



Damien Shanahan
International Organization of Securities Commissions (IOSCO)
Calle Oquendo 12
28006 Madrid
Spain

By email to: LMTGuidanceConsultation@iosco.org

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Dear Mr Shanahan,

Public Comment on LMT Guidance – Consultation Report

The Depository and Trustee Association (DATA) represents the depositaries of UK authorised funds and alternative investment funds.

DATA welcomes the opportunity to comment on this consultation and provides its response below to questions 18 & 19 on “Section III – Oversight of Anti-dilution LMTs by Fund / Manager Boards and Depositaries”.

Please do not hesitate to contact DATA if you would like to discuss any points made in this consultation response.

Yours sincerely

Thérèse Craig
DATA Chair

Depository and External Auditor Roles

Where an external third party, such as a fund depository or external auditor, has duties of oversight of the responsible entity's valuation, pricing and dealing processes, they should periodically review the effectiveness of the processes put in place for the use of anti-dilution LMTs

18. Do the proposed arrangements discussed above include all the essential elements regarding governance and oversight arrangements in relation to the use of anti-dilution LMTs? Are they proportionate to the differing size and complexity of responsible entities' fund ranges?

19. Please describe any material factors of the governance and oversight arrangements which have not been included.

DATA notes that the consultation recognises that not all jurisdictions impose an obligation for an independent third party to have oversight of the relevant processes applied by the responsible entity.

For example, US Mutual Funds, and the recently launched Australian CCIV product, do not have requirements for independent third-party oversight.

DATA therefore has significant concerns that the proposals appear to impose obligations and expectations on the conduct of such entities without any international standard on the relevance or existence of an independent third-party oversight function, such as a depository, or assessment of where such an entity fits into the overall regulatory environment of the jurisdiction concerned.

DATA believes this gives rise to a number of material risks: IOSCO's material may conflict with local legislation; it creates uncertainty as to which entity has actual accountability for liquidity management duties; and creates an unlevel playing field if the duties of independent third parties, such as depositaries, are extended in some jurisdictions when the role itself does not exist at all in others.

With this in mind DATA does not agree with IOSCO's proposal to introduce guidance on the role of independent third-parties, such as depositaries, at an international level and that this should be the domain of those national or regional competent authorities that require independent oversight.

If IOSCO does decide to proceed with this proposal, DATA notes the following:

In the European Union, and in onshored legislation in the UK, Article 3 (2) of EU Delegated Regulation 2016/438 (UCITS Directive)¹ and Article 95 of EU Delegated Regulation 231/2013 (AIFMD)² require the depository to implement procedures to verify that the manager (or responsible entity) complies with the appropriate regulations relating to the valuation of scheme property and how investors deal in units or shares within the fund. These do not prescribe any specific or granular rules relating to how depositaries should conduct oversight of use of LMTs.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0438&rid=1>

² <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:083:0001:0095:en:PDF>

In addition, ESMA's Guidelines on Liquidity Stress Testing (LST) in UCITS and AIFs require depositaries to *"set up appropriate verification procedures to check that the manager of a fund has in place documented procedures for its LST programme"*.³ The Guidelines further indicate that the depositary is not required to assess whether this procedure is adequate, or to replicate or challenge the LST undertaken by the manager, only to verify that procedures have been put in place.

In practice, the depositary may conduct reviews to ensure the manager implements those procedures as and when required. However, depositaries are not required to ensure that the implementation of an anti-dilution tool results in unitholders not being affected or impacted by dilution.

DATA requests that IOSCO ensures that: -

- The proposed guidance does not impose responsibilities on depositaries when the role itself is not prescribed at international level.
- Any reference to independent third-party oversight, including a depositary or auditor role, should reflect that such entities typically carry out only oversight of the responsible entity, and that national competent authorities ensure the responsible entity itself has clear and sole responsibility for ensuring processes are adequate and effective.

If IOSCO does retain material as consulted on, the use of the term "effectiveness" on page 25 (Depositary and External Auditor Roles) should be amended. The role of an independent third-party should be consistent with practice in jurisdictions where such a role exists, e.g., to check that a process has been put in place: i.e., 'effected' by the responsible entity. Independent third parties should not be subjected to additional requirements over and above those already in place in jurisdictions such as the EU and UK.

- Reviews by independent third parties should be conducted ex-post and on a sample basis.
- The language in the guidelines should not infer a specific report on use of LMTs and independent third parties should be able to include this in generic reporting to responsible entities as required under relevant legislation or agreed between the applicable parties.

³ https://www.esma.europa.eu/sites/default/files/library/esma34-39-897_guidelines_on_liquidity_stress_testing_in_ucits_and_aifs_en.pdf