

1 February 2013

Richard Stobo
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Submitted electronically at: www.esma.europa.eu

Dear Richard,

ESMA CONSULTATION PAPER ON GUIDELINES ON KEY CONCEPTS OF THE AIFMD

The IMA represents the asset management industry operating in the UK. Our Members include independent fund managers, the investment arms of retail banks, life insurers and investment banks, and the managers of occupational pension schemes. They are responsible for the management of around EUR 5 trillion of assets, which are invested on behalf of clients globally. These include authorised investment funds (UCITS and non-UCITS), institutional funds (e.g. pensions and life funds), private client accounts and a wide range of pooled investment vehicles (AIF).

In general we welcome the Guidelines, subject to a few points of detail, on which our comments are attached.

If you would like to discuss this or need more information, please do not hesitate to contact me.

Yours sincerely



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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 re-moved/included from the content of the guidelines.

As ESMA acknowledges in paragraph 4 of the Key Concepts CP, *"for a proper application of the different provisions of the AIFMD it is necessary to first have a clear understanding of which entity is the AIFM, which itself depends on a harmonised approach as to what constitutes an AIF"*. We therefore welcome the guidelines provided in the Key Concepts CP, and agree that *"appropriate consideration should be given to the interaction between the individual concepts of the definition of AIFs."*

Whilst the vast majority of fund structures will be straightforward and easily categorised, there will always be some bespoke structures around the edges, one example being joint ventures. We do not consider that being a joint venture is a deterministic factor in assessing whether an entity is, or is not, an AIF – some joint ventures are clearly AIFs and operate as such, while others are clearly not AIFs. We think that the proposed Guidelines achieve an appropriate balance between providing additional clarity about the entities that should be considered AIFs and AIFMs while avoiding becoming too prescriptive about the definitions given in the Directive. In this respect, and subject to our comments under question 3 about family office vehicles, we agree with the MSG that there is no need to define commercial terms and with their assessment of the key elements of the AIF definition.

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 welcome the clarification that *"it is only when all the elements included in the definition of AIFs...are present that an entity should be considered an AIF"*.

However, one area where there is considerable lack of clarity is where an entity is established with a number of investment compartments – is the entity as a whole a single AIF (an umbrella AIF in UCITS parlance) or is it the case that each individual investment compartment is an AIF? The language in Article 4(1)(a) of AIFMD is not clear, in that it states that *"AIFs means collective investment undertakings, including investment compartments thereof"....*.

Certain of the requirements in AIFMD would apply more logically to individual investment compartments (eg leverage, reporting to regulators and remuneration disclosure), whereas others would sit more logically at the umbrella level (e.g. capital if an internally-managed AIF). We believe the UCITS Directive is clearer on this question in that Article 1.2 of the UCITS Directive can reasonably be interpreted to mean that a single UCITS umbrella can consist of several investment compartments and Article 49 makes it clear that some requirements apply directly to each investment compartment. In the UK, non-UCITS retail schemes are treated in the same way.

We understand that different member states are taking different views on this under AIFMD: this could lead to problems with notification processes and inconsistencies in regulatory reporting/leverage calculations etc. Therefore, we urge ESMA to give this

more thought. We are not suggesting that ESMA should be prescriptive here, but, for instance, the question of how cross border notifications would work if there are inconsistent approaches needs to be addressed.

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.

We agree in general with the proposed guidelines. However, they do leave some doubts as to the treatment of family office vehicles.

First, the investors in a family investment vehicle may be individual members of a family, or they may be family trusts, the ultimate beneficiaries of which are members of the family. Some family investment vehicles may also include charitable trusts among their beneficiaries. The presence of such non-natural person beneficiaries (which of course have no "familial" relationship with the other beneficiaries) should not cause the vehicle to be treated as an AIF, and we believe that ESMA's guidelines should make this clear.

Secondly, we disagree with the suggestion that the group of persons connected by a close familial relationship must "***pre-date the existing of the undertaking***" for the fund to be exempt. This does not appear to allow future family members to invest in the undertaking without it becoming an AIF.

As regards co-investment vehicles of the kind set out in paragraph 14, we consider that these should not be treated as AIFs unless the manager/affiliate has raised capital from the investor. To this end we suggest that paragraph 14 is amended by the addition of the following wording at the end: "*...if the person in paragraph 13 carried out the activity in paragraph 11 with regard to that investor*".

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.

Yes, we agree.

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.

Yes, we agree.

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.

Yes, we agree.

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

An ordinary company has a perpetual and evolving business model instead of a "defined investment strategy".

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.

Paragraph 15 of the Guidelines says that a collective investment undertaking which is not so prevented *"should be regarded as a collective investment undertaking which raises capital from a number of investors in accordance with Article 4(1)(a)(i) of the AIFMD"*. However, a collective investment undertaking which has a number of investors is not an AIF unless it also *"raises capital"* and *"with a view to investing it in accordance with a defined investment policy"*. This can be clarified by changing 15 to read *"should be regarded as a collective investment undertaking which ~~raises capital from a number of investors in accordance with~~ may fall within Article 4(1)(a)(i) of the AIFMD if it also "raises capital" with a view to investing it in accordance with a "defined investment policy" (ie if VII and IX also apply)"*.

As regards paragraph 15(b) of the Guidelines, we support ESMA's intent: to ensure that layered structures or nominee arrangements are not used solely to enable the manager of a vehicle that would otherwise be an AIF to circumvent the requirements of the Directive. However, we suggest the drafting needs to be finessed to ensure that genuine single investors are not inadvertently caught by 15(b). For example, it would be useful to include definitive statements that:

- a pension fund or a pension fund trustee (as well as a charitable trust/trustee) is a single investor. Without a definitive statement in this regard, one could otherwise conclude that it is not, because of the breadth of the concept of *"invests funds which it has raised from more than one legal or natural person"*.
- an insurance company or bank may be a single investor in a vehicle, where it is both the legal and beneficial owner. The fact that it uses that asset to back the issuing of liabilities (ie insurance policies or structured products, the returns on which are related to the return on the investment vehicle) should not mean that it falls under 15(b).

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.

Yes, we agree.

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 believe any additional reference is required.