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Directorate General Internal Market and Services

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Mr Steven MAIJOOR
Sent by email: Steven.maijoor@esma.europa.eu

Dear Mr Maijoor,

On 2 April 2013 we received ESMA's draft regulatory technical standards (RTS) to determine types of alternative investment fund managers. These RTS aim to fulfil the mandate given to ESMA in Article 4(4) of Directive 2011/61/EU (AIFMD). ESMA invites the Commission to adopt the proposed RTS.

The Commission agrees with the overall approach suggested by the draft RTS. We concur that the RTS should establish a differentiation between managers of open and closed-ended AIFs. This distinction is relevant for several provisions in the AIFMD and in the Delegated Regulation (EU) No 231/2013 which attach legal consequences to the fact whether an AIF is of the open- or the closed-ended type.

The Commission's analysis of the draft RTS indicates, however, that Article 1(2)(a) of the RTS risks not be fully compatible with the AIFMD. Our concern relates to the fact that Article 1(2)(a) of the proposed RTS suggests basing the distinction between open and closed-end AIF on whether these funds offer redemptions and whether these redemptions are available at least once a year.

While we concur that the feature that distinguishes an open-ended AIF from a closed ended one is the possibility for investors to redeem their units or shares, we have serious doubts whether the frequency of redemptions is a criterion that can be employed to distinguish the two categories. Our doubts are based on the wording of Articles 19(3) and 16(1) AIFMD.

Article 19(3) provides that an open-ended AIF shall carry out valuations of its assets and the calculation of its net asset value (NAV) "at a frequency which is both appropriate to the assets held by the AIF and its issuance and redemption frequency". On the other hand, if the AIF is of the closed-ended type, such valuations and calculations shall be carried out in case of an increase or decrease of the capital by the relevant AIF.

The assumption underlying Article 19(3) therefore is that an open-ended AIF is a type of AIF that issues and redeems shares and units. On the other hand, a closed-ended AIF is a type of AIF that does not. Its valuation and calculation frequency is therefore linked solely to increases or decreases of its capital.

Article 16(1) AIFMD requires that all AIFMs shall, for each AIF that they manage which is not an unleveraged closed-ended AIF, employ an appropriate liquidity management system and adopt procedures which enable them to monitor the liquidity risk of the AIF and to ensure that the liquidity profile of the investments of the AIF complies with its underlying obligations.

The structure of Article 16(1) suggests that all open-ended AIF need to manage their liquidity while this requirement only applies to those closed-ended AIF that are leveraged. Again, the main distinction between open and closed-ended AIF rests on the fact that open-ended AIF are confronted with "underlying obligations" beyond those resulting from leverage, i.e., to redeem investors.

In our view, it results from the above that open-ended AIF are types of AIF that issue or redeem shares or units with their investors. The above legal provisions do not allow excluding AIF that redeem, but less frequently than on a yearly basis, from the type of open-ended AIF.

In accordance with Article 10(1) of the Regulation No (EU) 1095/2010 the Commission invites ESMA to submit new draft RTS reflecting the above distinction, preferably within a time-frame that allows the RTS to enter into force before or not later than 22 July 2013. In order to meet this deadline, the Commission's services stand ready to provide all necessary assistance to ESMA.

Yours sincerely



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Cc: J-P Gauzès, Council Secretariat