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**Date: 5 May 2015**

Dear Matteo

**RE: CP15/08 - Quarterly Consultation Paper Number 8, Chapter 4**

**ABOUT THE INVESTMENT ASSOCIATION**

The Investment Association represents UK investment managers. We have over 200 members who manage more than £5 trillion for clients around the world. Our aim is to make investment better for clients so they achieve their financial goals, better for companies so they get the capital they need to grow, and better for the economy so that everyone prospers.

We cover every link in the investment chain:

- We work with investors, helping them to understand the industry and the options available to them. We know investing can seem daunting, so we work hard to make it clear and accessible.
- We work with investment managers, promoting high standards and the need to put clients first. Our work includes helping members to manage money efficiently and communicate effectively.
- We work with the companies we invest in, helping them to achieve better long-term results and, ultimately, greater returns for investors and the economy.
- We work with regulators and governments around the world. We've built close, trusting relationships with these bodies and play an active role in shaping the rules that govern the industry.

The Investment Association's purpose is to ensure that investment managers are in the best possible position to help people build resilience to financial adversity, achieve their financial objectives and maintain a decent standard of living as they get older. It is also to help investment managers maximise their contribution to economic growth through the efficient allocation of capital.

## RESPONSE FROM THE INVESTMENT ASSOCIATION

The Investment Association welcomes the opportunity to respond to the proposals on the changes to the Handbook impacting AIFMs and AIF depositaries. Our responses to applicable questions are attached to this letter.

Other than noting a duplication of capital requirements for AIFMs which operate within group structures, we do not have any material concerns regarding the proposed Handbook changes. However, we note some issues on where further clarification is required. We also believe that further issues are likely to arise in respect of AIFMD that are difficult to anticipate at this stage, which may require clarification or guidance from the FCA. We therefore urge the FCA to maintain the existing open dialogue with industry participants on the implementation of AIFMD so that these issues can be addressed as and when they arise.

If you would like to discuss any of the points raised in our response further, please contact myself on 020 7831 0898 or by email to [peter.capper@theinvestmentassociation.org](mailto:peter.capper@theinvestmentassociation.org).

Yours sincerely



**Peter Capper**  
**Fund & Investment Risk Specialist**

**Q&A on Valuation Obligations under AIFMD**

*Q4.1: Do you agree with our proposed questions and answers on the valuation obligations under AIFMD?*

Overall, we welcome the guidance provided by the FCA in the proposed questions and answers on the valuation obligations under AIFMD. In general, we believe these are sufficient to assist AIFMs in understanding their obligations. We welcome the clarification in question 1.3 that a governing body of an AIF such as a board of directors or a trustee with a contractual right to override a valuation figure is not performing the valuation function, provided this right is only exercised in exceptional circumstances. However, we note that AIFs can also be structured as limited partnerships, and a similar governance function may be performed by the General Partner. It would therefore be helpful for this guidance to refer to any governing body of an AIF to account for the full spectrum of legal structures.

**Effects of article 72AA of the RAO on AIFMs**

*Q4.2: Do you agree with our proposed notification requirements for firms carrying on activities under the RAO exclusion in connection with, or for the purposes of, managing an AIF?*

We are largely comfortable with the approach proposed by the FCA, and in particular welcome the exclusion of the activities listed in the proposed rule for FUND 1.4.8R(2) from the notification requirement. In practice, we do not anticipate many full-scope UK AIFMs or small UK AIFMs applying the RAO exclusion to any activities not listed under FUND 1.4.8R(2). We note a typo in the draft rule 1.4.8R(2)(c) – the closing parenthesis after “investments” should be removed.

*Q4.3: Do you have any comments on the proposed notification form?*

No – the proposed notification form appears concise and not overly onerous.

*Q4.4: Do you think we should consult on similar notification requirements for firms carrying on activities under the RAO exclusion in connection with, or for the purposes of, managing a UCITS?*

We do not believe a similar notification requirement for firms carrying on activities under the RAO exclusion in connection with, or for the purposes of, managing a UCITS is necessary for the reasons cited by the FCA in paragraph 4.18.

**Administration fee for late submission of AIFMD Annex IV transparency reports**

*Q4.5: Do you agree with our proposal to make above-threshold non-EEA AIFMs, small non-EEA AIFMs and small registered AIFMs liable to pay a £250 administration fee for failing to report on time to the FCA?*

In so far as a £250 administrative fee is being levied by the FCA on UK AIFMs, we agree that this fee should be applicable to all AIFMs with reporting obligations, including those that are non-EEA AIFMs.

We do, however, request that the FCA take a proportionate approach when applying this administrative charge, whether to UK AIFMs or non-EEA AIFMs, while AIFMD is in the process of being embedded. To date, a number of firms have encountered significant difficulties in submitting their reports on time through GABRIEL, in many cases due to validation issues and difficulties accessing GABRIEL. We have also been notified by some non-EU AIFMs marketing

AIFs in the UK through the private placement regime that they are still awaiting the FCA to provide them with GABRIEL registration access, FRNs and PRNs.



We do not believe it is appropriate to penalise firms with an administration fee in such circumstances, and in particular where a firm has notified the FCA in advance of the deadline they are encountering difficulties in accessing GABRIEL. We would request that the administrative fee is reserved, at least in the early AIFMD post-implementation period, to those firms who have received the necessary information from the FCA to report, whose reports are materially overdue and who have not sought to engage with the FCA prior to the deadline. We would also welcome clarification that the FCA will **not** levy the £250 administration fee on those AIFMs who have not received the required information from the FCA in order to file their Annex IV transparency reports on GABRIEL.

### **Definition of assets under management (AUM) for the calculation of the AIFM professional liability risks requirement**

*Q4.6: Do you agree with our proposed guidance on how to treat portfolios of AIFs managed under delegation for the calculation of the AIFM's professional liability risks requirement?*

Should the FCA go ahead with this proposal it will create an impact for those AIFMs that exist within a Group structure and currently delegate either Risk Management or Portfolio Management to other Group AIFMs. Currently, the AIFM already holds the required capital as it has the legal responsibility to manage the AIFs. Introducing the proposed changes will create the effect of double counting within a Group setting, ie. the capital will be held twice within both the AIFM and the delegated AIFM.

Asking a delegate to hold additional funds as well as an AIFM would seem inconsistent with the principle that the AIFM remains responsible to the fund and its investors regardless of any delegations in place. Therefore, it is logical that it ought to be the AIFM that has the duty to either have adequate professional indemnity insurance or to hold additional own funds as required under AIFMD.

The requirement for both the AIFM and a delegate to hold additional own funds will also impact on the commercial effect of any arms-length delegations of either portfolio or risk management to another authorised AIFM. The need to retain 0.01% of the value of portfolios of AIFs managed as additional own funds will be a significant commercial disadvantage to any UK based delegate AIFM, if other EU member states do not replicate these requirements. The proposed rule would also suggest a difference between the treatment of delegation to an AIFM and delegation to a MiFID firm, which could again potentially disadvantage UK AIFMs.

Therefore we feel within a Group setting there is no additional risk to be mitigated by holding additional capital and therefore AIFs managed under delegation within Group settings should be exempt from the proposed requirements.

### **Guidance on how to interpret the reference to 'Non-Cooperative Country and Territory' in the AIFMD UK regulation**

*Q4.8: Do you agree with our proposed guidance on how to interpret the reference to a 'Non-Cooperative Country and Territory' in the AIFMD UK regulations?*

The proposals seems entirely reasonable.

## **Guidance on determining the place of establishment of an AIF**

*Q4.9: Do you agree with our proposed guidance on how to determine the place of establishment of an AIF?*

The clarification in the proposed guidance is largely welcomed. However, we do not believe that it would be helpful for unauthorised AIFs that are limited partnerships to be deemed to be established in the country of their principal place of business. We would suggest that it would be more sensible for limited partnerships to look at the AIF itself and the country in which it is established, which would typically be judged by the governing law of the limited partnership contract.

## **Passporting of non-core activities**

*Q 4.11: Do you agree with our proposed guidance on passporting of non-core activities under AIFMD?*

The flexibility of the proposal is welcomed.

## **Additional changes**

*Q4.12: Do you agree with these proposed additional changes?*

We note the addition of the words "on request" to FUND 3.3.2 R(3)(b) is consistent with the guidance given by the FCA in its response to question 33 in its questions and answers on Reporting Annex IV transparency information to the FCA. However, given that, under FUND 1.1.3 G, FUND prevails in any conflict between COLL and FUND, there is a possibility the amendment to FUND 3.3.2 R(3)(b) could be interpreted as dis-applying the requirements in COLL 4.5.14R (2)(d) and COLL 8.3.5(6) for the manager of a NURS or QIS to provide annual and half yearly reports to the FCA. We would welcome clarification in FUND 3.3.2R(3)(b) whether the requirements in COLL 4.5.14R (2)(d) and COLL 8.3.5(6) will continue to apply NURS and QIS respectively.

*Q4.13: Are there any other points in our AIFMD rules and guidance that you consider require correction or clarification?*

There are a number of issues relating to the implementation of the AIFMD where we believe further clarification is required. These include:

- **Annex IV Transparency Reporting:** Annex IV transparency reporting is still posing significant challenges to our members. The decision by the FCA to use version 1.1 of the ESMA schema instead of version 1.2, which is used in nearly all other EU jurisdictions which have implemented the AIFMD, is a contributing factor. In order to report using version 1.1, our members have had to make significant adjustments to the data submitted, one notable example being to geographical exposure. In addition, the tight validation tests on a number of questions, particularly where conversion of a value to a rounded percentage figure is required, also requires our members to make adjustments to the data in order for this to be accepted by GABRIEL. Making these adjustments, which have to be completed manually, adds significant man hours and therefore cost in completing their Annex IV transparency reports and frequently result in inaccurate and misleading data being reported. We therefore urge the FCA to implement version 1.2 of the ESMA schema as an urgent priority. We would welcome further engagement with the FCA on Annex IV transparency reporting.
- **Frequency of Leverage Calculation:** FUND 3.7.7 R (1) (a) (which implements AIFMD Article 15) requires AIFMs to "set a maximum level of leveraging which it may employ on behalf of each AIF it manages". FUND 3.7.8 R (which implements the first sentence of AIFMD Article 25 (3))

requires AIFMs to "demonstrate that the leverage limits it sets under FUND 3.7.7R (1)(a) are reasonable and that it complies with those limits **at all times**" (our emphasis). We are aware of different interpretations across the industry as regards how frequently leverage should be calculated and seek FCA clarification on this. For daily priced AIFs, we would expect the calculation to be performed on a daily basis and it could be argued that the calculation should be performed daily irrespective of how frequently the fund is priced given that the AIFM must comply with the leverage limits at all times and can deal in the scheme property at any time.

- Material changes to AIFs: We welcome the guidance provided by the FCA on its website on the respective application processes for new NURS and QIS schemes under COLL and FUND, and how these will be tackled in a joined up approach by the FCA. However, there remains uncertainty on which type of changes to an AIF will be deemed material for the purposes of AIFMD. We would welcome further guidance from the FCA in this area, or engagement by the FCA in the production of an industry best practice paper.

We believe further issues are likely to arise in respect of AIFMD which may require clarification or guidance from the FCA in the future. We therefore urge the FCA to maintain the existing open dialogue with industry participants on the implementation of AIFMD so that these issues can be addressed as and when they arise.