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Submitted online at www.esma.europa.eu

Mr. Steven Maijoor, Chair
European Securities and Markets Authority
103 Rue de Grenelle
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France

23 March 2012

RE: Discussion Paper on Key Concepts of the Alternative Investment Fund Managers Directive and types of AIFM

Dear Mr. Maijoor,

ICI Global¹ appreciates the opportunity to provide comments on ESMA's recent discussion paper concerning key concepts under the Alternative Investment Fund Managers Directive (AIFMD) and types of Alternative Investment Fund Manager (AIFM). ESMA's paper raises a number of important issues for ICI Global members.

ICI Global members, and their shareholders, have a strong interest in ensuring that the regulatory regime that is developed under the AIFMD encourages, rather than impedes, the operation, management and marketing of alternative investment funds (AIF), including regulated funds that are not UCITS, wherever those funds and their managers are based.

General Remarks

As a general comment, ICI Global supports the work being undertaken by ESMA to clarify a number of key elements of the AIFMD to ensure a high degree of legal certainty and consistency in the application of the Directive across all EU Member States. Of particular importance to ICI Global members is the application of the Directive to those AIFs and AIFMs established outside the EU and to those third party service providers to whom functions or tasks under the Directive are delegated by AIFMs.

ESMA's discussion paper deals with a number of key definitional elements of the AIFMD including the scope of the Directive's application to AIFs and to AIFMs. ICI Global does not have any specific comments on the more technical aspects of these definitional elements. However, ICI Global believes that it is of utmost importance that in clarifying these important elements of the framework of the Directive, both the letter and spirit of the Directive is respected.

¹ ICI Global is a global fund trade organization based in London; members include regulated non-U.S. based funds publicly offered to investors in jurisdictions worldwide. ICI Global seeks to advance the common interests and to promote public understanding of global investment funds, their managers, and investors. Members of ICI Global manage total assets of over US\$1 trillion.

Definition of AIFM

ESMA has set out its view of the definition of an AIFM in accordance with Article 4(1)(b) of the AIFMD. The Directive contains a complex framework for the definition and subsequent determination of the entity that is appointed as an AIFM for each AIF managed within the scope of the Directive. As well as setting out the formal definition of an AIFM², the functions which the AIFM must perform to be considered to be “managing AIFs”³ and the services for which an AIFM must be authorized⁴, the Directive also defines how an AIFM is to be determined including where the legal form of the AIF permits internal management⁵.

ESMA noted that an entity performing either portfolio management or risk management is managing an AIF and must seek authorization. We agree that an entity that is “performing” either the function of portfolio management or the function of risk management in accordance with Article 4(1)(w) should seek authorization from the relevant competent authorities for the provision of both these functions in accordance with Article 6(5)(d). As ESMA has acknowledged, the requirement for the AIFM to seek authorization for the provision of both functions reflects the overarching obligations on AIFM to be responsible for the proper performance of the delegated functions and compliance with the Directive.⁶ We also strongly support ESMA’s acknowledgement that no AIFM authorization is required when the performance of either portfolio management or risk management is done under a delegation arrangement with an AIFM.

Delegation of activities

ESMA has set out its view that notwithstanding the fact that an AIFM may not perform the additional functions set out in Annex I of the AIFMD itself, it believes that the functions should be considered as having been delegated by the AIFM to a third party. This view however does not reflect the legal and operational structure of certain funds, such as some trusts, nor do we believe that it is consistent with the intentions of the AIFMD or ESMA’s technical advice to the European Commission.

As a starting point, the AIFMD sets out a clear framework for the delegation of activities by the AIFM. Article 20 of the AIFMD lays down the conditions under which an AIFM may delegate to third parties the task of carrying out functions on its behalf and furthermore sets out specific conditions and obligations for the delegation of portfolio management and risk management.

² Article 4(1)(b)

³ Article 4(1)(w)

⁴ Article 6(5)

⁵ Article 5

⁶ Recital 30 and Article 5(1)

The Directive specifies that the strict limitations and requirements on the delegation of tasks by AIFMs should apply to the delegation of those functions set out in Annex I – namely the functions of portfolio management and risk management that constitute “managing AIFs” in accordance with Article 4(1)(w). The Directive also however acknowledges that “the delegation of supporting tasks, such as administrative or technical functions performed by the AIFM as a part of its management tasks, should not be subject to the specific limitations and requirements set out in this Directive”.⁷

Importantly, the Directive draws a distinction between investment “management” functions specified in paragraph 1 of Annex I and the “other” functions specified in paragraph 2 of Annex I. This is to acknowledge that the AIFM “may additionally perform” these other functions but that it is not required to do so. The Directive however contemplates the situation under some fund structures (e.g., some trusts) where the AIFM does not have the authority to delegate and therefore to ensure compliance with the requirements of the Directive by other entities providing services to the fund⁸ and identifies a mechanism to deal with instances where the AIFM is not able to ensure compliance.⁹

Unlike the UCITS IV Directive which specifies that investment management and administration activities are included in collective portfolio management, the AIFMD does not mandate that the functions of administration, marketing and activities related to the assets of the AIF be performed by the AIFM in the course of collective portfolio management.

The distinction is drawn between the UCITS IV and AIFM Directives in part to acknowledge the ability of an AIF to be managed by an external AIFM. Subjecting the AIFM to liability for delegation of those functions that the AIFM has not itself delegated is inconsistent with the intentions of the AIFMD and, more specifically with the provisions in Article 20(3) regarding the AIFM’s liability to the AIF and its investors for those functions delegated by the AIFM to a third party.

In addition, this is also inconsistent with ESMA’s advice to the European Commission.¹⁰ In that advice, ESMA specified that an AIFM “must comply with the provisions of Article 20 of the AIFMD prior to a third party performing a task which would otherwise be undertaken by the AIFM and which is critical or important for the proper performance of the functions it provides to an AIF” (emphasis added)¹¹. ESMA further stated that “it is not proportionate to require the AIFM to comply with requirements in Article 20 for each and every small task that is undertaken by a third party.

Accordingly, ESMA must revise its advice to accommodate those circumstances, such as in the case of certain trust structures, where the AIFM has not delegated, and lacks authority to delegate, a function.

⁷ Recital 31

⁸ Recital 11 states, in part, “[s]everal provisions of this Directive require AIFMs to ensure compliance with requirements for which, in some fund structures, AIFMs are not responsible. An example of such fund structures is where the responsibility for appointing the depositary rests with the AIF or another entity acting on behalf of the AIF. In such cases, the AIFM has no ultimate control over whether a depositary is in fact appointed unless the AIF is internally managed. Since this Directive does not regulate AIFs, it cannot require an AIF to appoint a depositary.”

⁹ Recital 11 and Article 5

¹⁰ Final Report, ESMA’s Technical Advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive (available from http://www.esma.europa.eu/system/files/2011_379.pdf)

¹¹ Paragraph 1, Box 63 of (http://www.esma.europa.eu/system/files/2011_379.pdf)

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As drafted ESMA's advice does not accommodate arrangements whereby an external AIFM is appointed by an AIF or on behalf of an AIF to only perform the functions of portfolio management and/or risk management for that AIF. This could be achieved by removing the assertion that the AIFM is subject to liability for delegation in respect of those functions that the AIFM has not itself delegated.

Treatment of UCITS Management Companies, MiFID Investment Firms and Credit Institutions

ICI Global supports ESMA's treatment of UCITS Management Companies, MIFID Investment firms and Credit Institutions providing investment services to AIF under delegation arrangements.

ICI Global also supports ESMA's advice in relation to the dual authorization of entities acting as both UCITS management companies and AIFMs and the provision of core and non-core investment services specified in Article 6 of the AIFMD. In this regard it is notable that, with the exception of the reception and transmission of orders in relation to financial instruments, the non-core services that AIFMs may be authorized to provide along with the additional elements of MIFID that apply, are identical to those under the UCITS Directive. Neither the AIFMD nor the UCITS Directive however expressly deals with the "passporting" of these additional core and non-core services by AIFMs and UCITS Management Companies, although the position is somewhat clearer under the UCITS Directive. This is despite both directives permitting the passporting of management and marketing related activities in respect of AIFs and UCITS funds.

We note that a firm authorized under MIFID to perform those core and non-core investment services that are the same as those investment services identified under Article 6 of the AIFMD would be able to exercise its rights to passport these services on a branch or services basis, subject to having made the appropriate notifications to the relevant competent authorities. AIFMs performing the Article 6 core and non-core services are subject to similar obligations to those to which a MiFID investment firm is subject however their ability to passport is unclear. Given that these firms are subject to similar obligations and cannot be dually authorized under MiFID, AIFM should benefit from similar rights to passport these services on a branch or services basis. ESMA should clarify the ability of an authorized AIFM to passport these services.

We appreciate the opportunity to provide comments on ESMA's Discussion Paper. If you have any questions about our comments or would like additional information please contact me (dan.waters@ici.org or +44 203 009 3101) or Giles Swan, Director of Global Funds Policy (giles.swan@ici.org or +44 203 009 3103).

Sincerely,

/s/

Dan Waters
Managing Director