

16 May 2011

European Securities and Markets Authority
11-13 avenue de Friedland
75008 Paris
France

Dear Sir/Madam

Consultation on the discussion paper on ESMA's policy orientations on possible implementing measures under Article 3 of the Alternative Investment Fund Managers Directive

IMA represents the UK-based investment management industry. Our Members include independent asset managers, the investment management arms of retail banks, life insurers and investment banks, and the managers of occupational pension schemes. They are responsible for the management of over €4 trillion of assets, which are invested on behalf of clients globally. These include authorised investment funds (both UCITS and non-UCITS), institutional funds (e.g. pensions and life funds), private client accounts and a wide range of pooled investment vehicles.

Our responses to the questions raised in the paper are attached. We would note that in many areas covered by this consultation the Level 1 text is already detailed. Also, the full range of AIF is not yet known. In the UK alone we estimate that there are circa 2,000 AIF, but we cannot be certain, precisely because many AIF are not currently regulated, registered or listed by any Competent Authority. We therefore urge ESMA to take a pragmatic approach to the setting of firm standards and calculations. We suggest that in a number of areas it would be more productive to issue minimal guidance at this stage and for ESMA to review the need for and format of more prescriptive requirements at a later date once the population of AIF is clearer and the vehicle types and asset classes better known.

Should you have any questions in relation to the points made in this letter or in our detailed comments, or should you need any further information, please do not hesitate to contact me.

Yours faithfully



Alwine Jones
EU & International Regulation

**ESMA Consultation on Level 2 measures under Article 3 AIFMD
IMA Response**

Thresholds – calculation and oscillation

- 1. Do you agree with the proposed approach in relation to the procedure to identify the AIFs under management?***
- 2. Do you agree that where available, the gross asset value for AIFs using leverage or net asset value for AIFs not using leverage should be used to calculate the total value of assets under management? Should ESMA consider the extent to which AIFs which produce gross and net asset values apply different valuation methodologies to the underlying assets?***
- 3. Do you consider that where gross and net asset values are not calculated regularly the AIFM can include portfolio valuations, taking into account the type of underlying asset?***
- 4. Can you suggest alternative approaches which could be used for AIFs which do not produce regular gross and net asset value calculations e.g. real estate, private equity? Can you provide information on best practice in relation to the calculation of the total value of the assets under management of AIFs in the sector in which you operate?***
- 5. Do you have any other suggestions in relation to the procedure for calculating the total assets under management, including leverage?***

At this stage, when the full number and types of AIF is not necessarily known, we strongly suggest that the identification of the portfolios of AIF under management by a particular AIFM is best left to the relevant national regulator and the requirements it imposes on the AIFM to report to it. It should be an obligation on the AIFM to report the relevant information correctly, with the usual national regulatory sanctions should a particular AIFM fail to do so.

As regards gross or net asset value, we note that the Level 1 text stipulates markedly different thresholds for those AIF that do and do not use leverage. Therefore, it is not appropriate to extend these markedly different thresholds yet further by using different asset values for the two types of AIF: for both types NET asset value should be used.

The value of the assets will usually be the subject of an annual, externally audited report and will follow the methodology set by relevant domestic recognised accountancy standards. In addition specific asset types might be valued in accordance with industry guidelines setting out best practice – for example in the UK, real estate investments are generally valued in accordance with the Royal Institute of Chartered Surveyors 'Appraisal and Valuation Manual'.

Leverage

6. Do you agree that gross asset value, when available, is an appropriate measure of the leverage generated by the AIF?

We do not agree. The net asset value or commitment method will be more appropriate – (see also 7 below).

7. Can you suggest an alternative measure of leverage?

A one-size-fits-all approach for leverage calculation is inappropriate given the diversity of and wide differences between types of AIF. In our view the results of the findings of the leverage task force needs to be cross referenced here. As we understand it this will allow for various options – gross, commitment and advanced commitment method.

8. In particular can you suggest a method by which leverage created at the level of an AIF-controlled entity, other than portfolio companies of private equity funds, can be captured in the calculation?

Again ESMA's advice needs to cross refer to the work of the leverage task force. It should not be necessary to look through to the underlying funds provided this does not create any contingent liability at the level of the top AIF.

Determination of value of AUM by an AIF for a given calendar year

9. Do you support the proposal for AIFs to calculate the total value of assets under management at least annually?

10. Please provide your views on the impact of requiring the calculation of the total value of assets under management or monitoring it on a quarterly basis.

11. Can you suggest any alternative procedure for the calculation of the total value of assets under management throughout the period that would provide an accurate picture of the total assets under management?

As noted above, the value of the assets will usually be the subject of an annual, external audit report.

Some types of AIF will, in addition, very regularly provide NAVs or balance sheet figures to the market and/or investors. Some, which offer daily subscriptions or redemptions, or which are listed, will calculate daily NAVs. But others (particularly closed ended funds) will not do so and it would be disproportionate to calculate or monitor asset values more frequently.

Therefore, given the wide (and uncertain) range of AIF, we suggest that the information provided in the audited annual report should be the basis for determining the value of AIF assets under management ("AUM"), with the AIFM being allowed to use a different total AUM figure when it has changed significantly from the last annual reports of the AIF it manages.

To have a requirement across the board that AIFMs' positions in relation to the threshold should be calculated quarterly, though, would be too onerous and disproportionate.

Treatment of cross holdings

12. Do you have a view on which option ESMA should apply, taking into account that excluding cross-holdings may result in the exclusion of certain AIFMs which perhaps should be included (such as those managing significant master-feeder structures)?

13. Please give reasons for your choice, taking into account the potential cost and administrative burden of excluding cross-holdings while considering the effect of leverage.

We recommend Option 2 - i.e. to exclude investment in other AIFs under management by the same AIFM. It is standard statistical practice to avoid the double-counting of assets managed within "internal" fund of funds structures and for these purposes such crossholdings do not, *per se*, increase operational risk.

On the other hand, for these purposes, where AIFM1 invests one of its AIF in the units or shares of another AIF (or UCITS) managed by a different AIFM2, it would be reasonable to count those AIF (or UCITS) units as part of the AUM of AIFM1, as well as part of the AUM of AIFM2, even though, when providing commentary on industry level statistics, we would avoid such double-counting, too. This is because it is appropriate to take into account the totality of AIF assets managed by any one AIFM when applying the provisions of the AIFMD to that AIFM.

Treatment of AIFMs whose total AUM occasionally exceed and/or fall below the threshold

14. Do you agree with the proposed approach to addressing circumstances where the threshold occasionally exceeds the limits?

15. Do you have any alternative suggestions?

It is not yet known how many AIF or AIFM are likely to fall into this grey area, and of these many may, for other reasons, wish to opt to be treated as if the exemption did not apply. In any case, the information specified in the Level 1 text (for instance in Article 3(3) regarding the contents of the registration requirement) is sufficient and there should be no need for further implementing measures here.

Given the large number of other important matters to be debated, we suggest that, initially, these points be left for national regulators to decide as they see fit, or at least until it is clearer what quantum of AIF and AIFM will fall under Article 3(2). This is unlikely to be reliably estimated until the passport takes effect.

For our comments on calculating the threshold see above.

Registration procedure

16. Do you agree with the proposal to require information on the value of assets under management of AIFs? Please provide information on any potential cost impact.

17. Do you agree with the minimum information which must be provided in relation to the AIF's investment strategy? Do you consider that the information requirement would be sufficient or can you suggest additions or amendments to the proposal?

18. Do you agree that the information referred to in Article 3(3)(d) should be provided at least annually?

19. Are there any other matters which should be considered?

We agree that there needs to be an alternative to the AIFM being required to provide its offering document, and that the description of the investment strategy as set out in the second bullet point seems to be a suitable alternative. (In the UK, it is similar, for example, to the "investment policy document" required to be submitted under the Listing Rules for closed-ended investment companies.) Some of the funds are over a hundred years old, and they do not in all cases have the original offering documents.

Notification to competent authorities for AIFMs that no longer comply with the exemptions granted in Article 3.2

20. Do you think that ESMA should be more prescriptive in relation to what constitutes a permanent or temporary increase above the threshold, for example by specifying the term 'occasionally'? Do you have any suggestions?

21. Do you have any alternative suggestions?

This approach is far too prescriptive. First, the first bullet point on page 15 states that AUM needs to be monitored on a "continuous" basis. This implies daily which is far from practical for most AIFs.

Second, the fourth bullet point requires the AIFM to notify the regulator that it will apply for authorisation within 30 days if it exceeds the threshold and the AIFM is satisfied that the situation "is not of a temporary nature". This seems like a very short timescale, and certainly a much longer time would be necessary to complete the application process, particularly where major structural changes may be necessary. For example, some AIF may not have a depositary, and we assume would have to appoint one prior to applying for authorisation. In view of this, a longer time period is essential for the application for authorisation. Our members have suggested up to 12 months. Moreover, whilst we do not think that ESMA should be more prescriptive in relation to what constitutes a permanent or temporary increase, in practice AIFMs are likely to want to wait until the next valuation point to see if a trend is developing (unless there is a material change they are aware of such as a significant increase in leverage).

To take as an example closed-ended funds that are not increasing capital nor materially increasing leverage, the annual accounts should be the trigger for any "permanent" change in size due to a change in market value of the assets already held. If such a fund does not exceed the threshold in year X, but does so in year X+1, then the permanence should be by reference to exceeding the test in year X+2 as well. At that point the fund should have a year to register and comply, getting depositaries etc along the way.

Even for open-ended funds the frequency of monitoring should depend upon the frequency upon which the AUM are calculated. "Continuous monitoring" would not be feasible.

Finally, bullet point 2 seems to be a circular argument – how would you know if you had not calculated it?

Opt-in procedure

22. Do you agree that all AIFMs which are obliged to be authorised, or which choose to be authorised under the opt-in procedure, should be subject to the same authorisation procedure under Article 7?

23. Do you agree that AIFMs previously registered under Article 3(2) of the AIFMD should submit all documents required under Article 7?

24. Alternatively, should AIFMs only be required to submit information not previously provided for registration purposes and to update information previously provided?

25. Please provide justification for your preferred choice between the two alternatives set out under questions 23 and 24.

The registration process should be the same. Only information not previously provided should be submitted, to avoid duplication. Duplication is simply a cost with no benefit for customers. We would expect competent authorities to hold data previously provided to them.