By email: FCAMission@fca.org.uk

10 January 2017

Dear Sirs

Re: Response to "Our Future Mission"

The British Private Equity and Venture Capital Association ("**BVCA**") is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 600 firms, the BVCA represents the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers. Our members have invested more than £27 billion in nearly 3,900 UK-based companies over the last five years. Companies backed by private equity and venture capital in the UK employ around 385,000 people and 84% of UK investments in 2015 were directed at small and medium-sized businesses.

This is a response to the FCA's consultation paper entitled "Our Future Mission" published in October 2016 (the "**Consultation**"). In the Consultation the FCA proposes to "take specific action, including a review of [its] Handbook, to reduce the restrictions [its] regulations cause without compromising [its] objectives." The BVCA welcomes this initiative to ensure that the UK's regulatory environment remains competitive and permits innovation. Before reviewing restrictions caused by existing FCA Handbook rules, however, the BVCA believes that the FCA should reconsider its proposals to introduce new rules that create restrictions beyond those agreed at the European level.

In the Guiding Principles for EU Legislation, the Government set out to end the gold-plating of EU legislation in the UK.[1] The Guiding Principles include commitments to ensure that the UK does not, except in exceptional circumstances, go beyond the minimum requirements set at a European level, and to endeavour to avoid putting UK businesses at a competitive disadvantage compared with their EU counterparts. The BVCA believes that the FCA should adopt a consistent approach. There have been a number of recent examples, however, where the FCA's approach has been in conflict with the Guiding Principles.

In particular, we refer the FCA to two recent BVCA responses to the FCA setting out the BVCA's concerns about proposed FCA rules that gold-plate European legislation. In the BVCA's "Preliminary response to AIFM issues in CP16/29" the BVCA expressed its concern about the FCA's proposals to mandatorily apply certain MiFID II standards to full scope AIFMs, sub-threshold AIFMs and residual CIS operators, which go beyond the requirements of MiFID II. Similarly, in the BVCA's response "Re: CP/17 (Quarterly Consultation No.13 July 2016)", the BVCA expresses its concern about FCA proposals to 'gold-plate' European transparency reporting requirements under the AIFMD.

These proposed changes to the FCA Handbook could result in UK AIFMs being subject to a greater level of EU regulation than their EU counterparts, which would put UK firms at a competitive disadvantage.

[1] https://www.gov.uk/government/publications/guiding-principles-for-eu-legislation

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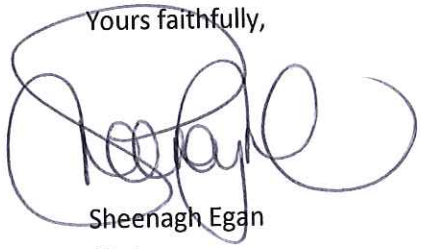
If you have any queries on this letter please do not hesitate to contact me or Tim Lewis at Travers Smith (tim.lewis@traverssmith.com).

Yours faithfully,



Sheenagh Egan
Chair
BVCA Regulatory Committee

Enc:

- Letter from BVCA to MiFID Coordination team "Re: Preliminary response to AIFM issues in CP16/29" dated 10 November 2016
- Letter from BVCA to SISW "Re: CP16/17 (Quarterly Consultation No. 13 July 2016) dated 5 September 2016

MiFID Coordination
Markets Policy and International Division
The Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London
E14 5HS

Re: **Preliminary response to AIFM issues in CP16/29**

Dear Sirs,

The British Private Equity and Venture Capital Association ("BVCA") is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 600 firms, the BVCA represents the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers. Our members have invested over £27 billion in nearly 3,900 UK-based companies over the last five years. Companies backed by private equity and venture capital in the UK employ around 385,000 people and 84% of UK investments in 2015 were directed at small and medium-sized businesses.

We wanted to take this opportunity to provide you with our preliminary response in relation to the proposals outlined in the FCA's consultation paper for the application of MiFID II standards to full scope AIFMs, sub-threshold AIFMs and residual CIS operators (together "Alternative Investment Managers"). We are providing this response to you in advance of our more detailed response on the CP so that you can take our concerns into account when preparing the AIFM specific consultation paper proposed for December 2016.

We welcome the fact that the FCA is not proposing to apply all of MiFID II standards to Alternative Investment Managers. However, we are very concerned that the FCA is proposing to mandatorily apply certain MiFID II standards to those managers, in particular those standards covering best execution and some aspects of the inducements regime. We note that this goes beyond the requirements of MiFID II. We also note that it would have been an option for the European Union authorities to apply these standards to full scope AIFMs through amending either the AIFM Directive or the AIFM implementing regulation through MiFID II/MiFIR. The European Union authorities have chosen not to do this but instead to leave any such updates to be considered as part of future work on potential changes to the AIFM Directive. We do not think it is appropriate for the UK to 'gold plate' MiFID II and AIFMD in advance of those changes potentially being made. There will be a number of firms in groups which are subject to MiFID II where it would be helpful for those firms to have the option to apply MiFID II standards to their AIFMs in order to ensure consistency across business lines. However, many private equity and venture capital groups are regulated solely under

the AIFM Directive and do not have a MiFID firm, therefore there is no advantage to these entities in applying MiFID standards. A mandatory, 'gold plated' approach for these firms would put them at a disadvantage when compared with funds operating in other jurisdictions within the EU given the additional compliance burden and costs entailed. This could result in UK AIFMs being indirectly subject to a greater level of EU regulation than their EU counterparts.

We would welcome the opportunity to discuss our concerns with you and more generally to discuss the position of UK AIFMs in light of MiFID II requirements. If you have any queries on this letter please do not hesitate to contact me or Gurpreet Manku at BVCA, 020 7492 0454, gmanku@bvca.co.uk.

Yours sincerely

Sheenagh Egan

By email: cp16-17@fca.org.uk

Deepu Venugopal, SISW
Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London E14 5HS

5 September 2016

Dear Deepu,

Re: CP 16/17 (Quarterly Consultation No. 13 July 2016)

We are disappointed with the FCA's proposed changes to the transparency reporting requirements under the AIFMD outlined in Chapter 10 of CP 16/17.

Both proposals impose additional costs on managers. Both proposals go beyond the minimum requirements of AIFMD. It is not clear to us in either case that the additional costs will be justified by the benefits to the FCA arising from the additional data.

If, despite these concerns, the FCA proceeds with these proposals, we support the decision to limit the additional reporting obligations to those AIFMs which are required to report on a quarterly basis. However, the proposed amendments to FUND set out in Appendix 10 of CP 16/17 should be clarified, as detailed below.

Q 10.1 Do you have any comments on our proposal for certain full-scope UK AIFMs to report on their non-EEA AIFs where those AIFs are not marketed in the EEA

We note that the FCA is proposing to require full-scope UK AIFMs to report Article 24(2) AIFMD information for each non-EEA AIF that they manage where reporting on the non-EEA AIF is required on a quarterly basis, even where the non-EEA AIF is not marketed in the EEA. This is despite ESMA's statement in its ESMA Opinion of 1 October 2013 (the "**ESMA Opinion**") that "AIFMs are not required to report information under Article 24(2) of the AIFMD for non-EU AIFs that are not marketed in the Union." Whilst this additional requirement may carry a marginal cost for UK managers of overseas funds, it may make them less cost-competitive compared to other EEA managers of overseas funds. It is not clear from CP 16/17 why the FCA's information requirements should extend to those overseas funds managed by UK managers which do not comprise UK assets and do not trade on UK markets.

In our view, the FCA should not introduce the proposed rule FUND 3.4.6C R. Nonetheless, if the FCA does introduce FUND 3.4.6C R, the current draft of the rule risks causing firms confusion. The draft text of FUND 3.4.6C R at Appendix 10 of CP16/17 does not make clear whether the

additional reporting requirement applies to AIFMs which report on a quarterly basis under article 110(3)(b) of the Level 2 regulation, or those which report under article 110(3)(c) of the Level 2 regulation, or both. Paragraph 10.2 of CP16/17 suggests that the FCA is particularly concerned about information gaps in relation to master AIFs with "large trading footprints in specific market segments" which "also have significant leverage relationships with other market counterparties". Although this explanation is brief, we understand that the FCA wants additional information in respect of AIFs that are not marketed in the EEA that have sufficient assets under management such that they could pose a systemic risk and threaten the financial stability of UK markets. It is not clear why the FCA is concerned that those non-EEA funds which are not marketed in the UK and do not hold UK assets or trade on UK markets could pose such a threat. We recommend that if retained, the draft of FUND 3.4.6C R should be amended such that it only applies in relation to those non-EEA AIFs that are not marketed in the EEA whose assets under management, including any assets acquired through the use of leverage, in total exceed EUR 500 million, such that, if that AIF was marketed in the EEA its AIFM would be obliged to report on a quarterly basis under article 110(3)(c) of the AIFMD level 2 regulation. We have set out the draft text of FUND 3.4.6C R below and have inserted wording (underlined) to clarify the draft:

> "3.4.6C R
>
> In addition to the information in FUND 3.4.2R, an AIFM must regularly report to the FCA the information in FUND 3.4.3R for each non-EEA AIF it manages that is not marketed in the EEA if the AIFM ~~is~~would be subject to quarterly reporting under article 110(3)(c) of the AIFMD level 2 regulation (see SUP 16.18.4EU) for that AIF were it to be marketed in the EEA.
>
> [Note: article 24(5) of AIFMD]"

Q 10.2 Do you have any comments on our proposal for an above threshold non-EEA AIFM to report on its master AIFs not marketed in the UK, if the relevant feeder is marketed in the UK

The FCA is proposing new guidance in FUND 10.5 on national private placement that will state that above threshold non-EEA AIFMs should report Article 24(1), Article 24(2), and (if substantially leveraged), Article 24(4) AIFMD information to the FCA for master AIFs that are (i) not marketed in the UK, (ii) have feeder AIFs which are marketed in the UK under Article 42 AIFMD, and (iii) have feeder AIFs which are managed by an AIFM that is subject to quarterly reporting under Article 110 of the AIFMD level 2 regulation for those feeder AIFs.

FUND 10.5 provides FCA guidance to interpret the primary obligations on AIFMs set out in the Alternative Investment Fund Managers Regulations 2013. Regulation 59(3) sets out the obligations on non-EEA AIFMs to report information required by the provisions of Articles 22 to 24 of AIFMD "in so far as such provisions are relevant to the AIFM [being the non-EEA AIFM marketing the AIF] and the AIF [being the AIF being marketed in the EEA]". Regulation 59(3) does

not place any obligations on non-EEA AIFMs to report in respect of the master AIF. The master and its feeder are two separate AIFs. Regulation 59 only refers to one AIF throughout, which is the AIF that is being marketed under Article 42 of the Directive. Given that FUND 10.5 simply offers guidance as to the FCA's interpretation of existing legislation, the FCA's 'reinterpretation' of Regulation 59(3) raises questions as to whether or not non-EEA AIFMs have been complying with the law to date. Further, given that Article 24(2) reporting obligations may serve as a disincentive for non-EEA managers to market funds into the UK, it is possible that non-EEA managers will be less likely to market in the UK if marketing a feeder AIF in the UK might expose the master fund to European reporting obligations. The FCA should add commentary to the policy statement that follows CP16/17 to make clear that the FCA does not consider that its new guidance at FUND 10.5.11B G will affect any regulatory filings made before the new guidance comes into force. The consequences of the FCA's change of position are potentially serious for those non-EEA managers which have already established EEA feeders and which might be caught by this 'reinterpretation' of Regulation 59(3). Not only might these managers not have established EEA feeders had they known that they would be required to carry out EEA reporting for the master fund, but these managers may become reluctant to market their funds in the UK going forwards if this change in regulatory approach creates uncertainty as to the future reporting obligations that such marketing might entail for their funds globally.

We also note that the FCA is proposing to gold-plate the ESMA Opinion by requiring master AIFs managed by another legal entity in the same fund management group as the manager of the feeder AIFs be subject to this additional reporting, rather than just master AIFs and feeder AIFs that have the same AIFM. This is despite the fact that the ESMA Opinion specifically states that ESMA "does not consider it useful for NCAs to require this information to be provided if the non-EU master AIFs and the feeder AIFs … do not have the same AIFM." The FCA has not explained why it disagrees with ESMA on this point.

Finally, we repeat our observations in the final paragraph of our response to Q 10.1 above, that it is not clear which AIFMs are caught by this new reporting obligation as the draft text of FUND 10.5.11B G set out in Appendix 10 does not specify whether the 'reinterpreted' reporting obligation applies to AIFMs which report on a quarterly basis under article 110(3)(b) of the Level 2 regulation, or those which report under article 110(3)(c) of the Level 2 regulation, or both. For the reasons we set out above, we consider that the FCA is concerned with large master AIFs and that the draft text of FUND 10.5.11B G should be amended by inserting the wording indicated by underlining below:

> "10.5.11B G
>
> An above-threshold non-EEA AIFM should report on a quarterly basis to the FCA the information in FUND 3.4.2R, FUND 3.4.3R and (if applicable) FUND 3.4.5R for each AIF that is not marketed in the UK if:

a) that AIF is a master AIF managed by the AIFM or an AIFM in the same group;

b) the AIFM markets the feeder AIF of that master AIF in the UK; and

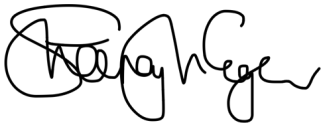
c) the AIFM is subject to quarterly reporting under article 110(3)(c) of the AIFMD level 2 regulation (see SUP 16.18.4EU) for the feeder AIF."

Concerns with FCA's cost benefit analysis

The FCA has noted at paragraph 10.35 of CP 16/17 that the benefits of the proposed changes are difficult to quantify. CP 16/17 fails to provide examples of the systemic risks posed by the activities of the AIFMs affected by these proposals and how these are connected to the Article 24(2) information. It is important for the FCA to clearly address the utility of the Article 24(2) information given the challenges firms have in reporting under Article 24(2). The FCA should not gold-plate its rules when it has not justified why the common information recommended at the European level is insufficient to allow it to secure its statutory objectives.

If you have any queries arising from these comments, please contact Tim Lewis (tim.lewis@traverssmith.com) in the first instance.

Yours faithfully,



Sheenagh Egan

Chair - BVCA Regulatory Committee