

FMA MINIMUM STANDARDS FOR DRAWING UP A CONTINGENCY PLAN FOR A POTENTIAL CHANGE OF CUSTODIAN BANK OR DEPOSITARY

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OVERVIEW OF VERSIONS

<i>Date</i>	<i>Document no.</i>	<i>Changes</i>
01.09.2011	01/2011	Initial version
25.04.2024	01/2024	Inclusion of AIFMG and editorial amendments

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1. PRELIMINARY REMARKS

- (1) These FMA Minimum Standards are addressed to all management companies (KAGs; Kapitalanlagegesellschaften) under InvFG 2011¹; real estate investment fund management companies (Immo-KAGs; Kapitalanlagegesellschaften für Immobilien) under ImmoInvFG² as well as licensed alternative investment fund managers (AIFMs) under the AIFMG³. Collectively they are referred to by the term “asset managers” with the term defined as managers of collectively held funds for investment, whose central role is the managing of assets on behalf of others.
- (2) These FMA Minimum Standards do not constitute a Regulation. They serve as guide for orientation purposes and reflect the FMA’s legal interpretation and practical recommendations for conduct in relation to the drawing up of contingency plans, in particular in relation to the following relevant legal provisions:

Article 30 para. 5 and Article 39 para. 1 in conjunction with Article 41 para. 1 InvFG 2011

Article 19 AIFMG

Article 35 ImmoInvFG

Article 39 BWG⁴

- (3) No rights and obligations beyond those stipulated in the legal provisions may be derived from these Minimum Standards. The FMA however expects, making reference to the aforementioned provisions, asset managers to observe these FMA Minimum Standards. Where specific items contained in these FMA Minimum Standards extend beyond the aforementioned listed conditions with regard to due diligence, these are to be considered as recommendations. The FMA reviews on a case-by-case basis whether legal provisions were also breached as a result of the non-observance of recommendations in minimum standards.
- (4) These FMA Minimum Standards do not prevent the addressed asset managers from setting higher standards. Other FMA Minimum Standards and FMA Circulars shall remain unaffected by these Minimum Standards.

¹ Investment Fund Act 2011 (InvFG 2011; Investmentfondsgesetz 2011), published in Federal Law Gazette I no. 77/2011, in the version of the Federal Act amended in Federal Law Gazette I No. 111/2023;

² Real Estate Investment Fund Act (ImmoInvFG - Immobilien-Investmentfondsgesetz), published in Federal Law Gazette I No. 80/2003, in the version of the Federal Act amended in Federal Law Gazette I No. 112/2022;

³ Alternative Investment Fund Managers Act (AIFMG; Alternative Investmentfonds Manager-Gesetz), published in Federal Law Gazette I No. 135/2013, in the version of the Federal Act amended in Federal Law Gazette I No. 111/2023.

⁴ Austrian Banking Act (BWG; Bankwesengesetz), published in Federal Law Gazette no. 532/1993, in the version of the Federal Act amended in Federal Law Gazette I No. 106/2023.

- (5) The custody of the assets of an investment fund or an AIF is legally conferred upon either a custodian bank or a depository.
- (6) Only a credit institution that is authorised to conduct custody business (Article 1 para. 1 no. 5 BWG) or an Austrian branch of an EEA credit institution established pursuant to Article 9 para. 4 BWG may be appointed as a custodian bank.
- (7) Only one of the following entities may be appointed as a depository:
- a credit institution established in the European Union that is authorised pursuant to Directive 2013/36/EU, or
 - an investment firm with its place of incorporation under its articles of association in the European Union, for which the capital requirements pursuant to Article 92 of Regulation (EU) No 575/2013 apply, including capital requirements for operational risks, and which is authorised pursuant to Directive 2014/65/EU, and which also provides ancillary services such as the safekeeping and administration of financial instruments for the account of clients pursuant to Annex I Section B point 1 of Directive 2014/65/EU; such investment firms must in any case have own funds that do not fall below the amount of initial capital stated in Article 28 (2) of Directive 2013/36/EU⁵; or
 - another category of entities, that are subject to prudential supervision and constant oversight, and which as of 21 July 2011 fell under one of categories of entities determined by EU Member States pursuant to Article 23 (3) of Directive 2009/65/EC, from which a depository may be chosen.
- (8) By way of derogation from the entities listed in MN 7, taking into consideration the conditions listed in Article 19 para. 18 AIFMG, pursuant to Part 5 Section 2 a fiduciary, who performs the duties of a depository within the scope of their professional or business activities may also be appointed as a depository.
- (9) In the event that a custodian bank or a depository encounters such kinds of financial difficulties that the risk exists that it will not be able to fulfil its function, this results in massive consequences for the respective affected investment funds or AIFs, and implies detrimental effects to unit-holders, in particular due to suspensions for longer periods of time, as well as economic damage and negative effects on the reputation of the Austrian financial centre. The search for a new custodian bank or depository as well as the legal, financial and technical transferring of the assets of the fund to another custodian bank or depository is an extensive and time-consuming endeavour, which necessitates extended due diligence in accordance

⁵ Regarding the reference to Article 28 of Directive 2013/36/EU in Article 19 para. 3 no. 2 AIFMG it should be noted that this should now be considered as a reference to Article 9 (1) of Directive (EU) 2019/2034 pursuant to Article 10 (a) of Directive (EU) 2019/2034.

with the FMA Minimum Standards for Special Credit Institutions and AIFMs for conducting due diligence⁶. In light of such considerations, the FMA recommends, to take necessary precautions for such a scenario by drawing up a contingency plan, in order to be able to perform a smooth and speedy change of custodian bank or depositary – taking into account the requirement for obtaining FMA approval to do so.

2. CONTINGENCY PLAN

- (10) The contingency plan is intended to provide for the event of a custodian bank or depositary being unable to fulfil its functions, or only being able to do so to a very limited extent. Being able to fulfil functions only to a limited extent occurs, for example in the case of a government commissioner being appointed pursuant to Article 70 para.2 no.2 BWG or an expert supervisory pursuant to Article 84 BWG for the custodian bank or the depositary.
- (11) The contingency plan prescribes measures that permit the immediate initiation of a change of custodian bank or depositary. This may include stipulating necessary provisions in the agreement between the asset manager and the custodian bank or depositary, under which the asset manager shall be allowed to prematurely terminate and transfer to another such entity under the conditions in the contingency plan that is to be drawn up, and that are regulated by the relevant procedure in this regard.
- (12) In the course of conducting their respective business activities, irrespective of any prevailing case-in-hand that cast doubt about the custodian bank or depositary's ability to fulfil its duties, asset managers shall establish communication channels and survey or document who could be considered as a potential custodian bank or depositary and has the necessary resources to take over the function as custodian bank or depositary quickly (e.g. by using the same IT systems, etc.). The selection as well as the determined communications channels shall be reviewed regularly and updated as necessary. The internal audit function shall review the contingency plan at least once a year. The executive directors shall be free to conclude pre-contracts in this matter or similar agreements, but doing so shall not constitute a mandatory part of a contingency plan.
- (13) Where indications exist on the basis of reliable publicly accessible information about the insolvency of the custodian bank or depositary, or the risk that is unable to meet its obligations towards its creditors, so that it no longer appears possible for a custodian bank or depositary to guarantee its ability to fulfil its tasks, then the willingness and well as the contractual framework conditions shall be clarified as a matter of priority on the basis of the contingency plan.

⁶ FMA Minimum Standards for Special Credit Institutions and AIFMs for conducting due diligence in their current version.