EFAMA Response to ESMA's Consultation Paper on Guidelines on key concepts of the AIFMD

EFAMA[1] welcomes the opportunity to provide a response on the ESMA Consultation Paper on Draft regulatory technical standards on types of AIFM.

II. Background

Q1: Do you agree with the approach suggested above on the topics which should be included in the guidelines on key concepts of the AIFMD? If not, please state the reasons for your answer and also specify which topics should be re-moved/included from the content of the guidelines.

EFAMA regrets that ESMA has decided not to include into this Consultation Paper topics which have been covered by the discussion paper of 23 February 2012, in particular[2]:

- The vehicles which are not AIFMs or AIFs or are exempted from the provisions of the AIFMD;
- The treatment of UCITS Management companies;
- The treatment of MiFID firms and Credit institutions.

These topics are of utmost importance to EFAMA Members and EFAMA urges ESMA to clarify questions raised in this regard in the discussion paper without further delay in order to allow EFAMA members timely application of the rules stemming from the AIFMD. In this regard please refer to our EFAMA response to the Discussion Paper as enclosed hereto.

[1] EFAMA is the representative association for the European investment management industry. EFAMA represents through its 27 member associations and 60 corporate members about EUR 14 trillion in assets under management of which EUR 8.7 trillion managed by 54,000 investment funds at end September 2012. Just under 36,000 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds. For more information about EFAMA, please visit www.efama.org.

[2] Consultation Paper, II. Background, N. 7.

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III. Concepts extracted from the definition of AIF

Q2: What are your views on/readings of the concepts used in the definition of AIF in the AIFMD? Do you agree with the orientations set out above on these concepts? Do you have any alternative/additional suggestions on the clarifications to be provided for these concepts?

EFAMA supports the selection made by ESMA with respect to the concepts of the AIF definition in need of further clarification.

Regarding the concept of "ownership of underlying assets", some EFAMA Members considered that it should not be considered a key element in defining an AIF because would be very difficult to grasp due to the divergences in national ownership rules relevant at the fund level. Other EFAMA Members would have preferred the Guidelines to cover this concept.

EFAMA would like to raise ESMA's attention on the articulation of the guidelines and other pieces of EU legislation. EFAMA believes that the application in other contexts of any definition set out in the guidelines should be subject to an impact assessment. As for now, EFAMA believes that these definitions should be relevant in the context of the AIFMD only.

1. <u>Raising Capital</u>

Q3: What are your views on the notion of 'raising capital'? Do you agree with the proposal set out above? If not, please provide explanations and possibly an alternative solution.

EFAMA agrees with the general approach suggested by ESMA with regard to the notion of "raising capital" as well as with the guidelines proposed in section VII of Annex V.

EFAMA welcomes the clarification that "raising capital" does not require any kind of marketing activities on the part of AIFM, but can be limited to some kind of commercial communication or indeed, to steps procuring the transfer or commitment of capital with a view to generating a pooled return for investors. In this regard, some EFAMA Members were in favor of further clarification of the notion "commercial communication".

EFAMA also shares ESMA's view that a vehicle raising capital solely from the members of its governing body, its employees or other persons listed in paragraph 13 of Annex V should not be considered an AIF. However, the proposed treatment of the "legal person managing the undertaking" (AIFM or an external manager) is not very clear. According to paragraph 15 of the consultation paper, capital provided by such person shall not be considered for the purpose of "raising capital", whereas paragraph 16 suggests that is should be relevant in this respect. For the sake of consistency, EFAMA suggests applying the exception under paragraph 13(a) of Annex V only to members of the governing body of the undertaking managing an AIF.

EFAMA would also welcome clarification that even if the investor of an AIF is an affiliate of the AIFM, the AIF remains an AIF. To achieve such clarification, the statements made in the first to third sentence of paragraph 16 of the consultation paper should be included in the final guidelines.

EFAMA would also appreciate clarification in several regards regarding the treatment of family offices. In Paragraph 14 of the text ESMA declares that investments made by a group of persons connected by a close familial relationship is not likely to be within the scope. Paragraph 13.c of the draft guidelines however mentions investments made by "a pre-existing group" as likely to be out of scope. The latter implies that there is no need for a family relationship. EFAMA agrees that there is no requirement of a family relationship in Recital 7 of the AIFMD which only mentions family office vehicles as an example. EFAMA would therefore appreciate a modification of the comment in Paragraph 14. Furthermore, the reference to a "pre-existing group" should not hinder the addition of new members to the group, for family offices for example by birth or marriage. Also, the investors in a family investment vehicle may be individual members of a family, or they may be family trusts, the ultimate beneficiaries of which are members of the family. Some family investment vehicles may also include charitable trusts among their beneficiaries. The presence of such non-natural person beneficiaries (which of course have no "familial" relationship with the other beneficiaries) should not cause the vehicle to be treated as an AIF.

Q4: Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance on the notion of 'raising capital' would imply.

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2. Collective Investment Undertaking

Q5: Do you agree with the proposed guidance for identifying a 'collective investment undertaking' for the purposes of the definition of AIF? If not, please explain why.

A large majority of EFAMA Members agrees with the characteristics for identifying a "collective investment undertaking" as proposed in section VI of Annex V. Especially, the criterion requiring investment of pooled investors' capital with a view of generating a pooled return should provide a sound basis for distinguishing AIFs from e.g. banking products where investments take place on the bank's own account and investors hold solely claims against the bank's balance sheets. #

Some EFAMA Members voiced concerns regarding the discretion left to the competent authorities and market participants to consider that an entity is an AIF even in the absence of all or any of the characteristics. They feared that the discretion could lead to an inconsistent application of the concepts in the definition of AIF across the EU and would therefore contradict the official aim of ESMA to achieve a harmonised regime.

EFAMA would appreciate a clarification of the boundary between an AIF(M) and a holding company. The holding company exemption in the AIFMD is likely to be interpreted in many different ways and therefore lead to an inconsistent application of the Directive.

Q6: Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance for identifying a 'collective investment undertaking' would imply.

Q7: Do you agree with the analysis on the absence of any day-to-day investor discretion or control of the underlying assets in an AIF? If not, please explain why.

EFAMA agrees with the analysis on the absence of any day-to-day investor discretion or control of the underlying assets in an AIF. Furthermore, EFAMA welcomes the clarifying statement in paragraph 23 of the consultation paper that some general influence or even the necessity to obtain prior approval from investors on certain high-level decisions should not deprive a vehicle of its AIF status.

Q8: Do you agree that an ordinary company with general commercial purpose should not be considered a collective investment undertaking? If not, please ex-plain why.

EFAMA agrees that an ordinary company with general commercial purpose should not be considered a collective investment undertaking.

Q9: Which are in your view the key characteristics defining an ordinary company with general commercial purpose?

EFAMA suggests using as starting point for definition the key characteristics the criteria established under national commercial and tax law for distinguishing commercial companies from other vehicles.

Such key characteristics include the notion of commercial purpose meaning that the ordinary company has a "business purpose" while an AIF has a defined investment policy. To achieve its business purpose, the commercial company will raise some form of capital periodically, if at all, under certain circumstances but not on a daily or pre-determined basis as driven by its business needs and not by potential investors/subscribers. Growth is originated and determined by the company and not dependent on daily or monthly subscriptions/redemptions by investors. Commercial companies will not publish a NAV and unlike a Private Equity Fund, that might meet all or many of the above criteria, a commercial company usually is not setup for limited number of years.

Very similar criteria can be found in Article 9 of the Council Directive 2006/112/EC[3] which contains a definition of "economic activity". According to this provision, any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". In addition, this definition encompasses the exploitation of tangible and intangible property for the purpose of obtaining income therefrom on a continuing basis.

As mentioned under question 8, EFAMA would appreciate a clarification of the boundary between an AIF(M) and a holding company. The holding company exemption in the AIFMD is likely to be interpreted in many different ways and therefore lead to an inconsistent application of the Directive.

3. Number of Investors

Q10: Do you agree with the proposed guidance for determining whether a 'number of investors' exists for the purposes of the definition of AIF? If not, please explain why.

Some EFAMA Members consider that AIFMD Level 1 does impose the requirement for a legally binding prohibition of more than one investor. Level 1 states "…undertakings…which raise capital from a number of investors" and not "which are capable of raising capital from a number of investors". It is not a test of the possible, merely the actual facts. Therefore, these EFAMA Members consider that where a person does not attempt to raise capital from more than one investor, the undertaking should not be regarded as an AIF just because there is no legally binding requirement prohibiting further investors. The very requirement that makes an undertaking an AIF when it raises capital from a number of investors means very simply that it will become an AIF if it satisfies the criteria for raising capital and from more than one investor. It would be a test of fact that should not be difficult to assess.

Other EFAMA Members agree with the proposed guidance concerning the notion of a "number of investors". In particular, these EFAMA Members share ESMA's view that the applicable restrictions on raising capital should be the decisive criterion and that an undertaking which is not prevented in a legally binding manner from raising capital from more than one investor should be considered collective for the purpose of the AIF definition.

Moreover, EFAMA believes that ancillary investors – only required to set up the structure – should not be taken into account when determining whether or not an entity raises capital from a number of investors.

[3] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

Q11: Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance for determining whether a 'number of investors' exists would imply.

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4. Defined investment policy

Q12: Do you agree with the proposed indicative criteria for determining whether a 'defined investment policy' exists for the purposes of the definition of AIF? If not, please explain why.

A large majority of EFAMA Members agrees with the proposed indicative criteria for determining whether a defined investment policy exists.

Some EFAMA Members voiced concerns regarding the discretion left to competent authorities and market participants in paragraph 18 page 53 which allows to conclude that an investment policy exist even if the mentioned factors are absent.

Q13: Please provide qualitative and quantitative data on the costs and benefits that the proposed indicative criteria for determining whether a 'defined investment policy' exists would imply.

Q14: Do you consider appropriate to add in Section IX, paragraph 16(b) of the draft guidelines (see Annex V) a reference to the national legislation among the places where (in addition to the rules or instruments of incorporation of the undertaking) the investment policy of an undertaking is referenced to?

Some EFAMA Members consider it appropriate to add a reference to the national legislation while others see no specific necessity to do so given that range of eligible assets and restrictions on asset allocation stipulated by national law are reflected in the individual fund rules or instruments of incorporation. This being said, such an additional reference brings no detriment and therefore EFAMA does not object to including it in the final guidelines.

4 February 2013
[13-4004]

efama
European Fund and Asset Management Association

EFAMA Response to the ESMA Discussion Paper
Key Concepts of the Alternative Investment Fund Managers Directive and types of AIFM

EFAMA[1] welcomes the publication of the ESMA Discussion Paper on Key Concepts of the Alternative Investment Fund Managers Directive and types of AIFM.

EFAMA appreciates the opportunity of commenting on drafts of the key concepts of the AIFMD at an early stage in ESMA's working process. Many interpretations explained in the Discussion Paper are fully shared by EFAMA. However, EFAMA has two key concerns on which it urges ESMA to reconsider its current position:

EFAMA is highly concerned about ESMA's interpretation in Paragraph 8 of the Discussion Paper that an AIFM may not delegate the functions of portfolio and risk management "in whole at the same time". There is no indication in the Level 1 text of the Directive that it shall be forbidden to delegate both the portfolio and risk management. Such delegation should be possible at the same time as long as these delegation arrangements do not result in the AIFM becoming a letter-box entity in accordance with the ESMA's advice on Level 2 measures. EFAMA therefore strongly urges ESMA to clarify Paragraph 8 to state that an AIFM may delegate the functions of portfolio and risk management at the same time for as long as these delegation arrangements do not result in the AIFM becoming a letter-box entity in accordance with ESMA advice on Level 2 measures.

Similarly, EFAMA asks ESMA to urgently reconsider its analysis in Paragraph 54 of the Discussion Paper. Article 6 (4) AIFMD allows the AIFM to perform certain investment services which fall under MiFID. As long as the AIFM restricts itself to these services as stipulated in Article 6 (4) AIFMD it should be permitted to hold a MiFID license permitting it to exercise these services listed under Article 6 (4) AIFMD if Member States require a separate MiFID license for such activities. This situation is comparable to the situation of UCITS Management Companies and the services stipulated in Article 6 (3) of the UCITS Directive. This being said EFAMA considers that credit institutions and MiFID firms providing services other than services listed in Article 6 (3) UCITS Directive and Article 6 (4) AIFMD should not be authorized as AIFMs. EFAMA would highly appreciate if ESMA could reconsider its analysis to take the above into account.

In addition to answering the specific questions raised in the Discussion Paper, EFAMA also submits a number of general comments throughout the document. The numbering of the paragraphs below corresponds to the numbering in the Discussion Paper.

[1] EFAMA is the representative association for the European investment management industry. EFAMA represents through its 26 member associations and 58 corporate members approximately EUR 13 trillion in assets under management of which EUR 7.9 trillion was managed by approximately 54,000 funds at end 2011. Just above 36,000 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds. For more information about EFAMA, please visit www.efama.org

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III. Definition of AIFM
Comments regarding Paragraph 6

Some EFAMA Members consider that the Level 1 text of the Directive of creates a certain confusion regarding the definition of AIFM. This confusion arises when reading on one hand the definition in Article 4 (1) (w) "managing AIF's" and on the other hand article 6 (5) (d). Reading both articles it could be stated that an entity that is performing either portfolio management or risk management function is supposed to be an AIFM, but that entity is explicitly not obliged to get an AIFM license (based on art 6). As Article 6 explicitly refers to this situation this can't be ignored by ESMA. Requiring a license as soon as a manager performs either one of these functions would however lead to the confusing situation that there could be two managers of an AIF.

These EFAMA Members would therefore suggest that with a view to this situation it should be clarified that the entity performing portfolio management (being the real core business of managing AIFs) is supposed to be the AIFM, who has then delegated the risk management to a third party (under article 20 of the Directive).

Comments regarding Paragraphs 7 and 8

EFAMA is highly concerned about the ESMA's interpretation in Paragraph 8 that an AIFM may not delegate the functions of portfolio and risk management "in whole at the same time"[2]. There is no indication in the Level 1 text of the Directive that it shall be forbidden to delegate both the portfolio and risk management. Such delegation should be possible at the same time as long as these delegation arrangements do not result in the AIFM becoming a letter-box entity in accordance with the ESMA's advice on Level 2 measures.

Furthermore, such an interdiction will significantly impact the current organizational structures of AIFM and would imply significant and costly restructuring of existing AIFM and prevent utilization of economies of scale to the detriment of AIF investors. For instance, in case of AIFM belonging to financial groups, it might no longer be admissible to bundle the risk management capacities in one entity within the group and concurrently delegate the AIF portfolio management to external providers in order to take advantage from their expertise in specific markets.

EFAMA therefore urges ESMA to clarify Paragraph 8 to state that an AIFM may delegate the functions of portfolio and risk management at the same time for as long as these delegation arrangements do not result in the AIFM becoming a letter-box entity in accordance with ESMA advice on Level 2 measures.

EFAMA also requests a clarification regarding that the calculation of individual risk figures by external providers should not be considered partial delegation of functions, but rather an ancillary service for the internal performance of risk management. This view should be clearly endorsed for

[2] In this context, EFAMA understands that some confusion stems from the use of the words "in whole" in ESMA's interpretation of Paragraph 8. EFAMA fully agrees that a delegation of both functions should not be to such a degree that it results in the AIFM being a letter box entity. Some EFAMA Members wondered whether ESMA with the words "in whole" referred to such a situation where there would not be a sufficient structure left at the level of the AIFM, in other words where the AIFM was a letter-box entity. A vast majority of EFAMA Members however understood from this wording that ESMA wanted to express that the AIFM could only delegate one or the other function but not both. To avoid such confusion, EFAMA strongly suggests to avoid the words "in whole".

situations where the third party has been assigned only with the task of regular risk measurement while the relevant processes for evaluation of risk measurement results and assessment of risk limits retain with the responsible AIFM.

Last, EFAMA would appreciate a clarification that the function of liquidity management stipulated in Article 16 AIFMD is distinct from risk management and hence would not be affected by the discussed approach.

Comments regarding Paragraph 10

EFAMA would appreciate a re-wording of Paragraph 10 by ESMA. The current drafting is ambiguous and causes important concerns.

As currently drafted, Paragraph 10 seems to suggest that an AIFM shall in any case be responsible for all functions performed for the AIF, including additional functions as listed in Annex I of the AIFMD. It seems to be ESMA's interpretation that the AIFM should either perform these functions or they are considered delegated by the AIFM with the AIFM remaining liable for these functions.

EFAMA is highly concerned by the interpretation proposed in Paragraph 10 which is contrary to the Level 1 wording of the Directive. In accordance with the Level 1 text of the Directive, it is possible that an AIF may appoint an AIFM for some functions only. The AIF may directly appoint third parties for other functions, such as distribution or administrative tasks etc. The Level 1 text of the Directive therefore also provides that it is not necessary that an AIFM performs all additional functions listed in Annex I para. 2 in order to ensure compliance with AIFMD in accordance with its duty from Article 5(1).

According to a general rule of law, nobody may delegate more functions than he has previously received. Accordingly, an AIFM which has not been appointed for all functions may also not delegate such functions for which it has not been appointed. Furthermore, there should also not be a presumption in the interpretation by ESMA that an AIFM has delegated a function which it has never received.

IV. Definition of AIF

Question 1 Do you see merit in clarifying further the notion of family office vehicles? If yes, please clarify what you believe the notion of 'investing the private wealth of investors without raising external capital' should cover.

EFAMA sees merit in clarifying further the notion of family office vehicles. The notion of family offices should also cover existing situations where banks use funds to optimize investment management for their clients with whom they entered into an investment management agreement. The notion should also cover situations where funds are used as a wealth structuring tool.

EFAMA would also appreciate clarification that the AIFMD, in particular Recital 7, does not prevent family offices from raising external capital such as bank loans. It could be specified that: "family offices do not raise external capital **from investors other than the family office investors**".

Question 2 Do you see merit in clarifying the terms 'insurance contracts' and 'joint ventures'? If yes, please provide suggestions.

Again, EFAMA sees merit in clarifying the terms 'insurance contracts' and 'joint ventures'.

EFAMA sees in particular a lack of legal definition at EU level of "joint ventures" and Member States may have different interpretations of this concept. Setting criteria at EU level identifying joint ventures would be helpful. Criteria to be considered could include:

- it is created by two or more companies
- it has moral personality
- its objective is to pool resources in a common goal
- it is controlled by the pooled actors (i.e. the community of ventures' / investors – rather than a fund manager – is responsible for making strategic decisions on the management of the assets)
- it has no investment policy
- it does not raise capital from a number of investors.

In this context, the question should however be raised whether the AIFMD may be the appropriate legislative to define 'joint ventures' at the European level.

Question 3 Do you see merit in elaborating further on the characteristics of holding companies, based on the definition provided by Article 4(1)(o) of the AIFMD? If yes, please provide suggestions.

EFAMA sees merit in further elaborating on the characteristics of holding companies.

EFAMA has concerns regarding the definition of holding companies as set out in Article 4 (1) (o) of the AIFMD and as repeated in Paragraph 15 of the Discussion Paper. Not all holding companies have their shares admitted to trading on a regulated market in the EU. This would exclude from this definition, in turn including them in the scope of the AIFMD:

- holding companies whose shares are not admitted to trading on any regulated market in the EU, for example by decision of the holding company not to be listed and
- holding companies whose shares are admitted to trading on markets outside the EU.

Question 4 Do you see merit in clarifying further the notion of any of the other exclusions and exemptions mentioned above in this section? If yes, please explain which other exclusions and exemptions should be further clarified and provide suggestions.

EFAMA would appreciate clarification of further notions of other exclusions and exemptions mentioned in this section:

Further clarification regarding the term "Securitisation special purpose entities" would be beneficial. EFAMA seeks confirmation from ESMA that a securitisation special purpose vehicle is not in scope of AIFMD when it fulfills the criteria as outlined in Article 4(1)(ao) of the Directive "securitisation special purpose entity" as an entity whose sole purpose is to carry on a securitisation or securitisations

within the meaning of Article 1(2) of Regulation (EC) No 24/2009 of the European Central Bank of 19 December 2008 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions (ECB/2008/30) and other activities which are appropriate to accomplish that purpose.

EFAMA would also appreciate clarification of the concept of "employee savings"

EFAMA would also seek a further clarification regarding the management of AIFs whose only investors are the AIFM or the parent undertakings or the subsidiaries of the AIFM or other subsidiaries of those parent undertakings, provided that none of those investors is itself an AIF. As regards the exemption itself it is not totally clear how the exemption applies to the so called intra group pooling fund structures. These pooling structures (top funds investing in base funds) are used by asset managers to allocate assets in an efficient way. Due to these structures it can happen that a specific intra group investor qualifies as an AIF. Therefore the exemption of article 3 does not apply to the base fund whereas the top fund itself is exempted and the fund structure will only be used for investments within the group. However, these funds do not raise capital from a number of external investors.

Furthermore, EFAMA underlines the importance of a clean interaction between the different exemptions. For example a joint venture may take the form of a holding company or of a family office and the provisions applying to these exemptions should be compatible.

3. Mapping Exercise

EFAMA generally agrees with the results of the mapping exercise as set out in Paragraph 20 of the Discussion Paper. EFAMA suggests including the following subsets of AIF which are currently not described in the list:

- Non-UCITS Funds that invest in asset classes that are similar to those in which UCITS invest, and which respect UCITS diversification and leverage requirements, but which are closed-ended or are not open to the public.
- Non-UCITS that are not labelled as UCIS for the simple reason that their managers decided not to subject them to the Directive (for example because they do not use the passport).

4. Proposed Criteria to identify an AIF

Question 5 Do you agree with the orientations set out above on the content of the criteria extracted from the definition of AIF?

Questions 5 and 6 are closely interlinked and the answers given under Question 6 concern both questions.

Question 6 Do you have any alternative/additional suggestions on the content of these criteria?

Questions 5 and 6 are closely interlinked and the answers given hereunder concern both questions.

EFAMA overall agrees with the orientations set out on the content of the criteria extracted from the definition of AIF. EFAMA welcomes that the criteria proposed by ESMA in order to define an AIF have to be looked at jointly: It is not because one of them is fulfilled that the structure under consideration can necessarily be defined as an AIF.

EFAMA has general comments regarding orientations as set out in the Paragraphs 24 – 34 of the Discussion Paper:

Paragraph 26/27: The criteria set in Paragraph 26 relating to "raising capital" and Paragraph 33 relating to the ownership of underlying assets are too large as they could apply to any financial instrument or any company. It is therefore very welcome that ESMA highlights in Paragraph 27 that fulfilling the criterion described in Paragraph 26 would not be "conclusive evidence that an entity is not an AIF".

Paragraph 28: As regards the notion of collective investment, EFAMA thinks it should be legitimate for AIF to have the general purpose of generating return for investors regardless of whether such return is achieved by sale and/or continuous management of its investments (with the latter generating income on a regular basis). It should also be noted that, for example for a closed-ended fund, the purpose may be to generate value during the lifetime of the fund. Several EFAMA Members thus suggested a modification to take into account the return to the AIF during the lifetime of the product (for example by dividends, interest or real estate income). A suggested wording was: "A collective investment undertaking should have the purpose of generating a return for its investors through **its investments or** the sale of its investments as opposed to an entity acting….".

Paragraph 29: EFAMA fully endorses the view that the decisive criterion for assessing the collective nature of an investment must be the content of the AIF's rules or instruments of incorporation, not the actual number of investors at a specific point of time.

Paragraph 31/32: EFAMA understands that the reference to an "entity" in paragraph 31 is meant as a reference to AIF, not AIFM. On these premises, it might also be considered to take into account whether certain terms such as "portfolio" or "investment guidelines" are included in the investment policy. Moreover, EFAMA thinks that a global view should be taken when assessing whether or not an entity has a defined investment policy which should especially allow for the absence or low degree of fulfillment in respect of some factors being offset by the clear presence of others.

Question 7 Do you agree with the details provided above on the notion of raising capital? If not, please provide explanations and an alternative solution.

EFAMA overall agrees with the details provided above on the notion of raising capital but some concerns remain:

In particular, EFAMA considers that capital raising for the purpose of AIFMD must involve some kind of communication by way of business as long as it is clear that such communication must not necessarily constitute marketing in the sense of Article 4(1)(x). In the commercial practice, there are situations where an AIFM is being approached by an investor/group of investors with a specific concept for the AIF set-up. This way of commencing a business relationship should by no means be relevant for the question whether or not an entity qualifies as AIF. Therefore, EFAMA supports the ESMA's stance that the absence of capital raising even in the broad terms described above should not be treated as conclusive evidence of the non-AIF status.

EFAMA is concerned about the application of the details to existing fund structures and would appreciate a flexible approach in this regard. As example EFAMA Members mentioned the detail set out in Paragraph 29 which states that "Where the AIF's rules or instruments of incorporation do not

restrict the sale of units/ share to a single investor, the AIF is considered to be raising capital from a number of investors". Some existing closed end funds are set up for a single client, but this is not reflected in instruments of incorporation or AIF rules.

EFAMA is concerned about the last sentence in Paragraph 29 which mentions that where a single investor represents a number of underlying beneficial owners, the fund falls within the definition of the AIF for the purpose of the AIFMD. EFAMA agrees with the cases of nominee agreements or feeder funds mentioned. However, EFAMA would appreciate clarification by ESMA regarding the cases of investment by a pension fund or by an insurance company. In case of an investment of an insurance company or a pension fund into an AIF, such investment should not be considered as an investment by the insurance company's clients or pension fund clients and thus not be considered as the investment by a number of investors.

Question 8 Do you consider that any co-investment of the manager should be taken into account when determining whether or not an entity raises capital from a number of investors?

EFAMA considers that co-investments of the manager should not be taken into account for determining that capital was raised from a number of investors. The term "raising from a number of investors" is clearly pointing to (multiple) third parties where capital is raised from. Internal investments (co-investments) by the manager should therefore not taken into account.

Question 9
Do you agree with the analysis on the ownership of the underlying assets in an AIF? Do other ownership structures exist in your jurisdiction?

EFAMA agrees that the analysis on the ownership of the underlying assets reflects the general rule. However, EFAMA Members mentioned cases of different ownership rules for the underlying assets for example for Germany, the UK or Hungary.

Question 10 Do you agree with the analysis on the absence of any investor discretion or control of the underlying assets in an AIF? If not, please explain why.

EFAMA agrees with the analysis that the AIFM or the internally managed AIF must have responsibility for the management of the assets and that there should be an absence of investor discretion or control of the underlying assets in the AIF.

Instead of being able to dispose of any asset in the fund directly and at their own discretion or on a day-to-day basis, investors have other tools of control or influence. In the professional fund business, it is quite common that investors have at their disposal some means to exercise influence over the fund investments without being able to dispose of them directly. For instance, investors are represented in investor committees.

5. Proposed criteria to determine the application of the AIFMD to certain types of AIF

Question 11 Do you agree with the proposed definition of open-ended funds in paragraph 41? In particular, do you agree that funds offering the ability to repurchase or redeem their units at less than an annual frequency should be considered as closed-ended?

EFAMA considers that the definition as it is currently proposed would be very helpful but risks being too strict.

In this context, EFAMA would appreciate clarification that the frequency of subscriptions or redemptions should only be one criterion to determine whether a fund may be considered as open-ended or closed-ended. It should be possible to apply the definition in a flexible manner taking into account additional considerations like the investment process.

Regarding the frequency for subscriptions and redemptions of one year or less proposed by ESMA as indication of open-ended funds, views in the EFAMA Membership were very diverging with some Members considering this period too long while others considered it as too short.

EFAMA also asks ESMA to clarify that a fund may still be considered as open-ended regardless of whether the redemption right of investors is subject to any limitations e.g. as regards the maximum amount of redeemable capital. Also, EFAMA would appreciate clarification that a fund will still be considered open-ended when applying under special circumstances side pockets, gates or suspensions of liquidity.

Question 12 Do you see merit in clarifying further the other concepts mentioned in paragraph 37 above? If so, please provide suggestions.

EFAMA asks for a clarification of the concept of “Leveraged / employs substantial leverage”. This clarification is crucial because every AIF will need to assess whether or not it is substantially leveraged and therefore falls under the additional reporting duties under Article 24 (4).

EFAMA is concerned that the considerations for determining whether leverage is employed on a substantial basis proposed by ESMA in its Level 2 advice are very broad and indefinite. Especially, it appears unclear how “the type of AIF under management including its nature, scale and complexity” shall allow any conclusions for the level of leverage employed by the fund.

Furthermore, the AIFMD allows for 3 definitions and thus 3 calculation methods of the leverage used by AIFs. For any given fund, each calculation will end up with a different figure. So, it is obvious that what is important is not the leverage figure as such but the leverage figure in conjunction with the methodology used. As a matter of fact, the methodology creates a reference framework within which each result has to be interpreted and analyzed in terms of risks being generated by the strategy implemented in the fund concerned. This means that for one given fund, each methodology will produce a result different from the other while the main conclusive actions, if any, should be the same. Marginally, each framework may shed light on a particular aspect of interest to the fund management and possibly to its supervisors. But these specifics will not have any impact whatsoever on the fact that the leverage is significant or not.

Furthermore, one EFAMA Member asked for a clarification on the definition of contracts with prime brokers.

V. Appointment of AIFM

Comment regarding Paragraph 47

EFAMA asks for a further clarification of Paragraph 47. From the current drafting it is clear that a company which performs the portfolio management functions or risk management functions is either appointed as AIFM by the AIF or has received these functions under a delegation agreement by the AIFM. EFAMA would appreciate clarification in the text of Paragraph 47 that the agreement for delegation of functions must be entered into by AIFM, not AIF, and the third party as it sets out the framework for the performance of tasks for which the AIFM bears legal responsibility.

VI. Treatment of UCITS management companies

Question 13 Do you agree with the above analysis? If not, please provide explanations.

EFAMA agrees with the analysis.

One EFAMA Member asked that ESMA should clarify that a UCITS management company not holding an AIFM license may only render services to AIFs under a delegation agreement with the appointed AIFM. This is not entirely clear from the current wording of paragraph 49.

In particular, EFAMA considers it important that ESMA underlined in Paragraph 50 that both the AIFMD and the UCITS Directive allow firms to be additionally authorised to provide discretionary portfolio management, including investment advice and safe-keeping and administration of units in collective investment undertakings.

VII. Treatment of MiFID firms and Credit Institutions

Question 14 Do you agree with the above analysis? If not, please provide explanations

EFAMA asks ESMA to reconsider its analysis in Paragraph 54. Article 6 (4) AIFMD allows the AIFM to perform certain investment services which fall under MiFID. As long as the AIFM restricts itself to the services as stipulated in Article 6 (4) it should be permitted to hold a MiFID license permitting it to exercise the services listed under Article 6 (4) if Member States require a separate MiFID license for such activities.

The discussion should take into consideration the current situation for UCITS Management Companies in the different Member States. This situation under the UCITS Directive currently differs strongly between Member States. In practice, UCITS Management Companies throughout Europe provide the services of discretionary portfolio management. For the same investment services, UCITS Management Companies in some Member States need an “extended UCITS license”, in other Member States are allowed or in even other Member States are under the obligation to hold separate MiFID licenses limited to the services in Article 6 (3) UCITS Directive in addition to the UCITS Management Company license. These same UCITS Management Companies also manage AIFs and will require an AIFM license in the future.

Against this background EFAMA considers that MiFID firms providing services other than services listed in Article 6 (3) UCITS Directive and Article 6 (4) AIFMD and credit institutions may not be authorized as AIFMs. As part of this it should be clear that MiFID firms (providing services other than

services listed in Article 6 (3) UCITS Directive and Article 6 (4) AIFMD) and credit institutions can never be appointed as AIFM to perform the two core investment management functions of the AIFM (portfolio management and risk management).

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