To: The Financial Stability Board

From: Maples & Calder (Ireland) LLP

Date: 4 September 2023

Our ref: FBB/999999-/34917511v2

Subject: **Revised OEF Recommendations**

1 Introduction

1.1 The Maples Group's Irish Funds & Investment Management Group, led by co-heads Adam Donoghue and Eimear O'Dwyer, comprises 18 partners and over 50 specialist investment fund lawyers and support staff. We are the largest dedicated Irish funds practice, both in terms of headcount and client base. We have the strength in depth, the experience and the expertise to represent the highest tier of investment fund clients on a day-to-day basis.

1.2 We welcome the opportunity to provide comments on the Financial Stability Board's (or "**FSB**") revised open-ended fund ("**OEF**") recommendations as detailed in the FSB Consultation Report entitled "*Addressing Structural Vulnerabilities from Liquidity Mismatch in Open-Ended Funds-Revisions to the FSB's 2017 Policy Recommendations*" (the "**Consultation Report**"). We are supportive of the aims of the FSB Recommendations and the underlying objectives and feel that they will have a positive impact in terms of both investor protection and aligning stakeholder interests.

1.3 We thoroughly support the FSB's position that OEF's are "*one part of a broader market eco-system, which supports a holistic and proportionate approach to addressing these vulnerabilities*."

1.4 We have set out below our responses to the questions raised in the Consultation Report but in the first instance wish to highlight the following points:

(a) **A principle based approach**: We recognise the importance of rules that provide the necessary and appropriate flexibility to account for the broad range of asset classes in scope (noting the application of the Consultation Report to all OEFs save for MMFs and ETFs).

While we acknowledge the need for consistency across OEFs in order to ensure that LMTs are understood by investors and allow for effective supervision of OEFs by the relevant national competent authority, we consider that this will be best achieved through a principle based approach and accordingly, a "*one size fits all*" approach to LMTs may not be workable.

(b) **AIFMD 2.0/UCITS VI**: More generally, we note that there are proposals to harmonise the availability of LMTs across the EU under both AIFMD 2.0 and UCITS VI with the activation and use of such tools under the draft proposals remaining the responsibility of the fund manager. Accordingly, there may be merit in waiting until these discussions have concluded to ensure that a consistent approach is adopted.

2 Questions

Structural liquidity mismatch (Recommendation 3)

2.1 Should "normal" and "stressed" market conditions be further described to facilitate the application of the bucketing approach? If yes, how would you propose describing such conditions?

Maples response: We believe that these terms are broadly understood by investors. We are also conscious that the understanding of these terms may vary depending on: (i) the asset class in question; (ii) the jurisdiction in which the fund is domiciled; and (iii) the differing categories of underlying investor. As such, bearing in mind the need for flexibility in response to ever-evolving market conditions and in order to avoid being overly prescriptive, we do not consider it necessary that these terms be further described.

2.2 Are the examples of the factors that should be considered in determining whether assets are liquid, less liquid or illiquid appropriate? Are there other factors which should be considered and, if yes, which ones and why?

Maples response: While we acknowledge the importance of the aims of the Consultation Report and welcome the additional clarity that the Consultation Report seeks to bring, we are conscious of the need for flexibility in the face of dynamic market conditions and the importance that the guidelines do not become overly prescriptive in scope.

We welcome the acknowledgement of the FSB that "*in general, OEF managers are well positioned to determine the appropriate level of liquid asset holdings for each OEF they manage.*"

We support the inclusion of a non-exhaustive list of factors of market liquidity to be included for assessment by national competent authorities. We are cognisant that the various liquidity buckets are contingent on fluctuating market conditions. As such, we would recommend that a flexible approach be applied to each of the buckets with discretion being afforded to asset managers who, we consider, are best placed to determine the liquidity of the assets under management.

2.3 Is the use of specific thresholds an appropriate way to implement the bucketing approach? If yes, are the proposed thresholds for defining funds that invest mainly (i.e. more than 50%) in liquid or less liquid assets and funds that allocate a significant proportion (i.e. 30% or more) of their assets to illiquid assets appropriate? If not, which thresholds would be more appropriate and why?

Maples response: As noted above, while we broadly agree with the proposed thresholds to be applied, we would advocate for a flexible approach to be adopted with respect to the bucketing of assets which we consider to be quite a broad and fluid concept depending on the asset class in question.

We welcome the FSB's statement that "*when considering the appropriateness of the redemption frequency and the length of a notice or settlement periods for funds in Categories 2 and 3, managers should take a holistic approach having due regard to both qualitative and quantitative factors…*"

We note that in the context of upcoming money market fund reform, ESMA has proposed decoupling thresholds for weekly liquid assets to the use of fees and gates with the intention being that this will reduce the incentive for investors to pre-emptively run to avoid being subject to fees and gates. Instead, it is proposed that managers "*establish, implement and consistently apply prudent and rigorous liquidity management procedures for ensuring compliance with the [weekly liquidity] thresholds applicable to such funds*." We would welcome a comparable approach being taken here.

2.4 Should the FSB consider recommending the use of a decreased redemption frequency (on a standalone basis), a longer notice period (on a standalone basis) or a longer settlement period (on a standalone basis) for OEFs investing in less liquid assets that do not meet the expectation on the implementation of anti-dilution LMTs? Or should these measures be used in combination, considering the risk of redemptions crowding around certain dates?

Maples response: For the reasons outlined in 2.2 above, we consider that a flexible (i.e. combination) approach should be provided for with managers being afforded the opportunity to take a holistic approach when considering the options available to them. We note that the redemption and settlement terms would need to be built into the offering and constitutional documents and as such, would caution against an overly prescriptive approach being taken by the FSB.

2.5 Would additional guidance on factors to consider when setting the redemption frequency or notice or settlement period be helpful? If yes, in what respect?

Maples response: We would welcome further guidance on this topic. We believe that increased flexibility should go hand in hand with robust governance and as such, a strong framework should be put in place to ensure that there are policies and procedures set down to guide managers in exercising their discretion (as is currently the case for the managers of Irish authorised collective investment schemes). We note that in the context of less liquid funds, there are more limited redemption opportunities and consider that this should also be reflected in the guidance.

Liquidity management tools (Recommendations 4, 5 and 8)

2.6 Do the proposed changes to Recommendations 4 and 5, when read together with the proposed IOSCO guidance on anti-dilution LMTs, help achieve greater use and a more consistent approach to the use of anti-dilution LMTs? If not, what changes should be proposed to the FSB Recommendations?

Maples response: Yes, we are supportive of the proposed changes to Recommendations 4 and 5. However, we would note that most Irish authorised collective investment schemes have a pre-existing and robust framework for LMTs with a broad range of LMTs having been built into their offering and constitutional documents.

2.7 Are there any obstacles (either universal or jurisdiction specific) to the implementation of the revised FSB Recommendations on the use of anti-dilution LMTs? If yes, what additional recommendations or guidance would help address such obstacles?

Maples response: We do not consider that there are any Irish-specific obstacles to the implementation of the revised FSB Recommendations on the use of anti-dilution LMTs. As noted above, we consider that the managers of Irish authorised collective investment schemes are already well-placed to access and implement a diverse range of LMTs with investors in Irish funds being familiar with LMTs as a concept.

We note, however, that in certain jurisdictions, some LMTs are not considered acceptable from an investor's perspective and as such, if the FSB Recommendations were to become too prescriptive in scope, this could cause difficulty on a jurisdiction-specific basis.

More broadly, we consider that the introduction of a prescribed list of LMTs required to be introduced to all OEFs could be problematic and cause undue costs in terms of the implementation of same (with such costs covering operational implementation, potentially seeking shareholder approval to amend constitutional documents and building the new LMTs into offering documents) and may not necessarily merit the reward for certain asset classes. As noted above, we consider that Irish authorised collective investment schemes already have a robust range of LMTs at their disposal.

We further note the current (albeit not yet final) proposals under AIFMD 2.0 are potentially less far-reaching in so far as they require managers to be able to temporarily suspend repurchase of units and choose at least one other appropriate LMT from a prescribed list. As noted above, we believe that there may be merit in awaiting the conclusion of AIFMD 2.0/UCITS VI to ensure that there is consistency in terms of approach.

2.8 Would additional recommendations or guidance be helpful in clarifying the expectation that OEF managers have internal systems, procedures and controls enabling them to use anti-dilution LMTs as part of the OEFs' day-to-day liquidity risk management?

Maples response: As noted above, we consider that the managers of Irish authorised collective investment schemes have existing and robust internal systems, procedures and controls in place enabling them to use anti-dilution LMTs, as needed, and as such, while we would welcome general guidance to ensure the universal application of anti-dilution LMTs, we do not consider that further binding recommendations are necessary in all instances.

2.9 Do you agree with applying anti-dilution LMTs to subscribing investors as well as to redeeming investors? If not, why?

Maples response: While we would welcome further detail on these proposals, we consider that both redeeming and subscribing investors should bear the anti-dilution costs in the case of net redemptions/subscriptions. We are of the view that the decision to apply anti-dilution LMTs should rest at the level of the manager rather than being strictly mandated. We consider that the application of anti-dilution LMTs to subscribing investors could potentially make these funds less attractive to investors and caution is needed in this respect.

2.10 Would additional international guidance on the availability and use of quantity-based LMTs be useful? If yes, what aspects should such guidance focus on? If not, why?

Maples response: Yes, we would welcome further guidance on the availability and the use of quantity-based LMTs, particularly on the frequency of use of quantity-based LMTs. Again, we are conscious of the need for such guidance not to become overly prescriptive in scope and welcome the acknowledgement in the Consultation Report that "*exclusive reliance on quantity-based LMTs can entail unintended consequences. For example, investor expectations that an OEF will use quantity-based LMTs may add to excess redemptions in stressed market conditions, if investors seek to anticipate potential restrictions on redemptions.*"

We note that in the context of upcoming MMF reform, each of ESMA, the ESRB, the FSB and the Commission has proposed decoupling the activation of LMTs from regulatory liquidity thresholds with a view to reducing the risk of runs and believe that there is merit in taking an equivalent (and flexible) approach here.

We are also conscious of the inherent tension between providing transparent disclosure to investors whilst ensuring that investors are not in a position to "game" the system and as such, balance is needed in this respect.

Other FSB Recommendations

2.11 Do the proposed changes to Recommendation 2, when read together with the proposed IOSCO guidance on disclosure to investors, help enhance disclosure to investors on the use of anti-dilution LMTs? If not, what changes should be proposed to the FSB Recommendations?

Maples response: Yes, we are supportive of the proposed changes to Recommendation 2 and in particular, the policy aim that "*any additional disclosure requirements should be proportionate to the benefits they bring to investors about liquidity transformation in OEFs individually and in the aggregate.*"

We are in agreement with EFAMA's position that public disclosure should not provide information on activation thresholds to avoid arbitrage from sophisticated investors.

We would note that the Central Bank of Ireland has to date required robust disclosure in terms of liquidity risk factors, detailed disclosure on the use of LMTs and their potential impact on investors in both normal and stressed market conditions.

Additional considerations

2.12 Are there any other aspects that should be considered in the revised FSB Recommendations to ensure that they are effective from a financial stability perspective?

Maples response: As reflected in our responses to each of the questions set out above, we consider that a principles-based (rather than prescriptive) approach should be adopted by the FSB with the implementation of same being manager led.

Yours faithfully

(sent by email and therefore bears no signature)

Maples and Calder (Ireland) LLP