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## AIMA, BAI and the ACC comments on the European Commission's proposal to review the AIFMD and the UCITS directive

The Alternative Investment Management Association (AIMA), the Bundersverband Alternative Investments eV (BAI) and the Alternative Credit Council (ACC) (together 'the Associations') welcome the opportunity to provide their members' views on the European Commission's (Commission) Proposal for a Directive of the European Parliament and of the Council amending Directives 2011/61/EU (the 'AIFMD') and 2009/65/EC (the 'UCITS directive') as regards delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services and loan origination by alternative investment funds (the 'Proposal').

Among its global membership, the Associations count a large amount of alternative investment fund managers ('AIFMs') who are either operating in the EU, serving EU clients and/or looking at expanding their operations in the EU. Those AIFMs manage alternative investment funds ('AIFs') which are mostly running liquid alternative and private credit strategies and are directly contributing to the financing of the EU economy and the consolidation and growth of EU capital markets.

The Associations' position on the AIFMD review remains that **any substantial regulatory changes should be limited to where absolutely required and supported by factual evidence.**

Adding further constraints to a sector which is working efficiently and which is already comprehensively regulated would be detrimental to the EU economy, at a time where market-based finance is critically needed for the financing of an innovative and competitive European economy and of the ecological and sustainable transition.

This letter specifically elaborates on the changes proposed by the Commission to amend the AIFMD. As regards the revision of the UCITS directive, given that the proposed provisions for the most part mirror the similar proposals for the AIFMD, all AIFMD-related comments on applicable

matters to the UCITS framework (namely sections on authorisation, delegation, liquidity and reporting) are also relevant for the proposed amendments of the UCITS directive, although sometimes nuanced in a footnote when differences in the directives are particularly relevant.

- **Delegation:** We welcome and support the fact that delegation has been explicitly recognised as a key contributor to the success of the EU fund and manager labels. We therefore recommend that the co-legislators confirm the Commission's view on the importance of delegation for the EU fund management industry in the Directive, so as to ensure that the ability to delegate some functions and its intrinsic value is not constantly disputed. We also question the need to introduce a reporting requirement for Member State national competent authorities ('NCAs') to the European Securities and Markets Authority (ESMA) on delegation arrangements given that ESMA already has the power to collect the necessary information from NCAs.

- **Loan originating funds – allow for the ability for AIFs to lend on a cross-border basis:** The successful growth of private credit in the EU is a significant achievement. As traditional lenders have reduced their lending to SMEs and mid-market businesses, private credit funds have filled the gap and become a vital source of finance for European businesses. Our research[1] also shows that private credit providers are supporting the sustainability transition among SMEs and mid-market companies. We would therefore strongly support for the directive to clarify that AIFs and AIFMs acting on behalf of AIFs can conduct their activity on a cross-border basis. We believe that this can be done without prejudice to specific Member State product regulation as regards loan origination funds.

- **Loan originating funds – need for more fund form and asset sale flexibility:** The proposals that restrict loan origination AIFs to operating only in closed-end fund forms have the potential to disrupt needlessly the development of the EU loan fund industry and restrict access to finance by EU businesses. This is because the large institutional investors who provide the bulk of the capital for the funding of the loans increasingly prefer so-called 'evergreen' funds that are formally open-end but that also do not permit runs on funds or redemptions that would force fire-sales of assets. To the extent that liquidity mismatches can be governed through fund design, it should be possible to avoid mandating the closed-end fund form as it would present an unjustified anomaly in the entire AIFMD framework. Similarly, there is no reason or justification to prevent AIFs from selling their loan exposures, either when such sales are conducted within a group of affiliated entities as part of the allocation process or when it would be in the interest of the investors to lower exposure in situations of borrower stress or distress. Concerns regarding misalignment of incentives can, therefore, be met through different means than simply mandating a hard threshold.

- **Liquidity risk management:** We welcome that liquidity risk management tools are to be made available in all Member States. The assessment, selection and activation of those tools must, however, remain the ultimate responsibility of the AIF (where it has appointed an external AIFM), supported by the AIFM who may be charged with ensuring the AIF is taking the appropriate actions. The conditions under which an AIF's shares may be redeemed are indeed

[1] See Financing the Economy 2021 – ESG and private credit ('FTE 2021').

integral terms of the shares of the AIF and must be reflected in the fund's rules or instruments of incorporation. We also question the effectiveness of the application of such tools on an ex-post basis by NCAs or ESMA, when those tools are embedded in a complex set of criteria and factors, such as the underlying investment strategy, financial instruments and targeted investors.

- **References to EU AML and tax blacklists:** We note the lack of predictability around the constitution of the EU list of "high risk countries" under the AML Directive and the list of non-cooperative jurisdictions for tax purposes and the potential magnitude of an impact the addition of some jurisdictions to those lists could have on the fund management industry which operates on a global scale. Furthermore, the placement of these provisions in the AIFMD makes the consequences of a fund jurisdiction ending up on of these lists more severe under AIFMD (i.e., a ban on marketing) than the consequences under the EU AML package (i.e., enhanced customer due diligence processes but no ban on transactions). We also ask that grandfathering and transition periods be added to mitigate the negative effects where an AIF or AIFM jurisdiction is added to one of those lists after marketing activity in the EU has commenced.

- **Fee disclosure:** Fees that would be disclosed on a quarterly basis would only be based on estimated figures. We question the usefulness of such disclosure, especially when compared to the costs in time spent by the AIFM to work on those estimates and extra reporting. The investor should be able to choose whether or not they prefer accurate and audited annual fee disclosure to quarterly estimations. We also recommend specifying that the scope of the disclosure explicitly covers expenses incurred by investee companies that accrue to the AIFM, so as to ensure that appropriate information is reported to the investor.

- **Reporting:** We caution EU policymakers against an approach to reporting that would be extremely burdensome for AIFMs operating in the EU, while not providing the right set of information or data to policymakers. We argue that achieving the "full picture" by regulatory reporting should not be the objective, but policymakers should instead try to get the "right picture" following a comprehensive analysis of the main indicators that would be most meaningful as regards systemic risk monitoring (for example data points related to initial margin, or margin variations in the derivatives markets).

We would be happy to elaborate further on any of the points raised in this letter. For further information please contact Jennifer Wood, Global Head of Asset Management Regulation, AIMA (jwood@aima.org).

Yours sincerely,

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| /s/ | /s/ |
| Jiří Król | Frank Dornseifer |
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**ANNEX I**

This Annex details our views on the AIFMD proposal. As regards the revision of the UCITS directive, given that the proposed provisions for the most part mirror the similar proposals for the AIFMD, all AIFMD-related comments on applicable sections to the UCITS framework (namely sections I, III and V) are also relevant for the proposed amendments to the UCITS directive, although sometimes nuanced in footnotes where differences in the directives are particularly relevant.

## I. Delegation: a reasonable targeted approach, but concerns that the Proposal introduces unclear concepts and burdensome administrative requirements

The Associations welcome and support the fact that delegation has been explicitly recognised in the explanatory memorandum of the Proposal as a key contributor to the success of the EU fund and manager labels.

We reviewed the targeted amendments proposed by the Commission related to delegation and would like to make the following comments.

*As delegation is a central contributor to the EU fund management industry's growth and success, its value should be explicitly recognised in the AIFMD.*

Being able to delegate portfolio management functions is considered as one of the reasons for the success of the AIFMD framework and a key enabler of the growth of the alternative investment management market over the recent years. The fund management industry is a global industry with a global value chain and we would recommend that co-legislators support and confirm the Commission's view on this matter by recognising and embedding those benefits in the level 1 text and by refraining from making additional substantive revisions.

Outsourcing the entirety of day-to-day portfolio management of an AIF is a normal activity undertaken by many of our members. Delegation of portfolio management is strictly regulated and limited by the AIFMD to third parties that are authorised or registered for the purpose of asset management and subject to supervision in their home countries and, in the case of third-country delegates, where there is a cooperation agreement in place between the competent authorities of the home member state of the AIFM and the supervisory authority of the proposed delegate.[2]

Not only is delegation to third-country entities already covered by the AIFMD regulatory framework, but it is also a key contributor to the EU fund management's industry's success as it has allowed (i) EU AIFMs to access global expertise, to the benefit of their own EU investors who can allocate their capital to highly sophisticated fund managers located anywhere in the world (subject to the regulatory conditions highlighted above) while being fully covered by the EU framework[3] and (ii) the EU in general to develop globally recognised investment management

[2] As per Article 20 of the AIFMD, notably points (1)(c) and (d).

[3] As noted in the Commission's impact assessment accompanying the Proposal (the 'impact assessment'), p.27 ("Often delegation serves a useful purpose by connecting European investors with investment opportunities and expertise in third country markets to meet their investment needs and properly diversify their investment portfolios.").

brands, regulatory framework and products which strongly contribute to the EU general economic attractiveness and influence.[4]

Where the delegate is in the EU (or the UK), this means the delegate will generally have to be an investment firm authorised under MiFID. Investment firms are, in turn, also required to establish risk management functions and carry out day-to-day risk oversight of the investment services provided (in this case portfolio management). This means that where portfolio management is delegated to a MiFID firm, by definition, some level of risk management must also take place at the MiFID entity as otherwise there would be a breach of the MiFID rules (e.g., Article 23 of Regulation (EU) 2017/565). For certain investment strategies requiring direct market access and membership of exchanges or clearing houses, delegation of portfolio management to MiFID entities is the only way to operate.

Furthermore, the industry has started to make use of so-called third-party AIFM platforms that allow smaller managers to focus on their core skills while having the variety of non-investment tasks be performed by an AIFMD that specialises in administration, middle office, banking, depositary, custody and many other AIFM services. Such platforms allow for previously unaffiliated (sub) investment managers to essentially "plug and play" by joining the platform with their own separately managed sub-fund. This sector has grown in recent years as the cost and complications involved in a new launch have expanded. These platforms are particularly favoured in EU Member States where the fund industry is still relatively small but growing. For those smaller fund management markets, delegation is essential to build a national, competitive and sophisticated investment management industry.

We therefore recommend that the co-legislators confirm the Commission's view on the importance of delegation for the EU fund management industry in the directive's recitals, for example in Recital 30 of the AIFMD, so as to ensure that the ability to delegate some functions and its intrinsic value is not constantly questioned.

*Current concerns on "letter box entities" have been dealt with by the ESMA 2017 opinions and are proposed to be codified in the Proposal's amendments dealing with FTEs*.

As a reminder, the ability for an EU AIFM to delegate functions is currently strictly regulated by the current AIFMD at level 1 (Article 20), which is itself supplemented by Commission Delegated Regulation (Article 75 to 82 of CDR 231/2013) and supervisory guidance, notably via the opinions published by ESMA in 2017[5] (the 'ESMA 2017 Opinion') which have substantially raised the bar in relation to substance and NCAs supervision requirements. It is also notable that in its 2017 opinions, ESMA recognises that "the general delegation requirements set out in Article 20 of the AIFMD have been specified by ***detailed*** Level 2 provisions" (emphasis added). ESMA further continues by recommending the alignment of the UCITS directive rules with the AIFMD rules on

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4 Soft global economic influence is notably one of the key benefits of the UCITS framework, which has gained a strong reputation among Asian investors, with high volumes of AUM being managed via UCITS funds on behalf of Asian clients thanks to delegation arrangements.

5 ESMA, Opinion to support supervisory convergence in the area of investment management in the context of the United Kingdom withdrawing from the European Union (July 2017).

letter box entities, thereby recognising that the AIFMD rules on the matter are considered effective and appropriate.

In response to the 2017 ESMA opinions, many NCAs have upgraded their approach to the supervision of delegation. The Luxembourg CSSF has significantly substantiated their specific questionnaire for firms intending to delegate some investment management functions. Questions asked in relation to delegation notably cover:

- reasoning for delegation/outsourcing;
- detailed information on control procedures in place within the management company:
    - impact this has on human resourcing locally,
    - detail on individuals responsible for oversight and coordination,
    - Number of personnel and time spent on oversight,
    - Experience of personnel responsible,
    - Diligence performed on outsourced activity and detail on specific methods,
    - Evidence of written agreements formalising delegation,
    - Detail on software and data handling/access as well as security of data/software/ communications (e.g., encryption processes), and
    - details on delegates' supervisory authority (regulator);
- group information;
- detail on specific tasks;
- the number of individuals assigned to outsourced tasks; and
- information on specific vehicles and amount of assets in question.

The Central Bank of Ireland (CBI) has also introduced detailed guidance relating to delegate oversight and the obligations of fund management companies following a stakeholders' consultation (known as "CP 86" in the industry). Following a thematic review of fund management companies' governance, management and effectiveness, the CBI has stated that all fund management companiesshould have a minimum number of full-time employees and should appoint locally based Designated Persons and other staff who have sufficient time to dedicate to their roles and responsibilities, including delegate oversight.

We would therefore encourage policymakers to continue improving the oversight of delegation arrangements at the supervisory level and support NCAs' supervisory and enforcement powers and actions, rather than seek to modify the current level 1 which is already considered "detailed" by ESMA and other stakeholders.

Furthermore, the Commission proposes to codify the ESMA 2017 Opinion with the proposed amendment to AIFMD Article 8(2), requiring "that the conduct of the authorised entity should be decided by at least two Senior Managers", thereby ensuring a minimum of substance at the level of the AIFM. Although we understand that all EU jurisdictions now comply with ESMA 2017 Opinions' requirements, **we support the Commission's proposed amendment to Article 8(2)** as a manner of ensuring AIFMs are not letter box entities with a clear and objective standard that provides for a minimum threshold. As mentioned above, other existing requirements, notably as regards an AIFM governance and senior management functions, including the necessity for senior managers to be fully responsible for all aspects of the EU AIFM operations and ensure compliance with the AIFMD, already provide further safeguards for risk management purposes.

*The provisions on "delegation notifications" should be either deleted or drastically simplified and clarified.*

As delegation is vital to the success of the EU fund management industry's growth and is comprehensively regulated by the AIFMD framework, we feel a healthy approach to support the development of the EU fund management industry would be for the co-legislators to offer a stable and predictable regulatory regime which is not subject to disproportionate administrative burden. Policy should avoid constantly reviewing and changing the delegation legal framework.

This view underpins our position on the proposed amendments to AIFMD Article 7(5) and the proposed data collection exercise by ESMA.

As regards the **proposed amendment to Article 7(5),** our recommendation would be to avoid legal uncertainty while ensuring that the policy objectives to develop a "reliable overview of delegation activities" in the EU (as per the stated policy purpose of Recital 6 of the Proposal) are met. In light of this, our recommendation is either to delete the proposed amendment to Article 7(5) (**Option 1**) and instead rely on ESMA's existing data collection powers; or ensure that the data collection exercise applies to all the delegations of an AIFM, in order to be useful to the regulator (**Option 2**). We feel that any other policy choices resulting in trying to define what level or type or volume of delegated activities should, or should not, be reported to ESMA risk creating much confusion and repapering in the market, only to provide regulators with a fragmented view of the situation.

Our preference would be opting for **Option 1** and the deletion of the amendment to Article 7(5). Indeed, we are concerned by the introduction of the concept "delegating more than what is being retained", a concept which is unclear, and the narrow and specific focus on delegation to third-country entities. The introduction of this concept will lead to (and already creates) confusion in the market - on the one hand at the level of NCAs, which will be tasked with the assessment of understanding what is retained over what is delegated, and then indirectly at the level of AIFMs which will have to operate in an unclear regulatory regime. We feel this approach is not conducive to a healthy regulatory environment and does not contribute to the sound and stable development of EU capital markets.

An additional point of concern with the amendments to Article 7(5) is the administrative burden that it might create, which would be potentially disproportionate compared to the specific and narrow issue at stake:

- It is likely that the NCAs will not have the information required for the notification readily to hand, given that, as highlighted above, the proposal introduces new concepts. This means that NCAs will turn back to EU AIFMs to collect information on (i) the quantum of "more", however this is to be interpreted; (ii) on the "description of portfolio and risk management functions", or (iii) on "any [...] information necessary to analyse the delegation arrangements" whatever that might be. This will result in a voluminous reporting exercise for all authorised AIFMs, potentially even existing EU AIFMs despite the fact that they have been authorised in line with all AIFMD rules and in addition to the already burdensome existing supervisory reporting requirements which they are already subject to. We would recommend instead for ESMA to collect the information as needed, during peer review exercises and/or under its existing powers, rather than hard-wiring this new heavy reporting approach in the AIFMD level 1.

- The amendments also seem to introduce an annual assessment by the NCA on whether EU AIFMs have delegated more than what they have retained which would seem to lead to an annual reporting requirement by AIFMs to NCAs. This would also mean a burdensome reporting exercise. We would rather favour a single notification at the time of authorisation of the delegation arrangement (as per Article 20 AIFMs have to notify NCAs of each delegation arrangements they are implementing) and, as noted above, some potential transfer of information during peer reviews exercises, but would caution against an annual exercise that might be overly burdensome for ESMA, NCAs and EU AIFMs.

Finally, we question the need for such a specific provisions on transfer of information from NCAs to ESMA when ESMA is already able to collect this information without any changes to the AIFMD level 1 text, as the existing regulatory framework already empowers ESMA to collect such information. First, AIFMD Article 7 points (5) and (6) allows ESMA to specify the information to be received by NCAs. Second, Article 35 "collection of information" in Regulation 1095/2010 on ESMA powers and governance[6] allows ESMA to collect the necessary information from NCAs to carry out its duties. The focus of the proposed amendment on delegation to third country entities, in addition to introducing new concepts and further uncertainty, does not seem necessary in light of ESMA's existing powers and could be superfluous in overly dragging attention to a specific aspect of a fund management company's operations, leaving aside other types of risks or vulnerabilities which could be as, if not more, detrimental to European investors (such as cybersecurity risks, greenwashing, or general frauds).

Furthermore, the fact that this information sharing requirement is so specific and is added as a stand-alone in the level 1 of the AIFMD seems a bit strange and could lead to a fragmented and scattered approach to ESMA's requests of information to NCAs.

For all these reasons (confusing concept, heavy administrative burden compared to the issue at stake and redundancy with existing regulations/powers), our recommended approach is to delete the amendment pertaining to those delegation notifications.

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6 Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) – available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010R1095-20200101.

Should such a deletion not be an ideal solution for policymakers, then we strongly recommend a clearer approach to reporting by NCAs on delegated activities, as this will ultimately benefit the overall EU regulatory regime. As such we would rather opt for a requirement for the NCA to send notifications to ESMA on all delegation arrangements they are supervising (on an ex-post basis) (**Option 2**). This option has the merit to introduce a clearer framework, which notably will mean less time, energy, resources and costs wasted by NCAs trying to figure out/assess whether more has been delegated than what has been retained each single fund manager. It seems also to be better addressing the stated policy objective in Recital 6 which is to "provide a reliable overview of delegation activities" in the EU. Indeed, limiting the reporting only to activities that are being delegated more than has been retained in house and only to third-country entities, as is proposed currently in the Commission's proposal, risks not meeting the policy objective of providing a comprehensive understanding of delegation in the EU and the potential risks to EU investors.

We also note that the amendment proposed by the Commission on data collection on delegation is linked to new AIFMD Article 69b and its review clause, notably related to an assessment of the effectiveness of the rules outlined in Article 20 on delegation. We are concerned that, due to the anticipated review of the regulatory framework, the topic of delegation remains *de facto* open for the years to come with continued policy uncertainty. The current regulatory framework for delegation is considered by many stakeholders as efficient and conducive to a high level of oversight and risk management by EU AIFMs. Keeping the legal framework surrounding delegation open for the foreseeable future creates legal uncertainty which risks undermining the global attractiveness of AIFs.

## II. AIFMD Annex I: Clarification is needed that the delegation rules do not apply to activities not carried by the AIFM

A point related to the proposed amendment to Article 20(1) to extend Article 20's scope to all activities listed in AIFMD Annex I when the AIFM intends to carry them out would be the clarification that the functions listed in point (2) of Annex I need not be performed by the AIFM. Only where the AIFM does assume legal responsibility for those functions by accepting an appointment to perform those services, the delegation rules will apply.[7]

Such clarification is needed following confusion brought by a 2016 ESMA Q&A which concluded that delegation rules would apply to activities listed in point (2) of Annex I even if the AIFM is not responsible for undertaking those activities (i.e., in instances where an AIF with a separate legal personality has not appointed an external AIFM to perform those activities). In order to come into

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[7] We recognise that the UCITS Directive has a similar list of activities under Annex II which are collectively included in the concept of collective portfolio management in the UCITS product directive context. However, the AIFMD was specifically developed as a directive governing the manager and not as a product directive, recognising that outside the UCITS context, investment funds most often have a separate legal personality from the manager and appoint an external entity as the manager. As a result, point (2) of Annex I of the AIFMD speaks to "functions that an AIFM may additionally perform" (emphasis added) in contrast to point (1)'s language of "shall at least perform". This distinction is important and is in line with the expectations of the investors in AIFs, which are significantly different than the expectations of investors in UCITS, especially as relates to the role and value of independent third-party service providers appointed directly by the fund to undertake certain tasks without a contractual obligation to the AIFM creating an inherent conflict of interest. These directives have been written differently and should remain written differently.

compliance with the ESMA position, EU-authorised external AIFMs relying on the current requirements would therefore have to renegotiate their arrangements with AIFs to be appointed to be responsible for any of those point (2) services required by the AIF before the AIFM can actually delegate them.

This would also mean that the AIFM rather than the AIF would need to have control over choices of service provider and contractual terms. For many AIFs this may not be acceptable or even legally feasible, given their structure. One of the clearest examples of this is in relation to listed investment companies, where routing all material service appointments through an AIFM would run counter to all expectations of independence and would, for all intents and purposes, bind the AIFM to the AIF (given how difficult it would be to terminate an AIFM's mandate if all appointments flowed through it). Another clear example of the difficulty of such approach is illustrated in the context of a corporate AIF (many EU AIFs are companies) which will need legal services in all events. The ESMA Q&A view would seem to treat legal advisers to an AIF as having been appointed by the AIFM, such that they owe their duties to the AIFM and must treat the AIFM as their client, rather than the AIF, despite the fact that the services will be rendered to the AIF and depriving the AIF of the protection of legal privilege where that concept applies. Moreover, this structure would require the AIF to first appoint the AIFM to perform those legal services (an activity for which the AIFM is not capable of being licensed by authorities governing the practice of law) before those activities could be delegated under Article 20.

The EU legislator could also clarify that those functions listed in point (2) of Annex I can be performed by third-party service providers appointed by the AIF independently from the AIFM, subject to the AIFM ensuring that an appropriate third-party service provider has been appointed (which is a compliance obligation). This would not affect activities listed in point (1) of Annex, which indeed, where a third party performs those functions, should be considered as having been delegated.

## III. The need for an adequate and proportionate framework for loan originating funds

*Private credit supports smaller businesses and the transition towards a sustainable economy*.

The successful growth of private credit in the EU is a significant achievement. As traditional lenders have reduced their lending to SMEs and mid-market businesses, private credit funds have filled the gap and become a vital source of finance for European businesses. Our research[8] also shows that private credit providers are supporting the sustainability transition of the European economy by providing technical ESG assistance and incentivising the adoption of sustainable practices among SMEs and mid-market companies.

Private credit's growth in Europe has taken place under the existing regulatory and supervisory framework for alternative asset managers in Europe, the AIFMD. We therefore strongly support a stable regulatory framework for private credit and recognise its value in promoting investor confidence in the European market.

[8] See FTE 2021, *supra* note 3.

We are, however, concerned that some of the additional regulatory interventions proposed for loan funds, in the absence of clear evidence of market failure or emerging risks, are neither necessary nor prudent at a time when such interventions could disrupt the flow of much needed capital during a period of economic fragility.

Finally, we would like to highlight that the proposed provisions and restrictions on loan funds would heavily interfere with currently well established structures for Debt Impact Investing Funds including Microfinance Funds. Those are currently structured and authorised as open-ended funds and they are able no meet investment and liquidity management requirements demanded not just by their investors, but as well by national competent authorities, as various Member States already provide for specific national regimes for these types of funds, which are even eligible for retail investors. As these funds play a significant role not just in the context of sustainable finace but also in the context of international development assistance we strongly urge the Co-Legislators to re-consider any such limitation which would directly affect well-established business models. Relevant fund managers already apply liquidity management tools which are now brought forward to being incorporated within AIFMD so the Co-Legislators should acknowledge existing market practices. Prohibitive regulation as a mandatory closed-ended fund structure would put existing funds out of business and prevent new funds being established.

*A more holistic approach to liquidity risk management is needed*.

**Our proposal to improve the text:** *We would propose that where AIFMs can demonstrate to NCAs that they have robust liquidity risk management measures in place, the requirement to ensure that an AIF originating loans adopts a closed-end structure is disapplied. The liquidity risk measures such as lock-ups, ex-ante gates, and infrequent redemptions could be required as a pre-condition to the disapplication of the requirement for a closed-end structure*.

The AIFMD proposals include a new requirement in Article 16(2a) for an AIFM to ensure that the AIF is closed-end if originated loans make up 60% or more of its net asset value. AIFMD already requires AIFMs to ensure that, for each AIF that they manage, the investment strategy, the liquidity profile and the redemption policy are consistent (Article 16(2)). This means that AIFMs managing loan origination funds already face a burden of demonstrating that its liquidity management arrangements are robust and appropriate. We understand that this proposal seeks to address concerns about potential liquidity mismatches in the sector, but we are not aware of any data or evidence to substantiate these concerns and the need for additional requirements.

There are many ways in which liquidity risks may be managed in addition to adopting a closed-end fund structure. There is a growing demand from institutional investors for so-called ‘evergreen’ funds which are open-end in nature but operate similarly to closed-end structures by adopting a series of restrictive liquidity tools such as:

- lock-up periods which prevent redemptions before a pre-determined period after initial investment;
- prescribed and infrequent redemption windows (e.g., quarterly, semi-annual or annual);
- ex-ante fund and investor-level gates which allow only a small portion of investor capital to be redeemable during any redemption windows; and

- long notice periods for redemption requests.

Such structures are usually set up to enable investors to:

- maintain capital within the fund indefinitely and not have to go through a series of AIF launches and liquidations which can result in investor capital not being fully invested during the periods between liquidation and new fund launches;
- increase their capital allocation to a particular strategy without having to wait for the AIFM to wind down existing funds and launch new ones; and
- receive limited distributions during incremental periods once loans are fully amortised.

These types of investment structures prescribe the liquidity available to investors on the way out of the fund to help align this with the maturity profile of the assets. In such structures, investors often do not have the right to request that managers liquidate or sell their positions on the secondary market, and instead must wait until the loans are fully repaid if they no longer wish to participate or are seeking to reduce their exposure. These features provide robust safeguards against liquidity risks arising from investor redemptions that have caused disruption in other markets, such as open-ended property funds. Indeed, we are not aware of any cases where these features have caused investor detriment or created liquidity challenges in the financial system.

From an investor perspective, these features are an important component of the return profile investors are seeking from private credit funds. For example, they ensure that investors cannot force the sale of a loan in a manner which affects the capital returned to investors on that investment. Such structures also promote fairness across different cohorts of investors by ensuring that the actions of minority investors do not disproportionately affect other investors in the fund, for example because of a loan being sold earlier than anticipated at a discount. Mandating closed-end structures in the manner proposed could significantly affect the return profile of private credit funds. This would appear counterproductive to the stated intent of the proposals to support this market.

The liquidity risk management of private credit funds is already subject to supervisory oversight and asset managers employ a full range of liquidity risk management tools to prevent liquidity mismatches between their investment structures and liquidity profile of their investment activity.

We propose that the requirement to adopt a closed-end structure is disapplied where AIFMs can demonstrate to NCAs that they have robust liquidity risk management measures in place as required by Article 16 of the AIFMD already. This would provide more flexibility for private credit investors and consistent with the enhanced focus on liquidity for open-ended AIFs within the proposed amendments to Article 16, new paragraph (2b):

> "After assessing the suitability in relation to the pursued investment strategy, the liquidity profile and the redemption policy, an AIFM that manages an open-ended AIF shall select at least one appropriate liquidity management tool from the list set out in Annex V, points (2) to (4), for possible use in the interest of the AIF's investors. The AIFM shall implement detailed policies and procedures for the activation and

> deactivation of any selected liquidity management tool and the operational and administrative arrangements for the use of such tool."

We would also highlight several practical challenges with the proposed requirement to ensure that an AIF adopts a closed-end structure where the notional value of its originated loans exceeds 60% of the AIF's net asset value:

- There is no definition of notional value and whether this this would need to be determined on a one time, ongoing or periodic basis when making the 60% calculation;

- The open or closed end nature of an AIF needs be determined ex ante since this is a fundamental feature of the liquidity terms of a fund. Any change from open end to closed end would (certainly for existing funds) require a shareholder vote to as these terms are almost inevitably part of the fund's rules and instruments of incorporation. While it may be possible to incorporate a provision to require a transition from open end to closed end (or vice versa) for newer funds crossing the 60% threshold, such provisions are likely to incentivise investors to redeem, potentially causing fire sales and a commensurate market impact depending on the nature and size of the portfolio.

- Whether a fund crosses the 60% threshold in either direction will be subject to external factors such as investment performance and capital deployment. The fund may therefore find itself on different sides of this threshold during its lifetime (e.g., before and after a ramp-up or wind down period). We also note there is no reference to grace periods that would allow time for any restructuring or for the fund to rebalance its overall exposure. Any risk that an AIF structure would be subject to amendment on an ongoing basis will be a significant disincentive to investors and credit fund managers to establish such funds. Furthermore, the requirement to hold at least 40% of the fund in liquid instruments could probably lead to investors redeeming given the impact on returns this requirement would have; and

- It is unclear how 60% has been determined as an appropriate threshold at which the fund poses sufficient liquidity risk to require a closed-ended structure. For example, there would appear to be few, if any, differences between funds with 59% and 61% originated loans from a liquidity risk management perspective.

We support policymakers' objectives to prevent the emergence of liquidity mismatches. Focusing on the appropriate application of liquidity risk management tools by the AIFM, rather than product level rules based on a single mechanism, is likely to be the most effective way of achieving this goal. As noted above, we believe that the new requirements proposed by Article 16(2b) provide an appropriate way to ensure that any liquidity risk presented by loan origination funds can be effectively supervised.

We also refer to our further comments on Article 16(2b) in the following Section IV, which recommend adding two LMTs to Annex V: infrequent redemptions and lock-ups, to be numbered tools '5' and '6' in Annex V (see further details on those tools in Section IV). Those tools could be part of the mandatory list of tools among which a loan origination fund should be selecting its relevant LMTs, as they provide robust safeguards and control on investors' redemption terms and conditions.

A policy option to ensure Article 16(2b) is used adequately and effectively in the context of loan funds is to require that an AIF composed of a substantial amount of originated loans selects at least three liquidity risk management tools from an amended version of Annex V which would include lock-ups and infrequent redemptions.

*Cross-border loan origination should recognise current market practice*.

**Our proposal to improve the text:** *Clarify that AIFMs are granted the right to act on behalf of AIFs and other clients when originating loans on a cross-border basis and that local Member State non-bank lending rules cannot prevent cross-border loan-origination or add supplementary requirements if it is carried out by AIFMs authorised to provide loan origination and other ancillary services in their relevant home Member States*.

The Proposal's amendment to Annex I appears to posit that AIFMs may carry out loan origination on behalf of AIFs and other clients. We welcome this policy and propose to clarify that where AIFMs are involved in the origination of loans, they do so in their capacity as agents for the originators - the AIFs and, possibly, AIFM clients that may be non-AIFs under the top-up license in Article 6. To ensure this change supports the growth of cross-border lending across the EU, it will be necessary to clarify that this applies to the AIFM and the activities necessary to effect loan origination and subsequent asset management in relation to any AIFs or associated entities.

The revised text generally refers to "loan originating AIFs" but these may not always be the originator in loan transactions arranged by AIFMs. Originators will include AIFs, their associated affiliated entities such as asset holding Special Purpose Entities ('SPEs'), controlled by the AIF and that can be essential for the structuring of the loan for example, as well as individual client accounts AIFMs are authorised to manage under MiFID top-up licenses (and their associated affiliated asset holding SPEs). It is therefore important to acknowledge this reality and ensure that the lending activity of the AIFM can be carried out through any necessary combination of AIFs or other investment structures on whose behalf the AIFM act. We therefore recommend amending Recital 9 of the Proposal to reflect the current structures and for example use a similar language as the existing language in Article 4(3)(a) of the AIFMD where "financial and/or legal structures involving third parties controlled by the relevant AIF" are referred to. This would ensure that the objective of establishing an efficient "internal market for loan originating AIFs" is met and that the current lending activity to SMEs in the various Member States can continue. We also propose amending Annex I's reference to loan origination to reflect this.

There is no definition proposed for loan origination within the text although the text does clearly distinguish between origination (primary market) and participation and/or trading of loans (secondary market). We support the distinction made between primary and secondary loan market activities within the proposed reforms – whether or not a formal definition in the text is added. Generally, participating in syndications and/or "club" deals or simply having portions of loans being allocated as part of an intra-group process should not be considered origination. This understanding appears to be consistent with ESMA's opinion[9] on the matter and existing current market practice according to which:

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[9] https://www.esma.europa.eu/sites/default/files/library/2016-596_opinion_on_loan_origination.pdf

- By carrying out loan origination, an entity provides credit (originates a loan), while acting as a sole or a primary lender.
- By contrast, examples of loan participation typically involve entities which have gained exposure to loans through secondary market participations.

_There are better ways to address originate-to-distribute risks_.

**Our proposal to improve the text:** *We suggest replacing the requirement to hold 5% of the loan exposure upon a sale of the loan with a more general requirement to prohibit the origination of loans with the sole purpose of transferring those loans to third parties unrelated to the AIFM, its AIFs, associated SPEs and client accounts. Additionally, where relevant, AIFMs could be required to provide supporting rationale for the sale of loans*.

Loans originated by AIFMs on behalf of AIFs are generally held to maturity or repayment. While such loans are not commonly traded on the secondary market, some trading and liquidity in the mid-market segment exists. The EU has been actively promoting greater liquidity for bank-originated loans in the non-performing loan market and it is logical to also permit the development of a secondary market for loans originated by AIFMs on behalf AIFs that they manage.

We understand that the new requirement under Article 15(4e) for the AIFM to ensure that any AIF it manages holds a 5% exposure when selling any loans the AIFM has originated on behalf of the AIF is introduced to address potential moral hazard concerns and promote sound credit underwriting and due diligence practices. There is no evidence that AIFMs have taken up the practice of selling loans which they originate as their core business model presented alongside the proposals to support such a requirement.

There are many legitimate reasons why AIFMs managing AIFs with credit strategies may sell a loan they have originated. Investors support the flexibility for loans to be sold as part of the investment mandate, as it supports the AIFM's ability to manage the investment and achieve the desired returns. For example, if the performance or circumstances of the underlying borrower has changed so it no longer meets the target investment profile of the AIF, it may be necessary to sell this loan to rebalance the portfolio. Requiring the AIF to hold a 5% interest in such scenarios would restrict AIFMs managing AIFs with credit strategies from adhering to the AIFs' investment mandates and be to the detriment of their investors.

The need for this requirement should also be assessed alongside the proposal under Article 15(3)(d) for AIFMs to develop adequate policies and procedures for the granting of loans, including assessing credit risk and administering and monitoring their portfolios on an ongoing basis. Such a requirement would provide NCAs with the necessary tools to assess whether robust underwriting and due diligence processes are being employed in lending and investment decisions.

We would therefore suggest removing the requirement to hold 5% of any loans originated then subsequently sold and replacing it with a more general requirement that would prohibit the origination of loans with the sole purpose of transferring those loans to third parties unrelated to the AIFM, its AIFs and associated SPEs.

If the 5% holding requirement is deemed necessary, we would propose the following amendments which would be a more proportionate way of addressing the risk of moral hazard:

- Establishing a holding period, after which the requirement to retain 5% exposure of a loan originated but later sold would cease.
- Replacing the 5% retention requirement with a requirement for the AIFM to provide supporting rationale for the sale, for example referencing how the loan no longer adheres to the AIF's investment strategy; or

We would also highlight the necessity for the proposed revisions to the AIFMD to clarify that, if the 5% retention requirement is maintained, it does not apply to:

- Intra-group transfers or where loans are allocated across different investment vehicles or structures managed or advised by the AIFM or any other management company within the same group as the AIFM or affiliated with the AIFM.

Neither of these scenarios would present any moral hazard concerns and all parties would retain exposure with respect to the subsequent performance of the loan.

*Grandfathering provisions are needed*.

**Our proposal to improve the text:** *Introduce appropriate grandfathering conditions for AIFMs engaging in loan origination prior to the implementation of proposed legislative changes*. *AIFs established prior to these changes should be exempted from applying the new provisions because of the substantial impact these could have on the contractual relationships with existing investors*

Private credit AIFs have long-term investment horizons. For example, a typical loan to an SME or mid-market business may have a duration of between three and seven years. This means that AIFMs managing private credit AIFs lending to businesses today will be making investments which may not come to fruition until after any amendments to the AIFMD are finalised. Those AIFMs and their AIFs will also have a contractual relationship with their investors which might not fully match with the substantial provisions of the proposed changes to the AIFMD as regards loan funds, such as the diversification requirements applicable to loans originated to financial institutions (proposed point (4a), (4b) and (4c) of Article 15) or the requirement to hold 5% of notional value of the loan (proposed point (4e) of Article 15). Indeed, existing investors might not agree with the new regulatory requirements (for example investors of an AIF mainly lending to fintechs, or investors who might not agree with the impact of holding 5% of the AIF's NAV on their returns) and might want to redeem their shares, forcing the AIF to shut down, or switch to an AIFM located outside of the EU, which would be counterproductive to the objectives of the proposed amendments to the AIFMD.

It is therefore essential for the proposed amendments to Article 15 to incorporate grandfathering provisions that would confirm such rules only apply from the date of implementation and not with respect to existing investment structures managed by the AIFM that have been launched prior to the entry into application of the proposed changes to the AIFMD.

In addition, a grandfathering period is also needed for proposed amendment (2a) to Article 16 on liquidity risk management requiring AIFs to be closed-ended if/when the portfolio of loans reaches 60% of their NAV. Indeed the impact of such amendment on existing AIFs could be that many investors of those AIFs will prefer to redeem their shares rather than being locked in a closed-ended AIF, forcing many of those AIFs to shut down as a result. Asset sales will be forced as investors redeem, creating the sort of instability the proposal is theoretically trying to avoid.

Therefore, if point (2a) of Article 16 is adopted as proposed, and not changed to refer to the use of three specific LMTs as we suggest in our section above, we recommend adopting a clear grandfathering provision by exempting all existing AIFs from point (2a) of Article 16 (as currently drafted).

Finally, we would add that ESMA has also previously recognised the need for grandfathering or transitional provisions should there be any changes to the European framework for loan origination.[10] It would also be unjust for any AIFM to be penalised (and in some jurisdictions this could amount to criminal liability) because of a law that was not in place at the time the investment structure was established.

*There is no need for loan-specific disclosure requirements*.

**Our proposal to improve the text:** *Eliminate asset-specific disclosures as these may not provide the full risk profile of loan funds*.

AIFMs already report information to their investors on their "originated loan portfolios". The additional requirements created by the amendment to Article 23 create confusion as to whether there should be any differentiated disclosure with respect to loans originated by the AIF on behalf of the AIFM. Credit- focused AIFs will often hold a broad mix of assets such as loans purchased on the secondary markets and bonds, as well as loans that the AIF may have originated. It makes little sense to create a specific reporting requirement without understanding the rationale or the potential for different content of such reporting. To the extent there is a need for enhanced disclosures, these should be tackled more broadly for all types of AIFs and not just for loan originating AIFs.

*A more flexible approach to diversification on lending to financial undertakings is needed.*

**Our proposal to improve the text:** *Allow for the disapplication of the diversification requirement where investor exposures are adequately diversified by other factors*.

Limits on the granting of loans to financial undertakings and UCITS at 20% maximum for a single obligor may pose some challenges for micro-financing structures where an AIF funds a micro-finance platform lender and in instances where individual AIFs or client accounts are used by an AIFM to segregate exposure between investors.

Peer-to-peer lending platforms have evolved significantly from their early days and rely less on raising assets from retail investors, and instead focus on raising capital from institutional specialists such as loan origination AIFs. These AIFs will sometimes be formed with the sole aim of

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[10] See paragraph 29, ESMA opinion – Key principles for a European framework on loan origination by funds.

supporting the activities of a single lending platform. Although there appears to be a sizeable concentration of risk, that concentration is only on the surface as the real economic exposure is to the underlying pool of loans originated by the platform.

While we recognise the policy intent to ensure diversification in any loan portfolio, the existing risk management requirements on the AIFM already address such matters. If there are specific scenarios, including lending platforms, where additional requirements are deemed necessary, we would propose that policymakers consider either removing or increasing the 20% threshold where the AIFM can demonstrate enhanced risk management practices or the existence of diversification on a look-through basis to address the concentration risk.

This would prevent any disruption to the flow of finance from the capital markets to businesses reliant on micro-finance lenders, while also promoting good risk management practices.

Another area where we would suggest disapplying the requirement is in instances where individual AIFs or client accounts are used by an AIFM to segregate exposure between investors. It is increasingly common for investors to seek more targeted exposure to individual assets and explore co-investment alongside an asset manager (and potentially a small number of other investors). In such instances, it is necessary for an investment to be structured through a separate AIF or individual client accounts rather than as a co-mingled fund. This ensures that any exposure to the asset is confined to those investor(s) who are seeking it. One consequence of this approach is that funds or client accounts of this type by nature have a higher concentration risk and likely be above the 20% threshold proposed under Article 15(4)a. While we recognise and support the desire of policymakers to limit concentration risks for investors it would not appear to us that such co-investment structures are the focus of such concerns. We would also highlight that such structures will typically be used by investors who also invest via other co-mingled structures (which would be subject to the requirements) and that any concerns around concentration risk should be assessed as part of the investor's overall exposure.

Removing such structures from the scope of the diversification requirements would support effective risk management and allow investors to adopt the most efficient investment structures.

*We support the requirement to develop adequate lending policies and procedures*.

The requirement to develop adequate policies and procedures for the granting of loans under Article 15, and the new rules prohibiting lending to the AIFM, staff or delegates, broadly codifies existing practices of credit fund managers and we support it.

### IV. Liquidity risk management tools welcome but some adjustments to the drafting are necessary

*We support the availability of LRM tools in all Member States*.

We recognise that the availability of liquidity risk management tools ('LRM tools') across the EU is not uniform, and support that all LRM tools are made available in all Member States (as per the amendments to Article 16) and we generally support the new Annex V and the list of LRM tools described there.

More specifically, we also support the fact that most of the binding provisions attach to suspension of redemptions, redemption gates, notice periods and redemption fees (points (1) to (4) of the Annex V), and that provisions attached to side pockets, anti-dilution levies, redemptions in kind and swing pricing (points 5 to 8 of the Annex V) are less stringent. For example those tools are not mentioned in the duty to report "without delay" when activating the LRM tool, or in the list of LRM tools that NCAs would be empowered to activate or deactivate. This is in line with market practices and should be supported.

We do have some concerns though about the wording of the new liquidity risk management provisions in Articles 16(2b) to 16(2h) and have provided some recommendations in the sub-sections that follow. The rationale for each recommendation is discussed separately.

Our concerns and recommendations regarding proposed Article 16(2a) are discussed in the section III above, starting at p 11.

*<u>LRMs tools should be attached to the AIF, rather than to the AIFM.</u>*

In most of the newly introduced points relating to liquidity risk management (specifically new points (2b), (2c), (2d) and (2e) of Article 16), the Proposal assumes that the AIFM has the ability to control the activities of AIFs that have separate legal personalities. Based on this faulty assumption, the Proposal mandates the AIFM to select and activate LRM tools.

First, we would like to highlight that LRM tools are features which are attached to the AIF's shares and which are incorporated in the rules or instruments of incorporation of the AIF, not those of the AIFM as suggested by the language in the first paragraph of the proposed Article 16(2c).[11] The LRM tools are then applied to affect redemptions by investors in the AIF, not investors in the AIFM.

Second, where the AIF has a legal personality separate from the AIFM (which would be the case where the AIF has appointed an external AIFM), the AIF governing body remains the responsible party to activate/deactivate, or not, those LRM tools. The AIFM cannot override the AIF's board, which is accountable to the AIF's investors, although it is common practice for the AIFM to have input into those decisions.

Points (2) and (3) of Article 5 of the AIFMD were included in the original text to address circumstances where the AIFM and the AIF would diverge, and set up a mechanism whereby when an AIFM is "unable to ensure compliance with requirements of this Directive for which an AIF or another entity on its behalf is responsible", the AIFM has to inform the competent authorities of its home Member State and, when relevant, the competent authorities of the EU AIF concerned. In the event the non-compliance persists, the competent authority of the home Member State of the AIFM can require that it "resign as AIFM of that AIF" and the AIFM is no longer permitted to market the AIF in the Union.

[11] This matter is less of an issue in the proposed UCITS amendments, as the UCITS directive's provisions attach to the UCITS itself and all UCITS are domiciled in the EU so within the jurisdiction of the direct application of the requirements. The other recommendations suggested in this section to the Proposal are, however, otherwise relevant.

We would therefore suggest rephrasing the proposed Article 16(2b) to reflect that LRM tools are the ultimate responsibility of the AIF and that AIFMs should only "ensure that the AIF" selects and applies the relevant LRM tools.

*Two further LRM tools should be added to the proposed AIFMD Annex V*.

We welcome the addition of the new Annex V, although we note that two commonly used LRM tools are missing, specifically "lock-ups" and infrequent redemptions.[12]

Lock-ups can be defined as an initial period during which the investor is not allowed to redeem shares, and lock-ups are often measured in years and not months or days.

Redemption frequency is defined as a mechanism whereby investors can redeem their shares at certain infrequent points in time (i.e., equal or less frequent than on a monthly basis). As a LRM tool, infrequent redemptions are as effective or more effective than the other tools listed and is most similar in style and application to notice periods. Accordingly, we believe infrequent redemptions should be considered as an additional optional tool similar to redemption gates, notice periods and redemption fees.

We suggest amending proposed Annex V of the AIFMD to add lock-ups and redemption frequency, re-numbering the rest of the list.

We also suggest adding a reference to infrequent redemption frequency as one of the handful of LRM tools from which each AIF must select at least one (as per point (2b)).

The discussion of redemption gates in Annex V should also be clarified since there are multiple types of redemption gates. A redemption gate is a restriction of the right of shareholders to redeem their shares. This restriction may be full, so that investors cannot redeem their shares at all, or partial, so that investors can only redeem a certain portion of their shares. Redemption gates can apply at the level of the AIF, at the level of a share class or at the level of an investor. Redemption gates can be temporary features activated from time to time or permanent features applying with respect to the AIF's relevant redemption frequency. These variations need to be recognised in the description of redemption gates in Annex V.

*In order to be "activated", suspensions of redemption and any other selected LRM tools need to be included in the AIF's rules or instruments of incorporation as terms of the AIF's shares*.

New point (2c) would allow AIFs to activate suspensions of redemptions. Such tools can only be applied when they appear in the AIF's incorporation documents as they have to be approved by the investors. Generally, an AIF cannot apply (or be mandated to apply) LRM tools which are not fully embedded in the AIF's rules or instruments of incorporation. We therefore recommend that AIFM ensure that the suspension ability foreseen by (2c) is in the AIF's rules and instruments of incorporation.

[12] Those additional tools will not be relevant for the similar list proposed for UCITS.

With these proposed amendments and the ESMA regulatory technical standards anticipated by proposed Articles 16(2f) to 16(2h), Article 16(2c) is redundant and can be left out, simplifying the provisions.

*Notification of "activation" of LRM tools to NCAs should be limited to changes from the AIF's fixed terms*.

New point (2d) requires that AIFMs notify NCAs "without delay" when activating or deactivating LRM tools (2), (3) and (4) (i.e., redemption gates, notice periods and redemptions fees).

We believe this fundamentally mis-apprehends the nature of many of these LRM tools. While redemption gates and redemption fees could be of the sort that might be turned on at some point (or turned off at some point), however, in many cases these LRM tools are always activated as fixed terms of an AIF's shares. Also, notice periods and redemption fees (as well as redemption frequency are generally fixed terms of an AIF's shares as well and always apply to redemptions of shares of the AIF. It would be administratively burdensome to have to make notice every time these LRM tools are applied (i.e., with respect to every dealing day) if they are fixed terms of the shares and always on. Any LRM tool that is a fixed terms of the shares should be treated differently from LRM tools that might be turned on in times of stress but are generally not applied and the regulatory framework should recognise this difference.

AIFMs should therefore not be promptly reporting to supervisors each time an LRM tool is applied where that LRM tool is an ex-ante, fixed term of the AIF's shares which always applies. We believe that, with respect to LRM tools of this nature, the requirement for disclosure set out in Article 23(1)(h) should be sufficient. However, we acknowledge that notifications should be made where the ex-ante fixed terms of the shares are changed, whether in the normal course or in exceptional circumstances.

We welcome the fact that the notification "without delay" to NCAs does not apply to the activation of swing pricing as this LRM tool is used on a fairly frequent basis by, in particular, large AIFMs. Requiring AIFMs to report the activation of swing pricing to the relevant NCA would result in excessive reporting with no tangible benefit to NCAs.

*LRM tools should be available in all Member States for all AIFs*.

We recognise that there is not a uniform and homogenous availability of LRM tools across the EU, and support that all LRM tools are made available in all Member States.

We however think the current drafting could benefit from some clarifications. Indeed, new point (2e) mandates all Member States to make the LRM tools listed in Annex V of the Proposal available in all Member States. However, It is only in the gift of the Member States to change their laws regarding the establishment of fund vehicles (whether in corporate form, partnership form or otherwise) to permit AIFs established in the Member State to integrate these LRM tools in the AIF's rules or instruments of incorporation.

We also believe that the availability of the LRM tools in Annex V should not be limited to open-end AIFs. All AIFs should be permitted to utilise these LRM tools as they deem necessary in the interest of investors.

Member States are generally permitted to make more restrictive requirements for marketing AIFs than are set out in the AIFMD. We believe strongly, however, that although LRM tools can be helpful for risk management purposes and can limit systemic risk, it should not be detrimental to open and fair competition. We would therefore not like to see Member States imposing restrictions on the use of LRM tools that do not apply to their domestic AIFs.

*Amendments to Article 16 should include a grandfathering provision for existing AIFs*.

A key consideration is the application of new LRM requirements to existing AIFs. LRM tools are terms usually included in the AIF's rules or instruments of incorporation from the inception of the AIF and disclosed in the offering documents as fixed terms of the AIF's shares. For some AIFs, compliance with new Article 16 requirements might mean having to change the terms of the AIF's shares, which in many cases can only be done following an investor vote (which would be costly to organise and takes time get done and there are no guarantees that investors would approve the changes).

We therefore strongly recommend introducing grandfathering provisions to allow EU AIFMs to:

1. take into account any RTS or guidance provided by ESMA on LRM tools, which will be published after the adoption of the revisions to the AIFMD;
2. thereafter carefully assess, select, design the conditions of the tools they are going to add to the AIF's rules; and
3. subsequently organise an orderly voting process with the AIFs' shareholders (i.e., the investors).

We would add that a too short grandfathering period might lead to hasty decision-making with potential counterproductive effects on LRM or risking a rejection of the proposal by the relevant AIF's shareholders.

We therefore recommend adding a grandfathering provision for existing open-end AIFs managed by EU AIFMs which would grant them until 12 months following the publication of the regulatory technical standards envisaged by proposed Article 16(2f) to 16(2h) to comply with the updated Article 16 requirements. Such a grandfathering provision will allow EU AIFMs to take into account the ESMA RTS and thereafter carefully assess, select, design the conditions of the tools they are going to add to the AIF's rules and subsequently organise an orderly voting process with the AIF's shareholders (i.e., the investors).

In the event shareholders rejected a proposal to amend the AIF's rules or instruments of incorporation to allow the AIFM to ensure compliance, the AIFM would apply Articles 5(2) and 5(3) mentioned in the section above.

Of course, we would not expect that this additional period would apply to any AIF launched after the entry into application of the reviewed Directive.

*NCAs proposed powers to "activate" or "deactivate" LRM tools on an ex-post basis are concerning*.

Article 46 of the AIFMD relates to NCA's powers and point (1)(j) currently provides NCAs with suspension of redemption powers over an AIF's shares. The proposed amendment to Article 46(1)(j) seeks to extend this power to "activate or deactivate" both suspensions of redemptions and redemption gates (i.e., points (1) and (2) of the new Annex V) regardless of whether those tools are included in the AIF's rules or instruments of incorporation, or any tools selected "by the AIFM" in accordance with point (2b), i.e., notice periods or redemption fees in addition to the first two tools. It is also implied that NCAs can opt to apply those tools to a single AIF or a group of AIFs.

We strongly disagree with this proposed amendment for the following reasons:

- As regards the possibility for NCAs or ESMA to activate or deactivate an LRM tool, we strongly believe that it is the ultimate responsibility of the AIF, supported by the AIFM, to select the appropriate and adequate LRM tools and deploy them as necessary. Liquidity risk management is one of the core activities of AIFMs managing open-end AIFs, especially in times of relative or extreme stresses. The tools selected need to be carefully designed and implemented ex-ante to fit the AIF's underlying investment strategy and targeted investors and we do not believe the NCAs are in a position to apply a tool that is not previously embedded in the AIF's rules or instruments of incorporation (as per the possibility for NCAs to apply redemption gates in proposed Article 46(1)(j)).

- Even if the tool is embedded in the AIF's rules or instruments of incorporation, any ex-post external intervention from an NCA due to financial stability concerns would require a thorough assessment of several elements: the underlying instruments and their liquidity profile at a specific point in time, the existing redemption policies of the AIF, the actual demand for redemptions from investors, or lack of, etc. It is our impression that there would be information imbalances between the AIFM and the NCA which would not necessarily be familiar with the AIF's complex situation. Any external action could therefore inadvertently lead to unintended consequences in terms of investor protection or financial stability, including a pro-cyclical effect.

- Since gate requirements (i.e., point (2) of Annex V) are optional and not mandatory as per proposed Article 16(2b), a redemption gate that is not provided for in the AIF's instruments of incorporation or disclosed to investors cannot be mandated to apply by an NCA. It is unclear what the terms of such a mandatory gate would be given that gates need to be if not already set out in the AIF's rules or instruments of incorporation (and therefore not previously disclosed as a possibility to investors).

- As already outlined above, some LRM tools are fixed terms of the AIF's shares set out in the AIF's rules or instruments of incorporation and cannot be deactivated short of changing the AIF's rules or instruments of incorporation. If a redemption gate, redemption fee or notice period was selected to be always applicable following the AIFM's analysis required by Article 16(2) of the AIFMD, it defies logic to permit an NCA to override the ability to use that LRM tool by "deactivating" it.

- Another point of concern is regarding the circumstances and scope of the potential activation of those tools by an NCA as it raises a number of issues that would need to be clarified, such as: (i) the circumstances in which such tools are to be activated, (ii) whether activating those tools on a national basis would have any impact on the markets for an event that would be systemic in nature, (iii) if the activation is decided to be taken at the regional level, then how to coordinate at the EU level in real time, and (iv) avoiding that such a coordination exercise on the activation of LRM tool, which would necessarily be public, has any procyclical-effects by triggering a rush to redemptions from EU investors.

For all the above stated reasons, we strongly recommend EU policymakers delete this amendment or limit the intervention of the NCAs to a dialogue with the AIF or its AIFM with the objective to support the AIFM's decision-making process in such market stresses.

*The power to "activate" or "deactivate" LRM tools of non-EU AIFs must remain the ultimate responsibility of the non-EU AIF*.

We note that it is proposed that ESMA would be empowered to apply those tools to non-EU AIFMs and EU AIFMs managing non-EU AIFs marketed via the NPPRs (Article 47(4)(d)). This amendment is extremely concerning for several reasons, which add to the comments stated above regarding ex-post intervention of NCAs:

- As regards both non-EU and EU AIFMs, as stated in sections above, LRM tools are terms affecting the redemption of shares of the AIF and as such are terms attached to an AIF's shares, rather than to the AIFM. These tools are not in the gift of the AIFM which does not generally have any direct powers to activate LRM tools that are imbedded in the AIF rules or instruments of incorporation.

- As regards EU AIFMs managing and distributing non-EU AIFs, those will have to comply with Article 16 but this does not necessarily provide ESMA with direct powers over any non-EU AIF, which remain under the supervision of their own home supervisory authority.

- Should ESMA decide to make use of LRM-related powers over EU AIFMs managing non-EU AIFs, it would override the powers of the authorised EU AIFM's home NCA. It seems that this provision would conflict with the LRM powers for NCAs proposed in Article 46(1)(j) (described above) which would apply to any EU AIFM. We would therefore suggest deleting the reference to EU AIFMs managing non-EU AIFs in the proposed amendment to Article 47(4)(d).

- As regards non-EU AIFMs managing and distributing AIFs: a reference in the amendment is made to the tools being selected by the non-EU AIFM in reference to the new Annex V. This reference to Annex V is not correct as non-EU AIFMs marketing the AIFs they manage in specific EU Member States that allow them to do so via NPPRs are only subject to AIFMD Article 42 (which refers to Articles 22, 23 and 24 related to reporting and disclosure and Articles 26-30 where applicable). Those non-EU AIFMs are not subject to any other sections of the AIFMD, and therefore, are not expected to comply with AIFMD Article 16, or Annex V which relates to the revised Article 16 as proposed. Such non-EU AIFMs will, however, be subject to their local requirements as regards liquidity risk management, and so will the AIFs. Those local obligations can be similar, but not identical to the AIFMD requirements. Subjecting those non-

EU AIFMs and the non-EU AIFs they manage to the AIFMD requirements on liquidity risk management could result in regulatory conflicts and unnecessary (if not counter-productive) duplications or overlaps.

- AIFs distributed under AIFMD Article 42 are also under the strict jurisdiction and national rules of the host Member State and its specific NPPR framework. Investors approached as part of the marketing of an AIF will be protected by the national rules and laws of the host Member State. ESMA's power to "activate" or "deactivate" LRM tools would override each host Member State's ability to protect its own investors, while also overriding the AIF's home country supervisory authority's powers.

- As an aside, we note that, when it comes to similar powers for NCAs (as per amendments to Article 46(2)(j)), there is an obligation for the host NCAs to request that the home NCA activates or deactivates the tools, there are no such similar requirements for ESMA to, if not request, at least inform the authority supervising the AIF of the activation or deactivation of such tools. We feel this amendment might create frictions and should be reviewed to implement a more collaborative process between ESMA and the home country of the AIF, should such powers be maintained in the text.

For all the above stated reasons, we strongly recommend EU policymakers reconsider the amendment to Article 47(4)(d) and suggest eliminating it entirely.

*The provisions related to the obligation to cooperate among NCAs need to be refined*.

We note that new points (5a), (5b), (5c), (5d) and (5e) are related to cooperation channels between the competent authorities of the "home" or "host" Member States of the AIFM (thereafter referred to as the 'home NCA' and the 'host NCA'). The home NCA is required to inform the host NCA when intending to exercise the powers of activating or deactivating LRM tools, both for the powers conferred by Article 46(1)(j) (which applies to NCAs) and Article 47(4)(d) (which applies to ESMA in relation to non-EU AIFs managed by non-EU or EU AIFMs). The host NCA can request the home NCA to exercise the powers referred to in Article 46(1)(j) and Article 47(4)(d). When doing so, home and host NCAs should notify both ESMA and the ESRB.

Although we would support a swift transmission of information between the respective home and host NCAs, we feel that this amendment needs clarification or further refinement in order to allow for a clear and effective process:

- As the LRM tools attach to the AIF rather than to the AIFM, when the home NCA is exercising its powers on the AIFM to ensure an EU AIF it manages activates LRM tools (under existing Article 46(1)(j) or in a future amended form), we feel it is also essential to inform the authority of the home Member State of the AIF which is the regulator of the EU AIF.

- The proposed amendments apply to 'competent authorities' which is defined as "national authorities of Member States which are empowered by law or regulation to supervise AIFMs" under the AIFMD Article 4(1)(f). The proposed amendment however also refers to powers under Article 47 which are those of ESMA. Since ESMA is not a competent authority, references to Article 47 in this Article seem to be misplaced and we suggest taking them out to improve clarity of the article.

## V. More predictability is needed around the EU lists of AML "high risk third country" and of non-cooperative jurisdictions for tax purposes if these lists are to be tied to the ability (or not) to market a particular AIF in the Union

*The references to the AML list of "high risk third countries" and non-cooperative jurisdictions for tax purposes introduce legal uncertainty which calls for grandfathering provisions (Amendments to Articles 36(1)(b) and 42(1)(c), also applies to similar amendments to Articles 35, 37 and 40)*.

We note that, in several articles applying to non-EU entities (for example Article 36 applying to EU AIFMs or Article 42 applying to non-EU AIFMs and the non-EU AIFs they manage being marketed under national private placement regimes in single Member States), the Commission has proposed a reference to (i) the list of high-risk third countries as per the AML Directive 2015/849, and (ii) a reference to the EU list of non-cooperative jurisdictions for tax purposes.

We are extremely concerned by the potential practical repercussions of such amendments and we do not support the insertion of the amendments for the following reasons:

The AIFMD relate to fund management and marketing and does not currently address tax matters. Funds are generally taxed differently from ordinary corporations in most jurisdictions around the world, including the EU. Most fund jurisdictions, including EU jurisdictions, aim to maintain tax neutrality of funds – making sure that investors are no worse-off by investing through funds than they would be had they invested directly. This means that, generally, the way third-country jurisdictions approach fund taxation cannot give rise to tax avoidance or evasion concerns as, like most EU jurisdictions, they either do not tax investment funds or tax them only nominally. Where tax concerns may arise, they are likely to arise outside the investment funds sector. It is, therefore, difficult to understand why a listing of a jurisdiction that may have little to do with the activity regulated by the AIFMD should automatically disqualify the marketing of investment funds domiciled in such jurisdiction.

As regards AML-related matters, as an association, we strongly support robust anti-money laundering regimes. We would point out that most egregious examples of money laundering to date have been observed outside the investment fund sector, including in many EU countries.

The proposed amendments would go much further than the existing requirements of the AML directives and the proposed new AML regulation. Those requirements do not prohibit interaction or investments with entities that may be established in high-risk countries but, instead, set out additional due diligence obligations. Under those rules, an "obliged entity" will need to take appropriate steps to identify and assess the risks of money laundering on its business, before establishing and maintaining policies and procedures to manage and mitigate those risks effectively.

The AIFMD amendments would, therefore, go much further and prohibit activities in relation to marketing AIFs even though other transactions and/or activities with entities located in high-risk jurisdictions would be allowed, for example, in the banking sector. We believe this is disproportionate and too blunt an instrument. We therefore suggest that the AML directives and regulations deal with AML issues across the board for all financial entities and that sectoral

legislation such as AIFMD does not set requirements that go beyond that of the AML rules themselves.

The process for adding, or taking out, a jurisdiction this list is often highly unpredictable and can happen from one day to the next without prior public notice or the possibility for any outside stakeholders to provide their views. It has been pointed out that some EU jurisdictions do not themselves meet the conditions set out for third countries in some of the assessments.

This lack of predictability creates an issue of general legal uncertainty which may affect the global economic attractiveness of the EU as a place to invest. If this list will start to be embedded in the EU regulatory framework, we believe such legal references should be accompanied by a specific process over (i) the selection of jurisdictions to appear on the lists, (ii) the timing of the additions to the lists, and (iii) the recourse or remediation offered to entities that may be located in the listed jurisdictions, as examples of improvements.

The lack of predictability regarding this process is also an issue in terms of grandfathering and transition periods for non-EU AIFs that are being marketed in the EU (be it either by EU or non-EU AIFMs) and also their AIFMs when those are located outside of the EU. Since there is little possibility to know in advance if the home jurisdiction of the AIF or AIFM will be added to the EU's AML list, we recommend that, for those "live" cases (including where a marketing effort for a closed-end AIF has commenced), a grandfathering period is adopted to provide time and flexibility to those AIFs and their AIFMs to cease their marketing operations in the EU in good order.

Similar amendments have been introduced to Articles related to the third country passport (which has not yet been activated). Those articles are Article 35, which relates to non-EU AIFs being marketed by EU AIFMs via the third country passport, Article 37 relating to the authorisation of non-EU AIFMs to manage or market AIFs and benefit from the third country passport; Article 40 relating to non-EU AIFs being marketed via the third country passport by a non-EU AIFM.

We would therefore recommend a deletion of the proposed amendments (**Option1**) or, at the minimum, the introduction of a grandfathering period to amended Articles 36 and 42 as well as Articles 35, 37 and 40 (**Option 2**).

*The references to the AML list of "high-risk third countries" in the proposed amendments to Articles 36(1)(b) and 42(1)(c) and Articles 35, 37 and 40 need to be refined.*

The EU AML regulatory framework is currently being reviewed notably as regards the interaction between the "Financial Action Task Force" process (which is the current reference in AIFMD and globally) and the EU process for adding Member States to the list of high risk countries. We would encourage co-legislators to align the reviewed AIFMD text with the updated AML package to ensure consistency. This could take the form of references to the EU AML Regulation to be adopted but only becoming effective when the AML package is finalised. In that regard, policymakers should ensure that the reference to the EU AML package in the AIFMD adequately reflects the current update to the EU list of "high risk countries" which is being split into two lists, to mirror the FATF process of "grey listing" and "black listing", the latter being those countries "subject to a call for action" under the FATF process. As per the explanatory memorandum of the proposal for an EU AML/CFT Regulation currently under review/adoption by co-legislators, the Commission will

identify the third countries "subject to a call for action" by the FATF as "high-risk third countries".[13] Point (1) of Article 23 of the proposed AML/CFT Regulation confirms this approach: "Third countries with significant strategic deficiencies in their national AML/CFT regimes shall be identified by the Commission and designated as 'high-risk third countries'."

Should the co-legislator decide to maintain the reference to the EU AML framework, as opposed to the current reference to the FATF, we recommend that the amendments to AIFMD refer to then precise terminology used in the AML/CFT Regulation proposal's Article 23 (Third countries with significant strategic deficiencies in their national AML/CFT regimes), instead of referring to the broader concept of "high risk countries".

Similar amendments have been introduced to Articles related to the third country passport (which has not yet been activated). Those articles are Article 35, which relates to non-EU AIFs being marketed by EU AIFMs via the third country passport, Article 37 relating to the authorisation of non-EU AIFMs to manage or market AIFs and benefit from the third country passport; Article 40 relating to non-EU AIFs being marketed via the third country passport by a non-EU AIFM.

We strongly support introducing similar modifications as the one we proposed for Articles 36 and 42 to the amendments to Articles 35, 37 and 40.

## VI. Regulatory reporting: the policy driver should be to seek the "right" set of data, rather than the "full" set of data

We note the proposed amendments to AIFMD Article 24 and the mandate for ESMA to draft a new regulatory reporting template. More specifically, we note the fact that the reporting would not be on the "main" markets or financial instruments in which the AIFM is involved, but more generally on (potentially all) markets and instruments.

AIMA has been working on reporting under the AIFMD for the past couple of years[14] and have been asking for more meaningful and purposeful reporting, rather than trying to reach the objective of having a "full" set of data which might be extremely burdensome while not being necessarily more useful to the regulators.

We are advocating for a reporting framework that collects *the right kind* of data, as opposed to *all* data. The framework should look to replicate the basic manner in which managers and investors look to understand and manage risks. It should therefore seek to develop an appropriate understanding of the core risk exposures by having a useful set of risk metrics that aggregate the underlying position level data, rather than seeking to have managers report position-level or instrument-level information. For example, we feel it is crucial for NCAs to receive data on initial margin and how it relates to the levels of unencumbered cash in a fund. Such important indicators are not currently collected and provide a meaningful picture of the potential risk as well as some

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[13] See p.9 of the proposal for a Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing – available at : https://eur-lex.europa.eu/resource.html?uri=cellar:0a4db7d6-eace-11eb-93a8-01aa75ed71a1.0001.02/DOC_1&format=PDF.

[14] Improving Regulatory Reporting under the AIFMD, AIMA position paper, March 2020 – available at: https://www.aima.org/resource/aima-position-paper-on-improving-systemic-regulatory-reporting-under-the-aifmd.html (by request for non-members).

levers for action on margin levels for example, much more than a position-by-position set of data on a myriad of funds would do.

While having a full portfolio listing may seem attractive (and probably is for funds with simple portfolios), for alternative funds, a full portfolio listing is likely to obscure rather than illuminate the level of risk in a portfolio. We recognise that the reporting requirements need to be set at a single level for all funds or risk be overly complex, but we submit that choosing a method of systemic risk data collection that has little chance of actually identifying and measuring the risks defeats the purpose. We would rather recommend establishing a focus on key metrics, such as those identified in our position paper on reporting: (i) breaking down DV01 and CS01 between cleared and non-cleared derivatives, (ii) improving the leverage-related indicators as per IOSCO's recommendations, and (iii) seeking details on margins and margin calls as mentioned above.

We also note the reference to the European Central Bank's (ECB) reporting framework and would like to point out that (i) the ECB reporting framework does not apply to all AIFs covered under the AIFMD and currently subject to regulatory reporting, and (ii) the reporting is currently effectively done by administrators, rather than by the AIFMs themselves, so we would caution against applying the ECB reporting requirements directly to AIFMs. We would rather recommend ensuring an adequate transfer of information among NCAs and the network of Central Banks.

Finally, we also note the absence of a reference or an amendment to the reporting requirements for sub-threshold AIFMs under Article 3(3)(d) and subsequent delegated acts under Article 3(6)(b). If the absence of such mention is a drafting oversight, we would suggest considering sub-threshold AIFMs regulatory reporting under the AIFMD in the specific context of those small, hardly systemic entities and ensure that their reporting obligations are kept proportionate and the changes limited to only a small number of key indicators, and only if demonstrably needed.

Furthermore, and specifically as regards UCITS funds, we do not believe that a similar AIFMD reporting for UCITS funds should be introduced. For example, it would be disproportionate for UCITS to become subject to leverage reporting provisions similar to those applicable to AIFs. This is because the UCITS Directive includes specific limits on leverage. In addition, we note that several NCAs already require UCITS to report portfolio liquidity profiles of fund. We understood that it was ESMA's intention to bridge these different approaches through its 2020 convergence exercise between NCAs regarding compliance with UCITS fund liquidity rules, which has already prompted investment managers to respond to questionnaires sent by NCAs in coordination with ESMA. Overall, we believe that supervision and enforcement of the existing rules should be the focus of the authorities.

Furthermore, we understand that UCITS are currently subject to extensive reporting to central banks and the European Central Bank (ECB) as per Regulation (EU) No 1073/2013. Since a new reporting system would represent a significant implementation project with unclear benefits, we believe that it would be preferable to use existing reporting and ensuring NCAs or ESMA are given access to existing central bank reporting.

## VII. A few other matters should be addressed as well

*Performing Article 6(4)(b) activities should be possible without having to have permission to perform Article 6(4)(a) activities*.

Article 6(5)(b) currently requires an AIFM wanting an Article 6(4) top up permission for services other than segregated portfolio management to seek the top up for segregated portfolio management before it can access the other top ups. This leads to odd situations where AIFMs which do not envisage conducting segregated portfolio management still having to declare that they do in order to be able to provide investment advice, perform safe-keeping or administration of assets or receive or transmit orders. Indeed, there are many situations where an AIFM can provide 'non-core services' as listed in paragraph (b) of Article 6(4) without providing segregated portfolio management.

For example, an authorised AIFM might be asked to assist another AIFM in its group by arranging or negotiating an investment made by that other AIFM's fund, passing orders onwards to brokers or to assist in marketing that other AIFM's fund to EU investors. Such activities do not involve segregated portfolio management but might be considered to involve the reception and transmission of orders (or in some cases, execution of orders on behalf of clients and/or placing of financial instruments without a firm commitment basis – as to which see next section).

The requirement does not appear to have a robust policy justification. There is no apparent reason why an AIFM needs to be authorised to perform a type of service it does not intend to undertake in order to be able to apply for permission to perform other unrelated MiFID services. Therefore, we recommend removing the pre-condition at Article 6(5)(b).

*The activity of 'execution of orders' should be added under Article 6(4)(b)*.

The inclusion of reception and transmission of client orders within Article 6(4)(b) allows an AIFM to provide a stand-alone execution service to a third party (e.g., another group company) provided that it confines that activity to passing orders to brokers or using direct market access (which are both types of reception and transmission). However, Article 6(4)(b) does not allow the AIFM to deal on behalf of its client on the basis of a price quoted by a market maker/systematic internaliser or other liquidity provider (which constitutes execution of client orders). This restriction may not be consistent with the AIFM's best execution obligation under MiFID II and it is not apparent to us what the policy rationale would be for missing this activity from Article 6(4)(b).

*Quarterly disclosure of fees will be costly and may not provide investors with accurate numbers*.

We note the addition, in investor disclosure requirements (Article 23(4)(e), of a quarterly disclosure requirement encompassing all "direct and indirect fees and charges that were directly or indirectly charged or allocated to the AIF or to any of its investments".

Although transparency of fees is an evergreen topic of discussion between institutional investors and fund managers, we are not convinced that mandated quarterly reporting of the type proposed will add much to the investors' overview of the management of the AIF. The quarterly fees that would be disclosed will necessarily be based on general assessment, rather than accurate numbers, as many outsourced contracts or providers are paid on a yearly basis, or twice a year.

Preparing such disclosure based on estimates would represent a significant addition of work which costs will be passed on to the AIF. In contrast, yearly reports on an AIF fees are accurate, audited numbers, which our investor community values.

Furthermore, we are concerned by the addition of the reference to fees allocated to "any of the investments" of the AIF. We feel this is too broad of a reference and would recommend narrowing the disclosure to fees directly incurred by the AIF. The addition of disclosures of fees and expenses to "any of the investments" of AIFs could lead to the absurd situation of AIFs having to, for example, disclose all operating expenses of publicly traded companies they may invest in. We would also highlight that for loan origination funds where investments have a fixed return, fees charged to the investments/portfolio companies themselves have no impact at all on investor returns (unlike a private equity fund for example where fees put to the company would impact the AIF investors returns). In this context, reporting fees charged to the portfolio company makes no sense in the context of a credit fund and gives no additional protection to investors.

Therefore, to the extent that the policy is to address expenses incurred by investee companies that accrue to the AIFM and/or the AIF, this should be made explicit and would clarify the scope and the intent of the proposed text considerably.

*Disclosure of identifiable confidential information should not be permitted even if the ultimate use is in a summary or aggregate form*.

While we are sympathetic to the idea that broader release of otherwise confidential data in a summary or in an aggregate form in which individual financial market participants cannot be identified, we believe the proposed amendment to Article 46(3) is written in a way that will in fact permit the release of confidential data that is not in summary, not in aggregate and where individual financial market participants can in fact be identified. As written, the amendment allows ESMA, competent authorities, the ESAs and the ESRB (each a potential discloser of the confidential information) to provide the confidential information to literally anyone (a user) as long as the information disclose to the user is "***used*** in a summary or in an aggregate form in which individual financial market participants cannot be identified." Once the information has been disclosed to a user, control over the ultimate use is substantially diminished and may be non-existent and there is no requirement made that any user to whom identifiable and otherwise confidential would have to have the appropriate internal controls and security to keep the identifiable data secure even if the only use to which the information was put was "in a summary or in an aggregate form in which individual financial market participants cannot be identified."

The provision should instead be framed so that the potential discloser is only able to disclose information in a summary or aggregate form. In other words, the person(s) to whom the disclosure is made never receive any identifying information so their subsequent use is not at issue.

**ANNEX II**

**AIMA - The Alternative Investment Management Association**

The Alternative Investment Management Association (AIMA) is the global representative of the alternative investment industry, with around 2,000 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in hedge fund and private credit assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space.

**ACC - The Alternative Credit Council**

The ACC currently represents over 250 members that manage over $600bn of private credit assets. The ACC is an affiliate of AIMA and is governed by its own board which ultimately reports to the AIMA Council. ACC members provide an important source of funding to the economy, providing finance to mid-market corporates, SMEs, commercial and residential real estate developments, infrastructure as well the trade and receivables business. The ACC's core objectives are to provide direction on policy and regulatory matters, support wider advocacy and educational efforts, and generate industry research with the view to strengthening the sector's sustainability and wider economic and financial benefits.

**BAI - The Bundesverband Alternative Investments**

The Bundesverband Alternative Investments e. V. (BAI) is the central interest group of the alternative investments industry in Germany. The federation understands itself as catalyst between professional German investors and recognized offerers of alternative Investments products world-wide. It is committed to ensuring that German institutional and professional investors are able to diversify their capital investments more easily and effectively with regard to alternative investments, in particular with a view to securing German old-age provision in the long term. The BAI promotes public awareness and understanding of alternative investments and is committed to scientific research. It conducts a dialogue with political decision-makers and the responsible supervisory authorities and cultivates exchanges with national and international organisations and associations.

The association pursues the goal of achieving legal reforms and further legal education in the interests of its members and their investors and of creating attractive and internationally competitive framework conditions for investing in alternative investments. The circle of BAI members recruited from all areas of the professional alternative investment business has grown to 250 businesses.