The European Securities and Markets Authority
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France

Submitted via webportal

3 April 2020

Dear Sir or Madam,

AIMA and MFA response to ESMA consultation on Draft technical standards on the provision of investment services and activities in the Union by third-country firms under MiFID II and MiFIR

The Alternative Investment Management Association Limited (AIMA)[1] and Managed Funds Association (MFA)[2] appreciate the opportunity to provide feedback on the draft technical standards on the provision of investment services and activities in the Union by third-country firms under MiFID II and MiFIR (the 'draft RTS') published by the European Securities and Markets Authority ('ESMA')

AIMA and MFA represent a variety of asset managers domiciled, supervised and authorised in the EU or outside of the EU. Among our members, some provide investment advice or discretionary

1 The Alternative Investment Management Association (AIMA) is the global representative of the alternative investment industry, with around 2,000 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in hedge fund and private credit assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. The ACC currently represents over 170 members that manage $400 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors).

2 The Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

portfolio management services which are activities governed by the MiFID framework. The associations have have been actively engaging with policy-makers on the revision of the MiFIR equivalence framework and are pleased to further contribute to making the legislation proportionate and efficient.

As a general comment, we would like to highlight that the establishment of a workable, efficient and proportionate equivalence regime framework seems essential for the EU to continue building and further deepening its capital markets. A sound and effective equivalence framework means that EU stakeholders, i.e. professional clients and counterparties, can continue to access a diversified pool of global counterparties, which is essential for them to be able to fulfil their duties locally.

We would therefore respectfully suggest that the reporting requirements should be kept reasonable and proportionate to the purpose so that they do not unintentionally serve as an administrative barrier to the use of the equivalence regime.

With this in mind and having carefully read the background and the Annexes to the consultation paper, we would like to make a few general comments and provide a detailed response in the Annex.

- **ESMA proposed registration and reporting draft RTS seem more onerous than other standard reporting requirements -** In general, we note that the information requirements for ESMA registration and annual reporting look overly onerous, notably in comparison to other similar processes. Indeed, the amount of information required seems to exceed that required to become fully authorised as an investment firm. We feel that some requirements may be overly expansive in particular because: (i) firms seeking registration will already be governed by a regulatory and supervisory framework deemed equivalent to the EU's own regime; (ii) this regime is only available in respect of professional clients and not retail investors; and (iii) it is expected that many members will be subject to equivalent substantial reporting to MiFID II and EMIR. Furthermore, as cross-border activities comprise only a partial amount of a firm's activity, the reporting seems disproportionate to the activities and could discourage use of the regime. We note also that the annual reporting template is significantly more onerous than other annual reporting requirements, for example the annual update of Form ADV required by the SEC.

- **Going beyond level 1 mandate –** As detailed in the Annex, some elements seem to go beyond ESMA's mandate in the new Article 46(6a) (as updated by the Regulation on investment firms' prudential requirements 2019/2033 ('IFR')). We would strongly recommend that the RTS be strictly aligned with the Level 1 mandate.

- **The cost-benefit analysis lacks quantitative justification –** We note that there are no explicit costings in the cost-benefit analysis, despite the fact that our members believe that the significant reporting costs associated with the regime might prevent them from using the equivalence regime. We would suggest ESMA reconsider its cost-benefit analysis and we stand ready to support such an endeavour.

We hope the above comments are useful and we would be happy to elaborate further on any of the points raised in this letter. For further information please contact Marie-Adelaide de Nicolay, Head of AIMA Brussels office (madenicolay@aima.org), or Matthew Newell, Associate General Counsel at MFA (mnewell@managedfunds.org).

Yours sincerely,

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Annex

We provide here detailed answers on the consultation paper.

Q1: Do you agree with the list of information to be requested by ESMA from applicant third-country firms for registration in the ESMA register? If no, which items should be added or deleted and for which reasons? Please provide detailed answers.

Our members recognise and agree that given ESMA's increased responsibilities, information sent to ESMA at the registration stage should be aligned with information reported on an annual basis, as set out in Article 63 of IFR, modifying MiFIR.

However, given that (i) firms seeking registration will be governed by a regulatory and supervisory framework deemed equivalent to the EU's own regime; (ii) that this regime is only available to professional counterparties or clients and not retail investors; and (iii) that it is expected that many members will be subject to equivalent substantial reporting to MiFID II and EMIR, we feel that some requirements might be too onerous or not justified. For some elements, there is also a question of availability or auditability of the information, depending on the type of firms covered.

In that regard, our members question the following elements in Article 1 of the draft RTS:

1(e) – information on the expected numbers of clients and counterparties and total net turnover: the definition of "net turnover" for an asset management firm is not clear. Requiring the expected total net turnover to be made in the EU seems difficult to provide when seeking registration.

1(f) – information on how the activities of the third country firm in the Union will contribute to the strategy of the third-country firm: this information is speculative, difficult to verify and not necessarily linked to ESMA's powers. Our members therefore fail to understand the purpose of reporting on these elements.

Fields 7-9 – Personal addresses are sensitive information and we recommend instead the provision of business addresses only for such persons.

We believe the following information required to be provided seems unduly onerous and not necessary for ESMA's needs:

- Information on the planned marketing strategy of the third-country firm in the Union;
- where the third-country firm provides the services [of portfolio management and/or investment advice], the arrangements of the third-country firm to ensure that such investment services provided to its clients are suitable;
- Information on the outsourcing arrangements of the third-country firm, with a focus on the operations of the third-country firm in the Union;
- Information on the structure, organisation of and monitoring by the compliance function, the internal audit function and the risk management function (or equivalent) of the third-country firm.

Q2: Taking into account the list of information in Article 46(6a) of MiFIR, as amended by the IFR, do you agree with the list of information that third-country firms providing investment services and investment activities in the Union in accordance with Article 46 of MiFIR should report to ESMA on an annual basis? If no, which items should be added or deleted and for which reasons? Please provide detailed answers.

In line with our comments above, we generally feel that questions regarding a third country firm's global activity are too onerous, and not within ESMA's remit.

We also note that requiring firms to report on these elements seems to go further than what was initially prescribed in Article 46 (6a) of MiFIR, notably as per point (a) and (d) which respectively require a firm to report on the "scale and scope" of the activities carried out in the Union (but not globally) and on the turnover and aggregated value of the assets corresponding to the activities carried on in the Union (but not globally).

We would therefore recommend deleting points (k) and (l) of Article 3. We would also recommend removing the following:

- total number of clients and counterparties of the third-country firm globally;
- total net turnover of the third-country firm globally;
- information about the value of the assets under management for clients in the Union.

Furthermore, the annual reporting requirements on the activities of the compliance function[3] seem overly onerous as they include elements such as:

a. a summary of the major findings of the compliance function;
b. a summary of the actions taken globally to address identified failures or risks of failures identified by the compliance function;
c. measures taken or to be taken to ensure compliance with regulatory developments (i.e. not yet in force compliance obligations);
d. granular details of how any complaints received in the EU were responded including pay outs and remedial action;
e. an explanation of any deviation by senior management in implement important recommendations issued by the compliance function.

Such requirements are more expansive than what national supervisors ask regarding the operation of the compliance function, and amount to the entire level of internal reporting that most asset managers themselves generate from their compliance functions.

At a minimum, the reporting on deviation of recommendations should be limited to EU-related business and not to non-EU business, especially as these would be firms operating under an

3 See field 27 in Annex II of the Draft RTS "Information to be provided to ESMA under Article 2 (Information to be provided to ESMA annually)".

equivalent regulatory and supervisory framework that ESMA would have judged efficient and protective enough to be granted equivalence with the EU's own framework.

Finally, the extension of point (b) to global issues is also of concern and overly broad, and could for some large firms be extremely onerous.

We would therefore suggest limiting the annual reporting requirements related to the compliance function to point (a): "a summary of the major findings of the compliance function".

Q5: Do you agree with the cost benefit analysis as it has been described in Annex II?

We would respectfully note that the cost-benefit analysis included in the consultation paper is quite limited as it does not quantify the significant costs this reporting will entail to all firms which will need to use it. The consultation paper mentions that such firms "may incur costs" but that "those costs may be compensated by the introduction of an harmonised regime giving them access to eligible counterparties and professional clients per se of the entire Union, sparing them the costs of having to monitor national third-country regimes of all jurisdictions". ESMA then states that the proposal is "the most cost-efficient solution to achieving the general objectives described". Although our members realise that these elements are hard to quantify, we would be very grateful if ESMA could provide some numerical evidence in the cost-benefit analysis.

Our members stand ready to support ESMA in the collection of this data and, by way of example, compliance consultants have already started to price these requirements at around EUR 10,000 for smaller firms and higher for larger firms. These amounts relate only to external costs, to which firms would also need to devote internal resources to complete this work.

We believe that the costs to comply with such reporting requirement are high, especially for smaller firms, and this could be detrimental to (i) the EU's attractiveness for business operations and (ii) EU investors' ability to access a diverse pool of asset management talent and financial services expertise.