



## **Standard regarding the reimbursement of costs for durable media**

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The standard was prepared with diligence and to the best of our knowledge, however, other legal views or mistakes by the persons drafting the guidance cannot be completely ruled out. The guidance does not claim exhaustive validity.

Should you recognize any flaws, mistakes, ambiguities or should you possess new or different information regarding administrative practice of BaFin, please inform us under [jenny.seydel@bvi.de](mailto:jenny.seydel@bvi.de).

**BVI and Deutsche Kreditwirtschaft do not accept any liability for the contents of this standard.**

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## INTRODUCTION

Investment management companies (“ManCos”) are required by law to provide in specified cases information to investors by way of durable medium (*dauerhafter Datenträger* – “DD”). The information is usually transmitted through the credit institution maintaining a custody account on behalf of their clients (“Custody Institution”), e.g. banks, fund platforms. This standard aims to provide guidance on the reimbursement of costs for the DD transmitted by the Custody Institution. It contains the following:

1. List of cases in which ManCo has to inform investors by way of DD
2. Form of DD according to law
3. EU ManCos or foreign ManCos’ obligation to reimburse
4. Standard regarding reimbursement including specific cases

## 1. LIST OF CASES IN WHICH MANCO HAS TO INFORM INVESTORS BY WAY OF DD

The EU or foreign ManCo has to inform investors by way of DD according to the German Capital Investment Act (*Kapitalanlagegesetzbuch* – “KAGB”) only in the following cases (“DD Cases”):<sup>1</sup>

- Suspension of redemption of investment units or shares;
- Termination of fund administration;
- Liquidation of the fund;
- Amendments to the fund rules which
  - o are not equivalent to the current investment principles,
  - o affect substantial rights of the unit holder,
  - o relate to fees and expenses, which are to be reimbursed by the fund;
- Information about fund mergers;<sup>2</sup>
- Transformation of a fund into a feeder-fund or a master-fund de-merger;<sup>3</sup>
- Any changes to the depository’s liability, in case of alternative investment funds (“AIFs”) marketed to private investors.<sup>4</sup>

In case of amendments to the fund rules regarding fees and expenses which are obviously to the benefit of the investors or only editorial, a transmission by DD is not required.<sup>5</sup> BaFin has confirmed that it will not take any measures if in such cases no DD will be transmitted. BaFin shares the view that the costs would be superfluous and would in any case be at the expense of the fund, hence the investor.

## 2. FORM OF DD ACCORDING TO LAW

A DD means an instrument which enables an investor to store information addressed personally to that investor in a way that is accessible for future reference for a period of time

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<sup>1</sup> See Sec. 298 para. 2 KAGB for EU-UCITS and Sec. 299 para. 5 KAGB for EU-AIF.

<sup>2</sup> See Art. 7 para. 1 Directive 2010/44/EG (“Fund Merger Directive”), Art. 43 para. 1 Directive 2009/65/EG (“UCITS Directive”).

<sup>3</sup> See Art. 29 Fund Merger Directive, Art. 64 para. 1 UCITS Directive.

<sup>4</sup> See Sec. 300 para. 4 KAGB.

<sup>5</sup> See E-Mail BaFin (Dr. Anahita Sahavi) to BVI (Marcus Mecklenburg) dated March 27, 2013; 5:57 p.m., subject: „Information der Anleger per dauerhaftem Datenträger bei offensichtlich begünstigenden oder neutralen, rein redaktionellen Änderungen von Kostenklauseln\_WA 41-Wp 2136-2011/0043“.

adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.<sup>6</sup> The following media are considered as DD (list is not exclusive):<sup>7</sup>

- Paper,
- E-Mail,<sup>8</sup>
- CD-Rom,
- DVD.

### 3. EU OR FOREIGN MANCOs' OBLIGATION TO REIMBURSE

In case the Custody Institution transmits information in a DD Case to the investor, it has to be reimbursed by the ManCo.<sup>9</sup> This also applies to EU or foreign ManCo since the rules for EU or foreign ManCos refer to rules applicable to German funds.<sup>10</sup> BaFin has confirmed this interpretation.<sup>11</sup>

The reimbursement, however, only comprises:

- Written notification
- Electronic notification
- Postage fees
- Copy/printing costs

The Custody Institution may not claim reimbursement of any other costs.

The costs to be reimbursed are determined by law.<sup>12</sup> These are as follows:

Type	Up to 30	31 to 100	101 to 5,000	5,001 to 50,000	More than 50,000
Written notification	EUR 3 per notification	EUR 2 per notification, at least EUR 90	EUR 0.95 per notification, at least EUR 200	EUR 0.55 per notification, at least EUR 4,750	EUR 0.45 per notification, at least EUR 27,500
Electronic notification	EUR 3 per notification	EUR 1 per notification, at least EUR 90	EUR 0.40 per notification, at least EUR 100	EUR 0.25 per notification, at least EUR 2,000	EUR 0.20 per notification, at least EUR 12,500
Postage fees	according to real costs				
Copy/printing costs	according to customary market conditions				

<sup>6</sup> See Art. 2 para. 1 m) UCITS Directive.

<sup>7</sup> See *Verführth/Emde*, in: *Emde/Dornseifer/Dreibus/Hölscher*, InvG, 2013, § 2, No. 244.

<sup>8</sup> See also Recital 5 Fund Merger Directive.

<sup>9</sup> See Secs. 299 para. 5, 298 para. 2, 167 para. 3 KAGB in connection with Sec. 1 of the regulation regarding reimbursement of credit institutions (*Verordnung über den Ersatz von Aufwendungen der Kreditinstitute* – “KredInstAufwV”).

<sup>10</sup> See Secs. 299 para. 5, 298 para. 2 in connection with Sec. 167 para. 3 sentence 3 and 4 KAGB.

<sup>11</sup> See “Annex 1 – BaFin opinion regarding DD cost reimbursement”. Though the opinion refers to the former Investment Law, the specific sections have not been amended under the new law despite editorial changes.

<sup>12</sup> See Sec. 1 KredInstAufwV.

#### 4. STANDARD REGARDING REIMBURSEMENT INCLUDING SPECIFIC CASES

The following rules should apply for the reimbursement of costs for the DD:

Rule	Rationale
<p>1. <b>ManCo has to submit DD in DD Cases to Custody Institutions. Custody Institutions shall only transmit information by durable media in case information is identified as such. Costs will only be reimbursed in such cases.</b></p>	<p>Some Custody Institutions tend to send all information by DD to be on the safe side. However, the ManCo can easily (i) assess whether the information has to be sent by DD and (ii) indicate this in the notice to the Custody Institution. Typically, the information is provided through an information data provider (e.g. WM Daten) where the files are also identified as DD. In other cases, a form could be used either by print letter or by e-mail (see the example in <b>Annex 1</b>). Otherwise Custody Institutions would have to analyse the documents and see whether a DD Case exists.</p>
<p>2. <b>The legal standard is by letter mail. However, Custody Institutions shall use the most reasonably priced way to transmit the DD in case the legal preconditions are fulfilled (customer agreement).</b></p>	<p>The Custody Institution should also take into account ManCos' and investors' interest and should not increase the costs unnecessarily.</p>
<p>3. <b>Copy/printing costs should be calculated on a reasonable basis.</b></p>	<p>The costs for copies and printout should be determined in advance to avoid disagreements between ManCo and Custody Institution. The reference to lawyers' expenses as stipulated by law seems fair since the legislator considered these as appropriate for lawyers' expenses. There is no reason why the expenses of the Custody Institution should be treated differently.</p>
<p>4. <b>Invoicing to the ManCo shall be made within reasonable time and following the enclosed invoicing form or a form with corresponding contents (Annex 2). Invoices should contain a reference to ManCo's instruction.</b></p>	<p>The enclosed form contains all information necessary to understand the basis for the amount invoiced. The invoice should generally be issued within three months' time after submission of the DD and should contain a reference to the ManCo's instruction to be identifiable.</p>
<p>5. <b>Invoices shall only comprise the costs for the transmission of a single DD Case. Unless otherwise agreed, summary invoices for several DD Cases should not be issued.</b></p>	<p>Whether the DD expenses can be charged to the fund or have to be borne by the ManCo depends on the type of DD. Hence if invoices contain more than one case of DD, the invoicing positions have to be separated. This increases the administrative amount of work since e.g. correcting invoices have to be issued and frequent queries posed.</p>
<p>6. <b>Unless otherwise agreed, Custody Institutions should issue one invoice for a single DD Case to the ManCo even if it concerns several ISINs and/or several funds.</b></p>	<p>A single DD Case may apply to several ISINs within one fund or several funds at a same time. Unless otherwise agreed between Custody Institution and ManCo, Custody Institutions should only issue one invoice for a single DD Case. Otherwise the ManCo could receive a significant higher number of individual invoices which it has to enter into its system. Further, the costs to be reimbursed according to law increase significantly if one DD Case which relates to several funds is divided in several DD Case.</p>

## ANNEX 1 – FORM FOR MANCOS

To be used only if the document is not identified as a DD by the Management Company

[Letterhead ManCo]

[Address of Custody Institution]

### Information to be transmitted by durable media

[ISINs]

Dear Sir or Madam,

The enclosed information concerns

- Suspension of redemption of investment units or shares;
- Termination of fund administration;
- Liquidation of the fund;
- Amendments to the fund rules which
  - are not equivalent to the current investment principles,
  - affect substantial rights of the unit holder,
  - relate to fees and expenses, which are to be reimbursed by the fund;
- Information about fund mergers;
- Transformation of a fund into a feeder-fund or a master-fund de-merger;
- Any changes to the depository's liability, in case of alternative investment funds ("AIFs") marketed to private investors.

**It is required to transmit the information by durable media to investors.** Please send the invoice to the attention of [name, address] using the format as provided by the Industry standard regarding the reimbursement of costs for a durable medium agreed between \_\_\_ and BVI.

## ANNEX 2 – INVOICING FORM<sup>13</sup>

[Letterhead of Custody Institution]

[Address of ManCo]

We would like to invoice the sum of [sum] for the transmission of durable media regarding [ISINs] to investors. The transmission concerned:

- Suspension of redemption of investment units;
- Termination of fund administration;
- Liquidation of the fund;
- Amendments to the fund rules which
  - are not equivalent to the current investment principles,
  - affect substantial rights of the unit holder,
  - relate to fees and expenses, which are to be reimbursed by the fund;
- Information about fund mergers;
- Transformation of a fund into a feeder-fund or a master-fund de-merger;
- Any changes to the depository's liability, in case of alternative investment funds ("AIFs") marketed to private investors.

[It relates to your instruction dated [date].]

Calculation:

Fund / Notification	Fund name					
Fund	Fund ISIN					
Position	Amount	Price scale	Unit price	Min. payment	VAT	Amount
<b>Written Notification</b>						
<b>Postage fees</b>						
<b>Electronic Notifica- tion</b>						
<b>Copy costs</b>						
<b>Subtotal</b>						
<b>TOTAL</b>						

Contact details: <Email-address/contact person>

<sup>13</sup> The invoice should contain below contents.



**ANNEX 3 – BAFIN OPINION REGARDING  
DD COST REIMBURSEMENT BY EU MANCos  
(December 2013)**

[letter body]

Ihre Anfrage ist an mich zur Bearbeitung weitergeleitet worden. Nach Abstimmung in meinem Hause darf ich Ihnen nun wie folgt antworten:

Ich stimme Ihnen insoweit zu, als dass § 122 Abs. 1 Satz 5 auf § 42a InvG vollumfänglich verweist mit der Folge, dass an sich die ausländische Investmentgesellschaft verpflichtet ist, inländische Anleger zu informieren. Dies ergibt sich auch systematisch aus dem Standort in § 122 InvG, der ausschließlich Pflichten der Investmentgesellschaften regelt. Materiell ist diese auch die einzige, die die notwendigen Informationen hat und in ihrer Bedeutung für den Anleger einschätzen kann.

Der Verweis auf § 42a Abs. 3 InvG ergibt überhaupt erst die Möglichkeit, die depotführende Stelle in den Informationsprozess einzuschalten. Dann kann es aber nicht sein, dass dort die ersten zwei Sätze angewandt werden, der Verweis auf die Sätze 3 und 4 mit den Regelungen zum Aufwendungsersatz aber als nicht eindeutig betrachtet wird. Wenn § 122 Abs. 1 Satz 5 InvG ausdrücklich eine entsprechende Anwendung des § 42a InvG anordnet, kann nicht eingewandt werden, dessen Wortlaut adressiere nur inländische Kapitalanlagegesellschaften; dieser Anwendungsbereich wird ja gerade durch § 122 Abs. 1 Satz 5 InvG erweitert. Es ist kein Grund ersichtlich, aus dem der Gesetzgeber die Kostentragungspflicht hier anders hätte regeln wollen oder sollen. Ich sehe auch kein Problem mit dem territorialen Anwendungsbereich der Norm, denn ein Inlandsbezug ist durch den gezielten Vertrieb in Deutschland zweifellos ebenso gegeben wie bei den Regelungen der §§ 130 ff. InvG.

Nicht akzeptabel sind dagegen die Erwägungen für den Fall, dass die ausländischen Investmentgesellschaften die Kostenerstattung verweigern. Es entspricht nicht der Ratio des InvG, dass die Anleger letztlich die Leidtragenden der Uneinigkeit der beteiligten Gesellschaften sind und die Informationen überhaupt nicht erhalten. Vielmehr ist die depotführende Stelle in jedem Fall nach § 122 Abs. 1 Satz 5 iVm § 42a Abs. 3 Satz 2 InvG originär verpflichtet, die ihr von den Investmentgesellschaften zur Verfügung gestellten Informationen für die Anleger unverzüglich und formgerecht, d.h. auf einem dauerhaften Datenträger weiterzugeben. Soweit sich die Investmentgesellschaften weigern, kenntlich zu machen, welche der übermittelten Informationen in den Anwendungsbereich von § 122 Abs. 1 Satz 5 Nr. 1 bis 5 fallen, oder die Kosten für die Anlegerunterrichtung im Nachhinein nicht begleichen, hat die ... nur die

Möglichkeit, entweder die vertraglichen Vereinbarungen entsprechend nachzubessern oder die Geschäftsbeziehung zu den betreffenden Gesellschaften zu beenden und ggf. offene Aufwandspositionen auf dem Rechtswege geltend zu machen. Ein Zurückbehaltungsrecht an den Informationen würde jedenfalls nicht den Richtigen treffen, sondern den Sinn des Gesetzes in sein Gegenteil verkehren.

Soweit Sie der Auffassung sind, dass ausländische Investmentgesellschaften sich weiterhin weigern, die Vorschriften nach § 122 Abs. 1 Satz 5 in Verbindung mit § 42a Abs. 3 invG einzuhalten, bitte ich, mir diese Gesellschaften zu benennen, damit ich weitere aufsichtliche Maßnahmen prüfen kann.

Mit freundlichen Grüßen

Im Auftrag

Hans-Georg Carny

Bundesanstalt für Finanzdienstleistungsaufsicht

Referent

Bereich Wertpapieraufsicht

Referat WA 41