeping functions have been delegated wholly or partly to a third party, a depositary shall ensure that the third party, to whom safe-keeping functions are delegated acts in accordance with the segregation obligation by verifying that the third party keeps such records and accounts as are necessary to enable it at any time and without delay to distinguish assets of the depositary's AIF clients from its own assets, assets of its other clients, assets held by the depositary for its own account and assets held for clients of the depositary which are not AIFs

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