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Dear Sirs

Alternative Investment Fund Managers Directive (the "Directive") – further comments

In our previous letter we expressed concerns of a fundamental nature in relation to the scope of the Directive. In particular we highlighted that the scope of the Directive was extremely wide and encompassed the managers of many types of alternative funds which we do not believe the provisions of the Directive were intended to encompass. In addition to the points already made, we believe that the following elements are capable of giving rise to great uncertainty unless clarified and are particularly acute for arrangements which are, perhaps unintentionally, caught within the current wide definition of "Alternative Investment Fund".

(a) A number of provisions in the Directive refer to an AIF, being 'leveraged'. The concept of leverage needs much greater definition in order to ensure that it is directed at the kind of leverage that can have systemic impact. Accordingly, it needs to be clear that:

- it is leverage at the level of the fund that is relevant; and

- that liquidity/drawdown bridging facilities will not of themselves bring a fund within the 'leverage' concept. In many fund structures (particularly in the private equity space) investors commit to advance monies but these are drawn down by the AIFM on an "as needed" basis. The use of borrowing against undrawn commitments to cover the period between making a subscription call and the arrival of funds from an investor, should not be confused with gearing aimed at enhancing returns.

Further the definition of "Leverage" refers to an AIF's exposure to a "particular investment". Very few AIFs borrow in respect of a "particular investment", notably hedge funds, and therefore the concern is that the definition is not sufficiently clear. Presumably it is intended to catch borrowing that will enhance returns irrespective of the nature or structure of the borrowing.

(b) The threshold tests are important, but it is not clear how the 'assets under management' are to be calculated for the purpose of assessing the test. In addition the concept assumes an existing manager with existing funds. Presumably a new manager raising a new fund would have to decide at the marketing stage whether or not to opt into the Directive, taking into account his expectation of the value of the funds to be raised? There needs to be a mechanism whereby a firm which has opted into the Directive can subsequently opt out of the Directive.

A related point arises as to the position of a manager where the value of the assets under management fluctuates above and below the threshold level. In particular are funds which are committed by investors to an AIF (but not yet drawn down) to be treated as "assets under management" for these purposes? If they are not then as further committed capital is drawndown from investors, this could result in the AIFM going over the threshold during the life of the AIF. There needs to be much greater clarity as to the impact of such an event. In particular, where a manager is originally outside the scope of the Directive, there needs to be a transitional period if his investment activity is so successful that his assets under management increase in value and bring him within the Directive thresholds. At that point the fund is established, agreed with investors and may not be fully compliant with the Directive. It is therefore essential that there is a 'grace period' for managers who cross the threshold during the life of a fund (or funds).

Finally, clarity is required as to what is meant in Article 2(a) by "directly or indirectly through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding". This definition is not one which, as far as we are aware, is used elsewhere within EU Directives and the meaning is not clear. We suggest that the more usual group tests are applied and that the words "substantive direct or indirect holding" in Article 2(a) are replaced with the words "group holding".

(c) Much greater clarity is needed as to the position in relation to national private placement

regimes, particularly so far as funds which are below the threshold level are concerned. It is not clear whether existing Member State private placement regimes will continue for AIFMs not required to comply with the Directive. We believe that it should be expressly stated on the face of the Directive that a manager of a fund which is exempt by reason of the threshold test, is able to market that fund in any Member State on the same basis that a national of that Member State could market a fund. There are already examples where Member States discriminate against fund managers from other Member States (in breach of fundamental Treaty principles) and we therefore believe that the position should be clearly stated on the face of the Directive.

(d) We are aware of the points being made by numerous industry bodies on the onerous and impractical nature of the notification and marketing provisions. We support the points being made, as the concept of prior notification and consent in relation to marketing documents and subsequent changes (particularly the tight timescales currently envisaged) does not fit with the reality of the marketing of AIFs. Investors are involved in negotiating fund documentation and changes, almost always in favour of investors, are often made to fund documentation in the period leading up to the closing. Such negotiations are undertaken with professional investors who are usually represented by their lawyers and such investors are keen to proceed with closing as soon as possible. Our view is that they will not want to hold back the close pending prior consent of the regulator to the changes. The position is particularly important if the definition of AIF continues to encompass private structures such as joint ventures, co-investment vehicles and distressed assets vehicles, which are usually outside of the definition of a fund.

Further clarification is required as to what is meant by "marketing" in the Directive. As we mentioned in our previous letter, it would create an absurdity to subject normal commercial, corporate and joint venture arrangements to pre-marketing notifications to regulators etc. Furthermore, professional investors should be permitted to make enquiries of an AIFM (and visa versa) about a prospective fund without triggering the prior notification and consent procedures.

As currently drafted, the Directive definition of "marketing" captures the marketing of secondary transactions between investors, but, in our view, the definition should only apply to marketing directly related to raising capital for the AIF.

(e) The delegation provisions are unclear in a number of respects. The requirement that an AIFM can only delegate portfolio and/or risk management functions to an AIFM highlights uncertainties we have raised previously. Does the reference to an AIFM in Article 18(i)(b) mean an AIFM authorised under the Directive, or could it include a fund manager regulated at national Member State level? In our view, the provisions regarding delegation and the use of depositaries should follow the MiFID regime rather than become more aligned with the UCITS regime. The MiFID outsourcing and custodian provisions were established recently in an investor protection context and it seems to us that it would be appropriate to follow these rules.

As referred to in our previous letter, we have concerns as to what is considered to constitute "management services" under the Directive. This ties in with our view that the delegation concept does not fit with many types of funds that will fall under the Directive – in the case of a real estate fund it may be highly desirable to delegate real estate management to a specialist. However real estate management is not of itself (as far as we are aware) regulated in any Member State, or under the Directive. The provision as drafted will therefore prevent many funds from obtaining and using the specialist expertise that their portfolio strategy requires which will disadvantage investors.

The Directive is unclear as to whether the delegation of marketing units in an AIF by the AIFM to a MiFID authorised placement agent is a delegation which would require pre-approval under the provisions of Article 18 or whether it is already permitted in accordance with Recital 5 (which states that MiFID authorised investment firms are permitted to provide services in respect of an AIF without requiring separate authorisation under the Directive). If the latter is correct, and in our view it should be, this would need to be reflected in the substantive part of the Directive. In our view, marketing should not be an activity covered by the delegation provisions of the Directive as the MiFID requirements imposed on a placement agent provide sufficient investor protection.

(f) There is great confusion as to the interaction with the Prospectus Directive. It appears that a fund that could be promoted under and in accordance with the Prospective Directive to retail investors, could not be so promoted because of the provisions of the AIFM Directive. Therefore the scope and value of the Prospectus Directive is significantly undermined by the AIFM Directive, with no valid reason for such a strange result. We believe that it must be made clear that, where a promotion is in accordance with the provisions of the Prospectus Directive, the marketing provisions of the AIFM Directive do not apply. Our suggestion would be to include a recital setting out how the Prospectus Directive and AIFM Directive interact.

(g) There seems to be confusion in the Directive as to whether the intention is for the Directive to regulate AIFs as well as AIFMs. Rather than bringing operators of certain AIFs within the scope of the Directive, our view is that bringing such operators within the scope of MiFID would provide a more proportionate result. They would then be subject to the MiFID regulatory capital rules, systems and controls rules and conduct of business rules which were incorporated into the regulatory regime of all Member States.

(h) The exemption for credit institutions and insurance companies is uncertain in scope. For example, there is inconsistency between Recital 5 (which states that the Directive should not apply to assets held on own account by credit institutions and insurance companies) and Article 2(2) of the Directive (which does not contain an equivalent carve out in respect of assets held on own account). There is no need for an exemption for a credit institution or an insurance company in respect of its 'own funds'; by definition these do not involve that entity managing monies belonging to third party investors. The effect of being exempt under the

Directive is also not clear – does it mean that a manager is free to establish funds without independent depositaries or valuers and promote them cross-border? We can see that a credit institution or an insurance company may not need a separate authorisation or capital requirement under the Directive, because of the other regulation to which it is subject, but we cannot see any case for any further exemption. Moreover we assume (but it is not clear) that the subsidiary of a credit institution or insurance company which is a separate legal entity would fall within the scope of the Directive.

(i) The position of MiFID investment firms, and the services which they can provide to AIFs is unclear. The penultimate sentence of Recital 5 links with our earlier observation that credit institutions appear to be favoured in that they will be permitted to provide services to AIFs due to their authorisation under MiFID. There is no substantive provision which relates to this last sentence, and therefore its legal effect is uncertain. We see no reason why a MiFID investment firm should be unable to advise on, place units in, or make decisions in the course of directionary investment management, in relation to an AIF, wherever located. The investor protection provisions of MiFID are all that is required in this respect, otherwise the AIFM Directive creates a discriminatory regime in respect of investment in funds, depriving investors of access to the range of investments that their advisers/manager considers necessary to meet their investment strategy.

(j) Article 35 is inconsistent with a common passport regime and has the potential to make the Directive passport (including that under Article 39) illusory for non-EU funds. We have previously mentioned that "AIFM" does not always appear to refer to a manager "authorised under the Directive" and clarity on this point is particularly important in respect of Article 35.

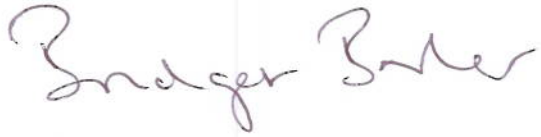
Additionally, the relationship, and apparent inconsistencies, between Articles 35 and 39 needs to be clarified. In particular, Article 35 appears to permit an EU AIFM to market a non-EU AIF that is not managed within the EU without that non-EU AIF having to comply with an equivalent regime to the Directive, whereas under Article 39, a non-EU AIFM may not be able to become authorised to sell the same non-EU AIF if the equivalence provisions contained in Article 39 are not satisfied in respect of that non-EU AIF. This is possibly the result of a lack of clarity in Article 39 as to the extent to which the equivalence provisions focus on the non-EU AIFM or the non-EU AIFs that it may wish to market, and a lack of recognition that the non-EU AIFM and non-EU AIF may not be established in the same jurisdiction.

(k) We believe that there is likely to be significant uncertainty in relation to the application of transitional provisions and would welcome further detail as to how transitional provisions are intended to operate within the text of the Directive itself. Article 51 states that AIFMs "operating" in the Community will be required to adopt measures to comply with the Directive with one year of the deadline for the transposition of the Directive. We would be grateful for clarification as to the meaning of "operating". Following on from this, it would be helpful to clarify how the Directive requirements will apply to a manager (whether EU or non-EU) of an existing fund which would qualify as an AIF once the Directive is

implemented.

Further, the Directive should be clearer about the position of non-EU managers, funds and services provides during the three year transitional period. In addition to the comments in our previous letter regarding the marketing of non-EU AIFs by non-EU AIFMs, it should be clarified that delegation of administrative services and valuator functions to non-EU entities are permitted prior to Chapter VII of the Directive taking effect.

Yours sincerely



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