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5 December 2018

Dear Sir, Madam

Re: BVCA response to FCA Consultation Papers Nos 18/28 and 18/29

We are writing on behalf of the British Private Equity and Venture Capital Association ("**BVCA**"), which is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 750 firms, the BVCA represents the vast majority of all UK-based firms, as well as their professional advisers and investors. Over the past five years (2013-2017), BVCA members have invested over £32bn into nearly 2,500 companies based in the UK. Our members currently back around 3,380 companies, employing close to 1.4 million people on a full-time equivalent basis ("FTEs") across the world. Of these, around 692,000 FTEs are employed in the UK.

The BVCA welcomes the opportunity to respond to the FCA's consultations on the Temporary Permissions Regime and proposed changes to the Handbook and Binding Technical Standards. We have confined our responses below to those questions where we have specific comments at the present time, but we are also very keen to engage in a continuing dialogue with the FCA in relation to the broader implementation of Brexit.

Consultation Paper No 18/28 Brexit: proposed changes to the Handbook and Binding Technical Standards – first consultation

Q2. Do you agree that we have correctly identified all relevant amendments in our draft Handbook and BTS text related to the cross-cutting issues set out above? Do you have any other points you wish to raise regarding our approach to these cross-cutting issues?

We note that the proposed changes in the Handbook need to be consistent with relevant changes that are being made in applicable legislation, consisting principally of the UK AIFM Regulations and the onshored version of the AIFMD Level 2 Regulation (Delegated Regulation (EU) No 231/2013).

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The effect of Regulation 36(8)(c) in the current draft of the Alternative Investment Fund Managers (Amendment) (EU Exit) Regulations 2018 (published on 8 October 2018) is that Article 110(2) of the onshored AIFM Level 2 Regulation will, after exit day, read as follows (emphasis added):

> "*2. For each of the EU AIFs they manage and for **each of the AIFs they market in the United Kingdom or the Union**, AIFMs shall provide to the FCA the following information in accordance with rule 3.4.3 of the Investment Funds sourcebook: […]*"

However, the proposed amended provision in FUND 3.4.3R will, after exit day, state (emphasis added):

> "*An AIFM must, for each UK AIF and EEA AIF it manages, and for **each AIF it markets in the UK**, provide the following to the FCA: […]*"

We assume that this is a transposition error in the CP (or an error in the onshored Level 2 Regulation), but as drafted the two provisions are inconsistent. As a matter of policy, we would question why UK AIFMs should continue to report information to the FCA on AIFs marketed in the EEA, given that the obligation does not apply to other third country AIFs marketed in the EEA and we understand that the general policy intention is to treat EEA AIFs in the same way as other non-UK AIFs. However, we acknowledge that the FCA does not have the power to amend the Level 2 Regulation itself; nonetheless, we would ask the FCA to confirm the correct intended position with HM Treasury in due course.

Similarly, we note that Article 110 of the Level 2 Regulation refers to AIFMs reporting for "*each of the EU AIFs they manage*", whereas FUND 3.4.3R refers to EEA AIFs. We appreciate that prior to exit day, the effect of the EEA Agreement is to expand the application of the Level 2 Regulation to include AIFs in the additional three EEA states. However, after exit day, the UK will no longer be a party to the EEA Agreement and we understand that this deemed modification to the text will not apply. The Level 2 Regulation does not appear to contain any general deeming provision which would, when it is onshored into UK domestic law, have the effect of converting the references to the EU in that text to references to the EEA. We are not aware of any other legislative provision which would have this general effect. In our view, this issue should be clarified, as it affects a number of references to EEA AIFs or EEA AIFMs throughout the proposed Handbook text.

Q16. Do you have any comments on the proposed guidance on our approach to EU level 3 materials set out at Appendix 3 to this CP?

We note that the broad effect of the draft non-Handbook guidance provided by the FCA in Appendix 3 to the CP is that firms should continue to apply existing Level 3 materials (where necessary, with appropriate deemed modifications to reflect the UK's withdrawal from the EU).

We understand that the general approach is that set out in paragraph 10(i) of the draft guidance (emphasis added):

> *"…we expect firms and market participants to continue to apply the Guidelines to the extent that they remain relevant, **as they did before exit-day**, interpreting them in light of the UK's withdrawal from the EU and the associated legislative changes that are being made to ensure the regulatory framework operates appropriately.*"

Paragraph 11 suggests that the same approach should be adopted in relation to other EU non-legislative material, in so far as relevant. We interpret this to mean that firms should apply the relevant Level 3 texts in the form in which they existed on exit day. Such an approach would be in keeping with the policy intention of EUWA and the UK government – i.e. to preserve the effect of EU law as at exit day, but not to incorporate subsequent changes thereafter. This is subject to paragraph 17 of the guidance, which states:

"*The FCA may consider materials produced by the ESAs post-exit, including where pre-exit material is updated. Where we consider it appropriate to do so, we will set out our expectations as to how it should be treated.*"

Our understanding of this paragraph is that in certain cases, where expressly advised by the FCA that they should do so, firms may need to take into account subsequent amendments to Level 3 guidance that was already in existence on exit day. However, the FCA's proposed guidance in Appendix 3 to the CP indicates that this is the exception, rather than the default.

We are concerned that in order to apply the Level 3 materials in the form in which they are in on exit day, firms will need a definitive library of texts which are "frozen in time" as at that date (subject only to any later directions from the FCA to incorporate future modifications by the ESAs after exit day, where applicable). We consider that the FCA should itself make those frozen in time texts available in a library on its website so that they are easily accessible to firms and can be used to avoid future disputes about the relevant content or version that should be used. It is impractical to expect firms to maintain their own versions of such texts and it is frequently difficult to obtain historic versions of Level 3 texts produced by the ESAs once they have been superseded by subsequent versions.

In addition, we consider that the FCA should also make available via its website fully consolidated versions of any Level 3 materials that it amends following exit day, so that firms have access to clear texts for the purposes of interpreting regulatory requirements.

Consultation Paper No 18/29 Temporary permission regime for inbound firms and funds

Q1. Do you agree that our proposed rule changes give adequate effect to our general approach for TP firms? If not, why not?

Generally, we would request that the FCA gives further clarity on the criteria that it will use when allocating landing slots to firms. The FCA states at paragraph 3.15 of CP 18/29 that it expects that firms will generally be given a landing slot based on the type of business undertaken. It would be helpful if the FCA would consider treating private equity and venture capital firms as a common group, and allow firms to indicate that they conduct private-equity or venture-capital related activities when applying to join the TPR. This would help to avoid competitive advantages for our member firms with earlier or later landing slots. We would also encourage the FCA to grant later landing slots to private equity and venture capital firms as a group (as these firms are perceived as low risk).

Firms which have exercised a passport to provide services in the UK on either a branch or a cross-border services basis need clarity as to the baseline requirements for authorisation as a third

country branch in the UK following the expiry of the TPR. Given that there is little precedent for the FCA to authorise branches of asset managers, it would be helpful if the FCA could indicate the minimum requirements for such authorisation.

As a general comment, we would encourage the FCA to implement procedures that prevent duplication of reporting and filing obligations wherever possible. For example, we note that the FCA will require fund managers to continue to provide it with updates to fund documents (as currently required under the UK AIFM Regulations). We consider that it would be advantageous to both the FCA and industry participants for the FCA to make use of cooperation arrangements in the context, preventing inefficient duplicate filings.

Q4. Do you agree with our proposed legal drafting to apply our general approach to fund marketing activities in the TPR? If not, why not?

General comments

As a general comment, we welcome the FCA's proposals for fund marketing activities under the temporary permissions regime (**TPR**) and the effective ability of EEA managers to continue to market in the UK on the same basis as under the marketing passport for up to 3 years. In our view, this is a sensible and practical way to avoid marketing disruption for existing funds.

As indicated in our response to Question 1 above, we would, however, ask for further clarification in relation to the proposed "landing slots" and the process for re-registration of passported funds for marketing under the NPPR. We note that the TPR for marketing will be available for "up to 3 years", although the effect of the drafting of Regulation 78C(2) of the proposed AIFM (Amendment) (EU Exit) Regulations 2018 appears to be that in reality the TPR for marketing will only be available for up to 2 years. We understand that the FCA is proposing that a fund will cease to benefit from the TPR from the time at which it submits a notification of registration under the NPPR (on the basis that such notifications take effect when submitted). This appears to be the effect of Regulation 78C(1) and (4) of the proposed AIFM (Amendment) (EU Exit) Regulations 2018, which states that the relevant period during which the TPR for marketing applies ends on the day after the day on which notice is given under Regulations 57 or 59 (i.e. Article 36 or Article 42 AIFMD) by the AIFM concerned. In practice, this means that the extent to which an AIFM can benefit from the TPR will vary depending upon the landing slot for NPPR registration that it is allocated.

We assume that no AIFM would be allocated a landing slot for re-registration under the NPPR where it would not, or might not, be possible for the AIFM to satisfy the necessary NPPR pre-conditions for marketing in the UK at the end of that landing slot. Principally, this could occur where the UK has not entered into the necessary cooperation arrangements with other national regulators for the purposes of Regulation 57(4)(b) and Regulation 59(2)(d) of the UK AIFM Regulations. This again reiterates the critical importance of the FCA doing everything within its power to ensure that all necessary cooperation arrangements are concluded as a matter of urgency prior to exit day.

Application of TPR and approach to changes of status outside passporting context

We would also seek further clarification from the FCA on certain aspects of the TPR for marketing activities. We understand that, as regards marketing activities, the TPR is only available to firms which are relying on a passport to market in the UK. In practice, in the context of AIFMs, this means

that it will be available only to incoming EEA AIFMs marketing (non-UK) EEA AIFs in accordance with Regulation 54 of the UK AIFM Regulations.

However, we note that it is not only EEA AIFMs falling within Regulation 54 that will be affected as a result of the UK's withdrawal from the EU and the consequential change in status of EEA-domiciled funds. On exit day, the status of the following AIFMs will also change:

- EEA AIFMs marketing non-EEA AIFs in the UK in accordance with Regulation 57 of the UK AIFM Regulations (i.e. under the Article 36 AIFMD national private placement regime (**NPPR**)). From exit day, such an AIFM would no longer be eligible to market under Regulation 57 and would need to market under Regulation 59 (i.e. the implementation of Article 42 AIFMD) instead. We understand, on the basis of the explanation in the CP, that such AIFMs would not be eligible to benefit from the TPR because the Regulation 57 NPPR is not an example of existing passporting.

- UK AIFMs marketing EEA AIFs in the UK in accordance with Regulation 54 of the UK AIFM Regulations would be required to use Regulation 57 (i.e. Article 36 AIFMD) following exit day, as the relevant AIFs would be treated as third country AIFs from that date. We understand that such AIFMs would not benefit from the TPR because they are not incoming EEA AIFMs (and arguably are not relying on a passport, since their notification to the FCA is effectively made for the purposes of Article 31 AIFMD, rather than Article 32 AIFMD).

In each of the above cases, notwithstanding that the AIFM's regulatory status will change on exit day, the TPR will not provide transitional relief. We therefore think that the FCA should articulate its expectations for such firms in order to ensure that they are aware of any notifications that they will need to make and the deadline by which they must be made. This would need to take into account the following potential difficulties:

- In each case, the status of the AIFM or the relevant AIF will change only on exit day and not before that time.

- Currently, Regulation 59 (i.e. Article 42 AIFMD NPPR marketing) can apply only where the relevant AIFM is a third country AIFM. Before exit day, an incoming EEA AIFM will not be a third country AIFM and therefore legally, it would appear that such an AIFM would be unable to submit a Regulation 59 NPPR notification in anticipation of its change of status on exit day.

- Currently, Regulation 57 (i.e. Article 36 AIFMD NPPR marketing) can apply only where the relevant AIF is, in so far as relevant in this context, a third country AIF. Therefore, a UK AIFM marketing an EEA AIF will be unable to submit a Regulation 57 NPPR notification until exit day because the relevant AIF will not be a third country AIF until that time.

- While we understand that notifications under Regulations 57 and 59 do not require FCA approval (and therefore take effect at the time at which they are submitted to the FCA, provided that they are validly completed), as a practical issue, we doubt that it would be desirable to require affected AIFMs to submit notifications at 11:00pm on 29 March 2019 in order to effect a smooth transition to their post-exit day status.

Our strong preference would therefore be for the FCA to operate a system of automatic deemed transition to the new status, given that in each case it is likely that the FCA will already have the substantive information that would be required to be included in a new NPPR notification. We appreciate that this may in part be a question of the legal powers available to the FCA under various existing and new statutory instruments, but we consider that to the extent that the FCA can effect deemed re-registration and/or waive re-registration requirements, this would be a more practical way of effecting a smooth transition to the new regime.

We would be very keen to discuss the contents of this letter with you. Please do not hesitate to contact me at tim.lewis@traverssmith.com, copying Gurpreet Manku (gmanku@bvca.co.uk), if you have any questions.

Yours faithfully,

Tim Lewis
Chair, BVCA Regulatory Committee