

23 September 2011

Chair Maijoor  
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103 rue de Grenelle  
75007 Paris  
France

**RE: Consultation on 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**

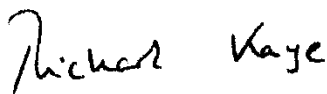
Chair Maijoor,

The American Chamber of Commerce to the EU (AmCham EU) welcomes the European Securities and Markets Authority's consultation on its 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.

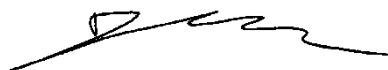
Attached are AmCham EU's comments in response to the consultation. AmCham EU believes these form part of the broader debate on regulatory cooperation between the European Union and the United States in the realm of financial services. AmCham EU remains committed to the topic of transatlantic equivalence in financial services regulation, and aims to provide ESMA with a more detailed paper on this particular issue in the coming weeks.

We would welcome the opportunity to discuss these issues further and to play our part in facilitating a constructive solution.

Yours sincerely,



Richard Kaye  
Co-Chair  
Financial Services & Company Law  
Committee



Mitchell Coen  
Co-Chair  
Financial Services & Company Law  
Committee

# **AmCham EU's response to ESMA's consultation on the Alternative Investment Fund Managers Directive in relation to supervision and third countries**

**CONSULTATION RESPONSE**

23 September 2011

## Background and Analysis

The American Chamber of Commerce to the EU (AmCham EU) notes the European Securities and Markets Authority's (ESMA's) consultation paper on the third country aspects of the Alternative Investment Fund Managers Directive (AIFMD), published on August 23 2011.

AmCham EU is most concerned by implementing provisions in relation to third countries. Nevertheless, in as much as other aspects of the implementation of the Directive, covered in ESMA's July 13 consultation, have a transatlantic dimension, AmCham EU would urge ESMA to provide proportionate guidance to the European Commission in relevant areas such as the definition of the value of assets under management for non-EU AIFMs, on the functions of depositaries where they are located in the third country, and in general on confidentiality issues. AmCham EU would like to make the following key points in respect of the proposal:

### **1. Cooperation Arrangements between EU and Third Country Regulators.**

AIFMD requires appropriate cooperation arrangements to be in place with non-EU countries for: (a) an EU Alternative Investment Fund Manager ("AIFM") to manage an Alternative Investment Fund ("AIF") established in the non-EU country; or (b) interests in a fund established in the non-EU country to be marketed in the EU (both under the national private placement regime and the proposed EU passport regime).

AmCham EU welcomes ESMA's proposal to prepare a template cooperation agreement. We are however concerned that the content of the proposed cooperation arrangements require far more than is currently required by the International Organization of Securities Commissions ("IOSCO"). Of particular concern to AmCham EU are the third country enforcement provisions proposed by ESMA. As currently drafted, these are unclear and overreaching, and will be challenged by US and other third country regulators. We believe any template cooperation agreement should not exceed IOSCO standards and should not, under any circumstances, extend to the compulsory enforcement of EU legislation by the third country to the co-operation agreement.

## **2. Delegation of Portfolio or Risk Management Functions to Undertakings in Third Countries.**

AIFMD provides that portfolio or risk management activities may only be delegated to third parties authorised or registered for the purpose of asset management. ESMA proposes that a third country undertaking would satisfy this requirement where it is authorised/registered for asset management under local criteria equivalent to the EU legislation.

AmCham EU is concerned these proposals suggest that AIFMs will have to consider whether a third country's regulatory regime for asset management is "equivalent" to EU legislation in order to ensure compliance. AmCham EU would highlight that the US maintains a strong, independent regulatory regime that is recognised globally. Nonetheless, it is clear that the US regulatory framework does not mirror the regulatory framework of the EU. We would therefore suggest that ESMA and the European Commission promptly confirm that the US regulatory system will be deemed, for these purposes, "equivalent". Further, we would suggest that the equivalence of other regimes be determined by the European Commission. The relevant regime should be considered as a whole, and not on a line by line basis. While it is not clear what is meant by the term "equivalent" - and little guidance is proposed by ESMA on the subject - it is very clear that few, if any other jurisdictions, have legislation or regulation which mirrors all, or is even substantially similar to, the requirements of the comprehensive set of EU directives aimed at the financial industry (*e.g.* AIFMD, the UCITS Directive and MiFID). We request that ESMA be mindful of this when making its recommendations to the Commission.

AIFMD also requires cooperation arrangements to be in place between the AIFM's Member State regulator and the regulator of any third country. AmCham EU has the same comments as above regarding these provisions. Furthermore, we note there is ambiguity on the appointment of delegates. Article 20(1) (c) clearly allows the appointment of delegates who are not authorised or registered to carry out the relevant functions. Yet Article 20(1) (d) is equally clear that supervisory co-operation arrangements must always be in place in relation to delegates from a third country. It should be made clear in ESMA's recommendations that this should only apply where the relevant entity is authorised or registered for the purpose of asset management, not when it is unauthorised but approved by the AIFM's competent authority.

## **3. Supervision/Assessment of Third Country Depositaries.**

AIFMD requires a depositary located in a third country to be subject to "effective prudential regulation", including minimum capital requirements and supervision having the same effect as EU law.

ESMA recommends further criteria to assist in determining whether a third country depositary is subject to such standards. This includes the establishment of an independent competent authority; adequate resources to ensure compliance; and sufficient sanctions to effectively deter violations of regulation.

AmCham EU believes that ESMA's proposed advice does not take sufficient account of the variety of institutions that function as depositaries. ESMA's advice assumes that a depositary will be a bank or investment firm. This is not in accordance with the provisions of the AIFMD which permits other types of institution to perform these functions. We therefore recommend that ESMA's advice should be revised to refer to corresponding requirements within the EU's existing regulatory regime, while ensuring of course that appropriate capital and regulatory requirements are maintained, thereby ensuring a high standard of protection for investors.

#### **4. Identifying the "Member State of Reference".**

AIFMD states that when a non-EU AIFM intends to market several AIFs in the EU, that non-EU AIFM's Member State of reference is "the Member State in which that AIFM intends to develop effective marketing for most of those AIFs". ESMA states it is difficult to provide more specific criteria.

AmCham EU submits that ESMA's advice in this area is inadequate and will lead to substantial uncertainty. We believe that ESMA should consider including the following additional criteria when determining a non-EU AIFM's Member State of reference: (a) stated preference of the AIFM; (b) whether a Member State of reference has already been selected for another AIFM within the same group; (c) whether members of the AIFM's group are already supervised by the authorities of a potential Member State of reference; (d) whether the AIFM's group already has entities in a potential Member State of reference with the capacity to act as legal representative; and (e) whether the language of the potential Member State of reference is the same as the operating language of the AIFM.

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*AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate U.S. investment in Europe totalled €1.4 trillion in 2009 and currently supports more than 4.5 million jobs in Europe.*

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