



Alternative Investment Management Association

AIFMD Consultation
Markets Policy Division
Central Bank of Ireland
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Sent by email to: AIFMDconsultation@centralbank.ie

11 December 2012

Dear Sirs,

AIMA's response to the Central Bank's Consultation Paper CP 60

The Alternative Investment Management Association (AIMA)¹ appreciates the opportunity to comment on the Central Bank of Ireland's (the 'Central Bank') consultation paper 'Consultation on implementation of Alternative Investment Fund Managers Directive (the 'AIFMD'): Consultation Paper CP 60' ('the Consultation Paper').

AIMA recognises the exceptional difficulty inherent in the task of implementing a complicated piece of legislation like the AIFMD, especially considering the extremely short time frame available and considering Member States have had to commence this analysis without the benefit of the final Level 2 measures. Overall, we welcome the approach taken in the Consultation Paper; however, we feel that there are a few issues which raise concerns for our members that we should bring to your attention.

Implementation of Level 1 Text Affected by Level 2 Regulations

As the outcome at Level 2 is not known, and the effect of any regulations (especially in the area of delegation) is therefore still unknown, we would urge the Central Bank to maintain a position with respect to the transposition which fully respects the legislative compromise reached with the Level 1.

Timing of Ability to Apply for Authorisation

We would welcome some clarification from the Central Bank as to when alternative investment fund managers ('AIFM's) will be able to apply for authorisation under the AIFMD. On page 7 of the Consultation Paper, the question is raised as to whether there any transitional measures that should be considered to facilitate an orderly transition for existing non-UCITS investment funds to the new regime. AIMA feels that it is extremely important that applications for authorisation under the AIFMD are accepted at least three months prior to the implementation date for the AIFMD so that firms can be fully authorised under the AIFMD by 22 June 2013. Without this, AIFMs will not be able to benefit from the passports under the AIFMD from the implementation date.

¹ AIMA is the trade body for the hedge fund industry globally; our membership represents all constituencies within the sector - including hedge fund managers, fund of hedge funds managers, prime brokers, fund administrators, accountants and lawyers. Our membership comprises over 1,300 corporate bodies in over 40 countries.

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Counterparty Credit Rating Criteria for Retail Investor AIFs

The alternative investment fund ('AIF') Handbook proposes to mandate minimum credit criteria eligibility requirements for certain counterparties of a Retail Investor AIF² in respect of financial derivative instruments (page 15 AIF Handbook). It appears that the proposal is to apply such credit rating criteria where the relevant counterparty is not a "relevant institution" where the term "relevant institution" is defined as "institutions specified in sub-paragraphs (a), (b) and (c) of paragraph 9 of section 1.ii of Part I."³

We would suggest that this minimum credit rating requirement should not be introduced. We note that the AIFMD does not include such a requirement. In respect of the possible implications of such criteria being applied to Retail Investor AIFs, we would highlight the following potential negative consequences:

- (i) In volatile markets such as recent conditions that have resulted in various rating agencies revising credit ratings of a wide range of financial institutions and not just the individual counterparty, a counterparty may become ineligible to continue to act as counterparty to a Retail Investor AIF resulting in an inadvertent breach of the regulation by the fund. In the case of open transactions, such automatic ineligibility creates legal uncertainty and may require significant transactions to be terminated in a short time frame potentially incurring termination costs that may be contrary to the interests of the fund and its investors.
- (ii) Such criteria may contribute to the creation of an increasingly small pool of eligible counterparties and potential counterparty concentration risks for the Retail Investor AIF. We would propose that alternative credit risk mitigation techniques, for example bilateral collateral arrangements, are available to the fund and these are equally (if not more) effective in the risk management of counterparty risk exposure.
- (iii) We are not aware that any other Member State is contemplating the introduction of minimum counterparty credit rating criteria in respect of AIFs and, as this is not a requirement of the AIFMD, such a step would represent gold plating by the Central Bank which does not reflect the maximum harmonisation objectives of the AIFMD and may place Ireland at a competitive disadvantage with comparable fund jurisdictions.

Requirements Applicable to AIFMs that are not Full AIFMs

AIMA considers that the provisions of the AIFMD⁴ which will apply to Qualifying Investor AIFs⁵ that do not have an AIFM (a 'Full AIFM') are disproportionate. Where there is no Full AIFM, an AIF should only be required to comply with the provisions of the AIFMD to the extent required therein. Article 3 of the AIFMD states that where an AIFM is below the threshold for authorisation as an AIFM, Member States shall ensure that these managers at least:

- (a) are subject to registration with the competent authorities of their home Member State;
- (b) identify themselves and the AIFs that they manage to the competent authorities of their home Member State at the time of registration;
- (c) provide information on the investment strategies of the AIFs that they manage to the competent authorities of their home Member State at the time of registration;

² Defined in the Consultation Paper as "alternative investment funds that are authorised by the Central Bank and that are not Qualifying Investor AIFs as defined in the Qualifying Investor AIF Requirements".

³ The definition includes: (a) a credit institution authorised in the European Economic Area (EEA) (European Union Member States, Norway, Iceland, Liechtenstein); (b) a credit institution authorised within a signatory state, other than a Member State of the EEA, to the Basle Capital Convergence Agreement of July 1988 (Switzerland, Canada, Japan, United States); and (c) a credit institution authorised in Jersey, Guernsey, the Isle of Man, Australia or New Zealand.

⁴ The requirements listed on page 119 of the Consultation Paper in respect of Retail Investor AIFs and on page 187 of the Consultation Paper in respect of Qualifying Investor AIFs include provisions relating to the AIFMD requirements for: (a) general principles, (b) remuneration, (c) conflicts of interest, (d) risk management, (e) liquidity management, (f) investment securitisation positions, (g) organisational requirements - general principles, (h) valuation, (i) delegation, (j) depositary, (k) annual report, (l) disclosure to unitholders, and (m) obligations for AIFMs managing AIFs which acquire control of non-listed companies and issuers.

⁵ As defined in the AIF Handbook at page 125 of the Consultation Paper.



- (d) regularly provide the competent authorities of their home Member State with information on the main instruments in which they are trading and on the principal exposures and most important concentrations of the AIFs that they manage in order to enable the competent authorities to monitor systemic risk effectively; and
- (e) notify the competent authorities of their home Member State in the event that they no longer meet the conditions for the exemption from authorisation.

Although Article 3 allows Member States to adopt stricter rules, AIMA considers that this would be disproportionate. AIMA considers a proportionate regulation of small AIFMs can be achieved if those targeting professional investors are only subject to the registration requirements set out in Article 3(a)-(e) of the AIFMD (set out above), with additional requirements for AIFMs marketing to retail investors. However, the list of requirements which the Central Bank proposes applying seems disproportionate considering the size of the AIFM's assets under management attributable to these AIFs.

Despite the problems that introducing a two-tier regulatory regime may present, AIMA believes that it would be proportionate to require that small AIFMs targeting professional investors should only be subject to the registration requirements in the AIFMD. Professional investors have the tools, expertise and knowledge to assess, analyse and evaluate investment opportunities in greater detail than retail consumers and as a result, professional investors are offered the privilege to invest in more sophisticated, higher risk products, often with reduced levels of fees. The trade-off for this privilege is a reduction in certain consumer protection rights offered to retail consumers.

AIMA also considers that the potential problem of misleading consumers by having a two-tier regime would be sufficiently addressed by clear communications to investors from the regulators. Whilst retail clients may find it difficult to understand the distinction between registration and full authorisation, professional investors are not likely to be misled by the distinction. AIMA therefore suggests that AIFMs targeting only professional investors should only be required to register and not be obliged to comply with all of the requirements of the AIFMD unless they wish to opt-in to the AIFMD.

We hope you find our comments useful and would be more than happy to answer any questions you have in relation to this submission.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "J. Król".

Jiří Król
Director of Government & Regulatory Affairs