

British Private Equity & Venture Capital Association

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6 November 2014

**To: Andrea Ferguson
Markets Division**

BY EMAIL: CP14-18@FCA.org.uk

Re: Response to CASS 6 amendments in quarterly consultation number 6 (CP14/18)

Dear Ms Ferguson,

The BVCA is the industry body for the UK PE/VC industry. With a membership of over 500 firms, the BVCA represents the vast majority of all UK-based PE/VC firms and their advisers. Its members have invested £33 billion in over 4,500 UK companies over the last five years. Companies backed by UK-based PE/VC firms employ over half a million people and 90 per. cent of UK investments in 2012 were directed at small and medium-sized businesses.

Question 4.1: Do you agree with our proposals affecting small authorised UK AIFMs? If not, please provide reasons.

We agree with the proposals.

Question 4.2: Do you agree with our proposals affecting small registered UK AIFMs? If not, please provide reasons.

We agree with the proposals.

Question 4.3: Do you agree with our proposal to ensure all the assets held by the depositaries of authorised AIFs are protected under CASS 6? If not, please provide reasons.

We do not comment on this proposal as we believe this will not be relevant to our members.

Question 4.4: What, if any, further clarification would be helpful for completing Section 6 of the CMAR? Please give details.

We propose that the rules be clarified to state that a full scope UK AIFM which does not have the top-up permission to perform safekeeping and administration under Article 6(4) of AIFMD should not be required to complete a CMAR. At present the drafting is unclear on whether full scope UK AIFM's without the top-up permission are required to file a CMAR. Firms with the top-up permission should file the CMAR only in

relation to assets to which CASS 6 applies to them. We also consider that the provisions relating to periodic reporting in SUP 16.12 could also be clarified.

CMAR

It is in our view anomalous to require a full-scope UK AIFM without the top-up permission to submit a CMAR. We understand that the policy objective behind the AIFM Directive is that the depository appointed for or on behalf of the AIFs is responsible for oversight of client money and assets. Accordingly, CASS 6 is disapplied in relation to a full-scope UK AIFM. It appears anomalous to require a firm to complete a CMAR where CASS 6 does not apply to it. We note that the form is drafted on the assumption that the reporting firm holds client assets subject to CASS and therefore it is unclear how a full-scope UK AIFM (to whom these requirements do not apply) should complete this form. We are concerned that unless the FCA makes the position clear, firms will be uncertain as to the approach which is expected of them and as a result the FCA will receive forms completed using different approaches.

The current drafting of the rules relating to the requirement to submit a CMAR (following implementation of the proposed amendments) is ambiguous. We are aware of instances in which certain of our members who are classified as full-scope UK AIFMs (and who do not undertake any additional permitted MiFID activities under Article 6(4) AIFMD) have been informed by the FCA that they should submit a CMAR on the basis that they are classified as CASS medium or CASS large firms (and therefore meet the application requirements in SUP 16.14) due to their holding of client assets. We note that the tests for whether a firm is classified as a CASS medium or CASS large firm are set out in CASS 1A.2.7 R and that, in the context of client assets, these refer to the highest total value of safe custody assets.

However, the definition of the term "safe custody asset" in the Glossary refers (in so far as is relevant to a full-scope UK AIFM not undertaking any additional permitted MiFID activities) to a safe custody investment held in the context of the regulated activity of safeguarding and administering investments. Since the effect of Article 72AA of the Regulated Activities Order is that a full-scope UK AIFM will not be safeguarding and administering investments when it is holding those investments in connection with its management of an AIF, it would appear that any assets held in that capacity must not be included in the calculation of whether a firm exceeds the safe custody assets threshold in order to be classified as a CASS medium or CASS large firm. We believe that this supports our view that a full-scope UK AIFM carrying on only custody activities which qualify as excluded custody activities (as defined in the proposed definition in CP14/18) should not be required to submit a CMAR.

We do not see that there is any value to the FCA in receiving CMARs which indicate that an AIFM may hold sufficient client assets in connection with the activity of managing an AIF to be classified as a CASS medium or CASS large firm, but which then contain no other information because, for the purposes of the CMAR (as set out in the modified SUP 16.14.4 R), the firm is not actually carrying on the regulated activity of safeguarding and administering investments in relation to any of those assets. The discussions between some of our members and the FCA that we refer to above indicate that there is confusion about

this point and in our view, it would be possible to clarify this through some simple amendments to the FCA Handbook.

We would therefore propose inserting the following amendments in SUP 16.14 to clarify that a full-scope UK AIFM which does not undertake any additional MiFID activities, which does not hold client money and which holds only client assets that are in connection with its AIFM management activities is not required to submit a CMAR:

- SUP 16.14.1 R
- (1) This section applies to a *CASS large firm* and a *CASS medium firm*.
 - (2) This section does not apply to a full-scope UK AIFM which meets the following conditions:
 - (a) the firm is a collective portfolio management firm;
 - (b) the firm does not hold client money; and
 - (a) the only safe custody investments held by the firm are held in connection with excluded custody activities.

SUP 16.14.1A G A full-scope UK AIFM which is a collective portfolio management investment firm may be subject to the requirements in this section if it:

- (1) holds financial instruments in connection with MiFID business; or
- (2) it carries on the activity of safeguarding and administering investments in relation to any safe custody investments,

and in so doing, it meets the definition of a CASS large firm or CASS medium firm in CASS 1A.2.7 R. Any CMAR filed by such a firm must be completed only in relation to financial instruments or safe custody investments falling within (1) or (2).

Alternatively, if the FCA considers that our interpretation of the definition of "safe custody asset" is sufficient to exclude such full-scope UK AIFMs from the definition of a CASS medium or CASS large firm (and therefore by extension, from the requirement to submit a CMAR), we consider that the same effect may be achieved by adding the following clarificatory guidance provision to SUP 16.14:

SUP 16.14.1A G The definition of *safe custody asset* does not include *safe custody investments* in the context of *excluded custody activities* carried on by a *firm* which is a *full-scope UK AIFM*. Accordingly, a *full-scope UK AIFM* which only holds *safe custody investments* in connection with *excluded custody activities* will not fall within the definition of a *CASS medium firm* or a *CASS large firm* and will not be required to submit a *CMAR*.

As noted above, we advocate removing this reporting requirement for full scope UK AIFMs. If it is intended that full-scope UK AIFMs should be subject to the requirement to submit a CMAR in respect of any client assets held in connection with their AIFM management activities, we would suggest amending the proposed revised definition of "safe custody asset" in the Consultation Paper as follows:

- Safe custody asset
- (a) in relation to *MiFID business*, a *financial instrument*;
 - (b) in relation to *safeguarding and administering investments* that is not *MiFID business* and/or *acting as trustee or depositary of a UCITS*, a *safe custody investment*;
 - (c) when *acting a trustee or depositary of an AIF*, an *AIF custodial asset*; or
 - (d) in relation to *excluded custody activities* carried on by a *firm* acting as a *small AIFM*, a *safe custody investment*; or
 - (e) (in CASS 1A.2 and SUP 16.14) in relation to *excluded custody activities* carried on by a *firm* acting as a *full-scope UK AIFM*, a *safe custody investment*.

In our view, the presence of a depositary providing oversight in relation to client assets and the link between the CMAR and the regulated activity of safeguarding and administering investments both favour disapplying the requirement for a CMAR for full-scope UK AIFMs who do not hold client money and who only hold client assets as part of their excluded custody activities. Whether or not the FCA agrees with this approach, we request that the FCA makes its expectations clear in the policy statement regarding the CASS amendments.


Periodic reporting

As a related issue, we also consider that the provisions relating to periodic reporting in SUP 16.12 could also be clarified. At present, the tables of data items applicable to each regulated activity group only refer to the periodic FSA039 return in relation to periodic reporting of client money and client assets. FSA039 is a very short report which merely confirms whether the relevant firm held client money or client assets during the relevant period and whether the firm undertook any stock lending activities with client custody assets. The requirement to file a CMAR is located elsewhere in SUP 16.14. In our view, it would be clearer if the CMAR were a data item listed in SUP 16.12, with a footnote which indicates that the requirement to submit a CMAR is subject to the CASS medium firm and CASS large firm threshold tests in CASS 1A.2.7 R. This would avoid confusion between FSA039 and the CMAR and would highlight to firms that it may be necessary to file a CMAR. It would also help centralise the periodic requirements to which firms are subject for easier reference. If our proposals above are adopted, the footnotes could also explain that the requirement to file a CMAR does not apply to a full-scope UK AIFM in relation to safe custody investments held in connection with excluded custody activities, thereby acting as another source of clarification as to how the obligation to submit a CMAR applies in that context.

Should the FCA continue with the requirement, we request a further clarification relating to the circumstances in which reporting is required.

If you have any queries on this letter please do not hesitate to contact Tim Lewis at Travers Smith tim.lewis@traverssmith.com.

Yours sincerely,



Sheenagh Egan
Chair
BVCA Regulatory Committee