



January 17, 2018

European Securities and Markets Authority
European Commission
Directorate-General for Financial Stability,
Financial Services and Capital Markets Union
European Parliament
The Council of the European Union

Re: Commission Proposal re: review of the European Supervisory Authorities

Dear Sir or Madam:

The American Investment Council (the “AIC”) respectfully submits this letter to the European Securities and Markets Authority (“ESMA”), the European Commission, the Directorate-General for Financial Stability, Financial Services and Capital Markets Union, the European Parliament and the Council of the European Union to address certain matters identified in the “Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; and Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market” (the “Commission Proposal”).

The AIC is an advocacy, communications and research organization established to advance access to capital, job creation, retirement security, innovation and economic growth by promoting responsible long-term investment. In this effort, the AIC develops, analyzes and distributes information about the private equity and growth capital industry and its contributions to the U.S. and global economy. Established in 2007 and formerly known as the Private Equity Growth Capital Council, the AIC is based in Washington, D.C. The AIC’s members are the world’s leading private equity and growth capital firms united by

their commitment to growing and strengthening the businesses in which they invest. For further information about the AIC and its members, please visit our website at <http://www.investmentcouncil.org>. As such, the AIC is well placed to comment on the Commission Proposal.

We understand the context and background against which the Commission Proposal is made and appreciate the efforts of the three European Supervisory Agencies (the “ESAs”) to ensure consistency in the application of certain EU rules.

We do, however, have concerns about the Commission Proposal in its current form as it relates to delegation of portfolio management to third-country managers. The Commission Proposal includes a requirement for national regulators to obtain a prior assessment from ESMA when an EU AIFM that is applying for authorization intends to delegate portfolio management to a third-country manager or, where an existing EU AIFM wants to delegate material functions to an entity outside the EU, that the national regulators need to notify ESMA thereof in advance. Under the current rules, implementing such delegations is already a lengthy and highly-scrutinized process, governed by strict EU rules. We do not believe that there is a benefit to add another layer of supervision by another regulator to this process, which will inevitably entail additional delay, complexity and bureaucracy. While the bottleneck in connection with an initial EU AIFM’s authorization could be accounted for and planned, there is a high degree of uncertainty when it comes to ESMA’s ongoing monitoring of existing AIFMs. Today, there is typically already a constant exchange of documents with and close review by the national regulators when it comes to delegation agreements. The perception by market participants is that the existing bureaucratic requirements are already high to comply with as they are. From an industry perspective, there is hence no need to add further oversight and bureaucratic obstacles.

In addition, it is also in particular unclear how ESMA will be staffed to address these additional reviews without causing impediment or delaying envisioned delegation scenarios. Any such uncertainties will, however, be detrimental to both the business of the third-country manager as well as the EU AIFM. In the end, if it becomes too burdensome to set up delegations so that managers abstain from it, it will be detrimental to EU investors who wish to invest in EU funds with respect to which non-EU managers assume portfolio management, while risk management is being retained with the EU AIFM which is also overseeing the portfolio management.

Moreover, in addition to the arguments above, we do not believe these amendments are at all required as the legal requirements are already clear in their current form. If there are issues concerning the implementation of delegation arrangements, we believe that these issues should be dealt with directly with the supervisory authorities concerned, and not by erecting additional barriers for non-EU firms who are seeking only to comply with the law. This issue is important in practice for the reasons explained below.

The private equity industry is a global industry: funds often invest globally and it is vital to have teams and operations located in different countries. In particular in the private equity industry, there has been a long-standing, established practice between EU and U.S. firms with regard to delegating services, both from the EU to the U.S. and vice versa. Such delegation arrangements are vital for the private equity industry, which operates across borders with multi-national teams. Flexibility to structure cross-border activities is of the utmost importance to our members and, likewise, EU managers, in order to ensure that personnel with the best skills and knowhow, irrespective of where they are based, can be utilized for the benefit of investors and portfolio companies. Delegation arrangements by fund managers on both sides of the Atlantic provide an efficient means for managers to access these skills and expertise on a flexible basis. Requiring an additional level of review to implement these arrangements would not be in the best interests of fund investors. Conversely, we believe that the interests of European investors and the growth of European capital markets are in fact better served by allowing EU firms to leverage portfolio management expertise not only within but also outside the EU.

Against this background, we feel strongly that the current rules on delegation to third-country firms as foreseen in the AIFMD and the corresponding Level 2 Regulation are sufficient as they stand and that no further action is necessary. It should be noted in this regard that typically the risk management function will be undertaken by the EU AIFM in accordance with the AIFMD requirements and only the portfolio management functions will be delegated to third-country firms such as an U.S. based investment adviser.

An investment adviser registered with the U.S. Securities and Exchange Commission (the “SEC”) will meet the requirement of being authorized or registered for the purpose of asset management and of being effectively supervised by a local regulator (the SEC), with whom co-operation arrangements are in place. An SEC-registered investment adviser is, among other requirements, subject to periodic examinations by SEC staff and to various SEC rules related to disclosure, record-keeping and custody of AIF assets. It is also required to adopt and implement written policies and procedures, administered by a designated chief compliance officer, designed to prevent a violation of the Advisers Act by such investment adviser or any of its supervised persons. These policies and procedures need to be reviewed annually to determine their adequacy and the effectiveness of their implementation. The investment adviser’s compliance program should additionally cover, among other things, the identification and, to the extent necessary, the mitigation and disclosure of any conflicts of interest, portfolio management processes and applicable regulatory restrictions and business continuity issues. Furthermore, risk management, in particular enterprise risk management, has drawn continued emphasis by the SEC. As a fiduciary, an SEC-registered adviser would also be expected to meet the EU requirements of having sufficient resources and sufficiently experienced personnel in rendering portfolio management services. In addition, the SEC has the ability to suspend the registration of, or place other restrictions on, firms that hire persons whom are not of good repute – that is, persons who have a history of violating the securities and certain other laws.

In summary and as a consequence of this equally strict and robust U.S. regulatory regime (which has been reviewed in great detail by ESMA with respect to its advice to the European Parliament, the Council and the Commission on the application of the AIFMD passport to non-EU AIFMs and AIFs), U.S. firms such as ‘investment advisers’ registered under the Investment Advisers Act of 1940, as amended (the “Advisers Act”) with the SEC meet the necessary standard required in Article 20 of the AIFMD and Articles 75 et seq. of the Level 2 Regulation for a third-country entity to whom services are delegated.

We are concerned that the Commission Proposal will, if enacted, create a further obstacle to legitimate and necessary delegation agreements, even where the legal requirements are fully met. We are also concerned that new requirements may be established by administrative practice, which go beyond those stipulated in the AIFMD and the corresponding Level 2 Regulation, and which will further complicate and impede authorizations and delegation agreements between EU and U.S. firms in the private equity industry. It is likely that, if enacted, the Commission Proposal would have a chilling effect on third-country firms, despite fulfilling all legal requirements and being subject to a strict and recognized regulatory regime, wanting to market and offer their services in the EU, which will in turn negatively impact EU investors. The ongoing monitoring may additionally convince third-country firms to limit the additional products they market to EU investors, thereby limiting the potential asset classes and investment options for EU investors. Such additional burdens on third-country firms as a result of the current Commission Proposal would hence not only be detrimental to these private equity firms, but also to investors on both side of the Atlantic.

For the reasons state above, we strongly urge all interested parties to reconsider the proposed amendments.

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We appreciate this opportunity to share our comments on the Commission Proposal. If you have any questions regarding our comments or would like additional information, please feel free to contact me at (202) 465-7700. Thank you for your consideration of these comments.

Respectfully submitted,



Jason Mulvihill
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American Investment Council