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European Securities and Markets Authority
103 Rue de Grenelle
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23 September 2011

Dear Sirs

Consultation paper 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

We are grateful for the opportunity to comment upon ESMA's Consultation paper on ESMA's draft technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive (the "Directive") in relation to supervision and third countries (the "Consultation Paper").

Who is BlackRock?

BlackRock is one of the world's preeminent asset management firms and a premier provider of global investment management, risk management and advisory services to institutional and retail clients around the world. As of 30 June 2011, BlackRock's assets under management totalled €2.56 trillion across equity, fixed income, cash management, alternative investment and multi-asset and advisory strategies including the industry-leading iShares® exchange traded funds. Through BlackRock Solutions®, the firm offers risk management, strategic advisory and enterprise investment system services to a broad base of clients with portfolios totalling more than €7.00 trillion.

Our client base includes corporate, public, multi-employer pension plans, insurance companies, third-party and mutual funds, endowments, foundations, charities, corporations, official institutions, banks and individuals. BlackRock represents the interests of its clients by acting in every case as a fiduciary. It is from this perspective that we engage on all matters of public policy. BlackRock supports regulatory reform globally where it increases transparency, protects investors, facilitates responsible growth of capital markets and, based on thorough cost-benefit analyses, preserves consumer choice.

BlackRock is a member of European Fund and Asset Management Association ("EFAMA") and a number of national industry associations reflecting our pan-European activities and reach.

Executive Summary

We recognise the considerable amount of work undertaken by ESMA in developing technical advice for implementing the Directive and appreciate that ESMA is working within an

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exceptional timeline set by the Commission in which it has to balance a number of different and complex interests.

The issue of third countries and supervision is of vital importance to the asset management industry, global regulators and to EU professional investors upon whose continued freedom of choice to invest in best in class AIF or, via delegation, to access key global strategies and investment expertise is dependent. Whilst we have set out further detailed comments in the main section of our response, we have two general comments.

Continued need for consultation with stakeholders

We appreciate that within the compressed timeline, ESMA has sensibly had to prioritise issues relating to EU AIFM and EU AIF before turning to consider third countries and supervision. Inevitably this has meant that ESMA has had less opportunity to consider the views of interested stakeholders prior to publishing the Consultation Paper than it had for ESMA's previous consultation on implementing measures of the Directive. It is also noted that, unlike previous ESMA and CESR consultations on the Directive, ESMA has not had the opportunity to host an Open Hearing to share views with stakeholders on the Consultation Paper prior to the deadline for submissions.

Given the lesser interaction with stakeholders to date on the issue of third countries and supervision, we would encourage ESMA to engage further with interested stakeholders to help ensure the most effective and balanced regulatory outcomes. In particular we would urge ESMA and, when applicable, the European Commission, to continue to enthusiastically consult and liaise with third country regulators on all relevant aspects of third country issues. We believe this will enhance understanding of the full breadth of third country funds, managers and regulatory regimes and will help ensure that the Directive operates most efficiently and without unduly restricting access by EU investors to third country funds, key global strategies and portfolio management expertise.

Level 2 requirements exceeding those of Level 1 - equivalence

The introduction of an "equivalence" requirement within the Level 2 delegation provisions goes well beyond the requirements in the Level 1 text. We are concerned that the proposed equivalence standard risks undermining and making unworkable the Level 1 delegation provisions meaning that EU AIFM would be unable to effectively delegate portfolio or risk management functions to third country entities, even in highly regulated jurisdictions. This would deprive EU professional investors of access to key global strategies and investment expertise.

We note that during the Level 1 negotiations to agree the third country provisions, an equivalence test had been proposed but was specifically rejected during the trilogue process as it was considered unworkable for many major third countries. The re-introduction of an equivalence standard at Level 2 therefore arguably runs contrary to the text of the Level 1 Directive and the final trilogue consensus.

It should be borne in mind that, whilst EU and third country regulatory infrastructure continue to develop with the common objectives of transparency, investor protection and systemic risk monitoring, third country regulatory systems are unlikely to have identical or "equivalent"

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provisions even for highly regulated third countries such as the United States, Hong Kong, Japan and Australia.

We urge ESMA to remain within the parameters of the Level 1 text, which requires that the entity is authorised or registered for the purpose of asset management, but does not specify any criteria for authorisation or registration.

We have similar concerns in respect of the "equivalence" standard proposed for third country depositaries, which we believe would similarly be unworkable for highly regulated third countries, and would urge that the Level 2 text keeps within the Level 1 framework which provides for a "same effect" standard. The deliberate use of the term "same effect" in Level 1, we believe, focuses the third country assessment on the outcomes from its regulatory regime rather than on alignment of individual standards with those in the EU.

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We wish to thank ESMA again for the opportunity to participate in the consultation process and for their efforts to date to increase the likelihood of a final Directive regime which provides robust protection for investors and improves the ability for regulators to monitor systemic risk, whilst maintaining EU investors' freedom of choice to invest in best-in-class AIF both within and outside of the EU.

Please do not hesitate to contact us to discuss any of the issues we raise in further detail.

Yours faithfully

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III. Delegation (Articles 20 (1)(c), 20(1)(d) and 20(4)

Box 1

1. In order to fulfill the requirement set out in Article 20(1)(d) of the AIFMD a written arrangement should exist between the competent authorities of the home Member State of the AIFM or ESMA and the supervisory authorities of the undertaking to which delegation is conferred.

2. Where the undertaking sub-delegates any of the functions delegated to it, a written arrangement should exist between the competent authorities of the home Member State of the AIFM or ESMA and the relevant supervisory authorities of the undertaking to which sub-delegation is conferred.

3. Where the sub-delegate further delegates any of the functions delegated to it the conditions in paragraph 2 shall apply mutatis mutandis.

4. With respect to the delegated functions from the entity to which functions were delegated or sub-delegated, the arrangement referred to in paragraphs 1 and 2 above should entitle the competent authorities to:

   a) obtain on request the relevant information necessary to carry out their supervisory tasks as provided for in AIFMD;
   b) obtain access to the documents relevant for the performance of their supervisory duties maintained in the third country;
   c) have the right to request an on-site inspection on the entity to which functions were delegated or sub-delegated. The practical procedures for on-site inspections should also be detailed in the arrangement;
   d) receive immediately information from the supervisory authority in the third country in the case of breach of regulations;
   e) ensure that enforcement actions can be performed in cases of breach of regulations.

5. The third country undertaking should be deemed to satisfy the requirement under Article 20(1)(c) when it is authorised or registered for the purpose of asset management based on local criteria which are equivalent to those established under EU legislation and is effectively supervised by an independent competent authority.

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

Response:

By introducing an equivalence requirement within the Level 2 delegation provisions (Box 1, para 5), we believe that ESMA has gone far beyond the requirements in the Level 1 text and well beyond the current UCITS delegation framework. We have significant concerns that the proposed equivalence standard risks undermining and making unworkable the Level 1 delegation provisions with respect to third country entities providing portfolio or risk management.

Article 20(1)(c) of the Level 1 text requires only that the third country delegate is authorised or registered for the purpose of asset management and subject to supervision in that country. It does not specify the criteria for authorisation or registration and supervision and does not indicate that the introduction of an equivalence standard would be suitable. We further note that the European Commission request to ESMA for advice makes no reference to any equivalence standard.

We note that during the Level 1 negotiations to agree the third country provisions, an equivalence test had been proposed but was specifically rejected during the trilogue process as it was considered unworkable for many major third countries. The re-introduction of an equivalence standard at Level 2 therefore arguably runs contrary to the text of the Level 1 Directive and the final trilogue consensus.

Whilst EU and third country regulatory infrastructure continue to develop with the common objectives of transparency, investor protection and systemic risk monitoring, it should be borne in mind that such regulatory systems are unlikely to have identical or "equivalent" provisions even for highly regulated third countries such as the United States, Hong Kong, Japan and Australia. We therefore believe that the current equivalence proposal would greatly restrict the scope for AIFM to delegate to third countries, would create significant industry and investor uncertainty and could lock out major highly regulated third countries. The result could be to compromise many commonly used existing and future delegation models and to significantly reduce EU professional investors' access to key global strategies and region-specific investment expertise, such as experience in regional currencies or emerging markets.

We would strongly recommend that ESMA removes the equivalence concept from the Level 2 delegation provisions and that it instead reaffirms the agreed Level 1 requirements as set out in Article 20(1)(c).

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Separately, we also attach to this paper at Appendix 1, our responses to Boxes 66 and 67 of the consultation paper on ESMA's draft technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive which was submitted to ESMA on 13 September. These responses note the different treatment in respect of delegation of portfolio and risk management functions to third country

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entities than for EU entities and certain issues which may arise.

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?

Response:

Subject to our comments below, we generally support the proposal in Paragraphs 1 and 7 of the Explanatory Text to use the IOSCO MMoU concerning consultation and co-operation and the exchange of information of May 2002 (the "IOSCO MMoU") and the IOSCO Principles as a basis of the cooperation arrangements. In this context, we would recommend that ESMA does not go beyond the requirements set out in the IOSCO MMoU and that it reflects in its advice the terminology used in the IOSCO MMoU.

We support the suggestion that MMoUs could be centrally negotiated by ESMA to obviate the need that third country regulators conclude different bilateral cooperation arrangements and to ensure a level playing field. However we recommend that ESMA should in its guidelines commit to actively engaging with all interested relevant third country regulators prior to concluding the terms of the MMoU. We believe that it would not be helpful for ESMA to unilaterally conclude a MMoU and then subsequently to require third country regulators' agreement.

We understand that it will be difficult to conclude the significant number of MMoUs and MoUs before July 2013. To assist this process, BlackRock would be happy to provide, or to work with industry associations to provide, a suggested list of countries and regulators with which the conclusion of MMoUs and MoUs may be prioritised. It should be noted that countries may have more than one relevant regulator – e.g. for the United States, in addition to the SEC, other regulators such as the Office of the Comptroller of the Currency (OCC) (http://www.occ.treas.gov/) will also fall within the scope of relevant regulators for the Directive. We would also recommend that ESMA enhances legal certainty and transparency in the MMoU/MoU process by publishing on its website a list of MMoUs and MoUs which have been concluded or which are a work in progress.

Some aspects of ESMA's drafting in Box 1 appear to imply that the cooperation arrangements proposed should establish legally binding obligations. Box 1 Para. 4 sets out that the cooperation arrangements "…should **entitle** the competent authorities to: (a) obtain on request…, (b) have the **right** to request an on-site inspection…, (c) receive immediately…, and (d) **ensure** that enforcement actions can be performed. We recommend that ESMA's advice should generally reflect the non-binding nature of the cooperation arrangements, as has been recognised by the European Commission. ESMA's advice also appears to suggest that the AIFM's competent authority has supervisory jurisdiction over the third country delegate. Whilst this may be appropriate where the EU competent authority has direct supervisory authority over a third country undertaking (such as a third country AIFM under the passport) it would be inappropriate where the EU competent authority has no supervisory authority over a third country delegate.

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We recommend that ESMA includes in Box 1 parts of Paragraph 12 of the Explanatory Text stating that where the conditions cannot be met (for example in case of non-existence of a MoU between the authorities or lack of the authorisation of the delegate for purposes of asset management), delegation may still take place subject to prior approval by the competent authorities of the home Member State of the AIFM. This would enhance consistency with the general delegation mechanism provided within Level 1 at Article 20(1)(c).

We recommend that the text of Box 1 Para. 4 regarding on-site inspections is further clarified to avoid the possibility of future diverging interpretation. We therefore suggest that ESMA inserts Paragraph 11 of the Explanatory Text into Box 1 to provide guidance on the scope of the capacity to request on-site inspections. Furthermore, it should be specified that on-site inspections may only be performed in accordance with existing international treaties (which in most cases do not allow for foreign supervisors to perform on-site inspections directly without the presence of the local supervisory authority).

We also recommend that ESMA confirms in its guidance that on-site inspections must be limited to the very specific case of delegation for which the competent authority requests the inspection and may not be extended ad hoc to other delegation cases or other activities of the entity to which functions were delegated.

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IV. Depositary (Article 21(6))

Box 2

1. For the purposes of the assessment provided for in Article 21 (6) the following criteria should be met:

   a) The entity should be subject to authorisation and on-going supervision by an independent competent authority with adequate resources to fulfill its tasks;
   b) The local regulatory framework should set out criteria for the eligibility to act as depositary that are equivalent to those set out for the access to the business of credit institution or investment firm;
   c) The capital requirements imposed in the third country should be equivalent to those applicable in the EU as set out in Article 21 (6) (b) depending on whether the entity is equivalent to a credit institution or to an investment firm;
   d) The operating conditions are equivalent to those set out for credit institutions or investment firms within the EU depending on the nature of the entity;
   e) The requirement on the performance of the specific duties as AIF depositary established in the third country regulatory framework are equivalent to those provided for in Article 21 (8) to (15) and in the relevant implementing provisions;
   f) The local regulatory framework provides for the application of sufficiently dissuasive sanctions in cases of violations by the depositary;
   g) The liability to the investors of the AIF can be invoked directly or indirectly through the AIFM, depending on the legal nature of the relationship between the depositary, the AIFM and the investors.

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

Response:

Many of the points made in respect of the proposed equivalence standard and cooperation arrangements under section III above are applicable here. In particular we believe that ESMA's proposal goes beyond the Level 1 depositary text and imposes requirements which may result in the exclusion of third countries from providing depositary services.

We are concerned that the proposed equivalence standard introduced at Level 2, and in particular the requirement that the third country imposes duties equivalent to Article 21(8) to (15) upon the third country depositary, is unlikely to be met by any third country - even highly regulated jurisdictions such as the United States. This would mean that, for example, highly regulated US 1940 Act mutual funds would not satisfy the requirements of Box 2, which could compromise the availability of the EU passport to such funds.

We note that the Level 1 text refers neither to an equivalence standard nor to a requirement that third country depositaries should comply with the specific requirements of Article 21(8)

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to (15). Instead Article 21(6) states that a third country depositary must be "subject to effective prudential regulation, including minimum capital requirements, and supervision which have the *same effect* as Union law and are effectively enforced." The deliberate use of the term "*same effect"* in Level 1, we believe, focuses the third country assessment on the outcomes from its regulatory regime rather than on alignment of individual standards with those in the EU. In other words, can the regulatory toolbox available to the third country regulator be used to reach a similar outcome as in the EU rather than having a nearly identical toolbox. Given that the Level 1 text focuses on the "same effect" rather than an equivalence standard we would recommend that ESMA's guidance similarly focuses upon the "same effect" provided by the prudential and supervisory third country regulation instead of a strict equivalence test which, in reality, most third countries will be unable to satisfy.

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

Response:

Please see our response to Question 3 above. Given that the Level 1 text focuses on the "same effect" rather than an equivalence standard we would recommend that ESMA's guidance similarly focuses upon the "same effect" provided by the prudential and supervisory third country regulation instead of a strict equivalence test which, in reality, most third countries will be unable to satisfy.

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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 the AIFMD

Box 3

1. The co-operation arrangement with the third country competent authority should be in writing and provide for:

   a) exchange of information for supervisory purposes;
   b) exchange of information for enforcement purposes;
   c) the right to obtain all information necessary for the performance of the duties provided for in the Directive;
   d) the right to request an on-site inspection to be performed or to perform directly such an on-site inspection.

2. The third country competent authority should assist the EU competent authorities where it is necessary to enforce EU legislation and national implementing legislation breached by the entity established in the third country.

3. Where specific reference is made to exchange of information for the purpose of systemic risk oversight, the arrangement should allow the EU competent authority to receive information on an ongoing basis as provided for in Box 109 of ESMA draft advice to the European Commission on possible implementing measures of the AIFMD in order to discharge its duties under the Directive.

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

Response:

Please refer to our response to Question 2 (above), which also applies in the context of ESMA's proposals on cooperation arrangements in this section V.I. In addition to our response to Question 2, there are three further material concerns with ESMA's proposal:

(1) Paragraph 4 of the Explanatory Text suggests that the arrangement could take the form of an MMoU centrally negotiated by ESMA. Whilst this may be a more efficient approach in certain areas, individually negotiated agreements may be more appropriate with respect to Article 42 which relates to national private placement regimes where this relates to transparency requirements but not other areas. This would permit national regulators to use as a foundation existing bilateral supervisory arrangements that currently are in place between certain Member States and third countries. We would urge that any centrally negotiated ESMA MMoU or individually negotiated arrangement is discussed and agreed

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between ESMA, EU national regulators, and third country regulators.

(2) With respect to Box 109 disclosures (as set out in ESMA's previous consultation paper), it is important that these requirements do not indirectly oblige non-EU AIFM managing non-EU AIF which are to be marketed into the EU on a private placement basis under Article 42 (and hence need only comply with the Transparency Requirements in Chapter IV of the Level 1 Directive) to also comply with other detailed operational parts of the Directive - please see Appendix 2 to this letter which details our general comments on the Level 2 Transparency text as well as our response to Box 109.

(3) Paragraph 7 of the Explanatory Text: We are concerned that many major third countries may not, at first instance, be able to satisfy the requirement under Article 52(1) of the Level 1 text that the third country regulator be able to meet adequate standards of data protection under the EU Data Protection Directive (95/46/EC). We understand that only a small number of third countries have been deemed "adequate" under the EU Data Protection Directive and that major third countries, such as the United States, Hong Kong, Japan and Australia, are not considered by the European Commission to provide an adequate level of data protection when compared with EU data protection laws. Should such third countries continue not to be deemed "adequate" under the EU Data Protection Directive, we would encourage ESMA to permit the mechanism of existing confidentiality arrangements between EU and third country regulators to continue (which may operate by way of derogation from the EU Data Protection Directive) so that transfers of personal data, where necessary, can be made to the third country regulator. We would also emphasise that the presence or absence of an "adequacy" determination for a third country should not, by itself, prevent the entry into cooperation arrangements by a third country – albeit that such cooperation arrangements will reflect that EU data protection provisions will apply to any transfer of personal data from the EU. In practical terms the volume of personal data from EU authorities to third countries may be relatively light.

Q6: In particular, do you support the suggestion to use as a basis for the cooperation 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?

Response:

Subject to our comments made in response to Question 2 above, we support the proposal in Paragraph 5 of the Explanatory Text to establish cooperation arrangements taking into account the IOSCO Multilateral Memorandum of Understanding with respect to co-operation for enforcement purposes and, for supervisory purposes, the IOSCO Technical Committee Principles for Supervisory Co-operation. In this context, we recommend that ESMA does not go beyond the requirements set out in these IOSCO standards and that ESMA should reflect in its advice the IOSCO terminology. We further suggest that ESMA inserts Paragraph 5 of the Explanatory Text into Box 3 Para. 1 so as to avoid future diverging interpretation.

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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
Box 4 1. The relevant provisions set out in Box 3 above could apply. 2. The final decision on the necessary safeguards in the case of a third country passport will be reassessed at the moment of the evaluation by ESMA required by Article 67 (i.e. before the entry into force of the relevant provisions in 2015)
Q7: Do you agree with the above proposal? If not, please give reasons.
Response: Please refer to our comments under Box 3 above.

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V.III. Co-operation and exchange of information between EU competent authorities
Q8: Do you agree with the above proposal? If not, please give reasons
Response: We support the exchange of information among regulators under appropriate circumstances and with the necessary confidentiality protections (see response to Question 5 above). However, we remain concerned about the proposed implementing measures under Article 24 as set out in ESMA's previous consultation paper. We refer you to our response and comment on Box 109, as set out in Appendix 2 to this letter.

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V.IV. Member State of reference: Authorisation of non-EU AIFMs – Opt-in (Article 37(4))

Box 5

1. In cases of conflict between competent authorities of several Member States, the Member State of reference should be identified taking into account the Member State in which the AIFM intends to develop most effective marketing for its AIFs pursuant Article 37(4) (h).

2. The competent authorities identified by non-EU AIFM as the potential authorities of reference should immediately upon reception of the request, and no more than 48 hours following the reception of the request, contact each other and ESMA in order to consult on whether any other EU competent authorities or ESMA could potentially be involved pursuant to Article 37(4).

3. Where other EU competent authorities could potentially be involved, ESMA should immediately inform them.

4. The information referred to in paragraph 2 above should include the submission made by the non-EU AIFM, including in particular the details referred to in the last subparagraph of Article 37(4).

5. Within one week of their initial consultation or, where applicable, of receipt of the information by the other EU competent authorities, all the relevant competent authorities should exchange their views and jointly take a decision on the identification of the Member State of reference.

6. ESMA should facilitate the agreement between the relevant competent authorities.

Q9: Do you have any suggestions on possible further criteria to identify the Member State of reference?

Response:

We believe that a narrow interpretation of “develop most effective marketing” is not optimal. If ESMA intends that the Member State of reference should be “the Member State where the AIFM intends to target investors by promoting and offering, including third party distributors, most of the AIFs” - i.e where there is the majority of investors (by number or value of investment) for the AIFs that an AIFM manages - then this could lead to unsatisfactory, burdensome and inefficient results for third country AIFM and regulators alike. Such an approach would create a high degree of uncertainty for third country AIFMs as the target investor base in the EU for such AIFMs may well change over time with successive

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marketing efforts targeting different Member States, resulting in a change of that third country AIFM's Member State of reference and thus a change in authorisation, legal representative, depositary, etc. That is a highly inefficient outcome from a regulatory perspective, as well as unduly burdensome and disruptive from the third country AIFM's perspective.

Article 37(4) of the Directive specifically refers to "the Member State where the AIFM intends to develop effective marketing". In order to give greater certainty to third country AIFMs intending to market in the EU, we suggest the following possible principles:

- Where the third country AIFM has an affiliate in an EU Member State which is already subject to EU financial services regulation, the Member State of reference of the third country AIFM should be the Member State of that regulated affiliate.

- Where a third country AIFM has affiliates in a number of Member States, the Member State of reference should be the Member State (or one of the Member States) where the AIFM's group has a significant presence relative to its presence in other Member States. This could be determined by having a significant affiliate established within the relevant Member State and also by weight of AIF domiciled within that Member State.

The above suggested approach would lead to an efficient regulatory outcome as the competent authority of that Member State is likely to already have knowledge of the AIFM's group. It would also provide certainty to third country AIFMs from the outset of their marketing activities in the EU and would help avoid the inefficiencies of having to move between jurisdictions depending on where the majority of investors are located.

Q10: Do you think that any implementing measures are necessary in the context of Member State of reference given the relatively comprehensive framework in the AIFMD itself?

Response:

We would suggest providing for implementing measures regarding the criteria for identifying the Member State of reference in response to Question 9 above.

Q11: Do you agree with the proposed time period for competent authorities identified as potential authorities of reference to contact each other and ESMA?

Response:

We appreciate ESMA's commitment to speedy and efficient decision-making, but query whether in reality, and particularly where there may be a more complicated analysis as to which Member State is the most appropriate Member State of reference, some additional time may be beneficial to the decision-making process.

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APPENDIX 1

Consultation paper on ESMA's draft technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive

IV. General operating conditions

IV.IX. Possible implementing measures on delegation

Sufficient resources and experience and sufficiently good repute of the delegate – Box 66

1. The AIFM has to evaluate if the delegate has sufficient resources to perform the delegated tasks and if the persons who effectively conduct the business of the delegate are sufficiently experienced and of sufficiently good repute.

2. The delegate should be considered to have sufficient resources if it employs sufficient personnel with the skill, knowledge and expertise necessary for the discharge of the tasks delegated to it and the appropriate organizational structure for the delegated tasks.

3. The persons who effectively conduct the business of the delegate should be considered to have sufficient experience if they have appropriate theoretical knowledge and appropriate practical experience in the relevant functions.

4. The persons who effectively conduct the business of the delegate should be considered to have sufficiently good repute if there are at least no negative records relevant both for the assessment of a good repute and for the proper performance of the delegated tasks. Such negative records include relevant criminal offences, judicial proceedings or administrative sanctions.

Questions:

No questions.

Response:

Box 66:

Paragraph 4 appears to prohibit the appointment of any delegate where any person who effectively conducts the business of the delegate has been the subject of any criminal, judicial or administrative proceedings or sanctions, however minor and, at least in the case of judicial proceedings, regardless of the outcome. This is too broad a restriction as asset managers, particularly larger groups, may commonly be subject to some form of legal proceedings. Paragraph 4 should be reworded such that the AIFM should be required only to take account of any negative records, including the nature and seriousness of the relevant

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criminal offences, judicial proceedings or administrative sanctions and their relevance to the delegated tasks.

Paragraph 29 of the explanatory text is helpful in that it states that the "good repute" requirement shall be assumed as satisfied in the case of EU authorised firms. There should be a similar extension for third country firms that are similarly authorisation (e.g. by the SEC, OCC, SFC, ASIC, JFSA, SMA etc). Whilst this Consultation Paper does not specifically consider third country delegation, it should be noted that the lack of an assumption of good reputation via authorisation for a non-EU delegation, combined with the overly broad term "negative records" potentially makes it materially more difficult to delegate to a non-EU authorised entity than an EU authorised entity. This goes beyond the Level 1 position and is not aligned with the position under UCITS or MiFID.

Types of institution that should be considered to be authorised or registered for asset management and subject to supervision – Box 67

(1) - Management companies authorized under the UCITS Directive,
- investment firms authorised under the MiFID Directive to perform portfolio management,
- credit institutions authorised under the Directive 2006/48/EC having the authorisation to perform portfolio management under MiFID, and

- externally-appointed AIFM authorised under the AIFM Directive

should be assumed as authorised for the purpose of asset management and subject to supervision.

Questions:

No questions.

Response:

Box 67:

Issues relating to delegates based outside the Member States are subject to a separate ESMA consultation paper, however we would reiterate that similarly authorised third country entities (e.g. authorised by SEC, OCC, SFC, ASIC, JFSA, SMA etc) should be considered authorised or registered for asset management and subject to supervision.

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APPENDIX 2

Consultation paper on ESMA's draft technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive

VIII. Transparency requirements

General comments:

Whilst acknowledging that this Consultation Paper does not specifically refer to Third Country issues, we believe it is important to make three Third Country observations:

- ***Practicalities of compliance by non-EU AIFM managing non-EU AIF with Level 2 transparency provisions***

  We have had the benefit of reading in draft the comments of other Third Country respondents, in particular those of the United States Investment Company Institute ("US ICI") who have provided examples of the practical considerations and potential difficulties involved for US 1940 Act mutual funds in complying with the proposed Level 2 transparency requirements. We would endorse the observations and comments of the US ICI and urge ESMA to be mindful that other types of non-EU AIFs may be similarly affected.

- ***Concern that Level 2 transparency provisions extend beyond final Level 1 agreement for non-EU AIFM managing non-EU AIF privately placing under Article 42***

  We wish to highlight in the context of proportionality that from 2013, non-EU AIFM managing non-EU AIF which are to be marketed into the EU on a private placement basis under Article 42, need only comply with the Transparency Requirements in Chapter IV of the Level 1 Directive.

  However we note that there are references and obligations linked to several operational sections of the Level 1 Directive in the Level 2 transparency requirements section (such as risk and liquidity management and leverage) which do not technically need to be complied with under the Level 1 Directive by non-EU AIFM managing non-EU AIF who are only privately placing under Article 42. Further, at the recent open hearing on 2 September 2011, ESMA appeared to suggest that compliance with these additional operational sections of the Directive will also apply to non-EU AIFMs from implementation of the Directive in 2013 on the basis that, if not, there would not be a level playing field with EU AIFMs.

  We would strongly disagree with this view. Where in future non-EU AIFM wish to take advantage of the passport requirements under Article 40, we agree it is important to ensure as much convergence as possible to provide a level playing field between EU AIFM and non-EU AIFM. However in the case of the private placement of non EU

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AIF by non EU AIFM, which is only available at the discretion of individual Member States, requiring an identical implementation of Level 2 transparency standards (as for EU AIFM who hold an EU-wide passport) for a Member State level only benefit would, in our view, be disproportionate and would not reflect the final position of the Level 1 Directive.

Compliance with other operational sections of the Level 1 Directive (e.g. risk and liquidity management and leverage) and their accompanying detailed Level 2 guidance would unduly burden non-EU AIFM/non-EU AIF, who are already subject to extensive non-identical local regulation and disclosure requirements, with significant costs and administrative difficulties and may not be possible in some instances. This would create a very unlevel playing field.

We would strongly recommend that the Level 2 transparency text does not reduce the flexibility of the Level 1 Directive to such an extent that it acts as a de facto barrier to non-EU AIFM managing non-EU AIF continuing to market via private placement during 2013-2018, bearing in mind that managers of such funds will not otherwise be permitted to access the EU via the passport at least until 2015.

- ***Recommendation for continued coordination between international regulators in the formulation of coherent and efficient reporting standards***

Regulatory bodies throughout the globe are simultaneously developing reporting obligations and standards for managers of alternative investment funds. Given the global nature of the asset management industry many managers will become subject to the reporting requirements of multiple jurisdictions. We would therefore encourage ESMA and EU regulators to continue to coordinate with other non-EU regulators, particularly within the US, on the development of reporting requirements so to avoid duplicative or onerous reporting for managers. We believe that greater conformity in reporting will also aid regulators globally in their oversight of systemic risk.

VIII.III. Possible Implementing Measures on Reporting to Competent Authorities

Format and content of reporting to competent authorities – Box 109

1. In accordance with the requirements in Article 3(3)(d) or Article 24(1) of Directive 2011/61/EU an AIFM shall report on a quarterly basis to the competent authorities of its home Member State the following information:
   (a) the main types of instrument in which it is trading, including a break-down of financial instruments and other assets, taking into account the AIF's investment strategy and its geographical and sector investment focus;
   (b) the markets of which it is a member or where it actively trades;
   (c) the diversification of the AIF's portfolio including, but not limited to, its principal exposures and most important concentrations.

2. The information required under paragraph 1 shall be provided no later than one month after the end of the relevant period.

3. In accordance with the requirements in Article 24(2) of Directive 2011/61/EU, an

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AIFM shall provide for each EU AIF it manages and for each of the AIF it markets in the Union, the following information to the competent authorities of its home Member State:

(a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature in accordance with Article 23(4)(a) of Directive 2011/61/EU and in accordance with Box 31 (Liquidity Management Definitions);
(b) any new arrangements to manage the liquidity of the AIF;
(c) a description of the risk management systems employed by the AIFM to manage market *risk, liquidity risk, counterparty risk and other risks including operational risk*;
(d) the current risk profile of the AIF including:
  (i) the market risk profile of the investments of the AIF including the expected return and volatility of the AIF in normal market conditions;
  (ii) the liquidity profile of the investments of the AIF including the liquidity profile of the AIF's assets, *the profile of redemption terms and the terms of financing provided by counterparties to the AIF*;
(e) information on the main categories of assets in which the AIF invested including the corresponding short market value and long market value, the turnover and performance during the reporting period; and
(f) the results of periodic stress tests, under normal and exceptional circumstances, to the extent that AIFM are subject to the requirements of Article 15 (3)(b) and Article 16 (1) second subparagraph of Directive 2011/61/EU.

4. Where an AIFM is required to report under paragraph 3 it shall provide the information required on a quarterly basis. The information shall be provided no later than one month after the end of the relevant period.

5. As an exception to paragraph 4, a competent authority may deem it appropriate to require an AIFM to report all or part of the information on a more frequent basis.

6. AIFMs managing one or more AIFs which they have assessed to be employing leverage on a substantial basis in accordance with Box 110 (Use of Leverage on a Substantial Basis), shall provide the information required under article 24(4) subparagraph of Directive 2011/61/EU at the same time as that required under paragraph 3.

7. AIFMs shall provide the information specified under paragraphs 1, 3 and 6 in accordance with the pro forma reporting template or, for information not specified in that template, in a manner determined by the competent authorities of the home Member State. However, where an AIFM is required to report information on a more frequent basis in accordance with paragraph 5, the competent authority of the home Member State may require an AIFM to provide all or part of the information specified in the pro-forma reporting template in a different format.

8. In accordance with Article 42 (1)(a) of Directive 2011/61/EU, for non-EU AIFMs any reference to the competent authorities of the home Member State shall mean the competent authority of the Member State where the AIF is marketed.

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Questions:

No questions.

Response:

Box 109:

Paragraphs 1 and 2 and 4: We recommend that further proportionality be incorporated into these requirements as reporting on a quarterly basis may be unduly onerous for many categories of AIF/AIFM in scope and may be a departure from normal practice, as would the requirement to provide information within one month after the end of the relevant period. This is true for various categories of EU managed/domiciled AIFs and various non EU managed/domiciled AIFs including US 1940 Act funds, where there is an obligation to report within 60 days of the relevant period end, as well as for fund of funds which may have to gather information from a number of underlying managers. In general we are concerned about the volume of information and the ability to comply, particularly if this is required quarterly. However we note from Annex V that only section 1 is applicable to all AIFMs; Sections 2 and 3 only apply to an AIF 'which is of a material size'. Much will depend therefore on which AIFs fall in this category.

We would recommend that annual reporting be required, with the reporting deadline to be in line with that required for the annual report. Competent Authorities should be able to request more frequent reporting if required.

Also, we are concerned about the implications for third country funds many of which will already be reporting similar (but not identical) information to their own regulators. To require separate reports to EU Competent Authorities would be disproportionate.

We would encourage ESMA and EU regulators to continue to coordinate with other non-EU regulators, particularly within the US, on reporting requirements so to avoid duplicative or onerous reporting for managers. We believe that greater conformity in reporting will aid regulators in their oversight of systemic risk.

Paragraph 3 (a): We would reiterate the comments previously made about special arrangements.

Paragraph 6: please see comments below for Box 110.

Use of leverage on a 'Substantial Basis' – Box 110

1. In order to comply with the requirements in Article 24(4) of Directive 2011/61/EU an AIFM employing leverage shall make an assessment for each EU AIF it manages and for each of the AIF it markets in the Union as to whether leverage is being employed on a substantial basis in accordance with the methods of calculation of exposure of AIF in Box 95 (Gross Method of Calculating the Exposure of the AIF) Box 96 (Commitment Method of Calculating the Exposure of an AIF) and, where applicable, Box 97 (Advanced Method of Calculating the Exposure of an AIF).

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2. The assessment of whether leverage is employed on a substantial basis shall have regard to the following non exhaustive considerations:
   (a) the type of AIF under management including its nature, scale and complexity;
   (b) the investment strategy of the AIFM in relation to the AIF concerned;
   (c) the market conditions in which the AIF and the AIFM operate;
   (d) whether the exposures of an AIF arising through the use of leverage by an AIFM could constitute an important source of market risk, liquidity risk or counterparty risk to a credit institution or other systemically relevant institution;
   (e) whether the techniques employed by the AIFM through use of leverage could contribute to the aggravation or downward spiral in the prices of financial instruments or other assets in a manner which threatens the viability of these prices; and
   (f) whether the degree of leverage employed by an AIF could contribute to the build up of systemic risk in the financial system or risk of disorderly markets.

3. AIFM shall monitor, on an ongoing basis, their use of leverage and, where there is a material change shall carry out a new assessment.

4. The competent authorities of the home Member State of the AIFM shall consider the information collected under Article 24 in their determination of whether leverage is employed on a substantial basis and may review the assessment made by the AIFM having regard to the factors considered in accordance with paragraph 2. Where the competent authority considers that the AIFM is employing leverage on a substantial basis the additional reporting obligations in accordance with Article 24(4) Directive 2011/61/EU and Paragraph 7 of Box 109 (Format and Content of Reporting to Competent Authorities) shall apply to such AIFM.

5. AIFM shall notify the competent authorities of their home Member State of the outcome of their assessment in paragraph 1, and shall provide a copy of the assessment to the competent authorities upon request.

Questions:

Q69:
Do you agree with the proposed frequency of disclosure? If not, please provide alternative suggestions.

Q70:
What costs do you expect completion of the reporting template to incur, both initially and on an ongoing basis? Please provide a detailed analysis of cost and other implications for different sizes and types of fund.

Q71:
Do you agree with the proposed reporting deadlines i.e. information to be provided to the competent authorities one month after the end of the reporting period?

Q72:
Does ESMA's proposed advice in relation to the assessment of whether leverage is employed on a substantial basis provide sufficient clarity to AIFMs to enable them to prepare such an assessment?

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Response:

Box 110:
Paragraph 1: We reaffirm the points previously made in relation to the calculation of leverage.

Paragraphs 2, 4 and 5:

- The criteria set out here in order to assess whether leverage is employed on a substantial basis are highly subjective and could be interpreted very differently by competent authorities and AIFMs. This is particularly the case as the list is noted as being "non exhaustive". We therefore suggest that further clarity and/or objective criteria are included here and also that our previous comments are borne in mind in determining those criteria.
- We also note that it is extremely unlikely that an AIFM would knowingly pursue a strategy which, per item (e), "could contribute to the aggravation or downward spiral in the prices of financial instruments or other assets in a manner which threatens the viability of these prices".

Q 69:
No, as per the reasons set out above in the general comments on Box 109.

Q 70:
No view at this stage.

Q 71:
No, as per the reasons set out above in the general comments on Box 109.

Q 72:
Please note the comments made above in the comments on Box 110.