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4 February 2013

Dear Sirs

***Re: ESMA Consultation Paper (ESMA/2012/845): Guidelines on key concepts of the AIFMD***

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The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world.

This paper has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). Members of the Committee advise a wide range of firms in the financial markets, including alternative investment fund managers specialising in numerous strategies and asset classes such as hedge, private equity, real estate, listed equities and fixed income, as well as service providers such as depositaries/custodians, prime brokers and fund administrators.

**1) Responses to Particular Questions**

***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 removed/included from the content of the guidelines.***

As identified in paragraph 5 of the Consultation Paper a range of core issues were covered in the Discussion Paper of February 2012, and a wide range of comments received, many of them disagreeing with certain points made in that Paper or

highlighting complexities not covered by the statements made. All of this is clear from the description provided of the comments made. We think that it must be clear from the volume and detail of comments made that further guidelines are necessary and urgently required, the Directive is implemented in July this year and firms are already working on their implementation plans. It is very disappointing that the Consultation Paper gives no indication of ESMA's position on the issues.

We do not however support the use of Q&A as a convergence tool. A proper analysis is required so as to provide guidance that can be interpreted to cover a range of situations. These issues are complex. Most of them are not capable of being covered by brief responses to pre-determined questions that cannot possibly cover the range of possible variations on the theme. In addition there is no proper consultation in relation to Q&A.

***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?***

We agree with ESMA's reading of the concepts in determining whether there is an AIF. We also agree that the concept of ownership of underlying assets is unsuitable to be covered in the draft guidelines.

***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.***

The concept of "raising capital" is critical to the definition of an AIF. There is after all no need for provisions on marketing etc. unless there is capital being raised from external sources.

We disagree with the definition implicit in paragraphs 15 and 16 that would mean that capital provided by some employees should be regarded as "capital raised". The distinction is between internal sources and external, not on the job description of those who are part of the AIFM or its group. We support the opinion of the Securities and Markets Stakeholder Group that a key element of an AIF is the raising of capital from external unaffiliated third parties.

***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.***

We agree that an ordinary company with general commercial purpose would fall outside of the definition of a collective investment undertaking and welcome the proposal to define this notion further. It would be helpful in particular to provide guidance to the effect that undertakings into which parties invest for commercial purposes wholly or mainly related to an existing commercial business will be within the scope of an ordinary company with general commercial purposes. This would be consistent with the comment in paragraph 20 of the Paper, that the definition of an AIF excludes an entity whose

purpose is to manage the underlying assets as part of a commercial or entrepreneurial activity. We also note that Recital 8 of AIFMD refers to joint ventures. We think it would be helpful if ESMA could give some clarity in this regard.

***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.***

We agree that this is a relevant factor, but the concept needs further clarification in particular to ensure that this is capable of being applied in joint venture situations.

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

We agree. We think too detailed a definition is dangerous. However it needs to be acknowledged that it is not just companies with general commercial purposes that are not collective investment undertakings. Companies (and other bodies corporate or similar) are established for a wide range of reasons, the fact they are not established for general commercial purposes is not of itself an indicator that they are a collective investment undertaking.

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

Please see the answer to Question 8.

***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.***

We do not agree that one should look at the rules or instruments of incorporation and consider that an undertaking has "a number of investors" unless the rules or instruments of incorporation specifically restrict the raising of capital from more than one investor. Whether there is more one investor should be a question of fact. Any undertaking that only has one investor cannot, by its nature, be said to contain the necessary collective element, or pooling.

We understand that ESMA's proposal reflects the position in one member state where it has some importance for tax purposes. However, an undertaking that currently does specifically restrict the raising of capital from a single investor would not need to change this approach if ESMA's proposal were adopted. However, many other Member States currently do not treat as an AIF (or its equivalent) structures which only have one investor, whether or not there is a legal restriction on further investors. Undertakings in these jurisdictions would need to suffer the costs of taking legal advice in order to change the position for no corresponding benefit.

The position should be that an undertaking with only one investor cannot be an AIF, but if a second investor joins, the undertaking could, at that point, become an AIF if the other relevant tests are met.

***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.***

We agree with the general approach but consider that paragraph 17 is unnecessary and confusing, given what is said about "ordinary companies" elsewhere and paragraph 18 seems to undermine the purpose of ESMA issuing Guidelines.

***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?***

We do not think this is necessary and we would not usually expect national legislation to be relevant.

If ESMA would find it helpful to discuss any of these comments then we would be happy to do so. Please contact me in the first instance by telephone on +44 (0) 20 7295 3233 or by email at [margaret.chamberlain@traverssmith.com](mailto:margaret.chamberlain@traverssmith.com).

Yours faithfully



**Margaret Chamberlain**  
Chair, CLLS Regulatory Law Committee

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