Depositary And Trustee Association

Marvin Narayanen
Financial Conduct Authority
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By email to: cp23-12@fca.org.uk

10 July 2023

Dear Marvin,

Re: DATA response to CP23/12: Expansion of the Dormant Assets scheme – second phase

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

DATA welcomes the opportunity to comment on the consultation. DATA's view is that depositaries will not need to participate directly in the Dormant Assets Scheme ("DAS")

It will be the Authorised Fund Manager's (AFM's) decision on whether to participate in the DAS. The AFM will be responsible for the investor records and other activities outlined in its agreement with RFL. Depositaries will only be responsible for:

- Oversight of the AFM's compliance with the relevant COLL rules where the AFM chooses to participate in the DAS, and
- The transfer or receipt of money relating to the DAS following an instruction from the AFM.

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

Yours sincerely

Perry Braithwaite
Senior Manager, DATA Secretariat

CP23/12: Expansion of the Dormant Assets scheme – second phase

Q1: Do you agree that these proposals are necessary and proportionate to allow AFMs and depositaries to be participants in the DAS?

No, we do not agree.

We do not expect that the fund's Depositary will need to participate directly in the Dormant Assets Scheme ('DAS'). The Depositary will perform additional functions where the Authorised Fund Manager ("AFM") wishes to participate, but fundamentally the investor records, held by the transfer agent as agent for the AFM, and other activities outlined in the AFM's agreement with RFL (the "TAA") are the AFMs responsibility. In cases where Depositary involvement will be required to transfer or receive money relating to the DAS (such as from or to a distribution account), the Depositary will be acting upon the AFM's instructions rather than on its own behalf.

The DAS may be an effective way for authorised fund managers ('AFMs') to manage their dormant cash or invested assets and provide a wider benefit to social and environmental causes.

Depositaries will only be responsible for:

- Oversight of the AFM's compliance with the relevant COLL rules where the AFM chooses to participate in the DAS.
- The transfer or receipt of money relating to the DAS following an instruction from the AFM.

In DATA's view the FCA's proposals currently do not include provision for scenarios where a fund has already been terminated, certain investors are untraceable and money attributable to these investors is held by the depositary on behalf of the fund, rather than being client money held by the AFM.

Q2: In particular, do you have any comments on the proposal to treat changes to the instrument and prospectus of the fund as significant changes requiring prior written notice to unitholders?

It is right that changes will be required to the Prospectus and Instrument to enable the necessary powers for participants to take part.

However, the obligation to treat the change as significant is onerous given the investors most affected will not be contactable in any case. Those investors impacted will benefit from enhanced protection under the DAS.

As the requirement to provide 60 days' written notice to investors may deter firms from participating in the DAS, we would ask that the proposed guidance in COLL 4.3 is reconsidered by the FCA.

We anticipate that the extended regime will prompt UK Government and the FCA itself to take steps to ensure awareness of the DAS, a national level initiative, both in context of its charitable activity and to support work by financial firms to trace end investors and encourage individuals to keep their details current. We would suggest change event classification decisions were assessed with that activity in mind, and approached with a view to encouraging participation, given the protections built into the DAS.

Q3: Are there any other steps we should take to enable participation, or to protect the rights of fund investors whose dormant assets are transferred to the ARF?

In the event of an AFM's insolvency, or where their business is sold and transferred to another, it is very unlikely that the fund depositary will be able to assume responsibility for the records of any investors whose dormant assets have been transferred to an ARF as the business of investor records is not a function of a depositary.

Depositaries do not have any direct contact with investors on a day-to day basis and do not have the capacity or resources to do so. The depositary's role is one of oversight only and is to ensure that the AFM maintains accurate records.

DATA's view is that there should be a central record of investors maintained by the ARF which could be utilised in the event of an AFM's insolvency. This would provide investors wishing to make a claim an industry single point of contact and remove the burden of claimants tracing or determining fund or operator changes in the intervening period.

Furthermore, for any AFM that has not opted into the DAS, which takes on the business of an AFM that has opted in, the on-boarding AFM will have no option but to opt in. This could limit the number of AFMs willing to on-board existing funds and could be detrimental to investors.

Q4: Do you agree that the proposed amendments provide sufficient certainty the requirement to hold the money as client money is extinguished for all relevant chapters of CASS? If not, what else should we consider?

No comment.

Q5: Do you agree that payments to the DAS should be given preference to paying away to charity where the firm is already a participant in the DAS?

DATA strongly disagrees with this proposal.

This requirement is inflexible to AFMs. There may be unforeseen consequences in that AFMs may be deterred from participating in the DAS, if doing so means that they are unable to choose other charitable options.

There may be situations where the amounts involved could be too small to justify transferring to the DAS and where a more cost-effective solution would be to allow AFMs to pay these sums to charity. A more flexible approach could be to allow AFMs to choose the most efficient option depending on the specific transaction or product involved subject to prior disclosure to investors in product documentation.

It is common for the terms of schemes of arrangement and termination or wind-up of funds to allow such sums, which are often immaterial or too small to be distributed to investors, to be paid to charity. We would ask that the FCA indicated if it had any concerns about AFMs

continuing to operate such mechanisms and if so, what alternative procedures it would suggest are utilised.

Q6: Do you agree that the CASS rules should be amended to include tracing requirements in addition to firms' contractual obligations with the ARF?

We agree with the proposals and that there is sufficient industry guidance to assist AFMs in tracing clients prior to transferring balances to the ARF.

Q7: Do you agree the requirements are proportionate? If not, what should we consider?

No comments.

Q8: Do you agree that firms holding dormant client money held under CASS 5, CASS 11 and CASS 13 must attempt to transfer the balance to the ARF?

No comments.

Q9: Do you agree that dormant client money held under CASS 7 should, where possible, be paid to the ARF in preference to applying it to any shortfall in the client money pool following a PPE?

No comments.

Q10: Do you agree with our proposal not to amend the Handbook Glossary definition of a regulated activity to include dealing with 'unwanted asset money'?

DATA agrees with this proposal.

Q11: Do you agree with our proposal to enable persons who were entitled to certain dormant investment assets owing to them, or client money held for them to refer a complaint about the dormant asset fund operator to the Financial Ombudsman Service?

DATA agrees with this proposal.

Q12: Do you agree with the Financial Ombudsman's proposal not to mirror the changes we are making to the CJ in the VJ and not to expand the VJ to cover complaints against dormant asset fund operators relating to dealing with unwanted asset money?

No comments.

Q13: Do you agree with the proposal to remove obligations relating to dormant asset fund operators from the FSCS?

DATA agrees with this proposal.

DATA is supportive of a broader framework in place to protect consumers from losses arising from the inability of a firm to meet its financial obligations.

However, DATA would like to take this opportunity to reiterate its concerns in respect of the current FSCS framework as it applies to UK depositaries of authorised funds. These have been previously raised with the FCA in our responses to CP16/42, CP17/36 and DP21/5:

➢ Depositaries have specific responsibilities for safekeeping and oversight. They have no role in product development, marketing/distribution, or any direct relationship with investors in the fund.

➢ Consequently, DATA does not believe depositaries should be within the scope of the FSCS.

➢ The look-through requirements do not work for depositaries, who do not have a relationship with, or access to information on investors to report eligible income. The result is that depositaries may have to include all revenue from authorised funds in the relevant section of their fee submissions to the FCA, further exaggerating the cost they incur.

➢ Depositaries are not product providers and should not be included in the investment provider class, nor in any proposals for contributions to the intermediary classes.

➢ Contributions to the FSCS should be risk-based: the costs to depositaries of meeting claims linked to unrelated parties is not proportionate due to the extremely low likelihood of a depositary failure resulting in a claim on the FSCS.