



European Securities and Markets Authority
103, rue de Grenelle
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Paris
France

23 March 2012

Dear Sirs

Discussion paper – Key concepts of the Alternative Investment Funds Managers Directive and types of AIFM.

We would like to thank ESMA for publishing this early discussion paper dealing with key issues relating to the scope of the Alternative Investment Fund Managers Directive (AIFMD) and welcome this opportunity to respond to this important consultation.

This submission is made by PricewaterhouseCoopers LLP, the London headquartered member firm of the PwC Network. Please note that PwC refers to the PwC network and/or one or more of its member firms, each of which is a separate legal entity. PwC is a network of firms in 158 countries with close to 169,000 people who are committed to delivering quality in assurance, tax and advisory services. In Europe, PwC has established a network of dedicated specialists focusing on the impact of regulatory developments on the financial services sector. This response has been developed by our European network.

PwC provides a wide range of professional services and audits enterprises across Europe, including investment funds, fund managers and advisers, investors and service providers with all varieties of strategy, focusing on virtually all asset classes. With this submission, we highlight certain areas of concern with AIFMD, where we feel the interests of regulators and industry participants will be assisted by further clarity, rather than focus on issues facing any particular actor or group of market participants.

Consequently, we have chosen not to comment or to provide an answer to every question raised by ESMA, as we believe that many of them will be addressed in detail by other individual respondents or trade associations representing particular interest groups. We have, rather, confined our comments to a number of high level issues.

Definition of AIF

We would like to suggest that ESMA establish generic characteristics or criteria as to what should be included as an AIF. In this regard we welcome the work that ESMA has commenced, as mentioned in the discussion paper on further scoping the characteristics of an AIF. We believe a precise 'definition' is an absolute necessity for the alternative industry to provide them with time to prepare for AIFMD.

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In this context, there are clearly some concepts which have been embodied in the Level 1 text which are further explored in the ESMA discussion paper because they merit further discussion and where we see there to be a potential advantage in combining some of the concepts embodied in AIFMD with concepts current elsewhere across Europe. Accordingly, we think it will be important to define what is meant by each component of the list set out in Article 4.1., namely, (a) raising capital from a number of investors, (b) with a view to investing it in accordance with a defined investment policy; (c) for the benefit of those investors. We believe ESMA should take note of the provisions in the Prospectus Directive, particularly around raising capital constituting offers to the public. The provisions of the Prospectus Directive are well established and understood and using these would allow a point of reference for those impacted.

‘Collective investment undertaking’ is a concept which has evolved in relation to UCITS legislation but which has never been specifically defined: AIFMD provides a ‘default’, capturing all collective investment undertakings which are not subject to Directive 2009/65/EC. However, a direct parallel may not always be appropriate. At the moment, there appears to be an assumption (evidenced particularly around discussions in connection with marketing) that such vehicles will have “units or shares”. We are aware of a range of investment vehicles which do not have “units or shares” as the interest which a participant in that venture may hold and, indeed, where each investor may have a participation which is not uniform with the interests held by other investors.

Definitions need to be clear enough to ensure that participants clearly understand firstly whether or not the vehicle they chose to carry on business through is a “collective investment vehicle” and secondly, assuming that it is, whether or not it satisfies the other criteria set forth in Article 4.

However, whilst we believe the guidance with regard to the characteristics of what is / is not an AIF should be clarified at the European level, we are of the view that detailed determinations of what will and will not constitute an AIF still need to be made by individual Member States. This approach reflects the fact that each Member State has the legal prerogative to specify the corporate and other business structures which may be created under the umbrella of its legal system, and accordingly, it is only Member States who should be capable of defining the nexus between the policy intent of the Directive and the legal or other entities capable of being established within a particular Member State.

There will, of course, be concerns about consistency across Member States as result of such an approach. However, we note that the new European regulatory framework provides mechanisms for challenge by ESMA and other competent authorities when it is felt that Member States have not correctly transposed a Directive which should help negate any opportunities of arbitrage between the different determinations identified by each Member State.

Clarifying the notion of family office vehicles

On June 22, 2011, the Securities and Exchange Commission (“SEC”) adopted new Rule 202(a)(11)(G)-1 (the “Rule”) to define the term “family office” under the Investment Advisers Act of 1940 (the “Advisers Act”), as required by Section 409 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). The wording of the rule can be found on the SEC’s website:

<http://www.sec.gov/rules/final/2011/ia-3220.pdf>

Helpfully, the SEC definition is broadly drafted to take into account the fact that these days family offices often look after a wide group of related persons with complex relationships (whether through marriage, divorce, adoption, etc).



We believe it would be sensible if the definition of a family investment vehicle in Europe was conformed with the US definition; this will save confusion for firms that operate in both Europe and the US.

Please contact James Greig (020 7213 5766) should you wish to meet with us to discuss our points of concern, and to allow us to further share our thinking.

Yours faithfully

A handwritten signature in black ink that reads "PricewaterhouseCoopers LLP".

PricewaterhouseCoopers LLP, on behalf of the PwC network