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### *By Electronic Delivery*

European Securities and Markets  
Authority  
103, rue de Grenelle  
75007 Paris  
FRANCE

RE: Discussion Paper 2012/117 – Key concepts of the  
Alternative Investment Fund Managers Directive

Dear Sirs:

We respectfully submit this letter in response to the invitation for comments by the European Securities and Markets Authority ("ESMA") set out in Discussion Paper 2012/117 – Key concepts of the Alternative Investment Fund Managers Directive and types of AIFM (the "Discussion Paper"). In this letter we provide comments in response to question 1 of the Discussion Paper which relates to "family office vehicles", namely:

**Q1 – Do you see merit in clarify further the notion of family office vehicles? If yes, please clarify what you believe the notion of 'investing the private wealth of investors without raising external capital' should cover.**

We represent a variety of family offices in the United Kingdom and elsewhere that heretofore have been exempt from the requirement to be authorised and regulated by the UK Financial Services Authority (the "FSA").

The Alternative Investment Fund Managers Directive (the "Directive") will introduce a new regulatory regime that, but for an available exemption, could classify a number of family office vehicles as "Alternative Investment Funds" ("AIFs") for the purposes of the Directive. However, Recital

7 thereto makes clear that undertakings such as family office vehicles should not be considered to be AIFs for the purposes of the Directive. Consequently managers and advisers of family office vehicles should not fall to be regulated under the Directive in respect of those family office vehicles.

We believe that there is merit in clarifying the notion of 'family office vehicle' because it can assist in providing greater regulatory certainty and can seek to avoid the risk of regulatory arbitrage and market distortion. We set out in this letter certain points for consideration by ESMA in this regard. We are making a similar submission to the FSA in response to its Discussion Paper "Implementation of the Alternative Investment Fund Managers Directive".

We agree in principle with the FSA's analysis, expressed at Section 3.16 of its Discussion Paper, of the key elements of a family office vehicle, namely that "there is a family relationship between the investors; the money or assets are in some way connected to the relationship and there is no raising of capital from investors outside of the relationship; and the money or assets and the relationship between investors are likely to pre-date the relationship between the investors and the AIF or AIFM".

We have set out below our views on the criteria for determining the family relationship. Also as set out below, while there is typically no raising of capital from outside investors, it is important to allow for employees and third party managers of the family's assets to hold investments in the family office vehicle as this is a common way of incentivising them. Further, as set out below, the family may change over time whether through the introduction of new members by marriage, the departure of other members through divorce, or otherwise, and the family may participate through a number of vehicles. Any definition of "family" should recognise that it is a fluid relationship.

#### **How to characterise the 'family relationship' between investors**

Any attempt to characterise the family relationship existing within family office vehicles should recognise that many family office vehicles are not formed by a single "founder" for the benefit of his or her descendants, but have instead been formed by or for the benefit of siblings or cousins whose families have co-invested jointly through the generations since their common ancestor who began the creation of the family wealth. Accordingly we suggest that any characterisation of the family relationship should allow a family office vehicle to be formed by any number of family members provided that they can trace their familial relationship to a common ancestor by blood or marriage.

As to which persons should be included, we believe that any definition of a family relationship must be broadly drafted so that it encompasses

all recognised forms of familial relationships and does not inadvertently exclude relationships such as civil partnerships or adopted, step or foster children.

Importantly, the definition should also allow for the situation where a person ceases to be a family member (typically through divorce) but who may continue to play an important role in relation to other key family members and who may well continue to be entitled to benefit financially from the family office vehicle. The continued inclusion of such former family members should not cause the family office vehicle to be treated as an AIF.

#### **Other features of a family office vehicle that can distinguish it from an AIF**

A feature of family office vehicles is that they commonly employ third party professional investment managers, who have no family relationship, to manage the assets of the family. In order to align their interests with those of the family, the employees and managers are often granted equity interests in the family office vehicle, or entitled (or required) to invest their own money alongside that of the family. Such alignment of incentives is a key part of the remuneration provisions of the Directive and, while family office vehicles are not AIFs, they should not lose the benefit of the exclusion simply because they are applying some of the best practices from the Directive. Additionally, in the same way that the family may change over time, the identities of the managers may change but they may retain a stake in the family office vehicle. Such retained stake should not disqualify the family office vehicle.

Further, it is important to recognise that the family rarely participates in the arrangements solely as individuals. Instead, family members may participate through a number of estate planning structures such as trusts, personal companies and other vehicles. The employees and managers may also make use of such estate planning structures.

Finally, the family may decide to allow a charitable trust or other charitable organisation to participate in the family's wealth (or, on the death of a family member, his or her share may pass in whole or in part to a charitable trust or other organisation that is not strictly for the benefit of his family). In many cases it will be impracticable for the family to sever the charitable trust's or other organisation's involvement from the family office vehicle. This may be because the principal asset of the family is a private company and it will not be feasible to sell a minority holding in that company to a third party or to allow the charitable trust or other organisation to manage it independently. There would appear to be no investor protection issues as to why such charitable trusts or other organisations should be excluded from participating in such a family office vehicle in such circumstances.

We are grateful to ESMA for the opportunity to comment on the Discussion Paper. We hope that our comments, observations and recommendations contribute to the continued efforts of ESMA in implementing the Directive. Should you have any questions or wish to discuss any of the matters raised in this letter, please do not hesitate to contact us at +44 20 7519 7000.

Yours faithfully,

Stephen G. Sims