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European Securities and Markets Authority  
103 Rue de Grenelle  
Paris  
75007  
France

Submitted via the ESMA website [www.esma.europa.eu](http://www.esma.europa.eu)

Dear Sirs,

**Response to ESMA's Consultation Paper - Guidelines on reporting obligations under Article 3 and Article 24 of the Alternative Investment Fund Managers Directive**

Simmons & Simmons LLP appreciates the opportunity to respond to ESMA's consultation paper on Guidelines on reporting obligations under Article 3 and Article 24 of the Alternative Investment Fund Managers Directive.

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We restrict our comments to two specific points:

**Reporting in respect of AIFs (a) where an investor disposes of its holding or (b) where marketing of the AIF leads to no acquisitions of units or shares of the AIF**

We believe it would be both sensible and helpful if provision was made in the final Guidelines whereby the obligation to report to a national competent authority to which an AIFM is subject would end in respect of a given AIF where either:

- an investor disposes of its units or shares of the AIF, with the result that no investors who are domiciled or have their registered office in a given EEA jurisdiction remain invested in the AIF; or
- where the marketing of the AIF leads to no units or shares of that AIF being acquired by an investor domiciled or with its registered office in an EEA jurisdiction.

We would note that such provision has been allowed in the UK by Article 59 (4)(a) of HM Treasury's draft AIFM Regulations in respect of marketing under Article 42 of the AIFMD.

In the limited circumstances specified above, the value to national competent authorities of the information received would, in our view, be considerably outweighed by the cost to the AIFM (and so, indirectly, the end

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investor) of making such reports. It would, in any event, be open to the home state regulator to require information from the AIFM should any specific issue or concern arise.

### **Calculating AUM of AIFs managed by non-EU AIFMs which are not marketed within the EU**

Level 2 measures, such as the Delegated Regulation, can neither override nor overreach the provisions of the relevant Level 1 text. Article 42(1) of the Level 1 text states that non-EU managers promoting AIFs that they manage into the EU need only comply with Article 24 (Reporting obligations to competent authorities) in respect of each AIF marketed by it pursuant to Article 42 (emphasis added). Article 24(2) of the Level 1 text also limits the obligation to report to "each of the EU AIFs [the AIFM] manages and for each of the AIFs it markets in the Union".

Against that backdrop, therefore, we consider that Article 110(3) of the Delegated Regulation seeks to overreach the Level 1 text. Article 110(3) establishes that the AIFM must calculate the AUM of all AIFs under its management in order to determine the frequency of its reporting. However, Article 110(3) also makes reference to reporting information on EU AIFs managed by the AIFM, and AIFs marketed by it. This clearly has to be read in the light of Article 42(1) of Level 1, since no information is required on AIFs which are not being marketed within the Union by a non-EU AIFM. We, therefore, believe that, for the purposes of the reporting guidelines, the reference to total AUM needs to be read in that light too. The Delegated Regulation would be going beyond the requirements of the Level 1 text if it sought to bring into scope for this purpose the AUM of AIFs which are out of scope of the Level 1 text. ESMA's final Guidelines should, therefore, reflect the intent of Articles 24 and 42 of the Level 1 text rather than Article 110 of the Delegated Regulation.

Accordingly, in our view, the analysis which underlies the flowchart at Annex V of the consultation paper (Reporting obligation diagram) is incorrect and the flowchart itself should be amended in the final version, drawing a distinction between AIFs being marketed within the EU and those not being marketed within the EU.

We would be happy to discuss the above comments with you if that would be helpful.

Yours faithfully



**Simmons & Simmons LLP**