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The European Banking Authority
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Submitted via email

29 June 2023

Dear Sir/Madam,

EBA/CP/2023/05. European Banking Authority (“EBA”) consultation on amendments to its guidelines on risk-based AML/CFT supervision to include crypto-asset service providers

The Alternative Investment Management Association (“AIMA”)¹ welcomes the opportunity to comment on the EBA consultation on amendments to its guidelines on risk-based AML/CFT supervision to include crypto-asset service providers (“CASPs”).

AIMA fully supports the aim of combatting financial crime and terrorist financing in all its forms using the globally accepted common standards from Financial Action Task Force (“FATF”) as the basis for doing so. However, we are concerned that the timing of this consultation could create uncertainty for both Member State regulators and CASPs.

The proposed changes are in some places based on draft and therefore unstable legislative texts which are still subject to change. In other areas the consultation refers to current legislation soon to be replaced by the draft laws currently going through the legislative process.

¹ The Alternative Investment Management Association (AIMA) is the global representative of the alternative investment industry, with around 2,100 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than US\$2.5 trillion in hedge fund and private credit assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. The ACC currently represents over 250 members that manage US\$800 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA's website, www.aima.org

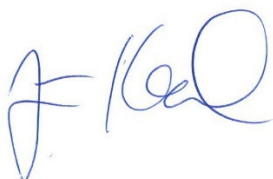
Further, stringent anti-money laundering and countering terrorist financing requirements already apply to a range of crypto-related activities courtesy of the fifth Anti-Money Laundering Directive (“AMLD5”).² Some national competent authorities have already issued guidance on the scope of application and such firms’ obligations.³ There is no discussion of this and whether further guidance is needed to supplement it in the consultation.

This last point is a part of a theme as the impact of the proposals in the consultation is not quantified in any detail. Rather the EBA has opted for what it describes as an impact assessment that is “high level and qualitative in nature”. It is therefore difficult to comment in places as some of the most basic information such as an estimate of the number of firms affected, the value of the assets they control and the potential extra burden this will place on supervisors, has not been provided. This prevents a full discussion on alternative approaches and how their impacts may differ. It also throws open to question whether the EBA is properly discharging its mandate to carry out a cost-benefit analysis.⁴

The consultation does not take into proper account the creation of the new Anti-Money Laundering Authority (“AMLA”) and that it could change its supervisory approach from that of the EBA, making the current guidelines outdated and at least in part redundant.⁵

Given the issues outlined above, it is challenging to give clear and definitive answers to the individual questions asked in the consultation. However, we provide more detailed analysis of our concerns in the annex. We would be happy to elaborate further on any of the points raised in this letter. For further information please contact James Hopegood, Director of Asset Management Regulation at jhopegood@aima.org.

Yours faithfully,



Jiří Król
Deputy CEO, Global Head of Government Affairs

² See recitals 8 to 10 and article 1(c) points (g) and (h) of Directive EU 2018/843 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018L0843&from=EN>

³ See, for example, the Central Bank of Ireland requirements <https://www.centralbank.ie/regulation/anti-money-laundering-and-countering-the-financing-of-terrorism/virtual-asset-service-providers>

⁴ Regulation 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Article 16.2: ‘The Authority shall, where appropriate, conduct open public consultations regarding the guidelines and recommendations and analyse the related potential costs and benefits. Such consultations and analyses shall be proportionate in relation to the scope, nature and impact of the guidelines or recommendations.’

⁵ [https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2021/0421/COM_COM\(2021\)0421_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2021/0421/COM_COM(2021)0421_EN.pdf)

ANNEX

A robust and coherent framework within which the menace of money laundering and terrorist financing can be effectively suppressed is a key element in maintaining clean financial markets and effective protection for all legitimate participants. We are concerned that the timing of this consultation will do little to support this aim for a range of reasons which we discuss in further detail here.

Some underpinning legislation is in draft form and subject to change

EBA's rationale in section 3 of the consultation for issuing this consultation now is that there has been agreement by the co-legislators on the new Transfer of Funds Regulation ("TFR").⁶ However, the closely linked legislative package of changes to the EU's anti-money laundering and countering terrorists financing laws ("the AML package") are still going through the legislative process and are therefore subject to change. The interaction between the TFR and the AML package is therefore not yet clear and the latter may well be amended further before inter-institutional agreement is achieved.

The consequence of this is that there is no legal certainty in relation to parts of the consultation that rely on references to legislation that is subject to change.

For example, the proposed amendment to paragraph 37 of the guidance says competent authorities, "should refer to the categories of obliged entities listed in Directive (EU) 2015/849".⁷ The consultation paper then lists the obliged entities. Directive (EU) 2015/849 is usually known as AML Directive 4, which is part of the legislative package being amended.⁸ The co-legislators may decide to add to, remove from or amend this list. Paragraphs 20 and 25 similarly rely on the text of this soon to be superseded directive.

It raises the very real risk that this guidance may have to be revisited in the short term to remedy issues that the EBA's unfortunate timing may create. We are surprised that the EBA is not waiting until the legislative process has been completed and can rely on finalised legal texts.

The scope of existing legislation

As we have already noted, the argument for consulting now hinges on the requirements of the TFR. However, this should not be taken to imply that CASPs and similar entities are not subject to existing AML and CTF requirements. AMLD5 has already put virtual asset service providers into scope of the existing rules and as we have noted, EU supervisory authorities are already responsible for ensuring they discharge those duties. The consultation does not consider this or how effective national competent authorities have been in supervising the existing requirements.

⁶ 'Provisional Agreement Resulting from Interinstitutional Negotiations' of 5 October 2022 (2021/0241 (COD)) https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/ECON/AG/2022/10-10/1264505EN.pdf

⁷ See Page 17 section 4.2.5 sector-wide ML/TF risk factors, paragraph 12 of the consultation.

⁸ See the European Commission's description of the timeline: https://finance.ec.europa.eu/financial-crime/eu-context-anti-money-laundering-and-countering-financing-terrorism_en#legislation

AIMA has already drawn the EBA's attention to the example of the Central Bank of Ireland's transposition of AMLD5 and notes its scope:

"For the purposes of the legislation, VASPs are firms that provide any of the following services relating to virtual assets:

1. exchange between virtual assets and fiat currencies;
2. exchange between one or more forms of virtual assets;
3. transfer of virtual assets, that is to say, to conduct a transaction on behalf of another person that moves a virtual asset from one virtual asset address or account to another;
4. custodian wallet provider; and
5. participation in, and provision of, financial services related to an issuer's offer or sale of a virtual asset or both."⁹

We urge the EBA to consider whether its proposal is necessary at this moment. We are concerned that it is not discussed in the consultation.

Creation of the AMLA and its future approach

We understand that there will be a process to go through for the AMLA to become operational, at which point it will assume EBA's current responsibilities as well as a range of others. However, no evidence has been presented of a current risk posed by CASPs that is not already addressed by existing legislation.

It will be open to the AMLA to reassess the current approach to supervisory guidance and how it views the requirement for proportionality. Different types of financial entities pose different types of risk and EBA's current approach may be amended. Embedding the current approach at this moment does not seem prudent. It creates the risk that supervisory authorities and firms may have to change their approaches once the AMLA has come into being. If this happens it will have incurred unnecessary uncertainty and cost for no clearly articulated benefit.

Impact assessment does not demonstrate the need for immediate action

The impact assessment or cost-benefit analysis fails to show why the EBA should make this change at this moment. It lacks the most basic details. For example, there is no indication of the total number of CASPs in the EU and in which jurisdictions they are domiciled. This does not allow an assessment of the extra resources that might be needed.

It is questionable as to whether the EBA is meeting its requirement to produce an impact assessment when contemplating guidance. There is an abundance of guidance for European institutions on what a meaningful cost-benefit analysis should include. One such guide notes, "three objective guiding principles that will help you identify the most appropriate scope for your cost-benefit analysis:

1. Establishing the self-sufficient unit of analysis as the principle to define the minimal scope of the cost-benefit analysis.
2. Adjusting the scope of the analysis, considering necessary and inter-related components.
3. Adding elements such as the direct effects and the broader network effects."¹⁰

⁹ See footnote 2.

¹⁰ <https://cinea.ec.europa.eu/system/files/2022-03/Note%20on%20scope%20of%20CBA%20-%20Final.pdf>

Taking each point in turn, there is:

1. No attempt to quantify cost based on current legislation.
2. No attempt to quantify variations in future costs based on amended legislation or the risk that interpretation may be changed.
3. No discussion of other legislation that already applies to CASPs.

Taking this established European best practice into account, we are concerned that the cost-benefit analysis is inadequate.