

FMA CIRCULAR REGARDING THE SUSPENSION OF INVESTMENT FUNDS AND REAL ESTATE FUNDS

CIRCULAR ON THE SUSPENSION OF FUNDS

Document No.: 04 / 2011
Publication date: 01.09.2011

CONTENTS

1	UCITS, other assets and pension investment funds.....	4
2	Foreign AIFs.....	5
3	Special Funds.....	5
4	Real estate funds.....	5

This circular does not constitute a legal regulation. It is intended to serve as guidance and reflects the FMA's legal interpretation. No rights and obligations extending over and above the provisions of the law can be derived from circulars.

Circular of 1 September 2011 addressed to all investment firms and investment services providers regarding “suspended” investment funds under the Investment Funds Act 2011 (InvFG 2011; *Investmentfondsgesetz 2011*) (published in Federal Law Gazette I No. 77/2011 as amended) as well as “suspended” real estate funds under the Real Estate Investment Fund Act (ImmoInvFG; *Immobilien-Investmentfondsgesetz*) (published in Federal Law Gazette I no. 80/2003 as amended)

The Austrian Financial Market Authority (FMA) refers in this circular to the framework under supervisory law regarding the issue of “suspended” investment and real estate funds. This circular constitutes the legal view of the FMA. The legal basis remains unaffected. No rights and obligations extending over and above the provisions of the law can be derived from this circular.

“Suspensions” of funds, i.e. suspension of the redemption of unit certificates or the calculation of the issue and redemption price shall only be allowed to occur on a temporary basis where exceptional circumstances exist (Article 56 para. 1 InvFG 2011 / Article 11 paras. 1 and 2 ImmoInvFG). These circumstances must make a suspension appear necessary when taking into account the unit-holders’ legitimate interests.

The duration of a suspension depends (exclusively) on the case in hand and is only restricted in that it shall only be permitted to occur temporarily. In most cases, a suspension of redemption is based on there being valuation problems. In such instances it shall also not be possible to issue additional unit certificates.

Exceptional circumstances may be deemed to exist particularly under the following factual circumstances: If stock exchanges or currency markets are closed (e.g. in the case of the 9/11 crisis), if a large proportion of unit-holders demands to redeem their unit certificates, or if it is not possible to determine an appropriate unit price due to political or economic developments (e.g. the ABS crisis).

As a rule the decision to suspend funds will be taken by the management company and shall be notified to the competent home Member State supervisory authorities (and in the case that there is an EEA link the competent supervisory authorities in the host Member State(s)). The management company shall notify the FMA about the suspension of Austrian and foreign UCITS¹, AIFs² or real estate funds that are authorised for distribution in Austria as well as the

¹ Undertaking for collective investment in transferable securities (UCITS), that were approved in Austria pursuant to Article 50 InvFG 2011 or in another Member State pursuant to Article 5 of Directive 2009/65/EC (UCITS IV Directive).

² Alternative investment funds are collective investment undertakings pursuant to Article 3 para. 2 no. 31 InvFG 2011 that are not subject to the Directive 2009/65/EC (UCITS IV Directive). They include special funds, other assets, pension investment funds, real estate investment funds and investment funds that are not UCITS and which are authorised for distribution in Austria.

resumption of redemption of unit certificates (Article 56 paras. 1 and 2 in conjunction with Article 151 no. 15 InvFG 2011 / Article 11 paras. 1 and 4 ImmInvFG).

The FMA publishes information on its website (including the name, type of fund, as well as the custodian bank) about Austrian funds as well as foreign funds that are authorised for distribution in Austria:

<https://webhost.fma.gv.at/FondsSearch#>

This link (also) allows a query to be performed about the respectively currently suspended UCITS, AIFs and Austrian real estate investment funds that are authorised for distribution in Austria. The information is always based on the disclosures made by the management companies.

The FMA advises that a breach of the notification or disclosure obligation regarding a suspension of resumption constitutes an administrative offence as defined in Article 190 InvFG 2011 or Article 38 ImmInvFG respectively.

1 UCITS, OTHER ASSETS AND PENSION INVESTMENT FUNDS

The management company of a (foreign or Austrian) UCITS that is authorised to distribute it in Austria shall notify the FMA about the suspension of the fund as well as the resumption of redemption of unit certificates (Article 56 para. 2 in conjunction Article 151 no. 15 InvFG 2011) and shall additionally inform the unit-holders about this ex lege by means of a public announcement (Article 56 paras. 1 and 2 in conjunction with Article 136 para. 4 InvFG 2011; Article 141 para. 1 InvFG 2011).

In the case of other assets and pension investment funds as defined in Article 168 InvFG 2011 that are formed in accordance with the provisions of the InvFG 2011, the FMA is to be notified about the suspension and resumption of redemption of unit certificates, and the unit-holders informed about this by means of a public announcement (Article 56 paras. 1 and 2 in conjunction with Article 167 paras. 1 and 8 as well as Article 151 no. 15 InvFG 2011; Article 56 paras. 1 and 2 in conjunction with Article 168 as well as Article 151 no. 15 InvFG 2011).

2 FOREIGN AIFS

A foreign management company that wishes to publicly offer foreign investment fund units of an AIF in Austria, shall be required to submit an explicit declaration to the FMA as part of the notification, that it will undertake to notify the FMA of any suspensions, and will inform unit-holders about this by means of a public announcement (Article 56 para. 1 in conjunctions with Article 181 para. 2 no. 5 lit. d InvFG 2011).

The management company of an AIF subject to foreign law that is distributed in Austria shall therefore notify the FMA about the suspension of the fund as well as the resumption of redemption of unit certificates and shall inform the unit-holders about this by means of a public announcement (Article 56 paras. 1 and 2 in conjunction with Article 175 para. 1 InvFG 2011; Article 141 para. 1 InvFG 2011).

3 SPECIAL FUNDS

In the case of special funds pursuant to Article 163 para. 1 InvFG 2011 it shall be permitted to refrain from notifying the FMA about the suspension (Article 164 para. 3 no. 4 InvFG 2011). It is therefore not possible to exclude the possibility that such funds are suspended, even where they show up on the FMA's webpage as not being suspended. However, it is explicitly pointed out that the unit-holders must be demonstrably informed about the suspension in writing, or in another manner that has been agreed upon with the unit-holders (Article 163 para. 2 in conjunction with Article 164 para. 3 no. 4 InvFG 2011).

4 REAL ESTATE FUNDS

The suspension and resumption of redemption of unit certificates of a real estate fund shall be notified to the FMA. Furthermore, the investors of the investment fund management company shall be required to be informed about the suspension and resumption by means of a public announcement (Article 11 paras. 1 and 4 ImmoInvFG).

In the case of special real estate funds pursuant to Article 1 para. 3 ImmoInvFG, in the event of a suspension a notification to the FMA is not necessary (Article 11 para. 1 ImmoInvFG), and nor is the disclosure of the suspension stipulated. It is therefore not possible to exclude the possibility that such funds are suspended, even where they show up on the FMA website as not being suspended.