European Fund and Asset Management Association

EFAMA Position on the draft Joint Guidelines of ESAs regarding customer due diligence under Anti-Money Laundering Directive ((EU) 2015/849)

The European Fund and Asset Management Association[1], EFAMA, is closely monitoring the recent regulatory developments in the field of anti-money laundering and counter-terrorist financing, in particular the due diligence duties of the asset management sector. EFAMA is embracing the objective of enhancing transparency and accessibility to the beneficial ownership information and also fully acknowledges the importance of obtaining accurate identification and verification data of natural and legal persons for fighting money laundering and terrorist financing. At the same time, it is essential that the right means and the appropriate channels are being used in order to meet those objectives.

In relation to the 4th Anti-Money Laundering Directive (AMLD (EU) 2015/849)[2] and the draft Joint Guidelines[3] prepared and consulted by the European Supervisory Authorities under article 17 and 18(4) of this Directive, the EU asset management industry has already presented in its previous letter to the ESAs, dated 17 June 2016, its key concerns as to the proposed requirements for performing due diligence duties, in particular in respect to the division of responsibilities of the asset manager and the intermediary towards the investor, the application of the definition of beneficial ownership and the equivalence regime of those third countries assessed to be of lower risk.

This Paper provides a more detailed analysis on these points via a comprehensive presentation of the situation specific to the asset management industry and the practical implications of some of the provisions in the current draft Guidelines. This analysis is followed by concrete proposals on the text of the Guidelines which, we believe, would address our concerns in an efficient manner.
We hope our suggestions are useful for the ESAs and can help achieve the common goal of ensuring an efficient and appropriate risk assessment framework toward the customers of financial institutions and the clarity on the division of responsibilities between obliged entities, when performing such an assessment.

[1] EFAMA is the representative association for the European investment management industry. EFAMA represents through its 26 member associations and 61 corporate members EUR 21 trillion in assets under management of which EUR 12.6 trillion managed by 56,000 investment funds at end 2015. Just over 30,000 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds, with the remaining 25,900 funds composed of AIFs (Alternative Investment Funds). For more information about EFAMA, please visit www.efama.org

[2] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, p. 73–117

[3] Joint Guidelines under Article 17 and 18(4) of Directive (EU) 2015/849 on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions, 21 Oxctober 2015, JC 2015 061

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I. KEY POINTS OF CONCERN FOR THE ASSET MANAGEMENT INDUSTRY

A. Intermediation business models and reliance principle

For the appropriate application of the Joint Guidelines to investment funds, it is crucial to take into consideration the different business models that exist in the EU related (a) to the distribution of units/shares of investment funds and (b) to the intermediaries the investment funds use for distribution purposes and their relation to their own clients. (Please see in Annex diagrams A & B with examples of access to a fund's shareholder register and services provided by the intermediary entities to the end-investors.)

As regards the first one, i.e. the different distribution models related to investment funds, there are two main options in the EU single market: (i) direct distribution, where the provision of units/shares of an investment fund is dealt directly by the asset management company, which means there is a direct relationship with the end-investor and (ii) intermediation, where the distribution is executed by an appointed (normally by the asset management company) intermediary third entity. In the first case it seems appropriate for the asset management company to be in charge of obtaining accurate identification and verification data of the (direct) investors and any beneficial owner of these (direct) investors, given its direct relation to them. However, direct distribution represents a relatively small proportion of investors in investment funds. This is also stated by ESMA in its recent consultation paper on MiFID II product governance requirements: "*manufacturer usually does not have a direct client contact, thus has no detailed, specific and individual information about the client base*[4]*"*.

In the case of intermediation there are several important points to consider as to which is the responsible entity to execute such diligence duties. Firstly, this will depend on the business model of the intermediary and its own relation to its investors, which is also linked to the ability of the fund's management company to have access to necessary data in order to comply with the AMLD diligence duties. Further on, this will depend on whether the intermediary entity is itself an obliged entity under the AMLD.

Concerning the different business models of an intermediary, these are diversified. One model is the one presented in the draft Joint Guidelines in paragraph 212, i.e. that the intermediary acts on its account, however in practice this is not a widely used model. Larger intermediaries typically act on behalf of multiple underlying customers with all shares being registered in the name of the intermediary and the activity being traceable back to their customers. Consequently, the activity is undertaken on behalf of the customer (rather than on the intermediary's own account). Funds held by the intermediary are held either separately for each customer (sub-accounts) or in co-mingled accounts (omnibus accounts). Moreover, the business, professional and commercial relationship of the intermediaries with their own customers may include additional services going beyond the execution of an order (investment advice, portfolio management etc., as also recently defined in MiFID II and Target Markets).

[4] ESMA's Consultation Paper on draft guidelines on MiFID II product governance requirements [ESMA/2016/1436], paragraph 12 page 6 https://www.esma.europa.eu/sites/default/files/library/2016-1436_cp_guidelines_on_product_governance.pdf

For that reason, the type of relationship of an intermediary with its customers goes beyond the control of the asset management company, which makes it very difficult to replace the intermediary for the performance of the diligence duties to the intermediary's customers. The regulators should, therefore, take fully into account, the different existing models and the diversity and mix of relationships of the intermediaries with their customers with the objective to include a more diversified approach in the Joint Guidelines.

One important significance of the different business models concerns the data access they enable to a third party. Indeed, based on the contractual agreements the intermediaries have with their own customers, particular provisions apply as to the right of a third party (such as the manager of a fund) to have access to the data of the customer. In the case of an omnibus account it is very difficult to anticipate that a bank acting as intermediary will be providing the manager of an investment fund with the possibility to look through to each of the owners of the assets in the account. In addition, data privacy and bank secrecy restrictions may also directly apply, which are not only foreseen from provisions in contractual agreements, but can also be imposed by national regulatory frameworks. For these reasons, looking through the intermediary's account to trace the end investor is a task that the asset manager will not be able to fulfil (unless the intermediary has required permissions under the local law or it has obtained the appropriate written consent from the underlying customer for sharing data with third parties, which in practice is not an often a standard clause of intermediaries' terms and conditions with their customers).

Additionally, in some countries, shares/units are distributed through intermediaries but registered in the name of end investors because the use of omnibus accounts is not at the core of the distribution model due to operational or local legal reasons. Under this distribution model, the fund/management company has no access to the information on the underlying clients of the intermediary and the intermediary is often not willing or not authorised by local law to share his clients´ information with the fund/management company. In this case, we consider that the fund/management company does not undertake the marketing of its units/shares directly with the client and therefore falls outside the scope of AML obligations.

Furthermore, where the intermediary is an AMLD regulated entity, i.e. an obliged entity under AMLD and supervised by a national competent authority, the due diligence process on the intermediary's customers is already a requirement imposed to the intermediary itself. In that case, it is appropriate and legally consistent that the obligation placed on the fund manager is limited to the application of its own diligence duties at the intermediary level, e.g. by ensuring that the appropriate procedures and controls are in place at the intermediary level to verify the identity and perform due diligence on its clients.

It should also be stressed that if asset managers are asked to perform diligence duties on the intermediaries' customers, this would imply that regulators consider that intermediaries are underperforming when it comes to their own diligence duties and asset managers are asked to take over this responsibility.

Moreover, the current requirements will unnecessarily increase the burden of financial institutions through duplication of performance of diligence on the same investor by two different actors,

distracting all important resources from other higher risk areas. There is also the implication of increased financial costs to be considered if funds are expected to look through the intermediary's customers.

Therefore, a look through approach cannot be exercised on the intermediary's customers, for reasons going far beyond the investment fund's competence and related directly to the business models of the intermediaries as well as to the relevant contractual agreements and regulatory frameworks in place. Instead, it should be considered sufficient that from the asset manager's perspective, the fund's customer is the intermediary and not the intermediary's customers. Customer Due Diligence measures should remain limited to identifying and verifying the identity of the Intermediary and to verify that the Intermediary has robust and risk sensitive AML program in place and applies Customer Due Diligence measures to its customers and to its customers' beneficial owners.

B. The notion of "beneficial owner" and the case of investment funds

EFAMA considers there is a need to better understand how the notion of "beneficial owner" is to be applied in the case of an investment fund, as there seems to be an important misconception.

In the draft Joint Guidelines there is a reference in paragraph 212 to the intermediary's customers being the fund's beneficial owners. According to the definition provided in the AMLD, "'beneficial owner' means any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted". Moreover, AMLD provides some minimum criteria which should apply for the identification of a beneficial owner in the case of corporate entities[5]. It is clear that the key factor for identifying a beneficial owner is the ultimate

[5] Article 3 (6) of Directive (EU) 2015/849 *'beneficial owner' means any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted and includes at least:*

(a) in the case of corporate entities:

(i) the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity, including through bearer shareholdings, or through control via other means, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Union law or subject to equivalent international standards which ensure adequate transparency of ownership information.

A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a natural person shall be an indication of direct ownership. A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a corporate entity, which is under the control of a natural person(s), or by multiple corporate entities, which are under the control of the same natural person(s), shall be an indication of indirect ownership. This applies without prejudice to the right of Member States to decide that a lower percentage may be an indication of ownership or control. Control through other means may be determined, inter alia, in accordance with the criteria in Article 22(1) to (5) of Directive 2013/34/EU of the European Parliament and of the Council (29);

(ii) if, after having exhausted all possible means and provided there are no grounds for suspicion, no person under point (i) is identified, or if there is any doubt that the person(s) identified are the beneficial owner(s), the natural person(s) who hold the position of senior managing official(s), the

ownership or control a customer/ investor has over a company. This same factor is key in the definition of the "beneficial owner" by the Financial Action Task Force (FATF) foreseen in its Recommendations published in 2012[6], according to which the term "beneficial owner" refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted.

In the case of investment funds, e.g. UCITS funds, one of their key features is their large distribution network, very often on a cross-border basis, making their shareholder register – where relevant - inclusive of a very big number of natural persons. It is very difficult to perceive persons holding a number of 10 shares in a UCITS fund via an intermediary being considered as the fund's beneficial owners, as they clearly have no ultimate control or ownership of the fund. Furthermore, the underlying customers of an intermediary have no direct relationship with the investment fund, which makes it unfeasible for them to have a controlling ownership or control over the daily activities of a fund. Additionally, the ownership of a fund can change intraday, with the beneficial ownership potentially changing through no action of an existing investor, but through other investors subscribing or redeeming their holding, which means that it will be challenging to track such passive changes in beneficial ownership, let alone track such changes through to an intermediary's customer. Hence, by stating that an intermediary's customer is automatically to be considered as the investment fund's beneficial owner, the Joint Guidelines do not follow and are not aligned with the definition of the "beneficial owner" of the AMLD and the FATF Recommendations.

Note also that many investment funds are distributed via fund platforms and distributors, who may distribute investment funds through their members and sub-distributors respectively. Concluding that the intermediary's clients are beneficial owners does not correspond to operational reality in the majority of the cases. Fund distribution chains involve multiple levels of professionals who are all equally subject to the AML/CTF regulations and who are already responsible for identifying their clients.

When identifying the beneficial owner of a legal entity, the FATF Recommendations foresee a multiple-step approach: first by identifying the natural person that has controlling ownership, second if the ownership interests are so diversified that there are no natural persons exercising control of the legal person, by verifying the identity of the natural persons (if any) exercising control through other means and last, where no natural person is identified via any of the above means, by identifying and taking reasonable measures to verify the identity of the relevant natural person who holds the position of senior managing official[7].

obliged entities shall keep records of the actions taken in order to identify the beneficial ownership under point (i) and this point;

[6] FATF (2012), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, updated October 2016, FATF, Paris, France, www.fatf-gafi.org/recommendations.html

[7] Interpretative Note to Recommendation 10 of the FATF Recommendations 2012 "Identify the beneficial owners of the customer and take reasonable measures to verify the identity of such persons, through the following information:
(i) For legal persons:

This multi-step approach when applied to investment funds results in excluding a natural person having the controlling ownership. Moreover, since there are no other means to identify such natural persons, the requirement has to be to determine the beneficial owner of the fund via the natural persons who exercise controls through other means, i.e. the senior managing official. Therefore, the beneficial owner of a fund under the AMLD definition can only be the senior managing officials responsible for running the activities of the fund, i.e. the fund's Board of Directors and the senior officers of its Management Company.

For all these reasons, we believe that the reference to the intermediary's customers as the beneficial owners of a fund is an important misconception that is not aligned and goes against the AMLD and FATF definitions on "beneficial owner".

C. **Need for alignment with International Standards, National Regulation and Best Practices on the intermediaries and beneficial ownership**

Previous arguments on the intermediary being the fund's customer and the notion of "beneficial owner" in the case of a fund are well based upon and supported by international guidelines and regulatory framework in major jurisdictions, as well as well-acknowledged best practices in the industry. It would be difficult for the final Joint Guidelines to foresee different implementation processes than the ones provided by already established International Standards and national regulatory frameworks both inside and outside the EU, especially given the cross-border nature of the distribution of investment funds.

EFAMA would like, therefore, to draw EU regulators' attention to the following framework at international and/or national level.

1. General Guide to Account Opening published by the Basel Committee on Banking Supervision (February 2016)[8]

In its General Guide to Account Opening, the Basel Committee on Banking Supervision lays out the principles related to the due diligence a credit institution should exercise in the case of professional intermediaries' accounts that are either opened on behalf of a single customer or that are opened as

(i.i) The identity of the natural persons (if any – as ownership interests can be so diversified that there are no natural persons (whether acting alone or together) exercising control of the legal person or arrangement through ownership) who ultimately have a controlling ownership interest32 in a legal person; and
(i.ii) to the extent that there is doubt under (i.i) as to whether the person(s) with the controlling ownership interest are the beneficial owner(s) or where no natural person exerts control through ownership interests, the identity of the natural persons (if any) exercising control of the legal person or arrangement through other means.
(i.iii) Where no natural person is identified under (i.i) or (i.ii) above, financial institutions should identify and take reasonable measures to verify the identity of the relevant natural person who holds the position of senior managing official.

[8] As incorporated in the Guidelines on sound management of risks related to money laundering and financing of terrorism of the Basel Committee on Banking Supervision (Annex IV) http://www.bis.org/bcbs/publ/d353.pdf

"pooled" accounts on behalf of a number of entities. In the second case, where funds held by the intermediary are co-mingled, the Basel Committee clearly offers banks (i.e. the obliged entities) a waiver of the requirement to look through to the beneficial owners of the intermediaries' accounts. This waiver is offered to them under concrete circumstances, *"e.g. when the intermediary is subject to due diligence standards in respect of its customer base that are equivalent to those applying to the bank itself, such as could be the case for broker-dealers"*[9].

In this manner, the Basel Committee recognises that if the intermediary is already regulated as obliged entity under an equivalent regime (in the case of the EU under the AMLD), banks do not need to apply anymore their own due diligence requirements to the customers of the intermediary.

If this type of waiver applies to credit institutions, there is no reason not to foresee its application also for investment funds and their intermediaries as long as the latter are regulated under the AMLD.

Any different approach would lead to unnecessary different standards for defining and assessing higher risk corporates and an important duplication of burden targeted to investment funds. Concretely, if a bank has to identify the beneficial owners of a higher risk it will focus on the persons having a controlling interest in their own corporate clients. If an investment fund has to identify the same type of risk and based on the draft Joint Guidelines, it should focus on its clients, i.e. the intermediaries, as well as on the intermediaries' clients. This could mean thousands of ultimate underlying investors, provided that the investment fund has directly appointed intermediaries/distributors and that no sub-distribution takes place, in which case the number of final investors would potentially even be superior.

Moreover, when it comes to investment funds being a client of a bank, the Guide of the Basel Committee requires the bank to identify the beneficial owner in the case of the fund by identifying its directors or any controlling board, its trustee, its managing (general) partners and any other person who has control over the relationship e.g. fund administrator or manager[10]. It is therefore clear, that

[9] Point 33 of the General Guide to Account *"When a professional intermediary opens a customer account on behalf of a single customer that customer must be identified. Professional intermediaries will often open "pooled" accounts on behalf of a number of entities. Where funds held by the intermediary are not co-mingled but "sub-accounts" are established which can be attributed to each beneficial owner, all beneficial owners of the account held by the intermediary should be identified. Where the funds are co-mingled, the bank should look through to the beneficial owners. However, there may be circumstances – which should be permitted by law and set out in supervisory guidance – where the bank may not need to look beyond the intermediary (eg when the intermediary is subject to due diligence standards in respect of its customer base that are equivalent to those applying to the bank itself, such as could be the case for broker-dealers)."*

[10] Point 34 of the General Guide to Account *"Where such circumstances apply and an account is opened for an open or closed-end investment company, unit trust or limited partnership that is subject to customer due diligence requirements which are equivalent to those applying to the bank itself, the bank should treat this investment vehicle as its customer and take steps to identify:*
- *the fund itself;*
- *its directors or any controlling board where it is a company;*
- *its trustee where it is a unit trust;*
- *its managing (general) partner where it is a limited partnership;*
- *account signatories; and*
- *any other person who has control over the relationship e.g. fund administrator or manager."*

the Basel Committee understands as the fund's beneficial owner all the aforementioned persons and certainly not the clients of the intermediaries of the fund (as stated in the draft Joint Guidelines). The MiFID II rules and (draft) guidance on product governance and target market also recognises that the fund and fund manager usually do not know their end-clients, but the distributor does[11].

2. Financial Crimes Enforcement Network (FinCen) Final Rules on Customer Due Diligence Requirements for Financial Institutions[12] & Autorité de Marchés Financiers (AMF) Guidelines on fighting money laundering and terrorist financing[13]

Further on this type of waiver, i.e. asset managers being not requested to perform diligence duties on the intermediaries' clients if the intermediaries are regulated entities, is also adopted at the national level both within the EU as well as internationally.

In the US, FinCen Final Rules on Customer Due Diligence Requirements for Financial Institutions foresee that it is the intermediary not the intermediary's clients that need to be considered as the fund's legal entity customer.

"In the NPRM[14], we proposed that if an intermediary is the customer, and the financial institution has no CIP[15] obligation with respect to the intermediary's underlying clients pursuant to existing guidance, a financial institution should treat the intermediary, and not the intermediary's underlying clients, as its legal entity customer. Thus, existing guidance issued jointly by Treasury or FinCEN and any of the Federal functional regulators for broker-dealers, mutual funds, and the futures industry related to intermediated relationships would apply. Commenters from the securities, mutual fund, and futures industries strongly supported this approach. FinCEN confirms that this principle will apply in interpreting the final rule, as follows: ***To the extent that existing guidance provides that, for purposes of the CIP rules, a financial institution shall treat an intermediary (and not the intermediary's customers) as its customer, the financial institution should treat the intermediary as its customer for purposes of this final rule. FinCEN also confirms that other guidance issued jointly by FinCEN and one or more Federal functional regulators relating to the application of the CIP rule will apply to this final rule, to the extent relevant.[16]"***

[11] See footnote Nr 4
[12] Customer Due Diligence Requirements for Financial Institutions, A Rule by the Financial Crimes Enforcement Network on 05/11/2016, Federal Register, Vol. 81, No 91, May 11, 2016) also here: https://www.federalregister.gov/documents/2016/05/11/2016-10567/customer-due-diligence-requirements-for-financial-institutions
[13] Position – recommandation : Lignes directrices en matière de lutte contre le blanchiment des capitaux et le financement du terrorisme – DOC-2010-22, Autorité de Marchés Financiers AMF
[14] Advance Notice of Proposed Rulemaking (ANPRM)
[15] Customer Identification Program (CIP)
[16] FinCen Rule on Customer Due Diligence Requirements for Financial Institutions, Section 1010.230 (e) 2

A similar position is adopted in the AMF's Guidelines, as in the case of distribution via an intermediary that is regulated, it is the intermediary that is requested to apply the diligence requirements and process related to the identification of beneficial owner[17].

It is also important to note that FinCen rules recognise the different distribution models of the fund and therefore, as highlighted also in our previous comments, the need that the diversity of models is taken into consideration by the regulator on how the risk-based due diligence is to be applied. FinCen stresses that this incorporates practices already generally undertaken by mutual funds. Moreover, it recognises that it is only a relatively small proportion of the funds' customers who purchase their shares directly from the fund and not via an intermediary.

"The structural changes to this section, as well as the rationale for these amendments, are identical to those articulated for banks and broker-dealers above. However, as an initial matter, FinCEN notes that, unlike the situation for other covered financial institutions, ***a relatively small proportion of a mutual fund's underlying customers purchase their shares directly from the fund. Rather, the great majority of mutual fund investors purchase shares through an intermediary, such as a securities broker-dealer, and therefore the mutual fund has no direct relationship with them.*** *In addition, of all the legal entity customers of a mutual fund, a significant number are typically financial intermediaries (e.g., securities broker-dealers), most of which are regulated. Such intermediaries are nonetheless subject to a mutual fund's AML program, which requires the application of risk-based due diligence. Of those legal entity customers that are not financial intermediaries, a substantial number are in many cases corporations that are administering benefit plans for their employees (or administrators doing this on behalf of such employers); these relationships are also subject to risk-based due diligence.* ***Thus, FinCEN understands that any legal entities that are direct customers of a fund, and not any type of intermediary, would comprise a relatively small portion of its direct customers, and FinCEN expects that such non-intermediary legal entity customers would be subject to a different risk assessment than intermediary customers for due diligence purposes.*** *The following discussion of mutual fund customer relationships must be read in this context. As in the case of banks and broker-dealers as described above,* ***FinCEN emphasizes that the incorporation of these elements serves only to articulate current practice consistent with existing regulatory and supervisory expectations. Thus, understanding the nature and purpose of customer relationships encapsulates practices already generally undertaken by mutual funds to know and understand their customers****.[18]"*

[17] AMF Lignes directrices en matière de lutte contre le blanchiment des capitaux et le financement du terrorisme, No 1 *« En revanche, en cas de commercialisation des parts ou actions d'OPC, par l'intermédiaire de distributeurs, tels les conseillers en investissement financier non démarcheurs, n'agissant pas comme mandataire de la société de gestion de portefeuille ou la société de gestion, celle-ci n'entre alors pas dans le champ de la réglementation au titre de la commercialisation des parts ou actions d'OPC. Dans ce cas, et lorsque le distributeur n'est pas lui-même assujetti au dispositif de Lutte Anti-Blanchiment français, européen ou d'un pays tiers équivalent figurant sur la liste fixée par l'arrêté du 21 juillet 2006 modifié4, le dépositaire de l'organisme de placement collectif devra veiller à ce que la convention conclue avec ce distributeur prévoit que ce dernier applique des procédures d'identification équivalentes à celles des Etats membres de l'Union européenne et qu'il ait accès aux éléments d'identification du bénéficiaire effectif (article R. 561-9 du code monétaire et financier). »*

[18] FinCen Rule on Customer Due Diligence Requirements for Financial Institutions, Section 1024.210

3. The Wolfsberg Statement – Anti-Money Laundering Guidance for Mutual Funds and Other Pooled Investment Vehicles[19]

As stated in the FinCen rules, there are well established industry practices as to the implementation of money-laundering rules by investment funds. Such a case is the Wolfsberg Statement, a Guidance developed by the Wolfsberg Group to assist mutual funds and other pooled investment vehicles to manage their money laundering risks.

Some of the key points of the Wolfsberg Guidance regarding the distribution via intermediaries are the following:

*"**Indirect Relationships***
In these cases, the PV[20] does not directly process the application and/or receive the funds directly from the investor. Shares are distributed by or through intermediaries such as banks, broker-dealers, insurance companies/agents, investment advisers, financial planners, or other financial institutions (collectively referred to in these principles as "Intermediaries"). Shares may be held by or through the Intermediaries in so-called "omnibus accounts". In such situations, and subject to the considerations set out in Section 4, the PV's customer is the intermediary. Accordingly, the PV has no direct relationship with the investors (regardless of whether the investors are the shareholders of record or not).
This Guidance, therefore, differentiates between direct and indirect relationships between the PV and the investors – although in all cases, a risk-based approach should be considered in implementing the AML standards described.

4. Intermediaries

4.1. Introduction

A variety of Intermediaries may be involved in the conduct of indirect relationships, and the PV should always undertake risk based due diligence on the Intermediary.

Each PV shall define its own policy in this regard, but in all cases, this risk based approach to due diligence on the Intermediary should focus on the level of regulatory supervision to which the Intermediary is subject, on the country in which the Intermediary is based, and the reputation and integrity of the Intermediary to determine whether the Intermediary is:

[19] The Wolfsberg Group consists of the following leading international financial institutions: ABN AMRO Bank N.V., Banco Santander Central Hispano S.A., Bank of Tokyo-Mitsubishi Ltd., Barclays Bank, Citigroup, Credit Suisse, Deutsche Bank AG, Goldman Sachs, HSBC, JPMorgan Chase, Société Générale, and UBS AG. This Guidance was prepared in association with Dexia Group, Lloyds TSB and RBC Financial Group.
http://www.wolfsberg-principles.com/pdf/standards/Wolfsberg_PV_Guidance_(2006).pdf
[20] Pooled Vehicle

- *itself subjected to adequate AML regulation in the context of its dealings with its clients and is supervised for compliance with such regulation (an Intermediary meeting the standards described in this bullet point being referred to in this Guidance as a "Regulated Intermediary"); or*

- *otherwise an Intermediary that the PV reasonably believes employs adequate AML procedures such that the PV concludes that it would be reasonable for the PV not to ascertain the identity of the Intermediary's customers itself (e.g. where the Intermediary is an affiliate of an adequately regulated entity or otherwise as described in Section 4.4) (an Intermediary meeting the standards described in this bullet point being referred to in this Guidance as an "Acceptable Intermediary").*

4.2.1 Regulated Intermediaries[21]

The PV does not have to perform its own CDD measures on the investors as set out in Section 3. The PV is not required to "drill down" to the regulated Intermediary's customers. In such cases, the PV may allow the Intermediary to open an "omnibus account". It may be opened in the Intermediary's name for all transactions that the Intermediary places with the PV on behalf of the Intermediary's customers and the PV need not obtain any information on the underlying investors."

D. **The equivalence status of third country AML/CTF rules for jurisdictions assessed being of lower risk status**

The draft Joint Guidelines are making a concrete distinction between EEA Member States, on which the provisions regarding the Simplified Due Diligence (SDD) apply and the non-EEA countries, for which a full Customer Due Diligence (CDD) should apply.

However, in Annex II of the AMLD a number of third countries may be considered as factors of potential lower risk, such as third countries having effective AML/CTF systems, third countries identified by credible sources as having a low level of corruption or other criminal activity and third countries which, on the basis of independent and reliable sources such as mutual evaluations, detailed assessment reports or published follow-up reports, have requirements to combat money laundering and terrorist financing consistent with the revised FATF Recommendations and effectively implement those requirements.
This means that all financial institutions are entitled to exercise their risk-based due diligence and assess whether a given jurisdiction is of lower risk, in which case they can apply a SDD process to the clients/intermediaries of that jurisdiction.

Given this is a possibility for all financial institutions, it would be not only inconsistent with the AMLD text, but also creating a non-level playing field if the Joint Guidelines are to foresee that in the case of investment funds there is no such possibility, meaning that for all intermediaries and clients coming

[21] Regulated Intermediaries are to be understood in this Guidance as being under the regulatory supervision of the local authority and having to comply with domestic AML/CTF legislation.

from a non-EEA country the CDD is the only possibility. A consistent approach is imperative even more so in the case of investment funds, as they are extensively distributed on a cross-border basis.

It should be also stressed that although there are several "white lists" of non-EEA jurisdictions published at national level (that are used however in a different way, e.g. some of a compulsory nature some not), as well as at the EU level, any such list should be an indicative (open-ended) one, whereas the key factor should always remain the risk-based approach adopted by the obliged entity.

- Summing up all the key points raised in that Section of the Paper, EFAMA wishes to stress that the EU asset management industry fully acknowledges its responsibility when it comes to addressing risks and contributing to anti-money laundering and counter-terrorism financing policies. Fostering an even closer co-operation between asset managers and financial intermediaries would certainly be beneficial, however it is crucial to avoid duplication and confusion, and to clearly define roles and responsibilities of each under their AML/CTF obligations in the specific cases mentioned above.

II. SUGGESTIONS FOR MODIFICATIONS IN THE TEXT OF THE DRAFT JOINT GUIDELINES[22]

201. Investment funds ***as every financial product***[23] can be abused for ML/TF purposes. ~~Retail funds are often conducted on a non-face to face basis; access to such funds is often easy and holdings of investment funds can easily be transferred between different parties.~~ However, the medium- to long term nature of the investment can contribute to limiting the attractiveness of these products for money launderers. ~~Institutional funds are exposed to similar risks, though these risks may be reduced where such funds are open only to a small number of investors.~~

206. The following factors may indicate lower risk:

• the customer is an institutional investor whose status has been verified by an EEA government agency, e.g. a government-approved pensions scheme ***or a government agency of a jurisdiction identified to comply with the geographical factors of lower risk as per Annex II of Directive (EU) 2015/849*** ;

• the customer or investor is a regulated financial intermediary in an EEA ***or a*** country ***identified to comply with the geographical factors of lower risk as per Annex II of Directive (EU) 2015/849***.

208. The following factors may indicate lower risk:

• the fund admits only a specific type of low-risk investors;
• the fund can be accessed only through regulated financial intermediaries in EEA countries, ***or in a country identified to comply with the geographical factors of lower risk as per Annex II of Directive (EU) 2015/849*** and who are within scope of their national AML/CFT legislation.

Simplified customer due diligence

211. To the extent permitted by national legislation and provided that the funds are being transferred to or from an account held in the customer's name at an EEA credit institution ***or credit institution of a jurisdiction identified to comply with the geographical factors of lower risk as per Annex II of***

[22] Proposed changes can be seen below in bold italics and strikethroughs.

[23] Paragraph 201 suggests that retail funds, because they are open to a wide range of investors and are easy to access, could be abused for ML/TF purposes. It is important to stress that the legal nature of a fund – open or closed – does not in itself influence the ML/TF risk profile of the vehicle. ML/TF risk comes from the investor and the origin of monies invested in the product, not from the product itself. Similarly, a stock can be used for ML/TF purposes and it is not however considered a high risk investment; the risk lies with the investor who byes the stock and with the origin of the funds in the transaction. That is why the risk can be mitigated efficiently by the distributor of the product (if any) or the broker in the case of a stock because they know their client and the rationale behind their transactions. Moreover, in the case of UCITS stating that they can in general often be used for ML/TF purposes is not correct, in particular as UCITS are mainly distributed via regulated channels.

Directive (EU) 2015/849, examples of SDD measures firms may apply include using the source of funds or the destination of funds to meet some of the CDD requirements.

212. Where a firm uses a financial intermediary to distribute fund shares, for example a regulated platform, ***a regulated intermediary under the AMLD,*** a bank or a financial adviser, that intermediary may be regarded as the firm's customer provided that the intermediary acts ~~on its own account~~ ***in its own name*** as the ~~direct~~ counterparty of the firm. This could be the case, for example, where the intermediary receives from its customer a mandate to manage their assets or carry out one or more investment transactions. ~~In those situations, the firm should treat the intermediary's customers as the fund's beneficial owners.~~ ***This would also apply when the unit/shares are registered in the intermediary's underlying client name in the funds shareholder register.***

213. ~~In those situations,~~ ***For intermediaries*** the firm may apply SDD measures provided that:

• the financial intermediary is subject to AML/CFT obligations in an EEA jurisdiction ***or a jurisdiction identified to comply with the geographical factors of lower risk as per Annex II of Directive (EU) 2015/849***;

• the ML/TF risk associated with the business relationship is low, based on the firm's assessment of the financial intermediary´s business, the types of clients the intermediary's business serves and the jurisdictions the intermediary's business is exposed to, among others; and

• ~~the firm is satisfied~~ ***there are no indications*** that the intermediary ***is not applying*** ~~applies~~ robust and risk-sensitive CDD measures to their own clients and their clients' beneficial owners. ***In the cases such indications exist, i***t may be appropriate for the firm to take risk-sensitive measures to assess the adequacy of its intermediary's CDD policies and procedures, for example by referring to publicly available information about the intermediary's compliance record, liaising directly with the intermediary or by sample-testing the intermediary's ability to provide CDD information upon request.

214. Where those conditions are met, and subject to applicable national legislation permitting this, SDD may consist of the firm:

• identifying and verifying the identity of its intermediary~~, including the intermediary's beneficial owners~~;

- assessing the purpose and ***intended*** nature of the business relationship;
- conducting ongoing monitoring of the business relationship; ~~and~~

• ~~establishing that the intermediary will provide upon request relevant information on their clients, who invested in the fund and who are the fund's beneficial owners~~.

215. Where the financial intermediary is established in a third country ***not identified to comply with the geographical factors of lower risk as per Annex II of Directive (EU) 2015/849*** or where there are indications that the risk associated with the business relationship may not be low, firms should apply full CDD, including reliance as per Article 25 of Directive (EU) 2015/849 or EDD measures as appropriate.

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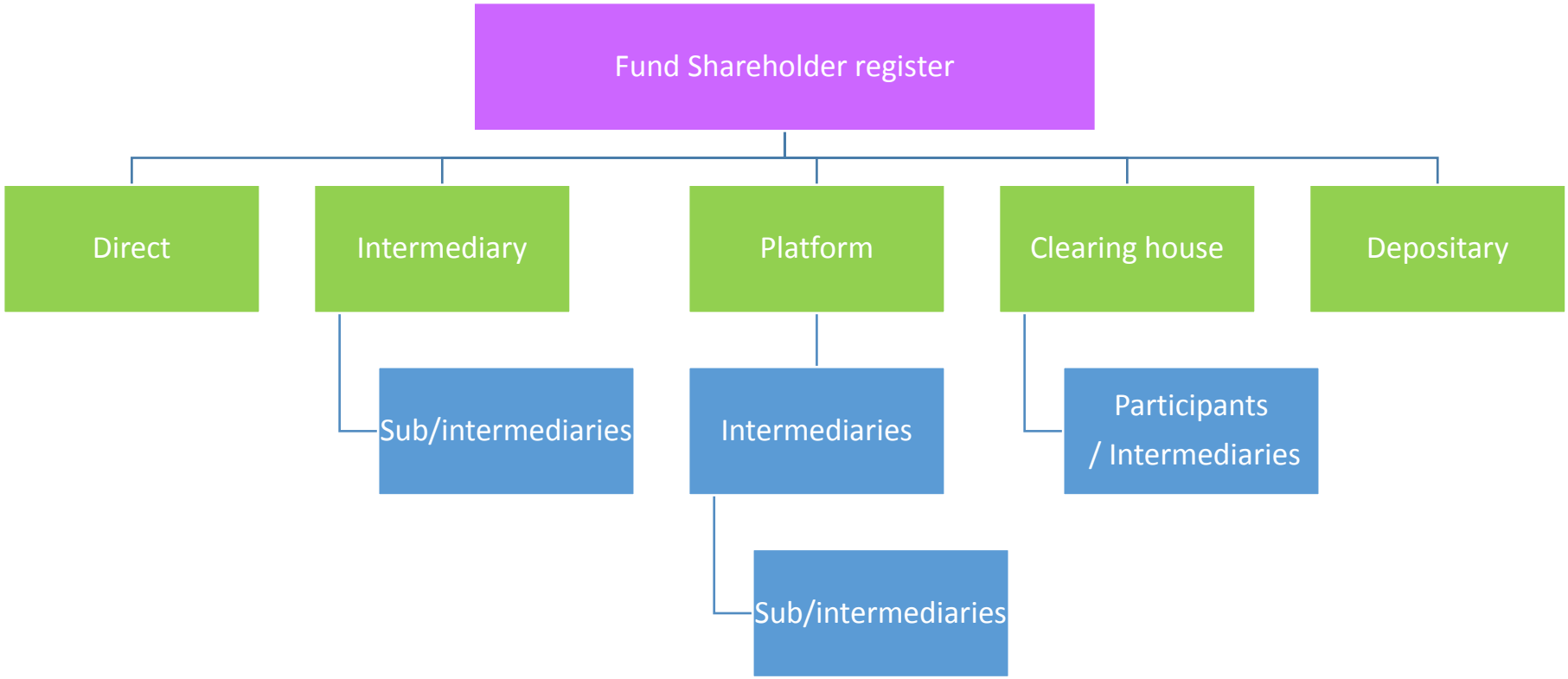
Brussels, 15 December 2016
[16-4082]

ANNEX

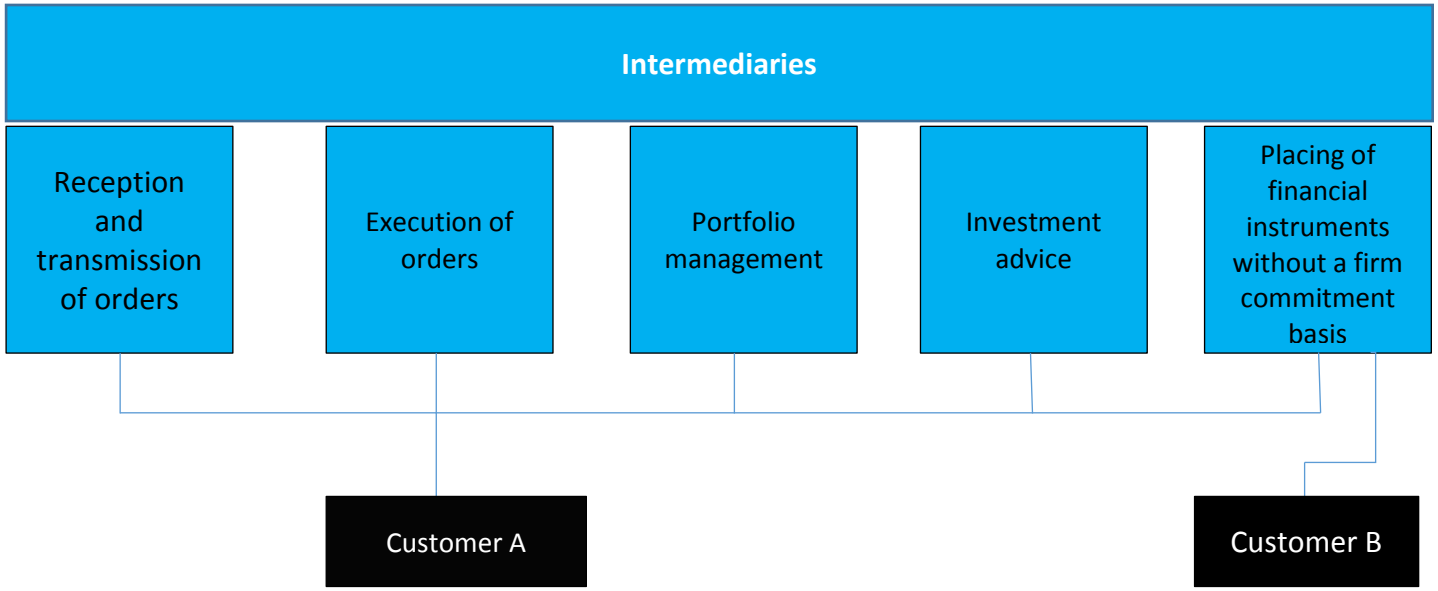
A

Example of access to the fund shareholder register direct or via intermediaries



B

Example of services provided to the intermediary customers



Customer A and B may be individuals or corporates/legal arrangements including other intermediaries