9 March 2022

EU Commission's proposal (the "Proposal") to amend the Alternative Investment Fund Managers Directive (AIFMD)[1], published on 25 November 2021

Dear Sir or Madam:

Many thanks for giving us the opportunity to provide our initial interpretation and respective concerns with respect to the published Proposal to amend certain AIFMD provisions. The American Investment Council ("AIC") is sending this letter to the EU Commission in light of the feedback period currently underway on the proposal and appreciates the opportunity to contribute to the legislative debate.

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, through private equity, private credit, and growth capital. In this effort, the AIC develops, analyzes, and distributes information about the private investment industry and its contributions to the American and global economies. Established in 2007 as the Private Equity Growth Capital Council, the AIC is based in Washington, DC. The AIC's members are united by their commitment to growing and strengthening the businesses in which they invest. Many of our members invest in the European Union and market their alternative investment funds (each, an "AIF") to professional investors in the European Union;[2] as such, the AIC is well placed to comment on the Proposal. For further information about the AIC, please visit https://www.investmentcouncil.org.

This letter highlights our topics of concern on the Proposal from the perspective of US fund managers ("US AIFMs").

[1] *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services and loan origination by alternative investment funds*, 25 November 2021, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12648-Financial-services-review-of-EU-rules-on-alternative-investment-fund-managers_en.

[2] According to Preqin's 2021 report, there are approximately 5,908 private equity and private credit fund managers in the United States. In Europe, there are approximately 3,110 private equity and private credit fund managers.

799 9th Street NW, Suite 200, Washington, DC 20001 202.465.7700 @AmericaInvests investmentcouncil.org

1. The Proposal Contains Unwarranted Changes to Delegation Arrangements to non-EU Managers.

We appreciate that the Proposal does not provide for major changes on delegation arrangements. We believe that the current requirements appropriately address investor protection and the concern that both risk and portfolio management cannot be delegated. That said, the Proposal provides that the relevant competent authority must report detailed information on third-country delegation arrangements to ESMA on an annual basis which, in turn, will influence the information relating to delegation that the competent authority will require from an EU AIFM.

We are concerned about the additional burden entailed by this new reporting framework and we do not agree that a delegation to a non-EU portfolio manager should be subject to higher level of monitoring by competent authorities. The Directive expressly permits such delegations and the circumstances under which such delegations are possible. Under the Directive, delegation of portfolio management is only possible if the non-EU manager is appropriately authorized in its home jurisdiction and if a co-operation agreement is in place with the supervisory authority of the portfolios manager's home country. These are fundamental protections for EU investors and have worked to benefit EU investors since the AIFMD's inception. In our view, the Commission's proposal for additional scrutiny and monitoring of delegation arrangements is not justified from the perspective of existing delegation arrangements by EU AIFMs to US AIFMs.

2. The Proposal's Regulatory Framework for Credit Funds should also be Accessible to non-EU Managers and not Impose Undue Burdens.

We welcome the creation of a new regulatory framework for loan originating funds that is consistent across the EU. That said, we do not think that it is appropriate in an environment of globally investing funds to limit such a regime to EU funds and managers only. In our view, it is extremely important that non-EU fund managers also benefit under the regime, at the very least if they comply with the same requirements as EU managers.

On the regulatory proposal relating to loan funds, we believe it should be clarified that the new "risk retention" rule (that requires AIFMs to retain 5% exposure when selling any loans they originate) should be restricted to apply only to funds whose investment strategy is to originate loans with a view to selling the loans, as opposed to funds that originate loans with the intent to hold them in the longer term, but could happen, in certain circumstances, also to sell a portion of the loans.

The proposal that an AIFM must ensure that the AIF it manages is closed-ended if the notional value of the AIF's originated loans exceeds 60% of its net asset value would restrict open-ended funds from originating loans beyond 40% of their net asset value, and have a significant impact on existing open-ended funds that originate loans. We respectfully question the basis of this restriction, and instead propose that open-ended funds can continue to originate loans without any such cap, on the basis of putting in place the liquidity management systems specified in the proposal (which requires open-ended AIFs to have detailed processes in place to activate at least one appropriate liquidity management tool). Liquidity management processes will ensure consistency between funds' liquidity profile and redemption policies.

3. AIFMs Already Report Sufficient Information on Fees and Expenses to Investors.

We appreciate the effort to simplify reporting more generally. That said, the new requirements to disclose any "direct and indirect fees and expenses that were directly or indirectly charged or allocated to the AIF or to any of its investments" and "a list of fees and charges that will be applied in connection with the operation of the AIF and that will be borne by the AIFM or its affiliates" should be clarified, as it is unclear as to the scope of fees and expenses that would be expected to be disclosed. For instance, the wording in its current form could cover expenses incurred by an AIF's portfolio companies that are "indirectly allocated to the AIF" level. It is further unclear to us why expenses borne by the AIFM itself and not the AIF should be disclosed. We understand that any fees, including fees charged by affiliates of the AIFM, need to be disclosed to the extent they are borne by the AIF. However, the benefit of disclosing fees and charges that will be applied in connection with the operation of the AIF and are borne by the AIFM itself is unclear to us, other than a fee borne by the AIFM in connection with the operation of the AIF raises a conflict of interest, which is already addressed in the rules in AIFMD dealing with identification, management and disclosure of conflicts of interest. In that context, we should point out that, when the United States updated its Advertising and Cash Solicitation Rules and merged them into a new Marketing Rule that is set to take effect in November 2022, the SEC considered requiring investment advisers (including any AIFM registered with the SEC) to include a schedule of each fee and expense applicable in calculating fund performance when providing performance information to investors. The SEC, however, explicitly rejected a "schedule of fees" approach, stating that such a schedule "could be overly burdensome for advisers and may not provide relevant information to investors," and that institutional investors are in a position to negotiate for appropriately tailored disclosures based on their particular needs.[3] The SEC based its rejection of a fee schedule in large part on industry comments that stressed the diversity of products and strategies that fund managers offer, the confusion that could result in determining what fund expenses would need to be included or how certain fees and expenses (like management fee offsets) would need to be reflected, and that forcing managers to use a pre-set schedule of fees would restrict competition and choice in investment products.

4. The AIC Supports the Proposal's Treatment of NPPRs as it benefits European Investors and Urges not to Unfairly Restrict Access.

We very much appreciate that the Proposal does not provide for significant changes to the existing third-country marketing regimes in Article 42 of the AIFMD. Non-EU AIFMs may continue to market to professional investors in the EU under the relevant National Private Placement Regimes. This is extremely important to US AIFMs and works well in practice.

We note that the Proposal deletes the reference to the Financial Action Task Force ("FATF") list and instead requires that non-EU AIFM and non-EU AIF cannot be domiciled in a "high risk jurisdiction" pursuant to the EU Anti-Money Laundering ("AML") Directive[4], i.e., the EU AML List. We also note that in addition, the Proposal adds a new condition, that each of the non-EU AIFM's

[3] Investment Adviser Marketing, SEC Release No. IA-5653; File No. S7-21-19 (Dec. 22, 2020).

[4] Directive (EU) 2015/849

and non-EU AIF's jurisdiction must have signed an agreement with each Member State in which the AIF is to be marketed that fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements and further must not be on the EU list of non-cooperative tax jurisdictions (the "EU Tax List").

We understand the requirement regarding high-risk jurisdictions under the AML Directive, although Article 42 of the AIFMD (the basis for non-EU managers to market in the EU) already contains the condition that the manager or fund jurisdiction is not listed as a Non-Cooperative Country and Territory by FATF. Regarding the condition to be listed on the Tax List, we question whether the concept of tax cooperation is an appropriate condition for a marketing regime. This creates significant additional uncertainty for non-EU AIFMs and for sophisticated European investors who appreciate the possibility to diversify their portfolio and invest in global funds, where the AIFM has obtained marketing approval for a fund and thereafter the fund's jurisdiction is added to the list of non-cooperative countries for reasons unrelated to fund activities.

By the same token, also in light of securing legal certainty, it should be ensured that there is a transparent and legal process in place with respect to the choice of countries added to such lists and that there is a consultation and the possibility of an appeal to these lists.

5. Conclusion: The AIC Supports Minimal Intervention at This Point.

The AIC believes that the AIFMD does not require considerable change at this point, not, at least, as it relates to US AIFMs. Like European Union investors, US AIFMs appreciate the channels provided by the AIFMD in its current form for US AIFMs to access the European Union investor market. The AIC urges the European Commission not to revisit a framework that has been tested and established and is proportionate from the perspective of EU investors and EU and non-EU managers.

The AIC appreciates the opportunity to submit this letter. We hope you find it helpful, and we would be pleased to answer any questions that you might have. If you would like additional information, please feel free to contact me personally at (202) 465-7700. Thank you for your consideration of these comments.

Respectfully submitted,

Jason Mulvihill

Jason Mulvihill
Chief Operating Officer & General Counsel
American Investment Council