Submission

European Private Equity & Venture Capital Association
Bastion Tower, Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20 F +32 2 725 07 04
info@evca.eu www.evca.eu

CREATING LASTING VALUE

On behalf of the Public Affairs Executive (PAE) of the EUROPEAN PRIVATE EQUITY AND VENTURE CAPITAL INDUSTRY

February 1, 2013

To **ESMA**

Re **Response to**

ESMA Consultation paper on Guidelines on key concepts of the Alternative Investment Fund Managers Directive (AIFMD), 19 December 2012, ESMA/2012/845

Table of Contents

Submission

European Private Equity & Venture Capital Association
Bastion Tower, Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20 F +32 2 725 07 04
info@evca.eu www.evca.eu
CREATING LASTING VALUE

Introduction

We write on behalf of the representative national and supranational European private equity and venture capital ("PE/VC") bodies. Our members cover the whole investment spectrum, including the institutional investors investing in a broad range of PE/VC funds, as well as the PE/VC firms raising such funds, who in turn invest in the full life-cycle of unlisted companies, from high-growth technology start-ups, to the largest global buyout funds turning around and growing mature companies, and thus we speak on behalf of the entire European PE/VC industry, investors as well as managers.

We welcome the opportunity to respond to ESMA's consultation concerning its Guidelines on Key Concepts of the AIFMD.

As always, we stand ready to provide whatever further contribution to this work ESMA might find helpful, including attending meetings and contributing further materials in writing.

European Private Equity & Venture Capital Association
Bastion Tower, Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20 F +32 2 725 07 04
info@evca.eu www.evca.eu
CREATING LASTING VALUE

Key concerns

We generally appreciate the consultation and broadly agree with the proposed guidelines subject to our comments made herein. However, we have a few concerns with some of the proposed guidelines. Our main concerns are the following:

- **Topics included in the guidelines**: Given the importance of carried interest structures to the private equity co-investment and risk-sharing model (building on an alignment of interest), we believe that such vehicles should be explicitly addressed in the guidelines. Although carried interest vehicles may share the same legal structure as an AIF they are not AIFs as they do not raise external money. They are designed to be the vehicle through which the alignment of the AIFM and investors in the AIF managed by the AIFM is effected. Carried interest vehicles should therefore be excluded from the definition of AIF.

  In addition, these structures are addressed under Annex II of the Directive. ESMA has recognised that in this context they are an important element of risk alignment. It would be illogical and disproportionate for a carried interest vehicle to be treated as an AIF in its own right simply because it is structured using a legal undertaking separate from the AIFM. Moreover, such carried interest vehicles do not involve "raising capital" from those individuals who participate in carried interest arrangements. The proposed guidelines should expressly state this to ensure consistent treatment across the EU.

- **Raising Capital**: The characteristics described in sub-paragraphs (a) and (b) of paragraph 11 should both be present if an undertaking is to be taken to raise capital; in other words, if either of the two mentioned is not fulfilled there should not be any "raising capital".

- **Co-investment arrangements**: Moreover, we believe that, in sub-paragraphs 13(a) and (b) of the draft guidelines, ESMA has drawn the test for a non-AIF co-investment arrangement too narrowly. Under ESMA's approach, it may be difficult to conclude that some executive co-investment vehicles in the private equity sector are not AIFs. That result would be the exact opposite of how they are viewed by genuine third party investors into private equity funds and the executive teams which run those funds. These market participants typically regard co-investment as an important element of alignment of interest. It is a deliberate strategy to align risk and reward throughout the executive ranks, whilst providing an appropriate degree of incentive, and is something which is actively encouraged, and frequently required, by those external investors who typically advance at least 95% of the capital invested in the relevant fund.

  Similarly we also consider that the concept of raising capital also requires that a practically significant sum of capital that can realistically be used for investment purposes is raised. Vehicles established with nominal or very small contributions for the purposes of establishment or governance but which do not otherwise raise significant capital for investment should be excluded.

- **Collective investment undertaking**: Again, we think that the proposed guidelines are drafted slightly too restrictively: Not every undertaking will require daily decisions to be made. It should be sufficient that discretion or control is exercised when the need arises. Furthermore, if one investor but not others has day-to-day discretion or control, that should not lead to a conclusion that the undertaking is not an AIF (if other characteristics of an AIF are present). The day-to-day discretion or control should, for this to be the case, be exercised by the

European Private Equity & Venture Capital Association
Bastion Tower, Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20 F +32 2 725 07 04
info@evca.eu www.evca.eu
CREATING LASTING VALUE

investors collectively, and all of them should in such case have day-to-day discretion or control to the extent of their respective interests in the undertaking.

- **Number of Investors**: We strongly oppose the proposal that a collective investment undertaking may be regarded as having more than one investor where national law, constitutional docs etc. do not prevent it from having or raising capital from more than one investor. If under certain European regimes specific collective investment fund vehicles are being used by only one investor, this could still on a national basis be treated as an AIF due to its legal form. We have made proposals to reflect that.

Submission

European Private Equity & Venture Capital Association
Bastion Tower, Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20 F +32 2 725 07 04
info@evca.eu www.evca.eu
CREATING LASTING VALUE

Specific Response to Sections and Questions

I. Section II - Background

Q1: Do you agree with the approach suggested above on the topics which should be included in the guidelines on key concepts of the AIFMD? If not, please state the reasons for your answer and also specify which topics should be re-moved/included from the content of the guidelines.

Broadly, we agree.

However, the meaning of Article 4(1)(a) is inevitably linked to those vehicles which are not AIF or are specifically exempted from the provisions of AIFMD and it might have been helpful to consider the two together. We hope that ESMA will consult in due course on further guidelines on the exemptions.

There is one further topic which we believe it would be helpful to address in these guidelines. Carried interest vehicles are often structured as limited partnership agreements in which the recipients of the carry are the limited partners.

We believe that these vehicles should not be considered to be AIFs for a number of reasons. First, they are dealt with separately under the Directive. The phrase "carried interest" is defined in Article 4(1)(d). Carried interest is already subjected to the rules concerning remuneration in Annex II to the Directive (even though it is not itself "remuneration" for reasons explained in our response to ESMA's consultation on remuneration guidelines). It would be illogical and disproportionate for a carried interest vehicle to be subjected to the rules in Annex II and treated as an AIF in its own right. Second, carried interest vehicles do not involve “raising capital”. We recommend that the proposed guidelines are clarified to make this point explicitly.

II. Section III - Concepts extracted from the definition of AIF

Q2: What are your views on/readings of the concepts used in the definition of AIF in the AIFMD? Do you agree with the orientations set out above on these concepts? Do you have any alternative/additional suggestions on the clarifications to be provided for these concepts?

We agree. It is appropriate to focus the guidelines on the specific elements of the definition contained in Article 4(1)(a) rather than looking at the ownership or control of the underlying assets.

Paragraph 9 of the consultation paper is helpful where it states:

“It is only when all the elements included in the definition of AIFs under Article 4(1)(a) of the AIFMD are present that an entity should be considered an AIF”

and we suggest including this sentence in paragraph 4 of the guidelines.

It is unclear why ESMA then states:

- in paragraph 10 of the consultation paper, that the elements of the definition set out in Article 4(1)(a) should not be construed in accordance with other EU law; and

European Private Equity & Venture Capital Association
Bastion Tower, Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20 F +32 2 725 07 04
info@evca.eu www.evca.eu
CREATING LASTING VALUE

- in paragraph 11 of the consultation paper, that the guidance should not be used to facilitate circumvention.

Both paragraphs add uncertainty and will not be helpful for competent authorities or market participants in construing ESMA's guidance, which is intended to help establish what an AIF is. We do not believe that the draft guidelines contain material which would facilitate circumvention and that suggestion that they might do so risks member states taking different approaches and thus destroying the harmonized approach the guidelines seek to promote.

We suggest paragraph 4 of the draft guidance should be amended as follows:

"4. The purpose of these guidelines is to ensure common, uniform and consistent application of the concepts in the definition of 'AIF' in Article 4(1)(a) of the AIFMD by providing clarification on each of these concepts. Nevertheless appropriate consideration should be given to the interaction between the individual concepts of the definition of AIFs, which should be considered together. <u>It is only when all the elements included in the definition of AIFs under Article 4(1)(a) are present that an entity should be considered an AIF.</u> By way of example, undertakings which do raise capital from a number of investors, but do not do so with a view to investing it in accordance with a defined investment policy, should not be considered AIFs for the purposes of the AIFMD. The additional details provided by these guidelines in no way alter the provisions of the AIFMD."

1. Raising Capital

Q3: What are your views on the notion of 'raising capital'? Do you agree with the proposal set out above? If not, please provide explanations and possibly an alternative solution.

This is the section of the proposal on which we had the greatest number of concerns. In general we believe that unless amended, this section would give rise to a widening of the scope of the Directive beyond what many market participants currently expect.

Paragraph 11

The characteristics described in sub-paragraphs (a) and (b) of paragraph 11 should **both** be present if an undertaking is to be taken to raise capital. Accordingly, paragraph 11 should be amended as follows:

"11. An activity with the following characteristics when carried out by an undertaking by way of business should amount to the activity of raising capital mentioned in Article 4(1)(a)(i) of the AIFMD:

(a) taking direct or indirect steps to procure the transfer or commitment of capital by one or more investors to an undertaking for the purpose of investment with a view to generating a pooled return for the investors; and~~/or~~

(b) commercial communication between the undertaking seeking capital or a person or entity acting on its behalf (typically, the AIFM), and the prospective investors, which aims at procuring the transfer of investors' capital."

ESMA is right to identify the feature of a "commercial communication". It is the most important ingredient as indicated in paragraph 18 of the Consultation Paper. The guidelines should make

European Private Equity & Venture Capital Association
Bastion Tower, Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20 F +32 2 725 07 04
info@evca.eu www.evca.eu
CREATING LASTING VALUE

commercial communication, irrespective of whether undertaken by the AIF, AIFM or an intermediary acting on either's behalf, a necessary condition for capital raising. Situations where family interests or other private wealth combine to make investments or carry out a development project may involve pooling of assets but would not normally be regarded as attempts to raise capital. If 11(a) were sufficient to constitute "capital raising", this would extend to include one of the family, or their advisers, taking technical or formal direct or indirect steps to procure the transfer of funds, for example by sending details of the account to which the transfer should be made or by the establishment of a trust or vehicle through which the investment was to be made. From a commercial perspective, this would not change the underlying nature of the activity to one involving capital raising rather than just carrying out the already agreed mutual arrangements.

Similarly, the guidelines should make note that the intention to generate a pooled return is a key condition for setting up a fund, i.e. engaging in capital raising. If there is a commercial communication between an entity seeking capital and a prospective investor this would still not create an AIF if there is no intention to generate *a pooled return* (as is the case for example in the case of a managed account). In fact, "*commercial communication with the aim at procuring the transfer of capital*" necessarily includes the element of "*taking a direct or indirect step to procure the commitment or transfer of capital*". The only new criteria added by (a) is the element "*with a view of generating a pooled return*" which is not an element of "raising capital" but rather an element of "collective investment vehicle".

Paragraph 13

Co-investment arrangements: We believe that, in sub-paragraphs 13(a) and (b) of the draft guidelines, ESMA has drawn the test for a non-AIF co-investment arrangement too narrowly. In practice, this provision will mean that almost all co-investment undertakings in the private equity sector, as well as the funds into or alongside which they invest, must be treated as AIFs. It is typical for participants in co-investment undertakings to comprise not only members of the governing body and risk takers but also other professional staff and frequently also the management entity itself or a related company. This is a deliberate strategy to align risk and reward throughout the executive ranks, whilst providing an appropriate degree of incentive, and is something which is actively encouraged, and frequently required, by the true external investors. These are typically sophisticated professional investors who negotiate the co-investment arrangements as part of agreeing to invest and typically advance at least 95% of the capital invested in the relevant fund.

The management company or affiliate or a related company may need to join the co-investment vehicle where it has more assets available to co-invest than the individuals do, or where it wishes to make provision for interests to be held by the "house" which can be transferred in future to new executives or used to pay bonuses or incentives to others to align the interests of those who are not able to co-invest at the outset of the frequently lengthy investment period. This should not be regarded as the external "raising of capital" in the relevant sense. It involves only those who are part of the management enterprise and does not require any external input. The effect of ESMA's guidance might be to restrict the offer of co-investment opportunities to only the most senior staff, which will not be welcomed by investors and will reduce risk alignment. We also consider that carried interest vehicles should not be classified as AIFs, for the reasons given in our response to Q1.

Group pooled investment arrangements, with carry/co-invest: We note the concern expressed by ESMA that the provision of capital by management companies and their related companies should be regarded as "raising capital" unless it fits within the exemption for AIF whose only investors are group undertakings. There are some circumstances, in large or complex groups,

European Private Equity & Venture Capital Association
Bastion Tower, Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20 F +32 2 725 07 04
info@evca.eu www.evca.eu
CREATING LASTING VALUE

where a group scheme might perhaps, but for the specific exclusion given for the avoidance of doubt, involve the raising of capital as a commercial matter. However, investment by a management entity together with its related companies, possibly accompanied by co-investment and/or carried interest arrangements would not normally involve raising capital. In particular, normally investment by the management entity would be a classic case of not raising external capital, just as, for example an employing entity may contribute funds to an employee participation scheme or savings scheme without those schemes ceasing to fall within Article 3(f). **Already the general elements of "raising capital" would not be fulfilled here**: There is no occasion for a commercial communication or other steps to "procure" investment by the management entity since it decides on its investment as part of its overall structuring of the fund, rather than being solicited for investment.

Raising capital from more than one external investor: We agree that if capital is raised from external investors then the fact that the management entity and/or executives also invest should not prevent the AIF still being regarded as an AIF and the external investors being protected accordingly. This will be the case where there is more than one external investor. However where there is only one external investor, coupled with co-investment and/or carried interest arrangements, this may not result in an AIF where capital is only raised from the external investor. This is likely to be the case where the arrangements are designed and marketed on the basis that there will be no pooling of multiple external investors' funds. We note that there appears to be a potential mismatch between paragraph 14 of the Guidelines according such rights to external investors and paragraph 17 of the Consultation Paper which accords such rights to the management personnel listed.

We also suggest that for additional clarity express reference should be made not only to managing "the undertaking" but also to managing "its investments", since it is also the management team of the underlying portfolio company which will be asked to invest in the company to align the interests. Enabling such persons to participate in incentive and co-investment arrangements is of fundamental importance to ensuring that interests are aligned throughout the ownership structure (and not merely at the AIF level). It is very much in the interests of investors to ensure that such persons are not inadvertently excluded from co-investment arrangements.

Accordingly, paragraph 13 should be amended as follows:

"13. Without prejudice to paragraph 14, when capital is ~~invested~~ raised for ~~in~~ an undertaking ~~by~~ from a natural or legal person or body of persons who is one of the following:

(a) ~~a member of the governing body of that undertaking or~~ the legal or natural person managing that undertaking or its investments or a delegate or an affiliate of such persons (each such person a "Management Entity");

(b) a member of the governing body, an officer, partner, member, employee or other member of staff ~~an employee of the undertaking or of the legal person managing the undertaking whose professional activities have a material impact on the risk profiles of the undertakings they manage and into which he or she invests~~ of any such Management Entity;

(c) a member of a *pre-existing group*, for the investment of whose private wealth the undertaking has been exclusively established;

this is not likely to be within the scope of raising capital.

European Private Equity & Venture Capital Association
Bastion Tower, Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20 F +32 2 725 07 04
info@evca.eu www.evca.eu
CREATING LASTING VALUE

14. Where the only capital raised by an undertaking is a nominal or de minimis amount required in connection with its establishment, governance, or ownership arrangements, but not sufficient to meaningfully contribute to an investment policy, this is not likely to be within the scope of raising capital."

Q4: Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance on the notion of 'raising capital' would imply.

N/A

2. Collective Investment Undertaking

Q5: Do you agree with the proposed guidance for identifying a 'collective investment undertaking' for the purposes of the definition of AIF? If not, please explain why.

We welcome and generally agree with the draft guidance on identifying a "collective investment undertaking", subject to certain comments on points of detail below.

Ordinary company with general commercial purpose

We agree that an ordinary company with general commercial purposes should not be regarded as an AIF.

However, we believe that the same principle applies whatever the legal form the undertaking happens to take. For this reason, we suggest that ESMA's draft paragraph 9(a) should be amended as follows:

"(a) is not an ordinary commercial ~~company~~ undertaking with commercial purposes;"

For example, it is not uncommon for an ordinary commercial undertaking with commercial purposes to take the following legal forms:

- Luxembourg SOPARFIS - these vehicles are very common and can take the form of companies, partnerships and co-operatives;
- limited liability partnerships - for example under the UK Limited Liability Partnerships Act 2000;
- unincorporated associations;
- partnerships or limited partnerships.

Pooled return

We suggest the definition of "pooled return" should be amended as follows:

> "the return generated by the pooled risk arising from acquiring, holding or selling investment assets as opposed to the activity of an entity ~~acting for its own account and~~

European Private Equity & Venture Capital Association
Bastion Tower, Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20 F +32 2 725 07 04
info@evca.eu www.evca.eu
CREATING LASTING VALUE

whose purpose is to manage the underlying assets as part of a commercial or entrepreneurial activity, irrespective of whether different returns to investors, such as under a tailored dividend policy, are generated."

We make this suggestion because it is not clear that "an entity acting for its own account" is inconsistent with the concept of pooling. Indeed any company or other entity which has legal personality acts for its own account and not as an agent for the shareholders who have invested in it and thereby achieved pooling. We believe that the words we propose to delete overlap unnecessarily with ESMA's guidance in paragraph 9(a) concerning ordinary commercial companies with general commercial purposes, so those words could safely be deleted here.

Q6: Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance for identifying a 'collective investment undertaking' would imply.

N/A

Q7: Do you agree with the analysis on the absence of any day-to-day investor discretion or control of the underlying assets in an AIF? If not, please explain why.

We suggest that the guidance in paragraph 9(c) should be amended as follows:

"(c) the unit holders or shareholders of it do not have ~~no~~ between them or collectively day-to-day discretion or control over the management of the undertakings' assets. Depending on the nature of the undertaking, unit holders or shareholders may have day-to-day discretion or control over management of the assets of that undertaking by way of exercising differing levels of voting power even without taking decisions on a daily basis."

We make these suggestions for two reasons.

First, not every undertaking will require *daily* decisions to be made by investors. It should be sufficient that the investors exercise discretion or control when the need arises.

Second, if one investor but not others has day-to-day discretion or control, that should not lead to a conclusion that the undertaking is not an AIF (if other characteristics of an AIF are present). In a private equity and venture capital context, as investments and realisations are few and far between, there is e.g. no need to exercise daily control. The day-to-day discretion or control should, for an undertaking not to be considered as an AIF, be exercised by the investors collectively, and all of them should in such case have day-to-day discretion or control to the extent of their respective interests in the undertaking.

To illustrate both points, in a classic joint venture situation holding an illiquid asset such as a building, major investment management decisions (for example about acquisition, holding or selling of the asset) would be taken by majority or in the case of only two joint venture partners upon both agreeing. Other, more minor "housekeeping" functions in relation to the asset (such as sub-letting space, rent collection or insuring the building) would be performed by a service provider. Taking the major decisions in this way should be taken to constitute "day-to-day discretion or control" for the purposes of the test.

European Private Equity & Venture Capital Association
Bastion Tower, Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20 F +32 2 725 07 04
info@evca.eu www.evca.eu
CREATING LASTING VALUE

Q8: Do you agree that an ordinary company with general commercial purpose should not be considered a collective investment undertaking? If not, please ex-plain why.

We agree that an ordinary company with general commercial purposes should not be considered a collective investment undertaking.

Please refer to our comments above, in response to question 5. We believe that the same principle applies to ordinary undertakings with general commercial purposes which happen to take a different legal form.

Q9: Which are in your view the key characteristics defining an ordinary company with general commercial purpose?

We agree with the approach taken by ESMA in the draft guidelines which is not to attempt to provide a list of the characteristics of an ordinary undertaking with general commercial purposes. Developing such a list (which could only ever be non-exhaustive) is too difficult. The concept should be left to be applied by business people and competent authorities on a case-by-case basis.

3. Number of Investors

Q10: Do you agree with the proposed guidance for determining whether a 'number of investors' exists for the purposes of the definition of AIF? If not, please explain why.

We strongly oppose the proposal that a collective investment undertaking may be regarded as having more than one investor where national law, constitutional docs etc. do not prevent it from having or raising capital from more than one investor. This adds an unnecessary additional requirement to the concept of actually having more than one investor in an undertaking for it to qualify as an AIF.

The Level 1 provision on number of investors is simply a factual analysis of the number of investors in the AIF. Indeed more than one investor is necessary for there to be a pooled return. Whether the constitutional documentation makes any positive statement about the number of possible investors (or is silent on this) is irrelevant. Indeed in most legal systems within and outside Europe, constitutional documents and national laws for undertakings which in practice only have one investor tend to be silent on the maximum permitted number of investors. If ESMA now makes it mandatory to include this restriction in order to avoid becoming an AIF under the "number of investors" test, it will introduce considerable uncertainty for many structures, including many pre-existing structures which have no reason to change their constitution in this way (and which may be completely unaware of the Directive). It would bring within the scope of the Directive structures which are not typically considered to be "funds" and are not what the Directive is aimed at. If under certain European regimes specific collective investment fund vehicles are being used by only one investor, this could still on a national basis be treated as an AIF due to its legal form.

The chapeau of paragraph 15 of the draft guidelines should be deleted, as should sub-paragraph (a).

We note that there are certain situations where it may be particularly important for investors for tax or other reasons that a particular structure **should** be regarded as a fund or AIF even if, for any reason, the number of investors at the outset, before capital has been raised for others, or subsequently (for instance because of sales of interests by other investors) may drop to only one. If this is the concern behind the chapeau and proposed guideline we respectfully suggest that the

European Private Equity & Venture Capital Association
Bastion Tower, Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20 F +32 2 725 07 04
info@evca.eu www.evca.eu
CREATING LASTING VALUE

more appropriate way to address it would be to state that any undertaking which under national law or its constitutional documents was stated to be an AIF should be deemed to raise capital from a number of investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors. This would:

A) mean that only those single investor vehicles whose investors positively required that status would need to ensure that their constitutional documents (or national law) addressed the question;

B) prevent existing and future single investor arrangements whose participants and managers have no reason to consider legislation relating to funds finding that they are accidentally drawn into the Directive,

C) avoid contradicting the express words of Level 1, since it could be regarded as another anti-avoidance provision, preventing funds which were originally established as AIF avoid the Directive provisions when the number of investors drops.

We support ESMA's draft guidance (in sub-paragraph 15(b)) to the effect that nominee arrangements with multiple underlying beneficiaries should not be used as a means of avoidance by contending that there is a single investor in an undertaking to which the nominee commits capital on behalf of numerous beneficiaries. However, we are concerned by the reference in that sub-paragraph to "feeder structures or fund of fund structures". Feeder funds or funds of funds are likely to be AIF in their own right; This is contemplated in the Level 1 text, including in the definition of "Feeder AIF". It is odd to imply that an undertaking to which a feeder AIF or fund of fund AIF commits capital is an AIF if the feeder AIF or the fund of fund AIF is the sole investor in the underlying undertaking. The reference is unnecessary to illustrate ESMA's basic point about avoidance and it would create confusion.

According, paragraph 15 should be amended as follows:

"15. ~~A collective investment undertaking which is not prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as a collective investment undertaking which raises capital from a number of investors in accordance with Article 4(1)(a)(i) of the AIFMD. This should be the case even if:~~

~~(a) it has in fact only one investor; or~~

An undertaking which is expressly stated to be an AIF by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect should be regarded as a collective investment undertaking which raises capital from a number of investors in accordance with Article 4(1)(a)(i) of the AIFMD. This should be the case even if at any time it has in fact a sole investor.

If~~if~~ a sole investor invests funds which it has raised from more than one legal or natural person for the benefit of those persons, as in the case of certain nominee arrangements, ~~feeder structures or fund of fund structures that have~~ the undertaking in which the nominee invests should be regarded as having more than one investor for the purposes of the AIFMD."

European Private Equity & Venture Capital Association
Bastion Tower, Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20 F +32 2 725 07 04
info@evca.eu www.evca.eu
CREATING LASTING VALUE

Q11: Please provide qualitative and quantitative data on the costs and benefits that the proposed guidance for determining whether a 'number of investors' exists would imply.

N/A

4. Defined investment policy

Q12: Do you agree with the proposed indicative criteria for determining whether a 'defined investment policy' exists for the purposes of the definition of AIF? If not, please explain why.

We agree with the proposed indicative criteria for determining whether a "defined investment policy" exists.

However, we disagree with paragraph 17 of the draft guidelines and believe it should be deleted. There are examples of investment criteria (not being the business strategy followed by an ordinary undertaking with general commercial purposes) which are clearly not "investment guidelines" within the meaning of paragraph 16(d). For example, in a classic joint venture arrangement, the participants make major decisions (for example about acquisition, holding or selling of the asset) collectively. Nevertheless, the joint venture agreement may well set out certain investment criteria or other restrictions, in order to make clear the intended scope of the venture and narrow the field of potential investment opportunities to be considered by the investors. Such "investment guidelines" are not an ordinary business strategy followed by an ordinary undertaking with general commercial purposes but nor are they "investment guidelines" of the kind needed to constitute a "defined investment policy".

Q13: Please provide qualitative and quantitative data on the costs and benefits that the proposed indicative criteria for determining whether a 'defined investment policy' exists would imply.

N/A

Q14: Do you consider appropriate to add in Section IX, paragraph 16(b) of the draft guidelines (see Annex V) a reference to the national legislation among the places where (in addition to the rules or instruments of incorporation of the undertaking) the investment policy of an undertaking is referenced to?

Yes. Where national law prescribes an investment policy or restrictions for particular types of fund vehicle, we would ordinarily expect those vehicles to be treated as AIFs, even if those legal requirements are not duplicated in the fund's constitutional documents. However, this is not a major point, as we believe such vehicles would typically fall to be treated as AIFs on the basis of the other factors listed in any case.

Submission

European Private Equity & Venture Capital Association
Bastion Tower, Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20 F +32 2 725 07 04
info@evca.eu www.evca.eu
CREATING LASTING VALUE

About the PAE

The Public Affairs Executive (PAE) consists of representatives from the venture capital, mid-market and large buyout parts of the private equity industry, as well as institutional investors and representatives of national private equity associations (NVCAs). The PAE represents the views of this industry in EU-level public affairs and aims to improve the understanding of its activities and its importance for the European economy.

About EVCA

The EVCA is the voice of European private equity and venture capital. We promote the interests of our more than 1,200 members, to ensure they can conduct their business effectively. The EVCA engages policymakers and promotes the industry among key stakeholders, including institutional investors, entrepreneurs and employee representatives. The EVCA develops professional standards, prepares research reports and holds professional training and networking events. The EVCA covers the whole range of private equity, from early-stage venture capital to the largest buyouts and the investors which invest in such funds.