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| 1 December 2014 |

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| **Reply form for the** **Guidelines on asset segregation under the AIFMD** |
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**Responding to this paper**

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper - Guidelines on asset segregation under the AIFMD, published on the ESMA website.

***Instructions***

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

1. use this form and send your responses in Word format;
2. do not remove the tags of type <ESMA\_QUESTION\_G\_AIFMD\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
3. if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

1. if they respond to the question stated;
2. contain a clear rationale, including on any related costs and benefits; and
3. describe any alternatives that ESMA should consider

**Naming protocol:**

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA\_CE\_G\_AIFMD \_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

E.g. if the respondent were ESMA, the name of the reply form would be ESMA\_CE\_G\_AIFMD \_AIXX\_REPLYFORM or ESMA\_CE\_G\_AIFMD\_AIXX\_ANNEX1

Responses must reach us by **30 January 2015**.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input/Consultations’.

***Publication of responses***

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

***Data protection***

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Disclaimer’.

**Which of the two identified options do you prefer?**

<ESMA\_QUESTION\_G\_AIFMD\_1>

We refer you to the submission of the Association for Financial Markets in Europe (AFME). We agree fully with AFME’s submission and we wish to indicate our support for the response and analysis put forward in their response to this question.

We agree with AFME that neither option 1 nor option 2 provides the optimal solution. We consider that option 4 would provide the best solution and disagree with ESMA’s reasoning for discarding Option 4 in favour of Option 1 or Option 2. However, of the two identified options, we consider that option 2 would be preferable.

<ESMA\_QUESTION\_G\_AIFMD\_1>

**Would you suggest any alternative option which is compatible with the AIFMD and its implementing measures? If yes, please provide details.**

<ESMA\_QUESTION\_G\_AIFMD\_2>

We refer you again to the submission of AFME. We agree fully with AFME’s submission and we wish to indicate our support for the response and analysis put forward in their response to this question.

AIMA agrees with AFME that option 4 would provide the best solution and disagrees with ESMA’s reasoning for discarding Option 4 in favour of Option 1 or Option 2. Option 4 is both consistent with AIFMD and achieves the objectives of AIFMD regarding investor and client asset protection. Option 4 is the model that is currently being used by the prime brokerage market and is consistent with the Markets in Financial Instruments Directive (MiFID).

We highlight for you some of the points made by AFME in their submission, which we support. We highlight some of the negative impacts that Option 1 or Option 2 would have on European alternative asset managers, EU AIFs and investors in EU AIFs.

On page 16 of the ESMA Consultation Paper - Guidelines on asset segregation under the AIFMD (the ‘Consultation Paper’) ESMA states that:

“[O]ptions 3-5 do not seem to be compatible with the provisions of the AIFMD and its implementing measures (the latter judgement having been based, inter alia, on the provisions of the Impact Assessment accompanying the Level 2 Regulation).”

We disagree with this assessment and consider that Option 4 is compatible with the provisions of the AIFMD. Article 21(11)(d)(iii) states:

“The depositary shall not delegate to third parties its functions as described in this Article, save for those referred to in paragraph 8.

The depositary may delegate to third parties the functions referred to in paragraph 8 subject to the following conditions: …

(d) the depositary ensures that the third party meets the following conditions at all times during the performance of the tasks delegated to it:…

(iii) the third party segregates the assets of the depositary’s clients from its own assets and from the assets of the depositary in such a way that they can at any time be clearly identified as belonging to clients of a particular depositary;”

Article 99(1)(a) of the Level 2 Regulation states:

“Where safekeeping functions have been delegated wholly or partly to a third party, a depositary shall ensure that the third party, to whom safe-keeping functions are delegated pursuant to Article 21(11) of Directive 2011/61/EU, acts in accordance with the segregation obligation laid down in point (iii) of Article 21(11)(d) of Directive 2011/61/EU ***by verifying that the third party***:

(a) keeps such records and accounts as are necessary to enable it at any time and without delay to distinguish assets of the depositary’s AIF clients from its own assets, assets of its other clients, assets held by the depositary for its own account and assets held for clients of the depositary which are not AIFs;”

The key obligation laid down in the Level 1 and Level 2 text is therefore that the delegate is able to easily ascertain which assets it is holding belong to which client. In Level 2 (see the wording in bold and italics above), it is clearly stated that the depositary’s obligations under Article 21(11) may be discharged by verifying that the prime broker keep books and records that enable it at any time and without delay to distinguish the ownership of the client assets. This does not require the assets of different classes of client to be held in separate accounts.

Option 1 or 2 would require a restructuring of the prime brokerage market, to the detriment of AIFs and investor protection. In order to entail such upheaval there would need to be a very clear statutory footing for this change, which is not present in the AIFMD.

Option 4 is also consistent with MiFID’s client asset segregation provisions, which currently apply equally to the assets of all clients of European prime brokers. We continue to support the asset segregation requirements imposed by MiFID and we believe that these requirements are sufficient, for all market participants. There is no investor appetite to gold-plate the MiFID segregation obligations for a particular class of market participant. Implementing either option 1 or option 2 would add additional cost, operational complexity and operational risk to prime brokerage arrangements, to the detriment of investor protection. For the reasons set out by AFME, there would be no counterbalancing enhancement to investor protection achieved by imposing these additional segregation requirements. In the event of an insolvency of a prime broker, a shortfall is more likely on account of the additional operational risks – and the losses from such shortfall would be shared amongst a smaller group of market participants, magnifying the negative impact.

We anticipate that the costs and complexities of prime brokers being obliged to run multiple segregated accounts (per Option 1 or 2) would deter prime brokers and custodians from offering their services to AIFs subject to these rules. The majority of such AIFs are established in the European Union. We anticipate that were Option 1 or 2 to be imposed then EU AIFs – in particular those managed by smaller asset managers - may have a reduced number of prime brokers willing to act for them and may be restricted from certain markets. Together with the added cost and operational risk and the reduced investor protection, we believe that this would make EU AIFs less attractive to investors and would put European asset managers and European AIFs at a competitive disadvantage to asset managers and funds established in other jurisdictions. Ultimately this would be to the detriment of the European asset management industry and of European investors.

<ESMA\_QUESTION\_G\_AIFMD\_2>

**Do you have knowledge of the impact that each of the two options identified would have on your business in terms of restructuring of existing delegation arrangements in Europe and third countries? Please quantify the one-off and ongoing costs as well as the type of costs for each of the two options or any alternative option that you may prefer.**

<ESMA\_QUESTION\_G\_AIFMD\_3>

See our response to Question 2 above.

<ESMA\_QUESTION\_G\_AIFMD\_3>

**Do you see merit in foreseeing a specific treatment for certain types of arrangement (e.g. collateral management arrangements)? If yes, please specify how your proposal would ensure compliance with the relevant requirements of the AIFMD and Level 2 Regulation.**

<ESMA\_QUESTION\_G\_AIFMD\_4>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_G\_AIFMD\_4>

**Do you agree with ESMA’s approach to discarding the third, fourth and fifth options described in Section 5 of the CBA? If not please provide data and information that support your view.**

<ESMA\_QUESTION\_G\_AIFMD\_5>

See our response to Question 2 above.

<ESMA\_QUESTION\_G\_AIFMD\_5>