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# Public consultation on the review of the alternative investment fund managers directive (AIFMD)

Fields marked with * are mandatory.

## Introduction

The **short version** of this consultation is now available in **23 European Union official languages**.

Please use the language selector at the top of this page to choose your language for this consultation.

In the European Union, alternative investment funds (AIFs) are collective investment funds that are not covered by Directive 2009/65/EC on undertakings for collective investment in transferable securities (UCITS). AIFs vary in terms of their investment strategies, markets, asset types and legal forms. Alternative investment fund managers (AIFMs) manage the AIFs, which are often established for saving or income generating purposes while supporting broader economic activity, and include venture capital and private equity funds, real estate funds, hedge funds and fund of funds. The activities of AIFMs are governed by the alternative investment fund managers Directive 2011/61/EU (AIFMD).

The AIFMD aims to facilitate greater AIF market integration, improve coherence in the actions taken by supervisory authorities to address potential risks posed to the financial system while ensuring appropriate levels of investor protection. To this end, an AIFM is required to obtain licence from its home supervisor and adhere to the operational requirements laid down in the AIFMD and its supplementing AIFMR, including taking measures to manage risks and to ensure the requisite transparency regarding the activities of their managed AIFs.

On 10 June 2020, the European Commission submitted its report to the European Parliament and the Council on the scope and the application of the AIFMD. The report concludes that while the AIFMD has contributed to the creation of the EU AIF market, provided a high-level protection to investors and facilitated monitoring of risks to financial stability, there are a number of areas where the legal framework could be improved. Given the European Commission's ongoing efforts to develop the capital markets union (CMU), this consultation seeks the views of stakeholders on how to achieve a more effective and efficient functioning of the EU AIF market as part of the overall financial system.

### Structure of the public consultation

First, this public consultation focuses on improving the utility of the AIFM passport and the overall competitiveness of the EU AIF industry. The analysed data indicates that the appropriate and balanced regulation of financial markets benefits investors as well as the overall economy. The questions in the section on **authorisation/scope** seek views from stakeholders on the scope of the AIFM licence, its potential extension to smaller AIFMs and level playing field concerns in relation to the regulation of other financial intermediaries, like MiFID firms, credit institutions or UCITS managers that provide similar services.

The **investor protection** section raises questions on investor access that take into account the differences between retail and professional investors. The same consideration is raised in the questions on a potential EU law pre-calibration of an AIF that would be suitable for marketing to retail. Adequacy of disclosure requirements are covered including the specific requirements that could be added, changed or removed from the current rulebook. Other questions address the alleged ambiguities in the depositary regime and the lack of the depositary passport. Stakeholders are also invited to comment on potential improvements to the AIFMD rules on valuation.

The issue of a level playing field is also covered in the section dedicated to **international issues**. Views are sought on how best to achieve the equitable treatment of non-EU AIFs and securing a wider choice of AIFs for investors while at the same time ensuring that EU AIFMs are not exposed to unfair competition or are otherwise disadvantaged.

The section dedicated to **financial stability** seeks stakeholder views on how to ensure NCAs and AIFMs have the tools necessary to effectively mitigate and deal with systemic risks. Specific input regarding improvements to the supervisory reporting template provided in the AIFMR is requested with a particular focus on the increased activities of AIFs in the credit market. The consultation suggests the potential for more centralised supervisory reporting and improved information sharing among the relevant supervisors. A revised supervisory setup and cooperation measures among the competent authorities are another focus of this consultation.

The rules on **investment in private companies** are examined with a view to potential improvements and comments are sought on the effectiveness of the current rules and their potential enhancement.

The **sustainability** related section seeks input on how the alternative investment sector can participate effectively in the areas of responsible investing and the preservation of our planet.

Questions are posed as regards the treatment of **UCITS**, particularly where a more coherent approach may be warranted. This includes the question of a single licence for AIF and UCITS managers, harmonised metrics for leverage calculation and reporting on the use of liquidity management tools.

Finally, stakeholders are welcome to raise other AIFMD related issues and submit proposals on how to otherwise improve the AIFMD legal framework with regard to any issues not directly addressed in the consultation.

Given the broad nature of the questions, well-substantiated, evidence/data backed answers and proposals will be particularly instructive. Clearly linking responses to the contributions already received in the public consultation reviewing MiFID II, informing digital strategy of the EU or any other relevant consultations would be particularly useful.

This public consultation aims to gather views from all interested parties, in particular collective investment fund managers and investment firms, AIF distributors, industry representatives, investors and investor protection associations. The questions 1, 2 and 3 as well as the section Investor protection, except for part (b) thereof, are available in all the EU official languages to gather citizens' views on these matters.

The consultation will be open for fourteen weeks.

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**Please note**: In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact fisma-aifmd-public-consultation@ec.europa.eu.

More information on

- this consultation
- the consultation document
- the consultation strategy
- the acronyms used in this consultation
- investment funds
- the protection of personal data regime for this consultation

## About you

*Language of my contribution

- ○ Bulgarian
- ○ Croatian
- ○ Czech
- ○ Danish
- ○ Dutch
- ◉ English
- ○ Estonian
- ○ Finnish
- ○ French
- ○ Gaelic
- ○ German
- ○ Greek
- ○ Hungarian
- ○ Italian
- ○ Latvian
- ○ Lithuanian
- ○ Maltese
- ○ Polish
- ○ Portuguese
- ○ Romanian
- ○ Slovak
- ○ Slovenian

- Spanish
- Swedish

*I am giving my contribution as

- Academic/research institution
- Business association
- (selected) Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union
- Other

*First name

Rayhan

*Surname

Oddud

*Email (this won't be published)

roddud@statestreet.com

*Organisation name

*255 character(s) maximum*

State Street Corporation

*Organisation size

- Micro (1 to 9 employees)
- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- (selected) Large (250 or more)

Transparency register number

*255 character(s) maximum*

Check if your organisation is on the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making.

2428270908-83

*Country of origin

Please add your country of origin, or that of your organisation.

- Afghanistan
- Åland Islands
- Albania
- Algeria
- American Samoa
- Andorra
- Angola
- Anguilla
- Antarctica
- Antigua and Barbuda
- Argentina
- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Djibouti
- Dominica
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Eswatini
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- Libya
- Liechtenstein
- Lithuania
- Luxembourg
- Macau
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Saint Martin
- Saint Pierre and Miquelon
- Saint Vincent and the Grenadines
- Samoa
- San Marino
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa

- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar /Burma
- Namibia
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago

| | | | |
|---|---|---|---|
| Cameroon | Iceland | North Macedonia | Tunisia |
| Canada | India | Norway | Turkey |
| Cape Verde | Indonesia | Oman | Turkmenistan |
| Cayman Islands | Iran | Pakistan | Turks and Caicos Islands |
| Central African Republic | Iraq | Palau | Tuvalu |
| Chad | Ireland | Palestine | Uganda |
| Chile | Isle of Man | Panama | Ukraine |
| China | Israel | Papua New Guinea | United Arab Emirates |
| Christmas Island | Italy | Paraguay | United Kingdom |
| Clipperton | Jamaica | Peru | United States |
| Cocos (Keeling) Islands | Japan | Philippines | United States Minor Outlying Islands |
| Colombia | Jersey | Pitcairn Islands | Uruguay |
| Comoros | Jordan | Poland | US Virgin Islands |
| Congo | Kazakhstan | Portugal | Uzbekistan |
| Cook Islands | Kenya | Puerto Rico | Vanuatu |
| Costa Rica | Kiribati | Qatar | Vatican City |
| Côte d’Ivoire | Kosovo | Réunion | Venezuela |
| Croatia | Kuwait | Romania | Vietnam |
| Cuba | Kyrgyzstan | Russia | Wallis and Futuna |
| Curaçao | Laos | Rwanda | Western Sahara |
| Cyprus | Latvia | Saint Barthélemy | Yemen |

- Czechia
- Lebanon
- Saint Helena Ascension and Tristan da Cunha
- Zambia
- Democratic Republic of the Congo
- Lesotho
- Saint Kitts and Nevis
- Zimbabwe
- Denmark
- Liberia
- Saint Lucia

*Field of activity or sector (if applicable):

*at least 1 choice(s)*

- [ ] Accounting
- [ ] Auditing
- [x] Banking
- [ ] Credit rating agencies
- [ ] Insurance
- [ ] Pension provision
- [x] Investment management (e.g. hedge funds, private equity funds, venture capital funds, money market funds, securities)
- [ ] Market infrastructure operation (e.g. CCPs, CSDs, Stock exchanges)
- [ ] Social entrepreneurship
- [ ] Other
- [ ] Not applicable

*Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

- ( ) **Anonymous**
  Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.
- (•) **Public**
  Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

- [x] I agree with the personal data protection provisions

## Choose your questionnaire

**Please indicate whether you wish to respond to the citizens' version (3 general questions and 14 investor protection questions) or full version (102 questions) of the questionnaire.**

**The short version only covers the general aspects of the AIFMD regime and investor protection matters under the AIFMD.**

**The full version contains 85 additional questions addressing more technical features of the AIFMD regulatory regime.**

**Note that only the questions that are part of the short version are also available in all EU languages.**

- ○ I want to respond only to the **short version of the questionnaire** (3 + 14 questions)
- ◉ I want to respond to the **full version of the questionnaire** (102 questions)

## I. Functioning of the AIFMD regulatory framework, scope and authorisation requirements

The central pillar of the AIFMD regulatory regime is a European licence or a so-called AIFM passport. EU AIFMs are able to manage and market EU AIFs to professional investors across the Union with a single authorisation. This section seeks to gather views on potential improvements to the AIFMD legal framework to facilitate further integration of the EU AIF market. The objective is to look at the specific regulatory aspects where their potential refining could enhance utility of the AIFM passport, gathering data on concrete costs and benefits of the suggested improvements, at the same time ensuring that the investor and financial stability interests are served in the best way. A number of questions focus on the level playing field between AIFMs and other financial intermediaries.

**Question 1. What is your overall experience with the functioning of the AIFMD legal framework?**

- ○ Very satisfied
- ◉ Satisfied

- Neutral
- Unsatisfied
- Very unsatisfied
- Don’t know / no opinion / not relevant

**Question 2. Do you believe that the effectiveness of the AIFMD is impaired by national legislation or existing market practices?**

- Fully agree
- Somewhat agree
- Neutral (selected)
- Somewhat disagree
- Fully disagree
- Don’t know / no opinion / not relevant

**Question 2.1 Please explain your answer to question 2, providing concrete examples and data to substantiate it:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 3. Please specify to what extent you agree with the statements below:**

**The AIFMD has been successful in achieving its objectives as follows:**

| | 1 (fully disagree) | 2 (somewhat disagree) | 3 (neutral) | 4 (somewhat agree) | 5 (fully agree) | Don't know - No opinion - Not applicable |
|---|---|---|---|---|---|---|
| creating internal market for AIFs | ○ | ○ | ● | ○ | ○ | ○ |
| enabling monitoring risks to the financial stability | ○ | ○ | ○ | ○ | ● | ○ |
| providing high level investor protection | ○ | ○ | ○ | ○ | ● | ○ |

## Other statements:

| | 1 (fully disagree) | 2 (somewhat disagree) | 3 (neutral) | 4 (somewhat agree) | 5 (fully agree) | Don't know - No opinion - Not applicable |
|---|---|---|---|---|---|---|
| The scope of the AIFM license is clear and appropriate | ○ | ○ | ○ | ● | ○ | ○ |
| The AIFMD costs and benefits are balanced (in particular regarding the regulatory and administrative burden) | ○ | ○ | ● | ○ | ○ | ○ |
| The different components of the AIFMD legal framework operate well together to achieve the AIFMD objectives | ○ | ○ | ○ | ● | ○ | ○ |
| The AIFMD objectives correspond to the needs and problems in EU asset management and financial markets | ○ | ○ | ○ | ● | ○ | ○ |
| The AIFMD has provided EU AIFs and AIFMs added Value | ○ | ○ | ○ | ○ | ● | ○ |

**Question 3.1 Please explain your answer to question 3, providing quantitative and qualitative reasons to substantiate it:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 4. Is the coverage of the AIFM licence appropriate?**

- (x) Yes
- ( ) No
- ( ) Don’t know / no opinion / not relevant

**Question 5. Should AIFMs be permitted to invest on own account?**

- ( ) Yes
- ( ) No
- (x) Don’t know / no opinion / not relevant

**Question 5.1 Please explain your answer to question 5:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 6. Are securitisation vehicles effectively excluded from the scope of the AIFMD?**

- ( ) Yes
- ( ) No
- (x) Don't know / no opinion / not relevant

**Question 7. Is the AIFMD provision providing that it does not apply to employee participation schemes or employee savings schemes effective?**

- ( ) Yes
- ( ) No
- (x) Don't know / no opinion / not relevant

**Question 8. Should the AIFM capital requirements be made more risk-sensitive and proportionate to the risk-profile of the managed AIFs?**

- (x) Yes
- ( ) No
- ( ) Don't know / no opinion / not relevant

**Question 8.1 Please explain your answer to question 8, presenting benefits and disadvantages of your approach as well as potential costs:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

State Street is supportive of a more risk-sensitive and proportionate approach to the AIFMD capital requirements, to facilitate that each AIFM's capital requirements better correlate with its activities and risk-profile, as well as any risks that the firm could pose to clients and potentially financial markets more broadly. We believe this is in keeping with the principles underpinning other parts of the AIFMD.

One element that we would like to highlight is that alignment between the capital requirements specified under the AIFMD and those that are set to be introduced as part of the Investment Firms Directive (IFD) and Investment Firms Regulation (IFR), the provisions of which will become applicable from June 2021 should be further considered. We note that many AIFMs will take the opportunity to avail of the benefits from delegating portfolio management to an investment firm. Without alignment between the AIFMD provisions and the IFR, we are concerned that it may result in double counting of Pillar 1 capital requirements, both by AIFM and the investment firm. Under the IFR, an investment firm is required to hold Pillar 1 regulatory capital, based upon assets-under-management (AuM), in order to manage funds of companies which do not conform to the IFR standards. We recognise that there has been some effort to achieve alignment, although, in our view, there remains interpretative uncertainty.

While providing definitive clarity in this regard will be no small undertaking and may introduce complexity in implementation, we would welcome a harmonised and consistent approach, which we believe is merited given the similarity of risks that certain AIFMs and investment firms will seek to address and mitigate through regulatory capital. Furthermore, we continue to believe that capital requirements should recognise the structure of the AIFM and whether it is part of a group structure. We are not commenting on the inherent risks of a standalone AIFM vis-à-vis an AIFM that is part of a group; rather we note that where the AIFM is part of a group, the relevant risks may be appropriately managed through capital held at a different level.

Finally, we are strongly supportive of the principle of proportionality in this regard. Any changes to the current regime should ensure risks to investors and the market more broadly are adequately addressed whilst not impeding the ability of firms to meet their strategic objectives and, perhaps more importantly, help investors to meet their investment objectives.

**Question 9. Are the own funds requirements of the AIFMD appropriate given the existing initial capital limit of EUR 10 million although not less than one quarter of the preceding year's fixed overheads?**

- ◯ Yes
- ◯ No
- ◉ Don't know / no opinion / not relevant

**Question 10. Would the AIFMD benefit from further clarification or harmonisation of the requirements concerning AIFM authorisation to provide ancillary services under Article 6 of the AIFMD?**

- ◯ Fully agree

- Somewhat agree
- Neutral
- Somewhat disagree
- Fully disagree
- (selected) Don’t know / no opinion / not relevant

**Question 10.1 Please explain your answer to question 10, presenting benefits and disadvantages of the entertained options as well as costs:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 11. Should the capital requirements for AIFMs authorised to carry out ancillary services under Article 6 of the AIFMD be calculated in a more risk-sensitive manner?**

- (selected) Yes
- No
- Don’t know / no opinion / not relevant

**Question 11.1 Please explain your answer to question 11, presenting benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Please refer to our response to Questions 8.

**Question 12. Should the capital requirements established for AIFMs carrying out ancillary services under Article 6 of the AIFMD correspond to the capital requirements applicable to the investment firms carrying out identical services?**

- ○ Yes
- ○ No
- ● Don’t know / no opinion / not relevant

**Question 12.1 Please explain your answer to question 12, presenting benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 13. What are the changes to the AIFMD legal framework needed to ensure a level playing field between investment firms and AIFMs providing competing services?**

**Please present benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 14. Would you see value in introducing in the AIFMD a Supervisory Review and Evaluation Process (SREP) similar to that applicable to the credit institutions?**

- Yes
- ● No
- Don't know / no opinion / not relevant

**Question 14.1 Please explain your answer to question 14, presenting benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We would like to flag that not all supervisory requirements for credit institutions are readily applicable to the asset management industry, including AIFMs. While the SREP can be helpful in providing useful and important insights for policymakers, we note that the process designed for credit institutions would likely present significant challenges for AIFMs, and in particular smaller AIFMs, and therefore may not offer proportionate benefits.

Should the European Commission be minded to introduce such a process for AIFMs, we believe it should only do so in a targeted way – for example for AIFMs for which there is sufficient and objective evidence that they may present risks to financial stability. In developing this process, we would encourage policymakers to engage with the industry in identifying relevant characteristics/thresholds for such entities and any additional expectations and responsibilities of such AIFMs.

**Question 15. Is a professional indemnity insurance option available under the AIFMD useful?**

- Yes
- No
- Don’t know / no opinion / not relevant

**Question 15.1 Please explain your answer to question 15, presenting benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 16. Are the assets under management thresholds laid down in Article 3 of the AIFMD appropriate?**

- Yes
- No
- Don’t know / no opinion / not relevant

**Question 17. Does the lack of an EU passport for the sub-threshold AIFMs impede capital raising in other Member States?**

- Yes
- No
- Don’t know / no opinion / not relevant

**Question 17.1 Please further detail your answer to question 17, substantiating it, also with examples of the alleged barriers:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 18. Is it necessary to provide an EU level passport for sub-threshold AIFMs?**

- Yes
- No
- (selected) Don’t know / no opinion / not relevant

**Question 18.1 Please explain your answer to question 18:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 19. What are the reasons for EuVECA managers to opt in the AIFMD regime instead of accessing investors across the EU with the EuVECA label?**

**Please explain your answer:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 20. Can the AIFM passport be improved to enhance cross-border marketing and investor access?**

- Yes
- No
- Don't know / no opinion / not relevant

**Question 20.1 Please explain your answer to question 20:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

## II. Investor protection

The AIFMD aims to protect investors by requiring AIFMs to act with the requisite transparency before and after investors commit capital to a particular AIF. Conflicts of interest must be managed in the best interest of the investors in the AIF. AIFMs must also ensure that the AIF's assets are valued in accordance with appropriate and consistent valuation procedures established for an each AIF. The AIF assets are then placed in safekeeping with an appointed depositary that also oversees AIF's cash flows and ensures regulatory compliance.

Questions in this section cover the topic of investor categorisation referencing to MiFID II, stopping short of repeating the same questions that have been raised in its recent public consultation on MiFID II, rather inviting comments on the most appropriate way forward. Views are also sought on the conditions that would make it possible to open up the AIF universe to a larger pool of investors while considering their varying degrees of financial literacy and risk awareness. Examples of redundant or insufficient investor disclosures are invited.

Greater clarity on stakeholders' views of the AIFMD rules on depositaries is sought in particular where such rules may require clarification or amending. The introduction of the depositary passport is desirable from an internal market point of view, but stakeholders are invited to propose other potential legal solutions, if any, that could address the issue of the short supply and concentration of depository services in smaller markets.

### a) Investor classification and investor access

**Question 21. Do you agree that the AIFMD should cross-refer to the client categories as defined in the MIFID II (Article 4(1)(ag) of the AIFMD)?**

- ( ) Yes
- ( ) No
- (x) Don't know / no opinion / not relevant

**Question 21.1 Please explain your answer to question 21:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 22. How AIFM access to retail investors can be improved?**

**Please give examples where possible and present benefits and disadvantages of your suggested approach as well as potential costs of the change:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 23. Is there a need to structure an AIF under the EU law that could be marketed to retail investors with a passport?**

- Yes
- No
- Don’t know / no opinion / not relevant

**Question 23.1 Please explain your answer to question 23:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**b) depositary regime**

**Question 24. What difficulties, if any, the depositaries face in exercising their functions in accordance with the AIFMD?**

**Please provide your answer by giving concrete examples identifying any barriers and associated costs.**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

In State Street’s view, there are a number of inconsistencies in the current framework, regarding both application and interpretation, which have presented material challenges for depositaries in exercising their functions under the AIFMD. In particular, we would like to highlight challenges we have experienced and observed in relation to safe-keeping obligations.

Firstly, the depositary’s obligations with regards to the safe-keeping of assets are set out in Article 21.8 of the AIFMD and is further specified in Articles 89 and 90 of Commission Delegated Regulation No. 231/2013 (AIFMR). The extent of the safe-keeping obligations are determined by whether an asset is considered to be a “financial instrument that can be held in custody” or “other assets”. In this context, the definition of ‘financial instruments’ is consistent with the list specified in Section C of Annex I in MiFID II. It is our understanding that there is an inconsistent approach across EU Member States on the treatment of fund units, where they are treated as assets to be held in custody in some jurisdictions, while they are treated as other assets in others. In this regard, we feel there is a need to clarify what is meant by assets capable of being held in custody. Simply holding an asset in the name of the depositary is not necessarily a good assessment as to whether it can be said to be “held in custody”. In relation to fund units, these are typically reflected in a register maintained by the transfer agent of the target fund. Regardless as to whether this register reflects the name of the depositary or not, a fund unit on a register would not traditionally be viewed as a financial instrument in custody. In addition, we would invite the European Commission to consider defining more explicitly what constitutes “other assets”, as this has been left open to interpretation.

We would also like to highlight the difficulties in obtaining and accessing information from the relevant third party. In relation to other assets, a depositary’s obligations are based upon ownership verification and record-keeping, as outlined under Article 90 of the AIFMR. More specifically, to be able to perform its depositary functions, Article 90.1 requires that:
“An AIFM shall provide the depositary, upon commencement of its duties and on an ongoing basis, with all relevant information the depositary needs in order to comply with its obligations pursuant to point (b) of Article 21(8) of Directive 2011/61/EU, and ensure that the depositary is provided with all relevant information by third parties.”
Despite this unambiguous instruction for third-parties to provide information to the depositary, and the requirement for AIFMs to facilitate the process, it remains a significant challenge to receive the necessary information from them, neither in a timely manner nor on a consistent basis. In addition, in some cases, we have experienced various obstacles and approval barriers prior to receiving counterparty statements. While certain jurisdictions have sought to address these issues through the introduction of local requirements, notably in Germany and Luxembourg, we note there is no consistent approach across the EU. We would suggest that there be a mechanism to protect depositaries from liability in circumstances where attempts have been made to obtain documentation but where this may not be forthcoming or may fall short of the documentary evidence that we would have initially endeavoured to receive in the first instance. Though the legislation provides a mechanism to escalate and report issues to the local NCA, in our experience this may not necessarily facilitate a more optimal outcome.

The challenges in obtaining information can be further compounded where the counterparty is located in a third-country jurisdiction. We have encountered situations where a third country counterparty does not feel that it is required to provide reporting on positions held with it by an in-scope AIF because the counterparty itself is not located within the EU.

There are other practical examples where we have experienced delays or other problems in receiving information, particularly in relation to our requirement to verify the ownership of “other assets”:
• Data protection legislation: as a consequence of increased focus on protecting data, counterparties have tightened up their own policies relating to the release of data. We find that we need to seek the permission of AIFMs in order to be able to request counterparty statements for AIFs, introducing additional burdens.
• Look-through obligations: where “other assets” are held by other entities controlled by the AIF, it is more difficult for us, acting as the depositary to the AIF, to obtain the necessary documentary evidence of ownership. The underlying assets are registered to the controlled entity rather than the AIF, which creates added complexity and delays in achieving the transparency required by the AIFMR.

## Question 25. Is it necessary and appropriate to explicitly define in the AIFMD tri-party collateral management services?

- (selected) Yes

- No
- Don’t know / no opinion / not relevant

## Question 25.1 Please explain your answer to question 25:

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We believe there is a need to clarify tri-party collateral management services within the AIFMD framework. In particular, we would welcome clarification with regards to the attribution of responsibilities to the depositary and the responsibilities to a tri-party collateral manager (TPCM).

It is important to note that under general market practice it is the AIFM, acting on behalf of the AIF and/or its investors, that will appoint the TPCM to carry out certain responsibilities; the depositary typically does not appoint the TPCM. In the event that a TPCM has been appointed, the following characteristics hold true:

- the investment fund shall submit a standing instruction to the TPCM with regards to collateral movement as and when necessary – this instruction does not go to the depositary;
- the rights of the investment fund in relation to the financial instruments shall be recorded in the nominee name of the TPCM within the book or register of the issuer CSD/issuer of the financial instruments;
- the TPCM is responsible for undertaking multiple collateral movements in a given day, in order to update ownership rights of the relevant financial instruments – these instructions are mostly settled internally and based on a pre-agreed asset pool (agreed by the depositary, AIFM and TPCM);
- while settlement instructions shall be passed on by the TPCM to either the issuer CSDs or issuers of the financial instruments, this will take place without any prior instruction from the depositary.

In light of the above process, it is clear that it is the TPCM, rather than the depositary, that holds the primary record of the investment fund’s holdings of financial instruments at the TPCM. Consequently, the depositary must rely upon the information that is provided to it by the TPCM, including in relation to its obligation to maintain books and records, as mandated by Commission Delegated Regulation (EU) 2018/1618. The 2018 Commission Delegated Regulation also requires the depositary to undertake reconciliations, to conducted as “often as is necessary”, between its own records and those of the third-party to which custody functions are delegated.

In the event that a TPCM has been appointed by an investment fund, we believe the depositary should continue to be able to fulfil its reconciliation obligations by utilising end-of-day collateral positions; the monitoring and control of intraday collateralisation should be clarified to be the responsibility of the third party collateral manager. Any alternative approach, including the requirement for the depositary to record and reconcile each individual settlement instruction, would not be operationally feasible. An approach based on a settlement-by-settlement instruction would not materially change a depositary’s control over the custody chain as well as potentially undermine investor protection, as it could cause a delay to the collateral transfer process. Furthermore, in such an event, the depositary may not permit the investment fund to appoint a third-party collateral manager, creating an unlevel playing field between EU investment funds and non-EU AIFs.

## Question 26. Should there be more specific rules for the delegation process, where the assets are in the custody of tri-party collateral managers?

Yes
- No
- Don't know / no opinion / not relevant

**Question 26.1 Please explain your answer to question 26, presenting benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 27. Where AIFMs use tri-party collateral managers' services, which of the aspects should be explicitly regulated by the AIFMD?**

Please select as many answers as you like

- [ ] the obligation for the asset manager to provide the depositary with the contract it has concluded with the tri-party collateral manager
- [x] the flow of information between the tri-party collateral manager and the depositary
- [x] the frequency at which the tri-party collateral manager should transmit the positions on a fund-by-fund basis to the depositary in order to enable it to record the movements in the financial instruments accounts opened in its books
- [ ] no additional rules are necessary, the current regulation is appropriate
- [ ] other

**Please explain why you think the flow of information between the tri-party collateral manager and the depositary should be explicitly regulated by the AIFMD.**

**Please present benefits and disadvantages of this approach as well as potential costs of the change, where possible:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Please refer to our response to Questions 24 and 25.

**Please explain why you think the frequency at which the tri-party collateral manager should transmit the positions on a fund-by-fund basis to the depositary in order to enable it to record the movements in the financial instruments accounts opened in its books should be explicitly regulated by the AIFMD.**

**Please present benefits and disadvantages of this approach as well as potential costs of the change, where possible:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Please refer to our response to Questions 24 and 25.

**Question 28. Are the AIFMD rules on the prime brokers clear?**

- ○ Yes
- ● No
- ○ Don't know / no opinion / not relevant

**Question 28.1 Please explain your answer to question 28, providing concrete examples of ambiguities and where available suggesting improvements:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We believe it is worth highlighting the differences that exist between EU and US reporting obligations for Prime Brokers, which can present challenges when seeking to appoint a US-based Prime Broker as a sub-custodian. In particular, Article 91(3)(c) of the AIFMR requires that the daily report that a Prime Broker is required to provide to the depositary also contains:
"(c) the value of assets where the prime broker has exercised a right of use in respect of the AIF's assets."

This essentially requires the Prime Broker to specify the value of assets that it has rehypothecated. The only exception available in making this disclosure is where the Prime Broker has explicitly agreed to prohibit rehypothecation of the assets. In practice, this is something which Prime Brokers are not typically willing or prepared to do; in our experience, we have observed only one such instance where a Prime Broker has entered into such an agreement.

Based on our experience with various US Prime Brokers, the rehypothecation report that we would receive from them specifies the positions that have been 'made available' for re-hypothecation and not necessarily what has actually been rehypothecated. We understand this to be a fairly widespread practice and the case with all US Prime Brokers, whereby positions are moved from memo segregation ('Memo Seg') to 'Free and Clear' within the Prime Brokers Participant Account with the Depositary Trust Company (DTC), in order to be made available for rehypothecation at an omnibus level.

There is no recognition of the concept of title transfer is the US; rather the Prime Brokers effectively collateralise the positions actually used, through a Special Reserve Bank Account. Once positions are released from Memo Seg, and moved to the Free & Clear account, it remains in the control of the Prime Broker. The positions available for rehypothecation within the Free & Clear account may not always be used, however, those that are used will be factored into the reserve formula that the US Prime Broker calculates on an aggregate basis for all of its customers. At a very high level, the rule requires the US Prime Broker to compute weekly the amount of funds obtained from customers or through the use of customer securities (credits) and compare it to the total amount it has extended to finance customer transactions (debits). If credits exceed debits, the US Prime Broker is required to have on deposit in the Special Reserve Bank Account at least an equal amount of cash or qualified securities. This is the SEC's 15(c)(3)(3) customer protection rule that requires Prime Brokers to lock up fully paid and excess margin securities. They are also required to maintain possession or control of all securities belonging to their customers.

In contrast to this, for non-US Prime Brokers, the rehypothecation reporting received outlines the details of the assets that have actually been rehypothecated i.e. there has been title transfer and these positions have been used by the Prime Broker for some purpose e.g. stock lending. In our view, a potential solution would involve the granting of some form of equivalence, which recognises the additional protections in place within the US Prime Broker environment. In the absence of such an approach and as is the case currently, the strict reporting requirement referenced above may prevent their use.

We would also welcome further clarity on certain provisions on the reporting obligations, as set out in Article 91 of the AIFMR. In particular, we would welcome clarification on Article 91.1(b), which states that the Prime Broker should provide the depositary with the following information:
"details of any other matters necessary to ensure that the depositary of the AIF has up-to-date and accurate information about the value of assets the safekeeping of which has been delegated in accordance with Article 21(11) of Directive 2011/61/EU."

Whilst we appreciate the intention of policymakers to include a catch-all provision to ensure that depositaries have access to all necessary and relevant information, the vagueness of the current wording has created some confusion on what this may relate to. Similarly, it is not clear what is meant in Article 91.3(a)(viii) and "all other assets relating to the AIF". While we acknowledge that there has been previous attempt to further specify this, we still receive frequent questions from Prime Brokers on what this may entail.

**Question 29. Where applicable, are there any difficulties faced by depositaries in obtaining the required reporting from prime brokers?**

- (x) Yes
- ( ) No
- ( ) Don't know / no opinion / not relevant

**Question 29.1 Please explain your answer to question 29, providing concrete examples and suggesting improvements to the current rules and presenting benefits and disadvantages of the potential changes as well as costs:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Please see our response to Question 28.

**Question 30. What additional measures are necessary at EU level to address the difficulties identified in the response to the preceding question?**

**Please explain your answer providing concrete examples:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 31. Does the lack of the depositary passport inhibit efficient functioning of the EU AIF market?**

- [x] Yes
- [ ] No
- [ ] Don’t know / no opinion / not relevant

**Question 31.1 Please explain your answer to question 31:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

While recent analysis into the functioning of the EU AIF market may indicate that it is currently operating well, we do not believe this to be the case in all aspects, such as access to depositary services, and note the experience in this regard may not be uniform across EU Member States. In particular, smaller Member States often face challenges in attracting a broader range of providers of depositary services within their jurisdiction.

As such, State Street is supportive of the European Commission’s efforts with regards the development of an EU depositary passport. As acknowledged by the European Commission in its June 2020 Report to the European Parliament and Council, we agree that the lack of a depositary passport appears to be inconsistent with the spirit of the single market. We believe there is merit in exploring how a depositary passport could be introduced, particularly as policymakers consider how to develop deeper and more integrated European capital markets following Brexit, including as part of wider efforts relating to the Capital Markets Union.

In our view, a necessary condition for the depositary passport, which its success will be predicated on, is achieving an enhanced level of harmonisation across Member States in the interpretation and implementation of how depositaries exercise their functions in accordance with the AIFMD. Achieving the appropriate level of harmonisation will ensure that investors in different funds in the same jurisdiction do not run the risk of being subject to different regulatory outcomes and treatment dependent on the location of the depositary.

**Question 32. What would be the potential benefits and risks associated with the introduction of the depositary passport?**

**Please explain your position, presenting benefits and disadvantages of your suggested approach as well as potential costs of the change, where possible:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

In our view, a depositary passport would result in a more competitive marketplace for depositary services across the EU. In particular, and as noted previously, AIFMs in Member States that have hitherto been reliant upon a limited number of participants for the provision of such services will have access to best-in-class providers. This may offer a number of operational efficiencies for AIFMs, including with regards to costs and economies of scale, which will ultimately be for the benefit investors. In addition, the depositary passport may help to reduce potential concentration risk in certain markets, as referenced in the European Commission's Report, by increasing the number of participants able to provide depositary services to AIFs domiciled in those markets that have to date only been able to avail of depositary services from the limited number of providers.

On the other hand, we acknowledge that the benefits of the depositary passport may not be fully realised without further harmonisation and due to potential operational complexities. For example, compliance costs may remain elevated should the depositary be effectively required to comply with different regulatory requirements and standards, due to differences in how the AIFMD has been implemented in different EU Member States. As a result, depositaries will potentially need to maintain multiple jurisdictional specific depositary teams who are deeply conversant in how national regulators require the depositary function to be discharged in their jurisdiction. Similarly, the depositary may still be required to engage with multiple supervisors.

For the depositary passport to deliver on its potential benefits for investors and further deepen the Capital Markets Union, there will need to be clear and consistent EU guidelines about how the depositary approaches it duties across all jurisdictions. We believe this should include, amongst other things, a common definition of errors and breaches, as well as the reporting obligations to regulators, in addition to a common definition of the interpretation of AIF (and UCITS) rules throughout Europe. While these challenges are not insurmountable, they do suggest that the depositary passport would be a medium-term endeavour and will require time. The process could be further facilitated by adopting a phased-in approach.

We are also aware that some stakeholders are concerned over what a depositary passport may mean for local presence. However, this can be addressed by ensuring the necessary and appropriate supervisory architecture is in place, where a depositary chooses to avail itself of the passport.

**Question 33. What barriers are precluding introducing the depositary passport?**

**Please explain your position providing concrete examples and evidence, where available, of the existing impediments:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Should the European Commission proceed with a depositary passport, there will need to be a significant level of harmonisation across a number of areas, including across custody, insolvency and securities laws. As noted in other parts of our response, the discretion afforded by the AIFMD has resulted in slightly different approaches to implementation and subsequently different applicable requirements across EU

Member States. Member States have been able to impose additional local requirements on depositaries, resulting in the practical and expected execution of depositary oversight to be inconsistent across the EU.

In addition, as the AIFMD primarily governs the activity of the manager of AIFs, as opposed to the funds themselves, Member States may have substantially different regimes for the AIFs, presenting additional challenges as the depositary would effectively be required to have an in-depth knowledge of each regime. By way of example, the Central Bank of Ireland (CBI) has issued its own requirements through its AIF Rulebook, which contains rules for retail AIFs and also for AIFs with different investment strategies, or other features, such as dealing frequency. The AIF Rulebook also imposes additional, local obligations on depositaries of Irish-authorised AIFs, such as the requirement to review transactions between connected parties, to verify performance fees, to review and approve in-specie subscriptions/redemptions and to provide a written report to AIF investors in the AIF's audited financial statements. AIFs designed for retail markets in particular may be subject to significant local regulatory requirements outside of the AIFMD framework. In light of this, it may be worth considering the possible introduction of a European AIF, similar to the concept of Societas Europaea (SE) under company law, in parallel with the passport, which may address some of the cross-border intra-EU challenges.

Furthermore, it is worth noting the different ways in which these obligations are discharged and the various operational processes that may exist across jurisdictions as a result – for example, in certain Member States, the use of transfer agents is commonplace, whereas in others it is not. In addition, consideration will need to be given towards supervision, as all NCAs would rightly want to have oversight of the depositary, perhaps even more so should that depositary be no longer required to maintain significant local presence. In this regard, we would encourage the European Commission to look to other pieces of EU legislation where a passport and cooperation between relevant NCAs is already functioning. Finally, the Commission should consider any possible tax implications, especially for non-corporate funds, as locating the depositary outside the jurisdiction of the fund could potentially change national authorities' treatment of a fund.

### Question 34. Are there other options that could address the lack of supply of depositary services in smaller markets?

### Please explain your position presenting benefits and disadvantages of your suggested approach as well as potential costs of the change:

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Not Applicable.

### Question 35. Should the investor CSDs be treated as delegates of the depositary?

- [x] Yes
- [ ] No
- [ ] Don’t know / no opinion / not relevant

### Question 35.1 Please explain your answer to question 35, providing concrete examples and suggesting improvements to the current rules and presenting benefits and disadvantages as well as costs:

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

State Street recognises the importance of achieving regulatory clarity on the matter of an investor CSD being considered a delegate of the depositary, as well as on how the term “investor CSD” is defined. We also understand the operational rationale for considering an investor CSD as delegate given that its intermediary services role is similar to and in competition with other intermediaries in the chain of custody that are already considered delegates under the AIFMD framework.

We have traditionally challenged efforts by policymakers to designate investor CSDs as delegates without further review of impact considerations, primarily for the reason that there is an asymmetric relationship between the depositary and market infrastructures such as CSDs, including investor CSDs. A depositary has limited control over a CSD’s participation agreement and ability to have it conform to AIFMD delegate standards. This is in contrast to contractual arrangements with other delegates, such as global custodians and sub-custodians, whereby contractual terms, risk protections, and levels of accountability for any loss of assets held in custody can be negotiated.

For CSD relationships that are to be considered delegates a depositary must therefore necessarily rely on appropriate regulatory measures being in place that confirm the delegate status of the given CSD and also direct a higher level of accountability on the CSD for any loss of assets held in their care or in the care of any further sub-custody arrangements the CSD may secure. The alternative is a willingness from the investor CSD itself to negotiate appropriate AIFMD liability risk mitigating provisions with its participants. Although depositaries and their custodians have initiated enhanced due diligence activities and discussions with investor CSDs in Europe, in the absence of a regulatory mandate, those CSDs have not been willing to take on increased responsibilities for losses commensurate with the AIFMD liability standard.

It is worth noting that today investor CSDs also serve as issuer CSDs at the same time, depending on the security type, which creates complexity and variability to any delegate status absent regulatory clarity on what functionalities and circumstances represent an investor CSD status. Also, investor CSDs operating in third countries outside of EU jurisdictions will create additional challenges for depositaries to introduce appropriate AIFMD measures. Finally, an argument that a depositary may simply choose to not link with an investor CSD with which it cannot achieve an appropriate measure of control under AIFMD is not a practicable alternative. A client of the depositary may insist that the use of the CSD is in its best interests, for commercial or practical reasons. The client may also make the choice after taking into account the competitive service offerings of various CSD and other intermediaries. This availability of choice is important and should be free of any competitive distortions among providers that could lead to an unlevel playing field. This would also align with the European Commission's intentions to increase fair competition in financial services, as well as removing obstacles to cross-border investments.

Again, we recognise that there are circumstances where investor CSDs will need to be considered delegates of the depositary and indeed that this is an approach being adopted in certain Member States. If this is to be definitively incorporated into the AIFMD framework, we believe there is scope for further clarity and guidance from the European Commission, notably to address some of the concerns highlighted above. We also believe it is important to achieve consistency in this regard between AIFMD and UCITS V requirements.

Furthermore, in the interests of absolute clarity, we would also welcome confirmation from the European Commission that an investor CSD is to be considered a delegate of a depositary only with regards to its activities in the provision of central maintenance services and not in relation to the provision of 'notary' or 'settlement' services.

### c) transparency and conflicts of interest

**Question 36. Are the mandatory disclosures under the AIFMD sufficient for investors to make informed investment decisions?**

- (x) Yes
- ( ) No
- ( ) Don't know / no opinion / not relevant

**Question 37. What elements of mandatory disclosure requirements, if any, should differ depending on the type of investor?**

**Please explain your position, presenting benefits and disadvantages of the potential changes as well as costs:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

N/A

**Question 38. Are there any additional disclosures that AIFMs could be obliged to make on an interim basis to the investors other than those required in the annual report?**

- ○ Yes
- ○ No
- ◉ Don't know / no opinion / not relevant

**Question 39. Are the AIFMD rules on conflicts of interest appropriate and proportionate?**

- ○ Yes
- ○ No
- ◉ Don't know / no opinion / not relevant

**d) valuation rules**

**Question 40. Are the AIFMD rules on valuation appropriate?**

- ○ Yes
- ○ No
- ◉ Don't know / no opinion / not relevant

**Question 41. Should the AIFMD legal framework be improved further given the experience with asset valuation during the recent pandemic?**

- ○ Yes
- ◉ No
- ○ Don't know / no opinion / not relevant

**Question 42. Are the AIFMD rules on valuation clear?**

- ◉ Yes
- ○ No
- ○ Don't know / no opinion / not relevant

### Question 43. Are the AIFMD rules on valuation sufficient?

- (●) Yes
- ( ) No
- ( ) Don’t know / no opinion / not relevant

### Question 44. Do you consider that it should be possible in the asset valuation process to combine input from internal and external valuers?

- ( ) Yes
- ( ) No
- (●) Don’t know / no opinion / not relevant

### Question 44.1 Please substantiate your answer to question 44, also in terms of benefits, disadvantages and costs:

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As a general internal rule, SSGA has taken the decision that for the instruments into which our AIFs invest, these shall be valued based upon input from third party sources. For these particular instruments and for instruments within the same asset class, it is not clear under what circumstances combining sources would be appropriate.

### Question 45. In your experience, which specific aspect(s) trigger liability of a valuer?

### Please provide concrete examples, presenting costs linked to the described occurrence:

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We have not experienced to date a scenario in which an external valuer is liable for the occurrence of a specific event. It is our understanding that such a liability could be triggered in the event of material valuation error or gross negligence on their part. However, this is highly unlikely given the instrument types held by SSGA’s AIFs.

**Question 46. In your experience, what measures are taken to mitigate/offset the liability of valuers in the jurisdiction of your choice?**

**Please provide concrete examples, presenting benefits and disadvantages as well as costs of the described approach:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Based on our experience in the jurisdictions in which we operate, an AIFM will typically undertake the following actions to mitigate any liability risk arising from external valuers by:

- Performing extensive due diligence prior to the appointment of an external valuer
- Monitoring performance on an ongoing basis, including:
  - o periodic methodology reviews
  - o regular price checks

More specifically, regarding the approach taken by SSGA, we have a Valuation Committee which oversees the implementation of our funds' valuation policy and underlying procedures. It provides numerous benefits to enhancing the rigour applied to appropriately valuing assets, including but not limited to:

- Recommending and monitoring vendors used and the pricing methodologies they employ;
- Reviewing and monitoring methodologies used to value related fund investment vehicles, including registered investment companies, collective investment funds, common trust funds, and securities lending cash collateral funds;
- Identifying circumstances that require fair valuation and determine the fair value of investments for which market quotations are not readily available, including where available market quotations are deemed unreliable;
- Monitoring significant events, unchanged prices, price tolerance breaks, and other occurrences that may indicate that market quotations are not readily available, including where available market quotations are deemed unreliable;
- Reviewing valuation challenges;
- Reviewing regular testing and back-testing reports and analyses;

These actions reflect standard market practice rather than being in response to legislation. In our view, they have proven to be largely effective to date.

# III. International relations

Considering the global nature of financial services, the AIFMD interacts with the third country regulatory regimes. By adopting the AIFMD the EU co-legislators sought to put in place a legal framework for tackling risks emanating from AIF activities that may impact the EU financial stability, market integrity and investor protection. The questions below are seeking views on where to strike the balance of having a functioning, efficient AIF market and ensuring that it operates under the conditions of a fair competition without undermining financial stability. Besides posing general questions on the competitiveness of the EU AIF market, this section seeks views on how the EU market could interact with international partners in the area governed by the AIFMD. The focus is on the appropriateness of the AIFMD third country passport regime and delegation rules.

**Question 47. Which elements of the AIFMD regulatory framework support the competitiveness of the EU AIF industry?**

**Please explain providing concrete examples and referring to data where available:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

N/A

**Question 48. Which elements of the AIFMD regulatory framework could be altered to enhance competitiveness of the EU AIF industry?**

**Please explain providing concrete examples and referring to data where available:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

N/A

**Question 49. Do you believe that national private placement regimes create an uneven playing field between EU and non-EU AIFMs?**

- ( ) Yes
- (x) No
- ( ) Don’t know / no opinion / not relevant

**Question 50. Are the delegation rules sufficiently clear to prevent creation of letter-box entities in the EU?**

- (x) Yes
- ( ) No
- ( ) Don’t know / no opinion / not relevant

**Question 51. Are the delegation rules under the AIFMD/AIFMR appropriate to ensure effective risk management?**

- (x) Yes
- ( ) No
- ( ) Don’t know / no opinion / not relevant

**Question 52. Should the AIFMD/AIFMR delegation rules, and in particular Article 82 of the Commission Delegated Regulation (EU) No 231/2013, be complemented?**

- ( ) Yes
- (x) No
- ( ) Don’t know / no opinion / not relevant

**Question 53. Should the AIFMD standards apply regardless of the location of a third party, to which AIFM has delegated the collective portfolio**

**management functions, in order to ensure investor protection and to prevent regulatory arbitrage?**

- (selected) Yes
- No
- Don’t know / no opinion / not relevant

### Question 53.1 Please explain your answer to question 53:

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We would welcome clarification from the European Commission on what is meant by AIFM standards applying to a third-party upon which functions have been delegated “regardless of the location”. In the event that the concern relates to ensuring that the fund or portion of the fund subject to the delegation of portfolio management is managed in accordance with the AIFMD, we would note that the third-party delegate must manage the fund in accordance with the prospectus. As the approval of prospectus would be based on the AIFMD (or indeed UCITS), in practice, the third-party delegate would be adhering to EU rules. The AIFMD and AIFMR contain obligations upon the AIFM to ensure this happens on an ongoing basis. As such, we see little possibility of material regulatory arbitrage or potential circumvention of AIFMD investor protection provisions.

Notwithstanding this, we would be strongly opposed to the possible extra-territorial application of AIFMD rules directly on third-country entities upon which activities are delegated. In our view, the drafting and development of the AIFMD is deliberate and intentional. Under Article 78.2(e) of the AIFMR, where an AIFM delegates portfolio management to a third-country entity, it must ensure that such an entity is authorised or registered:
“…for the purpose of asset management and effectively supervised by a competent authority in those countries” (emphasis added).
In our view, this implies that the third-party should be subject to requirements and the supervision in accordance with the rules of the third-country jurisdiction, rather than being required to comply directly with all the requirements of the AIFMD.

Similarly, we would caution against an automatic assumption that the rules in a third-country are inferior to those applicable in Europe. While the asset management industry is global in nature and is increasingly being underpinned by internationally agreed principles, the specific application of rules may differ across jurisdictions, whilst ostensibly delivering materially similar regulatory outcomes. Requiring the extra-territorial application of AIFMD rules would be a significant departure from the principle of deference, potentially resulting in market fragmentation and adverse outcomes for investors. For example, the extra-territorial application of AIFMD rules would likely lead to potential delegates opting-out or charging higher costs, as they would need to comply with the AIFMD for all of their activities, including for those which the AIFMD may not be relevant or suitable. This cost would likely be passed on to investors.

Another key principle governing the current framework is supervisory cooperation, which must be ensured between the EU and third-country NCAs. The comprehensive nature of such cooperation, as specified in Article 78.3 of the AIFMR, should negate the need for the direct application of AIFMD rules on third-country entities. To date, we are not aware of any deficiencies in supervisory cooperation arrangements between EU and third-country regulatory authorities, which may have undermined investor protection or increased the potential for regulatory arbitrage.

**Question 54. Do you consider that a consistent enforcement of the delegation rules throughout the EU should be improved?**

- Yes
- (x) No
- Don’t know / no opinion / not relevant

**Question 55. Which elements of the AIFMR delegation rules could be applied to UCITS?**

**Please explain your position, presenting benefits and disadvantages of the potential changes as well as costs:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The ESMA 2017 Opinion on investment management, in response to Brexit, states the following with regards to delegation:

42. Therefore, ESMA is of the view that the interpretation of Article 13 of the UCITS Directive and the relevant national laws transposing this provision should be consistent with the principles set out in Articles 75 to 82 of the AIFMD Level 2 Regulation. In this respect, NCAs should ensure that UCITS investors, which are often retail investors, benefit from at least the same level of protection as AIF investors.

As such, in practice, UCITS Management Companies are already subject to the AIFMR rule governing delegation. We understand this to be the approach adopted in practice by several Member States.

Should the harmonisation of delegation rules be a precursor for further harmonisation between the UCITS Directive and the AIFMD, we would encourage European policymakers to exercise caution, as this may not be straightforward or indeed desirable. The AIFMD is of course targeted at the manager, whereas UCITS relates to the product; as such, there may objective reasons why they have developed in the way they have. In this context, the provisions of one Directive may not be fully suitable or relevant for the other. Rather, it may be more of an iterative process. Additionally, as noted previously, the UCITS brand is a globally recognised hallmark in its own right.

## IV. Financial stability

One of the main objectives of the AIFMD is to enable supervisors to appreciate and mitigate systemic risks building up in financial markets from different sources. To this end, AIFMs are subject to periodic reporting obligations and supervisors are equipped with certain market intervention powers to mitigate negative effects to the financial stability that may arise from the activities on the AIF market.

The section below invites opinions whether the intervention powers and a tool-kit available to the relevant supervisors are sufficient in times of severe market disruptions. Shared views on the adequacy of the AIFMR supervisory reporting template will be important in rethinking the AIFM supervisory reporting obligations. According to the FSB report, markets for leveraged loans and CLOs have grown significantly in recent years exceeding pre-crisis levels (FSB, Vulnerabilities associated with leveraged loans and collateralised loan obligations (CLOs), PLEN/2019/91-REV, 22 November 2019). While most leveraged loans are originated and held by banks, investment funds are also exposed to the leveraged loan and CLO markets. In order to assess risks to the financial stability and regulatory implications associated with leveraged loans and CLOs it would be commendable to continue collecting the relevant data and monitoring the market. The stakeholders are invited to cast their views on the matter.

With particular regard to the loan originating AIFs, suggestions on the optimal harmonisation of the rules that could apply to these collective investment vehicles are welcome. Finally, questions are raised whether leverage calculation methods could benefit from further standardisation of metrics across the AIF market and potentially also across the UCITS for the supervisors to have a complete picture of the level of leverage engaged by the collective investment funds.

### a) macroprudential tools

## Question 56. Should the AIFMD framework be further enhanced for more effectively addressing macroprudential concerns?

- (x) Yes
- ( ) No
- ( ) Don’t know / no opinion / not relevant

## Question 56.1 If yes, which of the following amendments to the AIFMD legal framework would you suggest?

Please select as many answers as you like

- [x] improving supervisory reporting requirements
- [x] harmonising availability of liquidity risk management tools for AIFMs across the EU
- [ ] further detailing cooperation of the NCAs in case of activating liquidity risk management tools, in particular in situations with cross-border implications
- [ ] further clarifying grounds for supervisory intervention when applying macroprudential tools
- [ ] defining an inherently liquid/illiquid asset
- [ ] granting ESMA strong and binding coordination powers in market stress situations

- [ ] other

**Please explain why you would suggest improving supervisory reporting requirements.**

**Please present benefits and disadvantages of the potential changes as well as costs:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

With regards to supervisory reporting, we would welcome further coordination between NCAs, so that the data that is already provided can be accessed and utilised as necessary. During the peak of the crisis we, alongside other fund managers, received a multitude of ad-hoc requests, on top of routine reporting obligations. While we recognise that NCAs need real-time awareness of market developments during periods of stress, the volume of requests and the absence of a consistent format imposed an additional burden on AIFMs, which may have distracted valuable resources from addressing market challenges. Improvements in this area should avoid imposing additional burdens and, in so far as possible, any additional reporting requirements should be well-justified and considered with the principle of proportionality in mind.

**Please explain why you would suggest harmonising availability of liquidity risk management tools for AIFMs across the EU.**

**Please present benefits and disadvantages of the potential changes as well as costs:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

In State Street’s view, there is scope to improve the current AIFMD approach regarding financial stability and addressing macro-prudential concerns. However, we do not believe the current framework requires fundamental change or a significant overhaul. Rather, the focus should be on ensuring a more consistent and harmonised approach across the EU, as well as facilitating the usability of the current framework.

In this regard, an important area is the availability of liquidity management tools (LMT). Currently, the availability and usage of LMT varies across Member States, as a result of differences in national implementation and subsequent supervisory actions. The experience of the sector during the recent market stress highlighted that the current comprehensive framework is both appropriate and broadly effective. For example, measures imposed by funds, including swing pricing and anti-dilution levies, were generally effective in addressing the immediate and extreme liquidity pressures, as acknowledged by both the Bank of England and the European Central Bank, in their respective Financial Stability Reports during 2020. However, the lack of availability of LMT in some jurisdictions resulted in potentially different investor outcomes, depending on where they are located in the EU. We note that certain Member States have taken recent action to remedy this situation. For example, in April 2020, Germany passed legislation permitting the use of notice periods, redemption gates and swing pricing by funds; although, it is worth noting by that point, markets had already started to stabilise. As such, we are fully supportive of efforts by the European Commission and ESMA to harmonise the availability of liquidity risk management tools for AIFMs across the EU.

Notwithstanding this, we would also like to highlight a word of caution. Recent discussions on addressing potential financial stability concerns presented by investment funds has in some cases, and in our view erroneously, led to calls for the development of a macroprudential toolkit akin to that currently in operation in the banking sector. Given the full suite of LMT foreseen in the AIFMD is not yet fully available, we believe this discussion is premature. More importantly, it is critical that the approach taken in the AIFMD remains focused on what is most appropriate for investment funds and is calibrated to deliver policymaker objectives. During the recent market turmoil, we observed how certain measures (e.g. minimum cash/liquidity buffers) potentially encouraged procyclical behaviour, rather than operating as intended.

In addition, we would welcome further definitive clarification on the grounds for supervisory intervention when applying macro-prudential tools. This remains a key area of focus, particularly in the context of ESMA and the ESRB's ongoing work on addressing leverage and liquidity risks in investment funds. We note that certain commentators are seemingly advocating for NCAs to play an expanded role in this regard, possibly beyond that which is envisaged in Level 1. State Street continues to support the principle that the fund manager is best placed to decide as and when to use LMT. In this context, we welcome the recent comments by the ESMA Chair that, in the first instance and in the normal course of business, the decision to use LMT lies with the manager and fund board.

We acknowledge that ESMA plays an important role with regards to coordination and promoting supervisory practices, both in ordinary market circumstances and during market stress. However, we would encourage ESMA to avail of the tools currently available to them, including those recently granted under the ESAs Review. Ensuring that the decision to employ a broad range of agreed LMT lies with the manager while providing a regulatory level playing field could also help to alleviate the stigma surrounding the use of certain tools.

Regarding the introduction of the explicit definition of an inherently liquid asset, in principle, we see the merit. However, in practice, we believe this will be much more difficult to achieve and is likely to be very complex; while we believe simplicity is key, there is no one-size-fits all approach. Similarly, the liquidity characteristics of a specific instrument/asset class are dynamic and change over time. As such, this approach does not lend itself well to be specified in Level 1 legislation.

### Question 57. Is there a need to clarify in the AIFMD that the NCAs' right to require the suspension of the issue, repurchase or redemption of units in the public interest includes financial stability reasons?

- ( ) Yes
- (x) No
- ( ) Don't know / no opinion / not relevant

**Question 57.1 Please explain your answer to question 57, presenting benefits and disadvantages of the potential changes to the existing rules and processes as well as costs:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We do not see a need for further specification of the NCA's right to require the suspension of the issue, repurchase or redemption of units, as set out in Article 46.2(j) of the AIFMD. In our view, the current specification of this provision is sufficiently clear.

This issue has often gone hand in hand with the right of NCAs to intervene in markets by imposing leverage limits when justified by financial stability reasons; this power is granted to ESMA and NCAs in Article 25.7 of the AIFMD. We have observed that there is a perception amongst some policymakers that the fact that these measures are yet to be utilised is evidence of a deficiency in, or shortcoming of, the current regulatory framework. We do not agree with this. While the use of LMT, including suspension of redemptions, is ultimately for the benefit of investors, they are exceptional tools to be used in truly exceptional circumstances. The lack of use by NCAs of the right to suspend redemptions or impose leverage limits recognises this, in addition to the potentially significant untended consequences where such decisions are taken out of the hands of the fund manager.

**Question 58. Which data fields should be included in a template for NCAs to report relevant and timely data to ESMA during the period of the stressed market conditions?**

**Please provide your suggestions, presenting benefits and disadvantages of the potential changes as well as costs:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

N/A

**Question 59. Should AIFMs be required to report to the relevant supervisory authorities when they activate liquidity risk management tools?**

- ○ Yes
- ● No
- ○ Don't know / no opinion / not relevant

**Question 59.1 Please explain your answer to question 59, providing costs, benefits and disadvantages of the advocated approach:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We recognise the need and do not necessarily object to increased transparency around the activation of LMT, particularly during periods of heightened market stress. Nevertheless, we believe it is important to distinguish between exceptional-LMT, such as the suspension of redemptions, and ordinary-LMT, such as swing-pricing and other forms of anti-dilution levies. It is our understanding and experience that NCAs will ask for notification when an AIFM intends to utilise exceptional-LMT. However, extending this to ordinary-LMT, which may be used in the normal course of business, would be very onerous for both NCAs and the AIFM and, in our view, disproportionate.

Furthermore, daily reporting on the use of ordinary tools is likely to be of little informative value from a financial stability perspective, as their purpose is to achieve a more equitable treatment of the fund's remaining investors on an ordinary trading day, and not necessarily a reaction to liquidity stresses that could compromise the ongoing viability of a given fund.

**Question 60. Should the AIFMD rules on remuneration be adjusted to provide for the de minimis thresholds?**

- ○ Yes
- ○ No
- ● Don't know / no opinion / not relevant

**b) supervisory reporting requirements**

**Question 61. Are the supervisory reporting requirements as provided in the AIFMD and AIFMR's Annex IV appropriate?**

- ○ Fully agree
- ● Somewhat agree
- ○ Neutral
- ○

Somewhat disagree
- Fully disagree
- Don’t know / no opinion / not relevant

### Question 61.1 Please explain your answer to question 61:

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

In our view, the current supervisory reporting requirements as set out in the AIFMD and Annex IV of the AIFMR are appropriate. The Annex IV template in particular should facilitate a granular understanding of the key elements of a given AIF.

Notwithstanding this, we would welcome further clarity on how the data that is being reported is used by regulators and policymakers. The current reporting obligations are extensive and presented a significant burden that market participants have had to accept. With this in mind, we noted with a degree of concern the mixed reviews from policymakers with regards to data during the recent pandemic-related market turmoil; while some policymakers were effusive in their praise at how the data provided has enabled them to identify market developments with greater accuracy and in a more timely manner, others were far more critical over the current state of affairs. From our perspective, before an exercise on how existing reporting obligations could be augmented is undertaken, it would be more prudent to consider how the data that is currently provided to regulators could be better utilised.

Separately, we would like to highlight concerns relating to unlaunched and terminated funds. It is our understanding that, under the AIFMD framework, regardless of whether or not a sub-fund has assets/has been launched, there is still a requirement to complete quarterly returns. Given such funds cannot have any impact on the financial system, this seems entirely superfluous.

### Question 62. Should the AIFMR supervisory reporting template provide a more comprehensive portfolio breakdown?

- Yes
- (selected) No
- Don’t know / no opinion / not relevant

### Question 63. Should the identification of an AIF with a LEI identifier be mandatory?

- Yes
- No
- (selected) Don’t know / no opinion / not relevant

**Question 63.1 Please explain your answer to question 63, presenting benefits and disadvantages as well as costs associated with introducing such a requirement:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 64. Should the identification of an AIFM with a LEI identifier be mandatory?**

- Yes
- No
- Don't know / no opinion / not relevant

**Question 64.1 Please explain your answer to question 64, presenting benefits and disadvantages as well as costs associated with introducing such a requirement:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 65. Should the use of an LEI identifier for the purposes of identifying the counterparties and issuers of securities in an AIF's portfolio be mandatory for the Annex IV reporting of AIFMR?**

- Yes
- No

- [x] Don’t know / no opinion / not relevant

**Question 65.1 Please explain your answer to question 65, presenting benefits and disadvantages as well as costs associated with introducing such a requirement:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 66. Does the reporting data adequately cover activities of loan originating AIFs?**

- [ ] Yes
- [ ] No
- [x] Don’t know / no opinion / not relevant

**Question 66.1 Please explain your answer to question 66:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 67. Should the supervisory reporting by AIFMs be submitted to a single central authority?**

- [x] Yes
- [ ] No
- [ ] Don’t know / no opinion / not relevant

**Question 67.1 If yes, which one:**

- ◯ ESMA
- ◉ other options

**Please explain your choice, particularly substantiating 'other options', and provide information, where available, on the benefits, disadvantages and costs of implementing each proposition:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We would be supportive of a more streamlined approach to supervisory reporting, whereby market participants can discharge their obligations by submitting their reports to a single authority, who can then disseminate this information to other relevant policymakers, where relevant and appropriate. This would be particularly helpful for non-EU AIFMs.

In terms on which regulatory authority should be the initial recipient of such reports, we have a slight preference for maintaining the current approach as set out in Article 24 of the AIFMD, in which the AIFM is required to report to the NCA of its home Member State. Notwithstanding this, this approach should not preclude further efforts to facilitate the coordination and sharing of data across relevant NCAs, as well as ESMA. As noted, there are clear disparities in how this is currently approached, as highlighted by the experience during March and April, and we believe it imperative that this challenge is addressed before considering whether the existing supervisory reporting architecture and obligations should be overhauled

**Question 68. Should access to the AIFMD supervisory reporting data be granted to other relevant national and/or EU institutions with responsibilities in the area of financial stability?**

- ◉ Yes
- ◯ No
- ◯ Don't know / no opinion / not relevant

**Question 68.1 If yes, please specify which one:**

- ◯ ESRB
- ◯ ECB
- ◯ NCBs
- ◉ National macro-prudential authorities
- ◯ Other

### Question 68.2 Please explain your anwser to question 68.1:

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We see no reason why the data currently submitted could not be shared with ALL of the macroprudential authorities listed above, who have responsibility for financial stability, as well as other NCAs that have a relevant interest. In line with our previous response, we believe there is extensive information already provided and the first priority should be on how this can be better utilised.

### Question 69. Does the AIFMR template effectively capture links between financial institutions?

- ○ Yes
- ○ No
- ● Don’t know / no opinion / not relevant

### Question 69.1 Please explain your answer to question 69:

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

### Question 70. Should the fund classification under the AIFMR supervisory reporting template be improved to better identify the type of AIF?

- ● Yes
- ○ No
- ○ Don’t know / no opinion / not relevant

### Question 70.1 If yes, the AIF classification could be improved by:

Please select as many answers as you like

- [x] permitting multiple choice of investment strategies in the AIFMR template
- [ ] adding additional investment strategies
- [ ] other
- [ ] it cannot be improved, however, if a portfolio breakdown is provided to the supervisors this can be inferred

**Please explain why you think the AIF classification could be improved by permitting multiple choice of investment strategies in the AIFMR template, providing information, where available, on the costs, benefits and disadvantages of this option:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

> The approach to AIF classification as set out in the Annex IV reporting template has long been an area of contention, given the current list of options is fairly high-level and often results in the majority of funds being classified as 'other'. Similarly, the template only allows for the primary strategy to be selected, which seems particularly restrictive. It may be more informative by expanding the current template to incorporate a more exhaustive list and allow for the selection of multiple strategies.

**Question 71. What additional data fields should be added to the AIFMR supervisory reporting template to improve capturing risks to financial stability:**

Please select as many answers as you like

- [ ] value at Risk (VaR)
- [ ] additional details used for calculating leverage
- [ ] additional details on the liquidity profile of the fund's portfolio
- [ ] details on initial margin and variation margin
- [ ] the geographical focus expressed in monetary values
- [ ] the extent of hedging through long/short positions by an AIFM/AIF expressed as a percentage
- [ ] liquidity risk management tools that are available to AIFMs
- [ ] data on non-EU master AIFs that are not marketed into the EU, but which have an EU feeder AIF or a non-EU feeder marketed into the EU if managed by the same AIFM
- [ ] the role of external credit ratings in investment mandates

- [ ] LEIs of all counterparties to provide detail on exposures
- [ ] sustainability-related data, in particular on exposure to climate and environmental risks, including physical and transition risks (e.g. shares of assets for which sustainability risks are assessed; types and magnitudes of risks; forward-looking, scenario-based data)
- [ ] other

**Question 72. What additional data fields should be added to the AIFMR supervisory reporting template to better capture AIF's exposure to leveraged loans and CLO market?**

**Please explain your answer providing as much detail as possible and relevant examples as well as the costs, benefits and disadvantages:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 73. Should any data fields be deleted from the AIFMR supervisory reporting template?**

- ( ) Yes
- ( ) No
- (x) Don't know / no opinion / not relevant

**Question 74. Is the reporting frequency of the data required under Annex IV of the AIFMR appropriate?**

- [x] Yes
- [ ] No
- [ ] Don't know / no opinion / not relevant

**Question 75. Which data fields should be included in a template requiring AIFMs to provide ad hoc information in accordance with Article 24(5) of the AIFMD during the period of the stressed market in a harmonised and proportionate way?**

**Please explain your answer presenting the costs, benefits and disadvantages of implementing the suggestions:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

N/A

**Question 76. Should supervisory reporting for UCITS funds be introduced?**

- [ ] Yes
- [x] No
- [ ] Don't know / no opinion / not relevant

**Question 76.1 Please explain your answer to question 78, also in terms of costs, benefits and disadvantages:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

While we can understand that policymakers may wish to obtain further information from market participants, when considering whether supervisory reporting for UCITS should be introduced in a similar fashion as currently applicable for AIFs, we believe it is important to keep in mind the differences between UCITS and AIFs, in terms of the risks posed to investors and the broader financial system.

It is our understanding that one of the key tenets underpinning the comprehensive reporting framework established under the AIFMD is to facilitate the monitoring by regulators of the potential build-up of systemic risk. This is clearly acknowledged by Recital 123 of the AIFMR. However, in the event of UCITS, the prescriptive restrictions imposed with regards to eligible asset and investment, as well as limits on the use of leverage, mean the risks they present to both investors and the financial system are typically materially different. As such, we do not believe it necessary for UCITS to be subject to such a reporting framework and for NCAs to require the disclosure of the same level of information.

Notwithstanding the above, we note that NCAs are already empowered to request necessary information on investment funds during period of stress. This was employed extensively during the COVID-19-related market stress and we have not heard that this approach didn’t provide NCAs with sufficient oversight; indeed, policymakers have largely been positive on what the data provided by market participants enabled them to observe. In addition, we note that certain funds are already subject to specific reporting obligations, regardless of their underlying structure as either an AIF or UCITS e.g. EU money market funds.

### Question 77. Should the supervisory reporting requirements for UCITS and AIFs be harmonised?

- ◯ Yes
- ◯ No
- ◉ Don’t know / no opinion / not relevant

### Question 77.1 Please explain your answer to question 79, also in terms of costs, benefits and disadvantages:

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We refer to our response to Question 76.

### Question 78. Should the formats and definitions be harmonised with other reporting regimes (e.g. for derivates and repos, that the AIF could report using a straightforward transformation of the data that they already have to report under EMIR or SFTR)?

- [x] Yes
- [ ] No
- [ ] Don’t know / no opinion / not relevant

**Question 78.1 If yes, please explain your response indicating the benefits and disadvantages of a harmonisation of the format and definitions with other reporting regimes:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Provided that it does not result in additional reporting requirements being imposed on AIFs, we see merit in a more harmonised and streamlined approach to reporting, including with other reporting regimes where appropriate and relevant. For policymakers and regulators, this may facilitate a more holistic understanding market interdependencies and potential system-wide risks. For market participants, this may help alleviate some of the burdens placed by reporting requirements, particularly where there may be a high degree of overlap. Specifically, with regards to the latter, where there is overlap and duplication, we believe policymakers should also consider the removal of such a requirement.

**c) leverage**

**Question 79. Are the leverage calculation methods – gross and commitment – as provided in AIFMR appropriate?**

- [ ] Fully agree
- [x] Somewhat agree
- [ ] Neutral
- [ ] Somewhat disagree
- [ ] Fully disagree
- [ ] Don’t know / no opinion / not relevant

**Question 79.1 Please explain your answer to question 79 in terms of the costs, benefits and disadvantages:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We believe the current approach to measuring leverage, as set out in the AIFMR, is appropriate. These measures are now well integrated into firms' risk management systems and are well understood by broad range of stakeholders. In addition, the experience of the investment funds sector during the recent period of market stress and, more pertinently, the absence of any specific leverage-related concerns, suggests there is no need to fundamentally change the current approach.

We support the use of the commitment method, given its permitted use of netting, which provides a more accurate reflection of the risk in a specific portfolio and from the use of leverage. While we do not object to its use, it is important that stakeholders avoid drawing firm conclusions solely from the gross method, as it can present an overly-simplistic approach and also overstate the use of leverage.

### Question 80. Should the leverage calculation methods for UCITS and AIFs be harmonised?

- Yes
- (selected) No
- Don't know / no opinion / not relevant

### Question 80.1 Please explain your answer to question 80:

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

While the AIFMD permits the use of the gross and commitment methods to measure leverage, the UCITS Directive specifies the commitment method and value-at-risk (VaR) metrics. We appreciate there is an appeal to harmonising the approach across all EU investment funds. However, given the functioning of the sector to date, including with regards to leverage, we see little justification for amending the current frameworks. There may also be credible reasons for a different approach between UCITS and AIFs e.g. the effective hard limit on the amount of leverage that can be employed by a UCITS fund.

It is worth noting that there is no single perfect measure and the measures currently envisaged have both advantages and disadvantages. As noted, the gross method is overly-simplistic. Similarly, the use of VaR metrics, while informative from the perspective of total exposure, may not necessarily provide an accurate portrayal of the use of leverage; indeed, in its July 2016 paper, the ESRB notes that VaR in and of itself is not considered a measure of leverage and may be open to procyclical effects.

### Question 81. What is your assessment of the two-step approach as suggested by International Organisation of Securities Commissions ('IOSCO') in the Framework Assessing Leverage in Investment Funds published in December 2019 to collect data on the asset by asset class to assess leverage in AIFs?

### Please provide it, presenting costs, benefits and disadvantages of implementing the IOSCO approach:

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

State Street is supportive of the two-step approach proposed by IOSCO to measure leverage-related risks in investment funds. In general, we support the principle that a fund using leverage should not itself be regarded as inherently risky and, in our view, the majority of investment funds that employ leverage as part of their investment strategy will not present financial stability risks. We agree that only those investment funds that fulfil the criteria in Step 1, in that they are more likely to pose risks to financial stability should be subjected to further risk-based analyses under Step 2. However, we would caution against any automatic designation of such funds as 'systemically risky'. Indeed, we do not believe this to be the intention of IOSCO.

Regarding the collection of data broken down by asset class, while we see the merits in this approach, we believe it could introduce a significant burden on top of the already extensive information provided through current reporting obligations without providing further meaningful insights. We do not believe the benefits of this approach would outweigh the implementation costs and, as such, would encourage European policymakers to avail of the data that is currently made available to them.

### Question 82. Should the leverage calculation metrics be harmonised at EU level?

- ○ Yes
- ● No
- ○ Don't know / no opinion / not relevant

### Question 82.1 Please explain your answer to question 82, presenting the costs, benefits and disadvantages of your chosen approach:

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Please refer to our response to Question 80.

**Question 83. What additional measures may be required given the reported increase in CLO and leveraged loans in the financial system and the risks those may present to macro-prudential stability?**

**Please provide your suggestion(s) including information, where available, on the costs and benefits, advantages and disadvantages of the proposed measures:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

N/A

**Question 84. Are the current AIFMD rules permitting NCAs to cap the use of leverage appropriate?**

- (●) Yes
- ( ) No
- ( ) Don't know / no opinion / not relevant

**Question 85. Should the requirements for loan originating AIFs be harmonised at EU level?**

- ( ) Yes
- ( ) No
- (●) Don't know / no opinion / not relevant

**Question 85.1 Please explain your answer to question 85:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

## V. Investing in private companies

The AIFMD rules regulating investing in private companies aim to increase transparency and accountability of collective investment funds holding controlling stakes in non-listed companies. This section seeks insights whether these provisions are delivering on the stated objectives and whether there are other ways to achieve those objectives more efficiently and effectively. Private equity industry has been growing for years from a few boutique firms to € 3,7 T global industry. The questions are raised therefore whether the AIFMD contains all the relevant regulatory elements that are fit for purpose.

**Question 86. Are the rules provided in Section 2 of Chapter 5 of the AIFMD laying down the obligations for AIFMs managing AIFs, which acquire control of non-listed companies and issuers, adequate, proportionate and effective in enhancing transparency regarding the employees of the portfolio company and the AIF investors?**

- Fully agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Fully disagree
- (selected) Don't know / no opinion / not relevant

**Question 86.1 Please explain your answer to question 86, providing concrete examples and data, where available:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 87. Are the AIFMD rules provided in Section 2 of Chapter 5 of the AIFMD whereby the AIFM of an AIF, which acquires control over a non-listed company, is required to provide the NCA of its home Member State with information on the financing of the acquisition necessary, adequate and proportionate?**

- Fully agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Fully disagree
- Don't know / no opinion / not relevant

**Question 87.1 Please explain your answer to question 87, providing concrete examples and data, where available:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 88. Are the AIFMD provisions against asset stripping in the case of an acquired control over a non-listed company or an issuer necessary, effective and proportionate?**

- Fully agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Fully disagree
- Don't know / no opinion / not relevant

**Question 88.1 Please explain your answer to question 88, providing concrete examples and data, where available:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 89. How can the AIFMD provisions against asset stripping in the case of an acquired control over a non-listed company or an issuer be improved?**

**Please provide your suggestion(s) including information, where available, on the costs and benefits, advantages and disadvantages of the proposed measures:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

N/A

## VI. Sustainability/ESG

Integrating sustainability factors in the portfolio selection and management has a double materiality perspective, in line with the non-financial reporting directive (2014/95) and the European Commission's 2017 non-binding guidelines on non-financial. Financial materiality refers in a broad sense to the financial value and performance of an investment. In this context, sustainability risks refer to potential environmental, social or governance events or conditions that if occurring could cause a negative material impact on the value of the investment. For example, physical risks from the consequences of climate change may concern a single investment/company, e.g. due to potential supply chain disruptions or scarcity of raw materials, and may concern welfare losses for the economy as a whole. Non-financial materiality, also known as environmental and social materiality, refers to the impacts of an investment/corporate activity on the environment and society (i.e. negative externalities). Still, there is also a financial dimension to non-financial materiality. Notably, so-called transition risks arise from an insufficient consideration for environmental materiality, for instance due to potential policy changes for mitigating climate change (e.g. to regulatory frameworks, incentive structures, carbon pricing), shifts of supply chains and end-demand, as well as stakeholder actions for mitigating climate change.

The disclosure regulation 2019/2088 requires a significant part of the financial services market, including AIFMs, to integrate in their processes, including in their due diligence processes, assessment of all relevant sustainability risks that might have a material negative impact on the financial return of an investment or advice. However, at the moment AIFMs are not required to integrate the quantification of sustainability risks. Regulatory technical standards under the disclosure regulation 2019/2088 will specify principal adverse impacts to be quantified or described. This section seeks to gather input permitting better understand and assess the appropriateness of the AIFMD rules in assessing the sustainability risks.

## Question 90. The disclosure regulation 2019/2088 defines sustainability risks, and allows their disclosures either in quantitative or qualitative terms.

## Should AIFMs only quantify such risks?

- ○ Yes
- ● No
- ○ Don’t know / no opinion / not relevant

## Question 90.1 Please substantiate your answer to question 90, also in terms of benefits, disadvantages and costs as well as in terms of available data:

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

State Street is broadly supportive of efforts by European policymakers to improve transparency, with regards to sustainability risks, and recognise that doing so in quantitative terms is a useful element. Nevertheless, in our view, it is not clear why such disclosures should be limited to quantitative terms only.

We believe there are likely to be instances where disclosure in quantitative terms only is unlikely to provide a sufficiently comprehensive assessment of material risks e.g. where there is a lack of readily available and/or accurate data. In such cases, a qualitative commentary or description may be helpful or indeed necessary. As such, we would support an approach whereby an AIFM is given discretion to use the approach that is most suitable and appropriate to ensure the most informative disclosures.

Furthermore, we note that qualitative and quantitative disclosures are both features of the draft Delegated Acts on the integration of sustainability risks into UCITS and the AIFMD, and therefore advocate for a consistent approach. Should European policymakers have material concerns regards qualitative disclosures, they should be discussed within the context of the ongoing work on sustainable finance.

**Question 91. Should investment decision processes of any AIFM integrate the assessment of non-financial materiality, i.e. potential principal adverse sustainability impacts?**

- Yes
- **No** (selected)
- Don’t know / no opinion / not relevant

**Question 91.1 Please substantiate your answer to question 91, also in terms of benefits, disadvantages and costs. Please make a distinction between adverse impacts and principal adverse impacts and consider those types of adverse impacts for which data and methodologies are available as well as those where the competence is nascent or evolving:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

> Our preference would be to maintain some form of financial materiality to determine which elements are considered in an AIFM’s investment processes. In the absence of an explicit direction by investors to consider a specific factor or sub-set of factors, the investment decision process will normally consider a multitude of elements that have a material bearing on the performance of the fund. As such, where sustainability risks will have a material impact, much like any other factor, they shall be treated accordingly. A departure from this approach, whereby the AIFM’s investment processes take into account factors based on non-financial materiality may result in worse investor outcomes.
>
> As noted by the European Commission in the example, there is a financial dimension to environmental and social materiality, which should ensure they are sufficiently acknowledged.

**Question 92. Should the adverse impacts on sustainability factors be integrated in the quantification of sustainability risks (see the example in the introduction)?**

- Fully agree
- Somewhat agree
- **Neutral** (selected)
- Somewhat disagree
- Fully disagree
- Don’t know / no opinion / not relevant

### Question 92.1 Please explain your answer to question 92:

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

These impacts should be considered where they are appropriate to the investment strategy and investor objections in relation to a particular fund.

However, this discussion may be premature at this stage, given various elements of the EU's sustainable finance legislation (including the SFDR), which contain specific provisions in this regard, are yet to be implemented. We do not believe it appropriate to potentially materially change these provisions where they have not yet been tested.

### Question 93. Should AIFMs, when considering investment decisions, be required to take account of sustainability-related impacts beyond what is currently required by the EU law (such as environmental pollution and degradation, climate change, social impacts, human rights violations) alongside the interests and preferences of investors?

- ○ Yes
- ◉ No
- ○ No, ESMA's current competences and powers are sufficient
- ○ Don't know / no opinion / not relevant

### Question 93.1 Please explain your answer to question 93:

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Unless included in the investment strategy/fund characteristics or to reflect any additional MiFID top-up mandate, AIFMs should not be mandated to take into account sustainability-related impacts beyond that which is set out in relevant EU legislation, as part of their investment decision-making processes. We note the EU has put considerable effort into developing its sustainable finance agenda, which has not yet been fully implemented. As such, it is premature to consider what elements may be further incorporated.

**Question 94. The EU Taxonomy Regulation 2020/852 provides a framework for identifying economic activities that are in fact sustainable in order to establish a common understanding for market participants and prevent green-washing. To qualify as sustainable, an activity needs to make a**

**substantial contribution to one of six environmental objectives, do no significant harm to any of the other five, and meet certain social minimum standards. In your view, should the EU Taxonomy play a role when AIFMs are making investment decisions, in particular regarding sustainability factors?**

- ○ Yes
- ● No
- ○ Don't know / no opinion / not relevant

**Question 94.1 Please explain your answer to question 94:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

In principle we are not opposed to the consideration of the EU Taxonomy where it is appropriate in the context of the fund's investment strategy. As noted previously, should a client have expressed a sustainability preference, we recognise that the inclusion of sustainability related requirements as laid down in the EU Taxonomy Regulation is warranted in the AIFMs investment decision-making process. However, we would not support mandatory consideration; we believe their ex-ante inclusion for every investment decision is not necessary nor appropriate and, in our opinion, would be inconsistent with a fund managers' due diligence obligations.

With regards to the EU Taxonomy Regulation more specifically, while we recognise the intention behind the legislation, certain provisions are far too prescriptive. As such, it is not user-friendly and is difficult to reference in a meaningful way for the purposes of investment decision-making.

**Question 95. Should other sustainability-related requirements or international principles beyond those laid down in Regulation (EU) 2020/852 be considered by AIFMs when making investment decisions?**

- ○ Yes
- ● No
- ○ Don't know / no opinion / not relevant

**Question 95.1 Please explain your answer to question 95, describing sustainability-related requirements or international principles that you would propose to consider.**

**Please indicate, where possible, costs, advantages and disadvantages associated therewith:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As a globally active market participant, State Street recognises the value of international consistency, particularly in terms of improving and facilitating comparability for investors. In particular, we note the merits of the standards developed by the Sustainability Accounting Standards Board (SASB) and the recommendations made by the FSB's Taskforce on Climate-related Financial Disclosures (TCFD). In our view, both SASB and TCFD will support the creation of transparent market infrastructure around a common definition of, and disclosure on, material ESG issues.

Nevertheless, in line with our response to Question 93, at this stage, we do not believe AIFMs should consider broader elements other than those that have been set out in EU legislation and believe the focus should be on implementing these rules, rather than on how they can be further augmented.

# VII. Miscellaneous

This section contains a few questions on the competences and powers of supervisory authorities. It also opens up the floor for any other comments of the stakeholders on the AIFMD related regulatory issues that are raised in the preceding sections. Respondents are invited to provide relevant data to support their remarks/proposals.

### Question 96. Should ESMA be granted additional competences and powers beyond those already granted to them under the AIFMD?

Please select as many answers as you like

- [ ] entrusting ESMA with authorisation and supervision of all AIFMs
- [ ] entrusting ESMA with authorisation and supervision of non-EU AIFMs and AIFs
- [ ] enhancing ESMA's powers in taking action against individual AIMFs and AIFs where their activities threaten integrity of the EU financial market or stability the financial system
- [ ] enhance ESMA's powers in getting information about national supervisory practices, including in relation to individual AIMF and AIFs
- [x] no, there is no need to change competences and powers of ESMA
- [ ] other

### Question 97. Should NCAs be granted additional powers and competences beyond those already granted to them under the AIFMD?

- ( ) Yes
- (x) No
- ( ) Don’t know / no opinion / not relevant

**Question 98. Are the AIFMD provisions for the supervision of intra-EU cross-border entities effective?**

- ( ) Fully agree
- ( ) Somewhat agree
- ( ) Neutral
- ( ) Somewhat disagree
- ( ) Fully disagree
- (x) Don’t know / no opinion / not relevant

**Question 98.1 Please explain your answer to question 98, providing concrete examples:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

**Question 99. What improvements to intra-EU cross-border supervisory cooperation would you suggest?**

**Please provide your answer presenting costs, advantages and disadvantages associated with the suggestions:**

*5000 character(s) maximum*
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

N/A

**Question 100. Should the sanctioning regime under the AIFMD be changed?**

- Yes
- No
- ● Don't know / no opinion / not relevant

**Question 101. Should the UCITS and AIFM regulatory frameworks be merged into a single EU rulebook?**

- Yes
- ● No
- Don't know / no opinion / not relevant

**Question 102. Are there other regulatory issues related to the proportionality, efficiency and effectiveness of the AIFMD legal framework?**

**Please detail your answer, substantiating your answer in terms of costs /benefits/advantages, where possible:**

*5000 character(s) maximum*

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

N/A

## Additional information

Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s) here:

The maximum file size is 1 MB.
You can upload several files.
Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

**7b86e4e5-8900-4422-a388-d9de7d8d7e07/290121_-_EC_AIFMD_STATE_STREET_ADDITIONAL_INFO.pdf**

### Useful links

More on this consultation (https://ec.europa.eu/info/publications/finance-consultations-2020-aifmd-review_en)

Consultation document (https://ec.europa.eu/info/files/2020-aifmd-review-consultation-document_en)

Consultation strategy (https://ec.europa.eu/info/files/2020-aifmd-review-consultation-strategy_en)

List of acronyms used in this consultation (https://ec.europa.eu/info/files/2020-aifmd-review-acronyms_en)

More on investment funds (https://ec.europa.eu/info/business-economy-euro/growth-and-investment/investment-funds_en)

Specific privacy statement (https://ec.europa.eu/info/law/better-regulation/specific-privacy-statement_en)

More on the Transparency register (http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en)

### Contact

fisma-aifmd-public-consultation@ec.europa.eu

Please find below additional input on selected questions.

## II. Investor Protection

**Question 42. Are the AIFMD rules on valuation clear?**

☒ **Yes**

☐ No

☐ Don't know / no opinion / not relevant

**Question 42.1 Please explain your answer to question 42:**

With regards to the AIFs provided by State Street Global Advisors (SSGA), these are primarily non-complex, long-only funds that are invested in traditional equity and fixed income assets. In terms of our experience during the pandemic, and the extreme volatility observed in financial markets, we encountered very few issues from a valuation perspective in relation to these funds. As such, we believe that the valuation rules established by the AIFMD are broadly clear.

The only exception to our general experience above is with regards to an AIF that is invested in real estate assets. However, we note the challenges experienced here were relatively short-lived and overcome by the implementation of internal procedures. While these funds have experienced issues during other extreme market events in recent years, it is not clear that these were driven by issues relating to valuation. Therefore, we do not believe the short-lived experience of a small subset of funds during a period of extreme market dislocation provides sufficient justification to significantly amend the current framework.

## III – International Relations

**Question 49. Do you believe that national private placement regimes create an uneven playing field between EU and non-EU AIFMs?**

☐ Yes

☒ **No**

☐ Don't know / no opinion / not relevant

**Question 49.1 If you believe there is an uneven playing field between EU and non-EU AIFMs, which action would you suggest to address the issue? Please explain your choice, presenting benefits and disadvantages of the potential changes to the AIFMD as well as potential costs associated with your preferred option:**

We do not believe that the presence and operation of national private placement regimes (NPPRs) has resulted in an unlevel playing field between EU and non-EU AIFMs. In line with our response to other parts of this consultation, when considering such questions, we would encourage the European Commission to consider investor outcomes. The presence of NPPRs has enabled EU investors to have access to a broader range of financial products and investable opportunities, helping them to better meet their investment objectives. For certain fund types, for example ETFs, this has increased investor choice and access to funds that have better liquidity than those available in Europe. Indeed, without prejudice to investor protection rules and effective supervision requirements, where feasible, European policymakers should perhaps consider removing potential obstacles that would allow a broader range of investors (including retail investors) to avail themselves of these opportunities.

We are aware that in recent times there has been discussion on whether the NPPR will continue to be permitted under the AIFMD framework. However, in the absence of the third-country passport being activated and its effective functioning being objectively demonstrable, we believe it is too early to entertain such a discussion. Furthermore, we do not believe it is a question of 'either or'; even in the event that the third-country passport regime becomes operational, we see no reason why the NPPR, which has to date served European investors well, should not continue.

**Question 50. Are the delegation rules sufficiently clear to prevent creation of letter-box entities in the EU?**

☒ **Yes**

☐ No

☐ Don't know / no opinion / not relevant

**Question 50.1 Please explain your answer to question 50:**

We believe the current delegation framework, which specifically includes measures to prevent the establishment of letter-box entities in the EU is both sufficiently clear and robust. We note this to be a multi-faceted, multi-tiered approach whereby the well-established principles that have long governed the duty asset managers have to their investors have been augmented by prescriptive regulatory requirements, at both the EU and national levels.

The AIFMD, through the AIFMR, contains detailed provisions regarding letter-box entities. More specifically, Article 82 of the AIFMR outlines a comprehensive set of minimum criteria which, if satisfied, may indicate when an AIFM has demonstrably become a letter-box entity. Incidentally, Section 8 of the AIFMR, which covers the delegation of AIFM functions more broadly, contains various other provisions that NCAs should consider when assessing delegation arrangements. In our view, these provisions directly address some of the potential challenges of the current framework identified by various commentators, including in the August 2020 letter from ESMA to the European Commission. Furthermore, ESMA's July 2017 Opinion, which is targeted at NCAs and seeks to promote supervisory convergence in the area of investment management, highlights further considerations in the context of the supervision of delegation, in light of the potential complexities arising from the UK's withdrawal from the EU.

In addition, the European rules are complemented by national-specific requirements, for example the Central Bank of Ireland's (CBI) CP/86 Guidance and the Commission de Surveillance du Secteur Financier's (CSSF) Circular 18/698. In line with good practice, these requirements are being reviewed and updated to ensure they keep pace with market developments. In October 2020, the CBI published the findings of their review of the implementation of the CP86 Guidelines, which includes requirements regarding how delegation should be overseen, for the protection of investors and the integrity of the market. The CBI notes that the findings demonstrate that the framework, when properly implemented, helps firms to ensure that their operational arrangements are robust and meet their expectations.

The asset management industry has been subject to heightened regulatory scrutiny for a number of years, notably in the area of delegation. The prescriptive framework in relation to delegation has served to regulate effectively such activity and to enforce against poor practices and bad actors. We are not aware of there being market events identified nor experienced, which may warrant and justify further revision. For example, the report by KPMG on the operation of the AIFMD, undertaken on behalf of the European Commission and published in January 2019, identified no issues with delegation. Rather, the report found that delegation rules have been largely effective and have also provided "EU added value". It is worth noting that the KPMG report also the included views of various public authorities, including those directly responsible for authorising AIFMs. Indeed, the European Commission's follow-up report to the European Parliament and Council assessing the application and scope of the AIFMD, published in June 2020, makes no reference to delegation at all.

Separately, we would also refer to ESMA's Supervisory Convergence Network (SCN), which was established following the UK's decision to leave the EU and which concluded it's work in May 2020. The SCN assessed 250 cases involving delegation to third-countries, submitted to it by NCAs. It is our understanding that the SCN did not challenge nor prohibit any individual case of delegation. Should ESMA have residual concerns regarding convergence, we would encourage them to make full use of the toolkit available to them, which was enhanced following the ESAs Review. As the provisions of the ESAs Review have only become fully applicable within the last 12 months, it is premature to conclude that they may not have gone far enough.

In light of the existing framework governing delegation, and specifically the provisions in place to address the risks of letter-box entities, as well as the lack of any substantive evidence of the shortcomings of such rules, we see little justification to review or further supplement current requirements. The framework achieves the appropriate balance between granularity to ensure concerns regarding investor protection, financial stability and effective supervision are addressed, whilst permitting AIFMs to avail themselves of the efficiencies afforded by delegation, to best meet the needs of their investors. We believe the discretion and the degree of subjectivity provided to NCAs under the AIFMD was intentional, in recognition of the fact that the AIFMD applies to a broad spectrum of participants. As such, more often than not, the NCA will be the best-positioned to make the most appropriate decision for a particular AIFM.

**Question 51. Are the delegation rules under the AIFMD/AIFMR appropriate to ensure effective risk management?**

☒ **Yes**

☐ No

☐ Don’t know / no opinion / not relevant

**Question 51.1 Please explain your answer to question 51, presenting benefits and disadvantages of the current rules and where available providing concrete examples substantiating your answer:**

In our view, we believe the current AIFMD/AIFMR framework is appropriate to ensure effective risk management on an ongoing basis, as a result of both EU-level and national specific requirements.

As noted in our response to the previous question, Section 8 of the AIFMR outlines specific requirements regarding the delegation of AIFM functions. In particular, we would refer to Article 75(f), which specifies that where an AIFM has delegated a function, it ensures that any associated risks are managed accordingly. In addition, and perhaps more importantly, earlier provisions in Article 75 states that in choosing to delegate a function, the AIFM shall retain its full responsibilities and liability, and it will not alter the obligation of the AIFM towards the AIF and its investors. Furthermore, Article 78 outlines specific requirements where delegation relates to portfolio and/or risk management. This provides a strong regulatory incentive for the AIFM to adopt a diligent approach towards risk management.

Should the concern relate more specifically to delegation of portfolio management to an entity established in a third-country, this is also addressed in the current regulatory framework. Under Article 78.2(e), the third-county entity must be authorised/registered for the purposes of asset management and be subject to effective supervision by a third-country NCA. This Article goes onto further specify that cooperation between the relevant NCA and the third-country NCA is ensured – to date, we are not aware of an instance where this has created an issue with regards to effective risk management.

Should there be concern from EU policymakers in the consistent application of the current framework across EU Member States, a more proportionate response would be to make use of the current (and recently enhanced) tools granted to ESMA to facilitate this.

**Question 52. Should the AIFMD/AIFMR delegation rules, and in particular Article 82 of the Commission Delegated Regulation (EU) No 231/2013, be complemented?**

☐ Yes

☒ **No**

☐ Don’t know / no opinion / not relevant

**Question 52.1 Should the delegation rules be complemented with:**

Please select as many answers as you like

- ☐ quantitative criteria
- ☐ a list of core or critical functions that would be always performed internally and may not be delegated to third parties
- ☐ other requirements

**Please explain why you think the AIFMD/AIFMR delegation rules should be complemented with quantitative criteria, presenting benefits and disadvantages of the potential changes as well as costs:**

As noted previously, State Street is of the view that the current requirements relating to the prevention of letter-box entities, which is specified in Article 82 of the AIFMR, are sufficient and do not require elaboration. Following from this, we are strongly opposed to the introduction of quantitative criteria as the indicator of when an AIFM is effectively operating as a letter-box entity. It is not clear to us how this would mitigate any material risks associated with delegation or facilitate a NCA's supervision or assessment of delegation.

First, we believe it would be very challenging and complex to identify criteria that is equally relevant and appropriate for all types of AIFMs. The AIFM universe encompasses a wide-range of entities and therefore does not readily lend itself to a one-size-fits-all approach. What is suitable for one type of AIFM will not necessarily have the same impact for another. In addition, it may relegate other qualitative elements to second-tier considerations, effectively rendering this a tick-box exercise. For example, two senior employees with 20+ years' experience are likely to be better positioned/equipped than 3 or perhaps even 4 relatively junior employees. This is of course a subjective decision and one that we believe that NCAs are best-positioned to make, considering the nature of expertise required within the AIFM, the conflicts to be managed (and therefore the tasks to be allocated to separate individuals) and the number and complexity of mandates/portfolios driving the activity of the AIFM.

In our view, the focus should rather be on the complexity of the activity undertaken and whether the entity is sufficiently and appropriately established to ensure adherence to the current framework, particularly with regards to governance and effective oversight. We do not believe that AUM alone is necessarily the best indicator of risk.

**Please explain why you think the AIFMD/AIFMR delegation rules should be complemented with a list of core or critical functions, presenting benefits and disadvantages of the potential changes as well as costs:**

Similarly, we are not supportive of Article 82 being complemented by a list of functions that must be performed internally and cannot be delegated. Our concerns in this regard relate to both operational efficiency for the AIFM as well as investor outcomes – in our view, specifying a list of functions is unlikely to deliver positive outcomes for either consideration.

Firstly, mandating a list of functions that cannot be delegated could prohibit an AIFM from availing itself of expertise, as well as the cost efficiencies offered by delegation. This may prevent AIFMs from accessing expertise and centres of excellence established outside of the AIFM itself, whether in other EU Member States or away from Europe, which may be particularly relevant for a fund's investment strategy. The asset management industry is global in nature and the ability to leverage expertise from other jurisdictions has served investors well, allowing investors to diversify their investments and have access to opportunities with little additional cost. In the event that AIFMs lose access to such expertise and cannot benefit from these operational efficiencies, they may either choose to no longer offer certain strategies to investors or do so with substantively higher costs. In addition, larger AIFMs, that can absorb such costs may be favoured by limiting the ability to delegate, and effectively create barriers for smaller AIFMs or indeed new market entrants.

Ultimately, this will translate into negative outcomes for European investors. They will potentially be faced with higher costs and less investment choice, both from a product and strategy perspective, as well as choice of manager, who may decide to exit the market. We do not see how such an outcome would be consistent with European policymakers' broader efforts to develop buoyant and competitive capital markets in Europe. This is further compounded by the fact that, as set out in our response to the previous questions, there is little justification for taking such drastic action.

Another consideration worth highlighting is that this measure would not result in increased responsibility or liability on the part of the AIFM with regards to the delegated activity. As noted, the delegation rules outlined in the AIFMR do not permit an AIFM to reduce its responsibility or liability, or its obligations to the AIF and its investors.

Furthermore, we believe it is worth noting that what may be perceived as an arbitrary and unjustified imposition of additional requirements regarding delegation could adversely impact the UCITS brand, should the European Commission choose to apply AIFMD rules to UCITS. As is broadly acknowledged, UCITS is a globally recognised success story and the fund structure of choice for investors in many jurisdictions, which has contributed to the development of the EU's funds industry. Going forward, we believe preserving and promoting both the competitiveness and attraction of UCITS to be an important component in the EU's efforts to further develop European capital markets.

**Question 54. Do you consider that a consistent enforcement of the delegation rules throughout the EU should be improved?**

☐ Yes

☒ **No**

☐ Don't know / no opinion / not relevant

**Question 54.1 Please explain your answer to question 54, presenting benefits and disadvantages of the current rules and where available providing concrete examples substantiating your answer:**

We would welcome further clarity on what the European Commission means by "enforcement". In the literal sense, based on our experience, we do not believe there to be a particular issue with how the current rules have been enforced where an AIFM has chosen to delegate one of its functions. We believe this is reflected in the lack of any issues identified by the European Commission's work to date or indeed in the ESMA SCN. In addition, we would refer to ESMA's November 2020 Report on the use of sanctions, in which it noted that more than half of the NCAs in the EEA had imposed sanctions in 2019. While the uneven use of sanctions was referenced in the Report, at no point was it highlighted that this reflected an instance where an NCA intended to enforce a sanction and was unable to do so. Rather NCAs, indicate that they have a variety of tools to address potential infringements.

However, should enforcement be understood in the broader collective sense to include the application and interpretation of the AIFMD rules, then yes, we see further scope for this to be improved and greater consistency to be achieved across the EU. However, we believe this could be more proportionately addressed through guidance and the current toolkit available to ESMA, rather than through changes to Level 1 legislation.

Also, in seeking to establish a more harmonised, consistent framework, European policymakers should avoid adopting the approach based on the lowest-common denominator. As noted, the framework(s) governing delegation have many layers and have been built over many years. Those jurisdictions with comparatively more developed frameworks, that already subject managers' delegation arrangements to significant initial and ongoing scrutiny and which could well be regarded as being the gold-standard, should not be forced to 'dilute' their rules to accommodate harmonisation.

## IV – Financial Stability

**Question 60. Should the AIFMD rules on remuneration be adjusted to provide for the de minimis thresholds?**

☐ Yes

☐ No

☒ **Don't know / no opinion / not relevant**

**Question 60.1 Please explain your answer to question 60, suggesting thresholds and justification thereof, if applicable:**

While not directly relevant for State Street, we would like to highlight some general concerns regarding remuneration provisions outlined in Annex II of the AIFMD, notably the requirement that a portion of variable remuneration is to be paid in units or shares of the relevant AIF. While we understand the rationale behind this provision is to align interests between decision-makers of the AIFM with the AIF investors, we believe it may also have unintended consequences. For example, in the case of a portfolio manager (PM) that manages two accounts, one of which is an AIF and the other is a segregated mandate. The PM would be identified staff for the AIF, and therefore subject to the remuneration rules. If the manager receives units in the fund as part of their bonus, a conflict of interest may be created whereby they are incentivised to favour the AIF.

**Question 84. Are the current AIFMD rules permitting NCAs to cap the use of leverage appropriate?**

☒ **Yes**

☐ No

☐ Don’t know / no opinion / not relevant

**Question 84.1 Please explain your answer to question 84, in terms of the costs, benefits and disadvantages:**

We believe the current rules regarding the ability for NCAs to impose leverage limits is both appropriate and sufficient. We note that the Level 1 legislation was augmented by the recently published ESMA Guidance on Article 25 of the AIFMD, which includes specific guidance for NCAs on the use of leverage limits. In the absence of any further evidence or market event during the recent period of heightened stress suggesting the current approach needs to be reconsidered, we see little justification to amend the current provisions.

We would like to reiterate the point made in our responses to Questions 56 and 57, that the lack of use to date of the power to impose leverage limits, as foreseen under the AIFMD, should not be considered to be an indicator of a potential shortcoming of the current framework. Rather, it is recognition by NCAs that this is an exceptional measure with potentially significant unintended consequences, and therefore should only be used in the most extreme cases.

We would also caution against an overly-prescriptive approach or a pre-specified limit as a means to addressing risk. This is due to the fact that while leverage limits don’t necessarily prevent the build-up of risk, their intrinsic link to asset valuations may result in deleveraging and broader procyclical effects.

## VII - Miscellaneous

**Question 96. Should ESMA be granted additional competences and powers beyond those already granted to them under the AIFMD?**

Please select as many answers as you like

☐ entrusting ESMA with authorisation and supervision of all AIFMs

☐ entrusting ESMA with authorisation and supervision of non-EU AIFMs and AIFs

☐ enhancing ESMA’s powers in taking action against individual AIMFs and AIFs where their activities threaten integrity of the EU financial market or stability the financial system

☐ enhance ESMA's powers in getting information about national supervisory practices, including in relation to individual AIMF and AIFs

☒ **no, there is no need to change competences and powers of ESMA**

☐ other

**Please explain why you think ESMA should be entrusted with authorisation and supervision of all AIFMs. Please present costs, advantages and disadvantages associated with the chosen option. Concrete examples substantiating your answer are welcome:**

In State Street's view, we do not believe it necessary nor proportionate to grant ESMA enhanced powers with regards to the authorisation and supervision of AIFMs.

Whilst considerable and commendable effort has gone into promoting supervisory convergence across Member States and there is an unambiguous set of fundamental requirements and principles underpinning the EU funds landscape (e.g. investor protection, financial stability), there remain national specificities that are best-served by NCAs with deep and intimate knowledge of those markets and their key players. In many cases, this knowledge will have been developed over decades-long regulatory interactions which could not be replicated in a short amount of time. ESMA has not traditionally had direct supervisory responsibility for financial services providers. Whilst this has recently changed in limited areas and for specific financial market participants, notably credit ratings agencies and CCPs, the multitude of entities operating in the investment management industry, in particular the AIFM sector, means it would undoubtedly be a significantly more complex and resource-intensive undertaking. In our view, ESMA would need to devote significant time and resources to maintain the current level of supervision, which would likely cause unnecessary disruption and be operationally burdensome on AIFMs, without any discernible improvement.

In addition, we are not aware of compelling evidence to suggest that the current framework is deficient and therefore warrants such a drastic move as removing this competence from NCAs and granting them to ESMA. In this context, we would make reference to the KPMG Report on the operation of the AIFMD, which states:

*"It can, therefore, be concluded in general that the specific objective of subjecting all AIFMs to appropriate authorisation and registration requirements is also met. Furthermore, regarding effectiveness, also the general objective of providing an internal market and a harmonised and stringent regulatory and supervisory framework for AIFMs is met."* (p.143)

Similarly, the European Commission's Report to the European Parliament and Council, from June 2020, did not identify any material issues with regards to supervision and authorisation.

In light of the above, namely our view that the current approach is working well, the absence of any objective justification or rationale, and the likely operational complexity and challenge of these powers being transferred to ESMA, we do not support this proposal. In line with our response to previous questions, we do see a role for ESMA in supporting and promoting supervisory convergence across the EU. However, any material concerns in this regard could be addressed more proportionately through the tools currently available to ESMA. The powers and competences of ESMA were discussed at length by the co-legislators during the ESAs Review and subsequently, ESMA's toolkit to achieve this objective has been complemented. As these rules came into full effect only in January 2020, it is premature to form a definitive conclusion on whether these may be insufficient.

**Please explain why you think ESMA should be entrusted with authorisation and supervision of non-EU AIFMs and AIFs. Please present costs, advantages and disadvantages associated with the chosen option. Concrete examples substantiating your answer are welcome:**

In line with our response to the previous question, granting ESMA competence for the authorisation and supervision of AIFMs would be a significant departure from current practice and would there require a strong rationale and objective justification. With regards to non-EU AIFMs, we think the priority should be to ensure a fully-functioning third-country regime under the AIFMD is operational before consideration is given to a potential overhaul of the way in which these entities are supervised.

We would welcome clarity over the reference to AIFs in the question. The AIFMD introduces a regulatory for AIFMs, rather than targeted at the product-level i.e. individual AIFs. Granting ESMA such competences with regards individual AIFs would be a significant departure from the premise of the AIFMD and in our view, is justified at this stage.

**Question 97. Should NCAs be granted additional powers and competences beyond those already granted to them under the AIFMD?**

☐ Yes

☒ **No**

☐ Don't know / no opinion / not relevant

**Question 97.1 Please explain your answer to question 97, providing information, where available, on the costs and benefits, advantages and disadvantages of implementing your suggestion:**

In our view, the current framework with regards supervision under the AIFMD is operating well and there is little reason for this to be changed.

**Question 101. Should the UCITS and AIFM regulatory frameworks be merged into a single EU rulebook?**

☐ Yes

☒ **No**

☐ Don't know / no opinion / not relevant

**Question 101.1 Please explain your answer to question 101, in terms of costs, benefits and disadvantages:**

In State Street's view, we do not support the merging of the UCITS Directive and the AIFMD into a single rulebook. Whilst such an approach may be aesthetically appealing and suggest a more simplified approach, the UCITS Directive and the AIFMD serve different purposes and are generally targeted at different stakeholders, including with regards to investor base. As such, we believe the twin-track approach to be justified. We agree that it is important to consider what lessons can be drawn as the two pieces of legislation are further developed and what elements can be harmonised, as was done with UCITS V. However, it is not clear whether this should extend to full harmonisation or indeed a single rulebook.

We would encourage the European Commission to exercise caution in its consideration of such a proposal and only consider making such a drastic change to two highly effective and internationally recognised pieces of EU legislation where there is strong evidence to suggest it is warranted.