

European Securities and Markets Authority  
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23 September 2011

Dear Sirs

**ESMA's draft technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive in relation to supervision and third countries**

We, The Association of Real Estate Funds (AREF), welcome the opportunity to comment on this aspect of the draft technical advice. A significant numbers of our members are based in third countries, more specifically the Channel Islands, and adhere to our transparency standards through compliance with our Code of Practice. The consultation is therefore particularly relevant to this portion of our membership.

AREF acts as the representative body for the unlisted real estate funds industry based in the UK and associated offshore jurisdictions, particularly on tax and regulatory matters. The Association promotes transparency in performance measurement and fund reporting through the AREF Code of Practice, the AREF/IPD UK Pooled Property Funds Indices and the AREF/IPD Property Fund Vision Handbook. It also publishes the AREF Investment Quarterly (AREF IQ), which provides data and commentary on fund returns, liquidity, yields, leverage and investor cash flows in an overview of the UK unlisted real estate funds market.

Overall we support the proposals in the draft technical advice. However, we are concerned that the criteria in relation to third country depositaries create an unlevel playing field. In addition, there are aspects of the advice that may leave key issues unresolved and we would like to see ESMA provide certainty for third country regulators as soon as possible. Our answers to ESMA's questions 1 to 7 are attached.

Yours faithfully



Mark Sherwin  
Secretary General

### **III. Delegation**

**Q1: Do you agree with the above proposal? If not, please give reasons.**

Yes. However we are concerned that ESMA has done little to specify how it intends to assess equivalence of the local and EU authorisation or registration criteria. This could involve significant work that has already been performed by competent authorities in AIFM's home Member States. We suggest that existing delegations based on authorisation or registration should be honoured when the AIFM seeks authorisation under the Directive. It is essential that ESMA makes its intentions known as early as possible to ensure third country regulators can act as necessary to remediate any deficiencies.

**Q2: In particular, do you support the suggestion to use as a basis for the co-operation arrangements to be signed at EU level the IOSCO Multilateral Memorandum of Understanding of May 2002 and the IOSCO Technical Committee Principles for Supervisory Co-operation?**

Generally we support the use of the IOSCO material as a basis. However, we call on ESMA to develop and negotiate a framework that can be published as soon as possible in order that third country regulators can ensure they can comply immediately that the Directive takes effect in national laws. Moreover, in the interests of minimising disruption to existing arrangements we suggest that the central framework is developed and operated in parallel with existing bilateral arrangements.

### **IV. Depositary**

**Q3: Do you agree with the above proposal? If not, please give reasons.**

We do not agree with the proposals in box 2 for two reasons:

Firstly, a significant number of our members are closed-ended non-EU AIFs investing in real estate. Subject to the rules in their Member States of reference these AIFs will appoint depositaries in their own country that are eligible depositaries by virtue of the third subparagraph of Article 21(3) of the Directive. These depositaries will not be, nor will they be of the same nature as, credit institutions or investment firms. Therefore, the satisfaction of several of the criteria in box 2 will not be achievable in so far as these criteria link to credit institutions, investment firms or equivalent entities. This will effectively prevent a non-EU AIF appointing a local depositary of a type that is available to an EU AIF.

Secondly, article 21(6)(e) requires contractual arrangements to be in place with the depositary that ensures investor protection is achieved. In this context criteria e of box 2 is inappropriate: Article 21(17)(b) limits the Commission's powers to "*specifying ... general criteria for assessing whether the prudential regulation and supervision of third countries as referred to in point (b) of paragraph 6 have the same effect as Union law and are effectively enforced*". Criteria e seeks, in effect, to require third country regulators to implement Article 21 (8) to (15). This is considerably beyond what is necessary to assess the effect and enforcement of the prudential regulation and supervision of depositaries in third countries.

**Q4: Do you have an alternative proposal on the equivalence criteria to be used instead of those suggested in point b above?**

Yes.

The references in points b, c and d of box 2 to "credit institutions or investment firms (and their equivalents)" should be amended to take account of "other entities eligible to be depositaries".

Point e should be deleted and ESMA's advice should be concerned only with ensuring the prudential regulation, capitalisation and supervision of depositaries by third countries gives equivalent levels of investor protection as in the EU and not with the specific duties of those depositaries.

## **V. Supervision**

### **V.I. Co-operation between EU and third country competent authorities for the purposes of Article 34 (1), 36 (1) and 42 (1) of AIFMD**

**Q5: Do you agree with the above proposal? If not, please give reasons.**

We agree in principle provided that the application is proportional to the scenario in question. For example, the co-operation arrangements envisaged by Article 42 relate only to systemic risk oversight whereas Article 34 refers generally to a competent authority's duties under the Directive. Therefore the arrangements should not be able to be used to extend the obligations placed on third country regulators of non-EU AIFs.

**Q6: In particular, do you support the suggestion to use as a basis for the co-operation arrangement to be signed at EU level the IOSCO Multilateral Memorandum of Understanding of May 2002 and the IOSCO Technical Committee Principles for Supervisory Co-operation?**

Generally we support the use of the IOSCO material as a basis. However, we call on ESMA to develop and negotiate a framework that can be published as soon as possible in order that third country regulators can ensure they can comply immediately that the Directive takes effect in national laws. Moreover, in the interests of minimising disruption to existing arrangements we suggest that the central framework is developed and operated in parallel with existing bilateral arrangements.

### **V.II. Co-operation arrangements between EU and non-EU competent authorities as required by Articles 35(2), 37(7)(d) and 39(2)(a) of AIFMD**

**Q7: Do you agree with the above proposal? If not, please give reasons.**

We agree with the proposals in box 4 but we are concerned about the deferred reassessment of the safeguards in paragraph 2. It would be beneficial if the assessments were communicated at the earliest opportunity in order that third country regulators can take the necessary steps to ensure the appropriate standards are met.