

**SUBMITTED ONLINE AT:**

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European Securities and Markets Authority

103, rue de Grenelle

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France

1 February 2013

**Re: Response to ESMA Consultation Paper  
“Guidelines on key concepts of the AIFMD”**

**Introduction**

The Irish Funds Industry Association (IFIA) is the industry association for the international investment fund community in Ireland, representing the custodians, administrators, managers, transfer agents and professional advisory firms involved in the international fund services industry in Ireland. As the leading centre for alternative investment funds (AIFs) with EUR 257 billion of assets in Irish domiciled non-UCITS funds, EUR 201 billion of which is in “qualifying investor funds” regulated by the Central Bank of Ireland (CBI) as of October 2012. Accordingly, all developments in the alternative investment arena are of particular importance to the Irish industry. In addition to the non-UCITS funds domiciled here, Ireland is established as the main centre globally for the servicing of alternative assets, with an estimated 40% of all alternative investment fund assets being serviced here.

Accordingly, all developments in the alternative investment arena are of particular importance to the IFIA which welcomes both the publication of, and the opportunity to comment on, ESMA’s Consultation Paper (ESMA/2012/845) setting out ESMA’s guidelines on key concepts of the AIFMD (Guidelines) and inviting responses from external stakeholders.

**Responses to Questions in Consultation Paper**

**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.**

We would consider that there may be merit in giving further consideration to the extent that private equity funds are considered to be collective investments schemes. While they exhibit the characteristics of a collective investment scheme set out in paragraph 9 of the draft Guidelines, there is a concern that private equity funds structured as partnerships may contain provisions such as “excuse provisions” that would mitigate against the concept of a common pool. An “excuse provision” in this context being a provision which allows an investor to be relieved of its obligations to make a particular capital contribution if a violation of applicable laws or regulations would result.

We regret that ESMA has decided not to include draft guidelines in this Consultation Paper in relation to:

1. clarifications on the appointment of a single AIFM and the range of functions that an AIFM must carry out and to what extent it may delegate these functions to third parties (sections III and V of the Discussion Paper (ESMA/2012/117));
2. the vehicles which are not AIFMs or AIFs or are exempted from the provisions of the AIFMD (Section IV.2 of the Discussion Paper);
3. the treatment of UCITS management companies (Section VI of the Discussion Paper); and
4. the treatment of MiFID firms and Credit Institutions (Section VII of the Discussion Paper).

Given the proximity of the implementation date of the AIFMD, we would be grateful if the consultation could be completed as soon as possible.

**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 are pleased to note that you no longer consider ownership of underlying assets to be a key element of defining an AIF.

**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 Guidelines have been amended in line with our previous comments so that the activity of raising capital should be met where a vehicle takes “direct or indirect steps to procure the transfer or commitment of capital by one or more investors to an undertaking for the purpose of investment with a view to generating a pooled return for the investors”. ESMA has kept the requirement for there to be commercial communication (“business communication” in the Discussion Paper) between the investor and the undertaking seeking capital, or the person acting on its behalf. We had previously raised the point that rigid language of this nature may have the unintended consequence of capturing transactions which are not capital raisings, which has not been taken into consideration.

We note the definition of *pre-existing group* which effectively means a family office. We would have three comments here:-

- (i) the defined term should make some reference to the familial context – we would suggest the term “family group” if the term “family office” is not to be used;
- (ii) the definition excludes investment by directors, partners, members, managers, trustees and employees of the pre-existing group. Investment by these persons is a fundamental feature of such groups and this allows for alignment of the investment managers with the interests of investors; and
- (iii) the use of the term “close familial relationship” is not sufficiently precise and that the nature of such relationships will change over time and generations.

All of these issues were addressed in the extract from the Investment Advisors Act, 1940 which we furnished with our response to the Discussion Paper on Key Concepts of the AIFMD (Discussion Paper).

The concern with regard to (ii) above may be addressed by clarifying that an undertaking for the purpose of paragraph 13 (b) includes an undertaking contemplated by paragraph 13 (c).

We would consider that, as stated in our response to the Discussion Paper, the prohibition outlined in paragraph 14 may have the effect of bringing joint ventures or managed accounts within the scope of AIFMD.

**Q4: Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance on the notion of ‘raising capital’ would imply.**

We would not have such data to hand, but we would reiterate that co-investment insofar as it permits alignment is a benefit and should not serve to bring otherwise excluded structures within the ambit of AIFMD.

**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.**

With regard to the definition of “pooled return”, the statement that “no consideration should be given to the existence of liquidity management arrangements such as side pockets” is important and we would recommend specific reference to “side pockets” in the definition.

In addition, to take account of the “excuse” provision issue referenced above, we would also recommend the inclusion of the words “exclusion of certain assets” after the words “dividend policy”.

The Guidelines do not address our previous point that “virtual pools” should not constitute AIFs. We remain of the belief that it would be helpful if ESMA could confirm in any technical standards that “virtual pooling arrangements” do not constitute AIFs. Such arrangements are commonly undertaken where a number of funds, managed accounts and/or other investors have a common investment strategy, investment manager and administrator. Virtual pooling is effectively an accounting solution whereby each pool participant (which may be a fund, a managed account or other investor) participates on a pro rata basis in a virtual asset pool. It is important to recognise that this pool does not have separate legal personality and is effectively an accounting construct. At any one time, the depositary of the pool participant is able to identify the share of the assets in the pool which are attributable to its client. The benefits of “virtual pooling” are primarily the cost savings (e.g., lower transaction costs) which result from the ability of the investment manager of the various clients to place block trades on behalf of the various pool participants rather than individual trades for each participant. While certain of the pool participants may themselves constitute AIF within the scope of AIFMD, the virtual pool itself should not be deemed to be an AIF as it does not constitute a “collective investment undertaking” within the meaning of Article 4 of the AIFMD.

**Q6: Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance for identifying a ‘collective investment undertaking’ would imply.**

We have no such data to hand.

**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.**

Please see response to 1 above.

It is noted that the Discussion Paper provided that the AIFM must have control of the AIF and that investors have no day-to-day control. The Guidelines have clarified that investors’ involvement in certain high level decisions does not preclude the entity from being a collective investment undertaking. This broadly takes into consideration our suggestion of clarifying that investor committees which provide feedback on investment strategies and performance should not constitute day-to-day control by investors.

We would suggest that clarification is given in the Guidelines around whether it is the actual day-to-day control or the power to exercise day-to-day control (for instance, by the investors having a right to remove the manager) which is being referred to.

**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 would agree with this.

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

We would consider that the characteristic when taken together with the other 2 characteristics adequately describe a collective investment scheme and that no further definition is necessary.

**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 agree with the proposed guidance.

**Q11: Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance for determining whether a ‘number of investors’ exists would imply.**

We have no such data to hand.

**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 proposed indicative criteria but we would like to make 2 suggestions with regard to paragraph 16 (d):-

(i) it would commonly be understood that AIFs have defined investment objective and policies. The terminology here refers to investment policy and then investment guidelines. Would it be possible to clarify that the reference to investment policy here is not the same as an investment objective as commonly understood?

(ii) although it is clear from the context, would it be possible to clarify that not all of the criteria reference need to apply by including the words “singly or cumulatively” after the word “reference”.

**Q13: Please provide qualitative and quantitative data on the costs and benefits that the proposed indicative criteria for determining whether a ‘defined investment policy’ exists would imply.**

We have no such data to hand.

**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 would have no objection to this proposal.