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# AIMA Position Paper on AML Regulation

This position paper seeks to outline the views of the Alternative Investment Management Association (AIMA)[1] on the European Commission's "Proposal for a Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing" (the "AMLR").

We support the efforts of the European Commission (the "Commission") to strengthen the European Union's rules on combating money laundering and terrorist financing, outlined in its Action Plan of May 2020. We appreciate the EU-wide objective to establish a single rulebook on anti-money laundering and countering the financing of terrorism ("AML/CFT") as the lack of direct applicability and granularity of the existing AML Directives has resulted in regulatory divergences and a lack of clear and consistent rules across the EU.

When it comes to management companies, we support the EU's endeavours to create a harmonised EU AML/CFT framework. However, we believe that the proposed AMLR insufficiently takes into account the well-functioning and long-existing arrangements that exist in the investment fund industry. Funds, management companies and fund administrators all perform separate but crucial functions in order to ensure compliance with global, regional and national AML/CFT standards. The proposal, as currently drafted, would result in a disruption of these practices for no good reason and so we ask that greater consideration is given to the impact of the proposals on the asset management industry.

The financial services industry covers a number of different sectors and markets, with widely differing characteristics in terms of services provided and client requirements. The application of same or similar requirements between non-comparable sectors in the financial services industry, is a concern which will need to be addressed. The predominantly one-size-fits-all approach in the AMLR creates particular difficulty with respect to proportionality, especially in the fund

1 AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in 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 on the private credit and direct lending space. The ACC currently represents over 200 members that manage $450 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). For further information, please visit AIMA's website, www.aima.org.

management sector, with the risk that proposed requirements set for larger and systemically important financial institutions, such as banks, would be applied in unsuitable contexts.

We list below a set of identified concerns and recommendations that we believe should be considered by the European Parliament (the "Parliament") and European Council (the "Council") as they prepare for their legislative debate. These are:

- Maintain current focus on collective investment undertakings (i.e., funds) as the appropriate obliged entities and only bring in scope the management company where the collective investment undertaking does not have a separate legal personality;
- If management companies are to be included, the collective investment undertaking should not be included as separate obliged entities and non-EU alternative investment fund managers ("non-EU AIFMs") should be excluded unless they are authorised under the AIFMD third country passport
- If non-EU AIFMs are to be considered obliged entities, this must be either (i) limited to non-EU AIFMs authorised to use the third country passport since only in these circumstances do non-EU AIFMs have a Member State of reference, or (ii) this should otherwise be addressed through the development of specific measures specifying how non-EU AIFMs are to comply where the requirements specify activities by or with the home Member State of the obliged entity;
- Fund administrators, fund managers and other service providers should continue to be allowed to perform the activities that the AMLR proposes to be no longer be able to be outsourced by the obliged entity as this would otherwise result in a significant disruption of current, and well-functioning CDD practices that exist within the alternative investment industry;
- Allow obliged entities to continue to place reliance on third parties as this would otherwise impose limits on the type of entities that can be relied on as these must now be subject to the AMLR provisions themselves;
- Remove the requirement for all obliged entities to have an independent audit function and retain the current proportionate approach as adopted under AMLD4 as this would otherwise be highly disproportionate on the majority of obliged entities;
- Introduce proportionality in the requirement to appoint a compliance officer as the majority of obliged entities will have a very limited number of employees;
- Alleviate the administrative burden on obliged entities with respect to updating beneficial ownership information by either (i) reducing the frequency from 14 calendar days to six months, or (ii) maintaining the 14 calendar days update requirement but limiting this to specific beneficial ownership information;
- Clarify who is responsible for entering and updating beneficial ownership information as the AMLR does not specify which actor is required to do so;
- Expand on what constitutes "a change in relevant circumstances" for purposes of monitoring and updating customer information as the AMLR currently lacks a knowledge

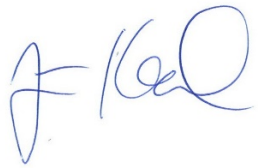
qualifier which would allow the obliged entity to assess and understand what such a change entails;

- Safeguard fundamental data protection principles to protect the security and confidentiality of beneficial ownership and applicant information.

We have outlined in the appendix below our detailed comments and initial feedback on the AMLR, in particular where we see the potential for further improvement in the area of application of the rules. We hope that our position outlined on the overall proposal will be helpful.

We would be happy to elaborate further on any of the points raised in this letter. For further information, please contact Jennifer Wood, Managing Director, Global Head of Asset Management Regulation & Sound Practices, at +44 (0) 20 7822 8380 or jwood@aima.org.

Yours faithfully,



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## APPENDIX

In this Appendix, we expand on our suggestions for targeted changes to the AMLR which we believe will be more proportionate and recognise the current and well-functioning practices that exist in the alternative investment industry.

### 1. Maintain current focus on collective investment undertakings as the appropriate obliged entities

The current EU AML regulatory framework is attached to the fund (or collective investment undertaking), as opposed to the management company. This is because investors invest in or buy shares of a fund, rather than in the management company, so the transactions involving fund shares is a relevant business relationship of the fund and not the management company where the fund has a legal personality that is separate from the management company.

More specifically, Article 3(2)(d) of the EU's Fourth AML Directive ("AMLD4"), as amended by the Fifth AML Directive ("AMLD5"), includes "collective investment undertakings marketing their shares or units". The management companies for these collective investment undertakings are not currently separately included as financial institutions or obliged entities.

Under the Commission's proposed text, the scope of asset management related entities that would be directly included as "financial institutions" and therefore as "obliged entities" would be expanded to include alternative investment fund managers ("AIFMs") established in the EU ("EU AIFMs"), AIFMs established outside the EU (non-EU AIFMs) if they manage an alternative investment fund ("AIF") established in the EU ("EU AIF") or market any AIF in the Union and UCITS management companies ("UCITS Mancos"), in addition to the funds they manage. Specifically, proposed Article 2(6)(e) of the AMLR includes the following as a "financial institution" (and therefore as an obliged entity) as follows:

> "(e) a collective investment undertaking, in particular:
>
> (i) an undertaking for collective investment in transferable securities as defined in Article 1(2) of Directive 2009/65/EC and its management company as defined in Article 2(1)(b) of that Directive or an investment company authorised in accordance with that Directive and which has not designated a management company, that makes available for purchase units of UCITS in the Union.
>
> (ii) an alternative investment fund as defined in Article 4(1)(a) of Directive 2011/61/EU and its alternative investment fund manager as defined in Article 4(1)(b) of that Directive that fall within the scope set out in Article 2 of that Directive."

Recital (18) of the Regulation argues that "Because funds might be constituted without legal personality, the inclusion of their managers in scope of this Regulation is also necessary." However, the Commission's proposal, as written, would include:

- Every UCITS and every UCITS Manco, regardless of whether the UCITS has a separate legal personality;

- Every AIF managed by an EU AIFM, regardless of where any non-EU AIF was established and regardless of whether the AIF has a separate legal personality;
- Every EU AIFM, regardless of whether the EU AIFM otherwise qualifies for an exclusion or exemption under either Article 2 or Article 3 of the Alternative Investment Fund Managers Directive (2011/61/EU) (the 'AIFMD');
- Every non-EU AIFM marketing one or more AIFs in the EU; and
- Every AIF managed by an in scope non-EU AIFM regardless of whether that AIF is marketed in the EU and regardless of whether the AIF has a separate legal personality.

a. Fix the problem of omission of funds without a legal personality…

We agree with the Commission's conclusion that there two broad types of collective investment undertakings: (i) those with a separate legal personality, and (ii) those without a separate legal personality which exist solely as an extension of the manager (i.e., management company). We also agree that on the current wording of AMLD4, those collective investment undertakings without a legal personality would not be captured under the AMLD4 requirements.

b. … but avoid creating unnecessary burdens and conflicts of interest

While we would be supportive of the EU's efforts to ensure that collective investment undertakings that do not have a legal personality are in scope of the proposed AML/CFT requirements, we believe that including the management companies of all AIFs and UCITS does not match the Commission's stated reasoning for the proposed change as the AMLR now not only covers those funds without a legal personality, but goes beyond that by capturing their AIFMs or UCITS Mancos, even if the fund has a legal personality.

The proposal, as written, would double the effort required on AML/CFT compliance for any UCITS or AIF that does have a legal personality as there will be two obliged entities involved for each aspect of what the rule requires. For example, there will be two compliance officers, two CDD processes, two minds deciding whether a particular transaction requires enhanced due diligence or requires a suspicious activity report ('SAR'). We note that if there is a disagreement between the compliance officers of the two entities, it is unclear how this would be resolved. The AMLR does not provide clarity on this. Moreover, as a result of the proposed outsourcing requirements, this duplication of efforts cannot even be mitigated by the fund appointing someone at the management company as its compliance officer since the suspicious transaction reporting is reserved to the compliance officer (see proposed Article 9(3)) and reporting of suspicious transactions cannot be outsourced (see proposed Article 40(2)).

We also believe that the inclusion of the management companies as separate obliged entities would be a disproportionate overreach as relates to non-EU AIFMs because one AIF marketed in the EU means all of the funds the AIFM manages, regardless of whether any of those are marketed in the EU, would become subject to the EU AML rules.

Therefore, we believe that AIFMs and UCITS Mancos should continue to be excluded from the AMLR's scope, except in the very limited circumstances where the EU AIF or UCITS does not have a separate legal personality. This would involve a much narrower change to the definition and would leave only a single obliged entity, which would generally be the fund, in line with

international norms. We recommend making the following amendments to Article 2(6)(i)(ii) of the AMLR to achieve the aims set forth by the Commission in Recital (18):

| Current text | Proposed amendment |
|---|---|
| Article 2<br><br>(6). 'financial institution' means: …<br><br>(e) a collective investment undertaking, in particular:<br>(i) an undertaking for collective investment in transferable securities as defined in Article 1(2) of Directive 2009/65/EC and its management company as defined in Article 2(1)(b) of that Directive or an investment company authorised in accordance with that Directive and which has not designated a management company, that makes available for purchase units of UCITS in the Union;<br>(ii) an alternative investment fund as defined in Article 4(1)(a) of Directive 2011/61/EU and its alternative investment fund manager as defined in Article 4(1)(b) of that Directive that fall within the scope set out in Article 2 of that Directive; | Article 2<br><br>(6). 'financial institution' means: …<br><br>(e) a collective investment undertaking, in particular:<br>(i) an undertaking for collective investment in transferable securities as defined in Article 1(2) of Directive 2009/65/EC ~~and~~ ***or*** its management company as defined in Article 2(1)(b) of that Directive ***if the undertaking for collective investment in transferable securities is constituted without legal personality*** ~~or an investment company authorised in accordance with that Directive and which has not designated a management company, that makes available for purchase units of UCITS in the Union~~;<br>(ii) an alternative investment fund as defined in Article 4(1)(a) of Directive 2011/61/EU ~~and~~ ***or*** its alternative investment fund manager as defined in Article 4(1)(b) of that Directive that fall within the scope set out in Article 2 of that Directive ***if the alternative investment fund is constituted without legal personality***; |

**2. If management companies are to be included, the "collective investment undertakings" should not be included as separate obliged entities and non-EU AIFMs should be excluded unless they are authorised under the AIFMD's third country passport**

For the reasons outlined above, the duplication of compliance requirements by including both the fund and the management company should be avoided. If the management companies are to be included, then logically the funds should be excluded from being separate obliged entities. If both are considered an obliged entity, this will double the AML/CFT burden as there will be two obliged entities involved for each aspect of what the rule requires.

Moreover, we note that the effect of the AMLR's proposed definition of an AIFM will capture non-EU AIFMs that are within the scope of Article 2(1) of the AIFMD. We believe that the scope of the AMLR should only apply to authorised EU AIFMs while non-EU AIFMs should be excluded unless they are authorised under the AIFMD's third country passport.

Although non-EU AIFMs are subject to certain requirements under the AIFMD, the enforcement of these requirements is on a Member State-by-Member State basis. Non-EU AIFMs will not have a

single Member State of reference responsible for their activities unless and until the third country passport is enabled. Because the AMLR relies on home Member State enforcement, until the AIFMD's third country passport is turned on, there is no enforcement mechanism for AMLR as relates to non-EU AIFMs either.

Building on the above, and excluding the collective investment undertaking from the scope of the AMLR, we recommend making the following amendments to Article 2(6)(e) of the AMLR:

| Current text | Proposed amendment |
|---|---|
| Article 2<br><br>(6). 'financial institution' means: …<br><br>(e) a collective investment undertaking, in particular:<br><br>(i) an undertaking for collective investment in transferable securities as defined in Article 1(2) of Directive 2009/65/EC and its management company as defined in Article 2(1)(b) of that Directive or an investment company authorised in accordance with that Directive and which has not designated a management company, that makes available for purchase units of UCITS in the Union;<br><br>(ii) an alternative investment fund as defined in Article 4(1)(a) of Directive 2011/61/EU and its alternative investment fund manager as defined in Article 4(1)(b) of that Directive that fall within the scope set out in Article 2 of that Directive; | Article 2<br><br>(6). 'financial institution' means: …<br><br>(e) ~~a collective investment undertaking, in particular:~~<br><br>~~(i) an undertaking for collective investment in transferable securities as defined in Article 1(2) of Directive 2009/65/EC and it's~~ a management company as defined in Article 2(1)(b) of ~~that~~ Directive ***2009/65/EC*** or an investment company authorised in accordance with that Directive and which has not designated a management company~~, that makes available for purchase units of UCITS in the Union~~;<br><br>***(ea)*** ~~(ii) an alternative investment fund as defined in Article 4(1)(a) of Directive 2011/61/EU and its~~ ***an*** alternative investment fund manager as defined in Article 4(1)(b) of that Directive that ~~fall within the scope set out~~ ***has been authorised*** in ***accordance with*** Article ~~2~~***6 or Article 37*** of that Directive; |

**3. If there is insistence that non-EU AIFMs marketing AIFs under Article 42 of the AIFMD are included, the collective investment undertaking should again not be included as separate obliged entities, but non-EU AIFMs should be included only with respect to the AIFs they market in the Union and enforcement will need to be re-assessed**

As mentioned above, here too the inclusion of the management companies as separate obliged entities would be a disproportionate overreach as relates to non-EU AIFMs because, in this instance, an AIF not marketed in the EU would, under the current AMLR drafting, become subject to the EU AML rules. Under the proposals, we note that the non-EU AIFM and non-EU AIF would then not only be subject to the requirements under the AMLR, but would already be subject to local, specific AML/CFT requirements in the jurisdiction where they are domiciled. In effect, this would mean that they would be required to comply with the proposed AMLR provisions and those in their home country and other applicable AML/CFT regimes, which is a disproportionate approach that we believe is not justified. For example, we note that many non-EU AIFs are domiciled in the Cayman Islands whose AML/CFT laws are structurally similar to and in many cases

stricter than the AMLR. While we fully support reasonable controls to detect and deter financial crime, being required to comply with multiple AML/CFT regulatory regimes by adapting an obliged entity's internal policies, controls and procedures to meet the various requirements will prove to be an administrative and operational burden as all seek a similar, if not identical, outcome and would therefore not bring the benefits that the AMLR seeks to achieve.

We believe that some of the proposed requirements raise additional complexity and are beyond the regulatory remit in respect of the EU financial sector as the EU does not have direct jurisdiction over non-EU AIFs (hence the AIFMD laying the obligations on the AIFM) and therefore there is no relevant sanction mechanism in the AMLR in relation to these vehicles. Furthermore, if non-EU AIFMs are included as obliged entities, specific measures on how non-EU AIFMs are to comply where the requirements envisage activities by or with the home Member State of the obliged entity will need to be considered and introduced in the AMLR which we note is currently missing from the proposal. As noted above, because the AMLR relies on home Member State enforcement, until the AIFMD's third country passport is turned on, there is no enforcement mechanism for AMLR as relates to non-EU AIFMs either.

To avoid confusion and to assure that the scope of the AMLR fits within the existing supervisory perimeter, we suggest the amendments below:

| Current text | Proposed amendment |
|---|---|
| Article 2 | Article 2 |
| (6). 'financial institution' means: … | (6). 'financial institution' means: … |
| (e) a collective investment undertaking, in particular: | (e) ~~a collective investment undertaking, in particular:~~ |
| (i) an undertaking for collective investment in transferable securities as defined in Article 1(2) of Directive 2009/65/EC and its management company as defined in Article 2(1)(b) of that Directive or an investment company authorised in accordance with that Directive and which has not designated a management company, that makes available for purchase units of UCITS in the Union; | ~~(i) an undertaking for collective investment in transferable securities as defined in Article 1(2) of Directive 2009/65/EC and it's~~ a management company as defined in Article 2(1)(b) of ~~that~~ Directive ***2009/65/EC*** or an investment company authorised in accordance with that Directive and which has not designated a management company~~, that makes available for purchase units of UCITS in the Union~~; |
| (ii) an alternative investment fund as defined in Article 4(1)(a) of Directive 2011/61/EU and its alternative investment fund manager as defined in Article 4(1)(b) of that Directive that fall within the scope set out in Article 2 of that Directive; | ***(ea)*** ~~(ii) an alternative investment fund as defined in Article 4(1)(a) of Directive 2011/61/EU and its~~ ***an*** alternative investment fund manager as defined in Article 4(1)(b) of that Directive that fall within the scope set out in Article 2 of that Directive ***but only with respect to the AIFs they manage or market in a Member State.*** |

## 4. Continue to allow the use of fund administrators and other service providers

Article 40(2) of the AMLR lists six tasks that obliged entities are not able to outsource under any circumstances:

> (a) the approval of the obliged entity's risk assessment;
>
> (b) the internal controls in place;
>
> (c) the drawing up and approval of the obliged entity's policies, controls and procedures to comply with the AMLR;
>
> (d) the attribution of a risk profile to a prospective client and the entering into a business relationship with that client;
>
> (e) the identification of criteria for the detection of suspicious or unusual transactions and activities; and
>
> (f) the reporting of suspicious activities or threshold-based declarations to the FIU."

In the global alternative investment industry, it is common practice that fund administrators and/or fund management companies are contracted by the fund's governing body to perform the types of activities listed in Article 40(2). Fund administrators, whether located in the EU or outside, generally offer investor onboarding services including AML, KYC and CFT related services. Fund management companies are often tasked by the fund's governing body to assist in the supervision and oversight of the fund's service providers, including the fund administrator. In addition, one or more employees of the management company may be appointed as the fund's money laundering reporting officer (MLRO) whose role it is to act as the focal point for the oversight of all activity relating to AML/CFT. The management company is also often involved with the AML, KYC and CFT related tasks around the fund's investments (i.e., its business relationships).

We note that in the European Banking Authority's (EBA) recently published draft Guidelines on policies and procedures in relation to compliance management and the role and responsibilities of the AML/CFT Compliance Officer (the 'draft EBA Guidelines'), the EBA, in paragraph 74, acknowledges that for collective investment funds, strategic decisions in relation to AML/CFT should continue to be allowed to be outsourced "since these entities have at a maximum a board or management in place and thus outsourcing will be beyond operational tasks." Moreover, if a fund is unable to outsource the tasks mentioned in Article 40(2) of the AMLR, this could also have the effect of significantly increasing the activities to be undertaken by fund directors.

Recital (102) of the AMLR underlines that the principle of proportionality, as set out in Article 5 of the Treaty on European Union, should be taken into account when adopting measures at EU level. As a result, this means that the proposed provisions should not go beyond what is necessary to achieve the AMLR's objective, namely, to prevent the use of the EU's financial system for the purposes of money laundering and terrorist financing (ML/TF). We note that the outsourcing limitations that the AMLR introduces would result in obliged entities, in particular smaller obliged entities, not being able to outsource activities that they currently do as these organisations do not have the operational resources to perform these tasks. They are highly dependent on other entities to undertake these activities and a full restriction on the use of external parties to perform

these tasks would result in a significant disruption of current, and well-functioning CDD practices that exist within the alternative investment industry.

The approval of the obliged entity's risk assessment of a prospective client, as well as its underlying tasks, should still be able to be completed by other parties than the obliged entity. In addition, the drawing up and approval of the obliged entity's policies, controls and procedures to comply with the AMLR requirements (see proposed Article 9(2)(c)) is another example where the fund management company or fund administrator are contracted to assist. In practice, both these activities are currently performed by the management company's MLRO. Furthermore, with regards to "the attribution of a risk profile to a prospective client and the entering into a business relationship with client" (see proposed Article 40(2)(d)), we note that the attribution of a risk profile is also an activity that is currently performed by other parties, in particular by the fund administrator.

We further note that Article 9(3) of the AMLR also describes the responsibilities the compliance officer is tasked with, including, for instance, the reporting of suspicious activity reports ("SARs") to Financial Intelligence Units ("FIUs"). Article 40(2)(f) of the AMLR, however, dictates that the reporting of SARs is an activity that, in fact, cannot be outsourced. We note that it is currently common practice for funds to outsource the function of compliance officer to the fund management company and one of the many tasks that the outsourced compliance officer is entrusted with is the reporting of SARs. In addition, this would then also prohibit the use of a group compliance officer (see proposed Article 9(3)). However, the AMLR, in effect, restricts funds from using an outsourced (group) compliance officer and we question whether this is indeed, or should be, the intention.

We believe that obliged entities should continue to be able to outsource the tasks identified in Article 40(2) to fund administrators and fund management companies. While the ultimate responsibility must remain with the obliged entity, obliged entities will face a heavy burden if they are not able to outsource the functions listed in Article 40(2) and will risk being much less efficient in combatting ML/TF. To address these matters, we suggest making the following amendments:

| Current text | Proposed amendment |
|---|---|
| Article 40 | Article 40 |
| 2. The tasks outsourced pursuant to paragraph 1 shall not be undertaken in such way as to impair materially the quality of the obliged entity's measures and procedures to comply with the requirements of this Regulation and of Regulation [please insert reference – proposal for a recast of Regulation (EU) 2015/847 – COM/2021/422 final]. The following tasks shall not be outsourced under any circumstances: | 2. The tasks outsourced pursuant to paragraph 1 shall not be undertaken in such way as to impair materially the quality of the obliged entity's measures and procedures to comply with the requirements of this Regulation and of Regulation [please insert reference – proposal for a recast of Regulation (EU) 2015/847 – COM/2021/422 final]. ~~The following tasks shall not be outsourced under any circumstances:~~ |
| (a) the approval of the obliged entity's risk assessment; | ~~(a) the approval of the obliged entity's risk assessment;~~ |
| (b) the internal controls in place pursuant to Article 7; | ~~(b) the internal controls in place pursuant to Article 7;~~ |
| (c) the drawing up and approval of the obliged entity's policies, controls and procedures to comply with the requirements of this Regulation; | ~~(c) the drawing up and approval of the obliged entity's policies, controls and procedures to comply with the requirements of this Regulation;~~ |
| (d) the attribution of a risk profile to a prospective client and the entering into a business relationship with that client; | ~~(d) the attribution of a risk profile to a prospective client and the entering into a business relationship with that client;~~ |
| (e) the identification of criteria for the detection of suspicious or unusual transactions and activities; | ~~(e) the identification of criteria for the detection of suspicious or unusual transactions and activities;~~ |
| (f) the reporting of suspicious activities or threshold-based declarations to the FIU pursuant to Article 50. | ~~(f) the reporting of suspicious activities or threshold-based declarations to the FIU pursuant to Article 50.~~ |

Putting in place obstacles that severely restrict the use of fund management companies and fund administrators will stifle the fund management industry, in particular considering the vital role that these parties play in the CDD life cycle.

### 5. Allow obliged entities to continue to place reliance on third parties

We note that proposed Article 38 dictates that obliged entities can "rely on **other obliged entities**, whether situated in a Member State or in a third country, to meet the customer due diligence requirements laid down in Article 16(1), points (a), (b) and (c)" (emphasis added). As proposed, the wording would impose limits on the type of entities that can be relied on as these must now be subject to the AMLR provisions themselves. For example, a third country bank or broker would no longer qualify nor would a European fund administrator.

We note that under Article 25 of AMLD4, obliged entities are allowed to rely on third parties to meet the customer due diligence requirements as referred to above. We do not understand why

the Commission has chosen to amend the wording considering that fund management companies – whom we believe should not be in scope of the AMLR (as mentioned above) – provide the customer due diligence activities as mentioned in Article 16(1) (a-c) of the AMLR. To that end, we recommend making the following amendment to proposed Article 38(1) of the AMLR:

| Current text | Proposed amendment |
|---|---|
| Article 38<br><br>1. Obliged entities may rely on other obliged entities, whether situated in a Member State or in a third country, to meet the customer due diligence requirements laid down in Article 16(1), points (a), (b) and (c), provided that:<br><br>(a) the other obliged entities apply customer due diligence requirements and record-keeping requirements laid down in this Regulation, or equivalent when the other obliged entities are established or reside in a third country;<br><br>(b) compliance with AML/CFT requirements by the other obliged entities is supervised in a manner consistent with Chapter IV of Directive [please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final].<br><br>The ultimate responsibility for meeting the customer due diligence requirements shall remain with the obliged entity which relies on another obliged entity. … | Article 38<br><br>1. ***Member States may permit obliged entities to rely on third parties***, whether situated in a Member State or in a third country, to meet the customer due diligence requirements laid down in Article 16(1), points (a), (b) and (c), provided that: (a) the ~~other obliged entities apply~~ ***the third party applies~~y~~*** customer due diligence requirements and record-keeping requirements laid down in this Regulation, or equivalent when the ~~other obliged entities are~~ ***third party is*** established or reside***s*** in a third country;<br><br>(b) compliance with AML/CFT requirements by the ~~other obliged entities~~ ***third party*** is supervised in a manner consistent with Chapter IV of Directive [please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final].<br><br>The ultimate responsibility for meeting the customer due diligence requirements shall remain with the obliged entity which relies on another obliged entity. … |

### 6. Remove the requirement for all obliged entities to have an independent audit function

Article 7 of the AMLR aims to widen the scope of internal policies, controls and procedures that obliged entities will need to have in place and which all must be recorded in writing and enhanced when weaknesses are identified. While we do not have any significant objections to the widening of the scope of the policies, controls and procedures, we note that Article 7(2)(c) appears to suggest that obliged entities will now be required to have "an independent audit function to test the internal policies, controls and procedures referred to in point (a)." Article 8(4)(b) of AMLD4, however, currently states that the requirement to have an independent audit function should be "appropriate with regard to the size and nature of business". It is not clear from the suggested wording in the AMLR whether this would require obliged entities to (i) contract an external auditor in the absence of an internal audit function; (ii) if they will be required to establish an internal audit function; (iii) or can use independent, individual members of staff (e.g., risk management staff).

If they would be required to establish an internal audit function, we note that due to the differences in size, activities and nature of business in the investment fund industry, this would be a disproportionate and costly requirement, which in reality may not add meaningful value to an obliged entity's stakeholders. We believe that the Commission has insufficiently considered the principle of proportionality and the proposed requirements on, for example, smaller firms in the investment management sector whom we believe will be at risk for potentially unjustifiable overburdening. The proportionate approach as is currently adopted under AMLD4 with regards to the testing of these policies, controls and procedures by an independent audit function should be retained as it would otherwise be disproportionate on the majority of obliged entities in the investment management industry.

By way of comparison, we refer the Council and Parliament to a statement[2] and guidance[3] issued by the U.S. Financial Crimes Enforcement Network (FiNCEN). While these are applicable to banks and money service businesses respectively, in both instances, FinCEN clearly states that testing may be conducted by an outside party or by an (internal) officer, employee or group of employees so long as the reviewer is not the designated compliance officer and does not directly report to the compliance officer.

Furthermore, obliged entities should be able to allow the internal, independent annual review of the functioning and effectiveness of the internal policies, controls and procedures to be done by an independent outside party (i.e., an external auditor) or by independent, individual members of staff (e.g., risk management staff). We believe that such an approach would achieve the objectives that Article 7(2)(c) seeks to achieve. To that end, we recommend the following amendments to Articles 2 and 7 of the AMLR:

[2] FinCEN, 'Interagency Statement on Sharing Bank Secrecy Act Resources, https://www.fincen.gov/news/news-releases/interagency-statement-sharing-bank-secrecy-act-resources, 3 October 2018.

[3] FinCEN, 'Frequently Asked Questions Conducting Independent Reviews of Money Services Business Anti-Money Laundering Programs', https://www.fincen.gov/resources/statutes-regulations/guidance/frequently-asked-questions-conducting-independent-reviews, 22 September 2006.

| Current text | Proposed amendment |
|---|---|
| Article 2<br><br>For the purposes of this Regulation, the following definitions shall apply: …<br><br>(37) 'proliferation financing-related targeted financial sanctions' means those targeted financial sanctions referred to in point (36) that are imposed pursuant to Council Decision (CFSP) 2016/849 and Council Decision 2010/413/CFSP and pursuant to Council Regulation (EU) 2017/1509 and Council Regulation (EU) 267/2012.<br><br>… | Article 2<br><br>For the purposes of this Regulation, the following definitions shall apply: …<br><br>(37) 'proliferation financing-related targeted financial sanctions' means those targeted financial sanctions referred to in point (36) that are imposed pursuant to Council Decision (CFSP) 2016/849 and Council Decision 2010/413/CFSP and pursuant to Council Regulation (EU) 2017/1509 and Council Regulation (EU) 267/2012.<br><br>*(38) 'independent audit function' means an independent, contracted outside party or an obliged entity's internal audit function, or other officer, employee or group of employees which does not report to the designated compliance officer.* |

| Current text | Proposed amendment |
|---|---|
| Article 7<br><br>2. The measures referred to in paragraph 1 shall include: …<br><br>(c) an independent audit function to test the internal policies, controls and procedures referred to in point (a);<br><br>… | Article 7<br><br>2. The measures referred to in paragraph 1 shall include: …<br><br>(c) *where appropriate with regard to the size and nature of business*, an independent audit function*, which may be internal or external to the organisation,* to test the internal policies, controls and procedures referred to in point (a);<br><br>… |

## 7. Introduce proportionality in the requirement to appoint a compliance officer and a compliance manager

Article 9(3) of the AMLR requires all obliged entities to appoint a compliance officer. However, in the draft EBA Guidelines, paragraph 31 states that "A financial sector operator should appoint an AML/CFT compliance officer unless they are a sole trader **or have a very limited number of employees or members**" (emphasis added). We note that the proportionate approach as proposed by the EBA is not reflected in the AMLR. Funds, by their very nature, have a very limited number of employees, consisting only of a board of directors. The board of directors delegates

the day-to-day managerial responsibilities to the management company and the fund administrator.

We also note that under proposed Article 9(6) of the AMLR, the functions of compliance officer and that of the compliance manager may be performed by the same natural person "where the size of the obliged entity justifies it". However, we do not believe that the criterion of an obliged entity's size in itself sufficiently addresses proportionality as it lacks further detailed criteria that would help obliged entities determine if they are able to make use of the Article 9(6) provision. We stress that it should not only be the size, but also the nature of an obliged entity's business that might be relevant to determine the added value of having both a compliance manager and a compliance officer.

To that end, we ask the Council and Parliament to follow the EBA's proportionate approach by making the following amendment to Article 9(3)(6) of the AMLR:

| Current text | Proposed amendment |
|---|---|
| Article 9<br><br>3. Obliged entities shall have a compliance officer, to be appointed by the board of directors or governing body, who shall be in charge of the day-to-day operation of the obliged entity's anti-money laundering and countering the financing of terrorism (AML/CFT) policies.<br><br>…<br><br>6. Where the size of the obliged entity justifies it, the functions referred to in paragraphs 1 and 3 may be performed by the same natural person. … | Article 9<br><br>3. ***Where appropriate with regard to the size and nature of business,*** ~~O~~***obliged*** entities, shall have a compliance officer, to be appointed by the board of directors or governing body, who shall be in charge of the day-to-day operation of the obliged entity's anti-money laundering and countering the financing of terrorism (AML/CFT) policies.<br><br>…<br><br>6. ***Where appropriate with regard to the size and nature of business,*** ~~Where the size of the obliged entity justifies it,~~ the functions referred to in paragraphs 1 and 3 may be performed by the same natural person. … |

## 8. Reduce the frequency of updating beneficial ownership information

Article 44(1) of the AMLR prescribes the type of beneficial ownership (BO) information that must be collected while Article 44(2) requires this information to be updated within 14 calendar days "following **any change** of the beneficial owner(s)" (emphasis added). While the BO information that needs to be collected is similar to the information that is currently required to be collected under the AMLD4, the obligation for entities to ensure that this information is updated within 14 calendar days will present a significant administrative burden. In particular, we note that Article 44(1)(b) would require obliged entities to collect the "nature and extent of the beneficial interest held in the legal entity, whether through ownership interest or control via other means, as well as the date of acquisition of the beneficial interest held."

The requirement to update the information on each occasion the beneficial owner increases or decreases its beneficial interest would prove to be a disproportionate exercise. While we acknowledge that the BO information will need to be updated should a beneficial owner increase or decrease its beneficial interests to a large extent, we do not see a valid reason as to why this should be updated within the proposed 14 calendar days period if the increase or decrease is minor. For example, an increase or decrease of a beneficial interest from 27% to 26% does not, in our view, constitute a relevant and important change that would merit the requirement to update this information within 14 calendar days. Instead of updating the BO information on every single occasion the information as outlined Article 44(1) (a-c) of the AMLR changes, we believe that any requirement to update the BO information should be done on a less frequent basis, for example, on a half-yearly basis, as this would be a less onerous burden on obliged entities while still ensuring that the BO information is updated to reflect any relevant changes. To alleviate the administrative burdens on obliged entities, we ask the Council and Parliament to consider making the following amendments:

| Current text | Proposed amendment |
|---|---|
| Article 44<br><br>2. Beneficial ownership information shall be obtained within 14 calendar days from the creation of legal entities or legal arrangements. It shall be updated promptly, and in any case no later than 14 calendar days following any change of the beneficial owner(s), and on an annual basis. | Article 44<br><br>2. Beneficial ownership information shall be obtained within 14 calendar days from the creation of legal entities or legal arrangements. It shall be updated ~~promptly, and in any case~~ no later than ***6 months*** following any change of the beneficial owner(s), and ***to affirm its continuing accuracy*** on an annual basis. |

However, should the BO information indeed be required to be updated within 14 calendar days, we believe that this should be limited to the information as set out in Article 44(1)(a) and (c). While we acknowledge that changes in the extent of the beneficial interest that would take a beneficial owner above or under the 25% BO threshold (see proposed Article 42(1)) could trigger a timelier change, we do not believe that this should be the case for each occasion that the BO interest held changes if the 25% BO threshold is already exceeded. For example, an increase from 30% to 32% should not generate a requirement to be updated within 14 calendar days as we believe this would otherwise be administratively burdensome with little to no benefit. To that end, we would suggest introducing the following amendments to Article 44(2) of the AMLR:

| Current text | Proposed amendment |
|---|---|
| Article 44<br><br>2. Beneficial ownership information shall be obtained within 14 calendar days from the creation of legal entities or legal arrangements. It shall be updated promptly, and in any case no later than 14 calendar days following any change of the beneficial owner(s), and on an annual basis. | Article 44<br><br>2. *With the exception of the beneficial ownership information referred to in paragraph 1(b),* ~~b~~beneficial ownership information shall be obtained within 14 calendar days from the creation of legal entities or legal arrangements. It shall be updated promptly, and in any case no later than 14 calendar days following any change of the beneficial owner(s), and on an annual basis. *The information referred to in paragraph 1(b) shall be updated no later than 6 months following any change, and to affirm its continuing accuracy on an annual basis*. |

**9. Clarify who is responsible for entering and updating beneficial ownership information**

Building on from the above, we further note that it is not clear which actor(s) are required to provide, validate and update this information (e.g., the customer, the obliged entity, or both).

In addition, Article 48(1) of the AMLR requires that the BO information of legal entities incorporated outside the EU, or of express trusts or similar legal arrangement administered outside the EU, and who enter into a business relationship with an obliged entity, must be held in a central register. Again, the question arises which actor(s) is/are responsible to file this information in the register. In both instances, we ask the Council and Parliament to expand on and explicitly clarify which actor(s) will be assigned the responsible party. We believe that this should be done by the fund as the obliged entity, with a possibility to outsource this activity to the fund administrator as they have the day-to-day responsibility for investor onboarding.

**10. Expand on what constitutes a change in relevant circumstances for purposes of monitoring and updating customer information**

Article 21 of the AMLR introduces an obligation on obliged entities to conduct ongoing monitoring of the business relationship throughout the course of that relationship. We note, however, that Article 21(3) would require obliged entities to review, and where relevant, update the information where "there is a change in the relevant circumstances of a customer." We ask the Council and Parliament to consider and clarify what its understanding is of a change in 'relevant circumstances' as the AMLR currently lacks a knowledge qualifier which would allow the obliged entity to assess and understand what such a change entails.

We further note that if the obliged entity does not review or update the customer information and the relevant FIU does in fact determine that the information was subject to a review or update, the former could then be subject to punitive sanctions or measures. We acknowledge that under Article 21(4) of the AMLR the AML Authority is tasked to issue guidelines on ongoing monitoring of a business relationship but we note that these will be issued "By [2 years after the entry into force of this Regulation]". Until these guidelines have been issued, obliged entities will be required to

comply with Article 21 and may be subject to punitive measures. Therefore, to avoid these circumstances from materialising, it would be helpful to expand on what constitutes as change in relevant circumstances in the Regulation or in the Level 2 Regulation.

### 11. Safeguard fundamental data protection principles

While not specifically related to the AMLR, we note that having data such as names, addresses, nationalities, ID numbers, tax identification number and birth dates of the shareholders in funds publicly made available through the interconnected BO central registers raises data protection concerns and personal security concerns. If BO information is publicly accessible, it will fail to recognise the important distinction between the legitimate need for privacy and unjustified secrecy. Investors may have legitimate reasons for wanting to have their share ownership in a collective investment scheme to remain non-public. We urge the Council and Parliament to restrict access to the BO register to only allow specified public authorities, such as law enforcement agencies and supervisory authorities, including FIUs, as well as other obliged entities for purposes of conducting the customer due diligence requirements as proposed in proposed Article 16(1), points (a), (b) and (c) of the AMLR. We further note that certain fundamental principles should always be protected to the fullest extent possible: confidentiality, consistency, appropriate use (of information) and data protection. There should be a balance maintained between the collection of sensible information and protection of the EU business environment. Therefore, we encourage the Council and Parliament to ensure that effective safeguards are put in place that will protect the security and confidentiality of beneficial ownership and applicant information.