Submission

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

CREATING LASTING VALUE

September 9, 2013

To **ESMA**

Re **Response to**

ESMA Consultation Paper: Draft Regulatory Technical Standards on information requirements for assessment of acquisitions and increases in holdings in investment firms (MiFID), 8 July 2013, ESMA/2013/918

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Introduction

1. The European Private Equity and Venture Capital Association (EVCA) is the voice of European private equity. Our members cover the whole investment spectrum, including the institutional investors investing in a broad range of private equity and venture capital (PE/VC) funds, as well as the PE/VC firms raising such funds, which in turn invest in the full life-cycle of unlisted companies, from high-growth technology start-ups, to the largest global buyout funds turning around and growing mature companies.

2. We welcome the opportunity to respond to ESMA's consultation concerning its Regulatory Technical Standards on information requirements for assessment of acquisitions and increases in holdings in investment firms (MiFID) (the "RTS"). We stand ready to provide whatever further contribution to this work ESMA might find helpful, including attending meetings and contributing further materials in writing.

3. We set out below answers to ESMA's questions relevant to the PE/VC industry. These comprise of (i) a number of general comments as to how the RTS could best be applied to private equity and venture capital fund structures and (ii) our specific responses to the questions raised within the RTS. In this response: (a) references to "CP paragraphs" are to paragraphs of ESMA's consultation paper; (b) "Articles" are to Articles of the draft Regulatory Technical Standards in Annex IV to the consultation paper; and (c) technical terms used but not otherwise defined have the meanings attributed to them in ESMA's consultation paper.

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General comments

4. As a general observation, we welcome the proposed RTS, which appear to us to be proportionate and require a sensible level of disclosure from potential acquirers. In our view they broadly reflect current best practice in a number of Member States.

5. Private equity and venture capital firms and their funds may in the course of their activity acquire interests in or control of regulated entities such as investment firms. However, due to the fund management structures, such acquisitions may often face a difficult analysis and overly complex set of documents. In our view this creates unnecessary costs and burdens for the firms and their investors, for the investment firms in question and for the regulators themselves. This complexity has prohibited the development of a harmonized approach to fund structures across the EU and the EVCA believes that in many cases the competent authorities have been presented with unnecessarily complex and detailed application packs, only certain elements of which were likely to be relevant and useful. As such, we welcome the harmonized approach set out in the RTS but would like to make a number of comments that we hope will be helpful in addressing the specificities of the alternative fund private equity and venture capital industry.

6. With that in mind, **the EVCA would argue that the RTS present an opportunity to use the newly enacted concepts of "alternative investment fund" ("AIF") and "alternative investment fund manager" ("AIFM"), as derived from the Alternative Investment Fund Managers Directive ("AIFMD"), so as to ensure that regulators receive the most relevant information while also simplifying filings for private equity firms**. In particular we would like to suggest the following:

   - ESMA may confirm explicitly in the RTS that where an AIF or series of AIFs managed by the same AIFM may acquire control over an investment firm, the AIF(s) ought to be treated as either the acquirer (or where the acquiring entity sits below the AIF(s)), the ultimate parent of the acquirer. However, given the essentially passive nature of investors' interests in the AIFs we think it is important that this approach is complemented with a number of key clarifications in order to avoid unnecessarily complex filings that would create unnecessary costs for the ultimate investors in the AIFs and result in overly complex and/or irrelevant materials being presented to the regulators tasked with assessing the applications.

   - As the active decision maker behind the AIF will be its AIFM, we would consider that where an AIF is managed by a regulated AIFM that the relevant AIF(s) should be treated as EU regulated entities for the purposes of the short-form disclosures under Article 11.

   - Assuming that it is determined that the AIF or AIFs should be treated as the acquirer or its ultimate parent, we would welcome further clarifications in the RTS. Such clarifications could be provided to reflect their status and simplify the necessary disclosures so that competent authorities are only required to consider relevant materials. In particular:

     - It could be stated explicitly that any AIF may be treated as the 'legal person' to whom the RTS applies (notwithstanding the fact that in some jurisdictions some AIFs may not have legal personality from their investors).

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- Article 3(2)(e) should be disapplied in respect of AIFs. It would be disproportionate to require disclosure of all beneficial owners in an AIF. This would require AIFs and their AIFMs to prepare application packs listing potentially hundreds of different investing entities and may require them to confer with or seek the consent of those investors to the disclosures. Ultimately, competent authorities would be presented with unnecessarily detailed information which is of little or no relevance as the underlying investors are entirely passive. Consideration should be given to requiring disclosure only where the relevant investor holds a significant amount of the relevant AIF or has the ability to significant influence over its day-to-day operations.

- For similar reasons we also consider that Article 4(2)(f) would be potentially unduly onerous for AIFs if it was construed so as to require disclosure of their underlying investors. However, a clarification that an investor that has no day to day control over the AIF should not be treated as having a significant influence over it should be sufficient to avoid this scenario.

- Articles 4(2) (d) and (e) are unnecessary and overly burdensome. Many structures which invest in investment firms directly or indirectly may have interests in hundreds of undertakings throughout the world. It is impractical to provide information on potential conflicts of interest in such situations. The proposed RTS, if read too broadly, might require an expensive due diligence exercise ensuring that no existing investee companies held by the AIF (or potentially other AIFs that it manages) have any relationships with or conflicts with the target company. This process would be time consuming and impractical. It could also create major confidentiality issues, particularly in bid situations. Ultimately regulators may find themselves presented with over-cautious disclosures noting numerous conceivable conflicts, which in practice would be highly unlikely to affect the target company as each company within the portfolios would be managed separately (to the extent that the companies have been acquired as part of a broader consolidation strategy, this fact would be required to be disclosed elsewhere in the application). We are therefore particularly concerned that these provisions should not be applied to AIFMs or AIFs as currently drafted. At the least some form of materiality threshold should be considered.

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Specific Response to Sections and Questions

I. Section III.I - Proportionality

Q1: Should the information requirements for intra-group transactions, where the group is consolidated and regulated, be determined separately, with a 'lighter' version of requirements? If so, could you please provide detail on what requirements may not be necessary when assessing intra-group acquiring transactions, where the group is consolidated and regulated.

7. Yes, the EVCA strongly agrees that intra-group transactions should be determined based on a lighter version of the requirements. In our view the requirements should be limited to information in Articles 3, 5 and 10 of the draft RTS. This is because detailed information on the group will already have been gathered and assessed upon initial authorisation of the investment firm. Other information required under the draft RTS, especially that under Article 8, would be disproportionately onerous if applied to a transaction within a group.

Q2. Should the concept of proportionality be considered more broadly, such as in terms of the nature, scale and complexity of the target entity and the envisaged plans of the proposed acquirer where the proposed acquirer is an EU-regulated entity? Do you agree with the suggested information requirements set out in Article 11 of the draft RTS?

8. Yes, the concept of proportionality should be applied broadly where the proposed acquirer is an EU-regulated entity. In this case the proposed acquirer will already be subject to supervision by an EU regulator and information on the proposed acquirer should be made available to competent authorities via information sharing. We would also request further clarification on the status of alternative investment fund managers and alternative investment funds including confirmation that an AIF that is managed by an authorised AIFM will be treated as an EU regulated entity.

9. We agree with the inclusion of Article 11 of the draft RTS in principle but would suggest that Article 11(1)(a)(ii) and 11(1)(b)(ii) be removed. The provision of information set out in points (d) to (h) of paragraph 1 of Article 4 and/or (d) to (k) (we presume that (m) here is a typographical error) of paragraph 2 of Article 4 is disproportionate where the proposed acquirer is an EU-regulated entity and should already be available to competent authorities via existing information sharing principles.

Q3. Do you agree with the definition provided of a small, non-complex investment firm? What would be an appropriate 'assets under management' threshold in this regard?

10. Yes, the EVCA agrees with the definition of small, non-complex investment firm. However, we also consider that it should also be made clear under Article 11(2)(c) that the EUR 500 million threshold of assets under management of a target firm only applies to assets managed under arrangements which are subject to MiFID. This would have the effect of excluding any assets under management in relation to the operation of collective investment schemes, which are expressly exempt from MiFID under MiFID Article 2(h). It might be helpful to expressly confirm this.

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Q4. Do you have any other suggestions in relation to the application of the proportionality principle to the information requirements in these RTS?

11. We do not have any other particular suggestions in respect of proportionality, although we would welcome any further extensions to the principle that may be suggested. Consideration could thus be given to:

    - Reducing requirements on any transactions that do not result in a change of control, even where the target is not a small non-complex investment firm (for instance to include complex investment firms where their value was under a particular threshold).

    - Reducing requirements on any transactions where the proposed acquirer is or is controlled by an EU regulated entity, even where the target is not a small non-complex investment firm.

II. Section III.II - Documentation

Q5. Are there specific documents that cause a difficulty that should be harmonised? If so, please explain which documents cause a difficulty, and why, and provide your suggestions on how they should be harmonised.

12. Where a limited partnership acquires control, and no single limited partner would itself be deemed to have a controlling interest, it should not be necessary to submit limited partnership agreements or a list of limited partners because they are passive and not involved in the management of the limited partnership. As noted in in General Comments above, this should be expressly addressed in the RTS.

III. Section III.III - Close links

Q6: Do you agree with the proposal to include an analysis of the impact of the proposed acquisition on the target entity's relationship with its supervisor?

13. No, we do not agree. This appears to us to be requiring the proposed acquirer to perform an assessment on behalf of the competent authority. This is not an assessment the proposed acquirer will necessarily be in a position to perform, and in any event, we consider it disproportionate and unfair that it be required to take responsibility for this. As such we would suggest deleting the requirements of Article 6, and particularly those in Article 6(1)(a).

Q7: Do you believe that any further information is necessary in relation to the close links of the proposed acquirer?

14. No, we consider the current proposals in relation to close links of the proposed acquirer are sufficient.

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IV. Section III.IV – Consolidated supervision

Q8: Do you agree with the proposal to include, as an information requirement, an analysis of the impact of the proposed acquisition on the consolidated supervision of the target entity's group?

15. No we do not agree. This appears to us to be requiring the proposed acquirer to perform an assessment on behalf of the competent authority. This is not an assessment the proposed acquirer will necessarily be in a position to perform and in any event we consider it disproportionate and unfair that it be required to take responsibility for this. As such we would suggest deleting the requirements of Article 6, but particularly those in Article 6(1)(a)].

Q9: Do you agree that where the target entity has a waiver from capital requirements on a consolidated basis, confirmation should be provided that the requirements for having the waiver will continue to be met post the proposed acquisition?

16. Yes, we agree in principle, although it should be clear that as an alternative the target entity could either (i) be capitalized so as to no longer require the waiver and/or (ii) agree alternative requirements for the waiver with its regulator.

V. Section III.V – Third country acquirers

Q10: Do you agree that as a minimum the above information should be additionally required where the proposed acquirer is a third country natural or legal person?

17. No, the EVCA does not agree with the additional information requirements for third country acquirers. Requiring a "certificate of good standing" from a government or regulator about a third country acquirer is impractical. We note that there is no such concept in many jurisdictions. Further, requiring a declaration that there are no obstacles or limitation to the provision of information necessary for supervision of the target entity is also disproportionate and onerous as foreign authorities will likely be unwilling to supply such a declaration, with the effect that some third country entities will be unable to acquire holdings in investment firms. Further, both requirements will add unnecessary costs and delay to the process with little apparent benefit.

Q11: Is there any additional information that should be required when the proposed acquirer is located in an off-shore jurisdiction where there are legal barriers to supervision?

18. No, we do not believe any further information is necessary.

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VI. Section III.VI - Legal structures of acquirers

Q12: Do you agree with the suggested additional information to be required where the acquirer is a sovereign wealth fund, or any other state/government-owned entity?

19. n/a

Q13: Do any other particular legal structures of acquirers create a need for additional information (for example partnerships, trusts)?

20. No, the EVCA does not believe any further information is necessary and indeed we believe that structures of this nature ought to have express provisions made that would to some extent simplify the applicable disclosure requirements. We would refer to our general comments in that regard.

VII. Section III.VII - Shareholding structure of proposed acquirers

Q14: Do you agree that information relevant to the reputation of shareholders that exert significant influence on the proposed acquirer should be required?

21. No, the EVCA does not agree that information relevant to the reputation of shareholders of the proposed acquirer should be required. This requirement is disproportionate, would cover highly subjective information that would be difficult to identify and provide, and is likely to increase time and costs in preparing notifications with little apparent benefit.

VIII. Section III.VIII - Other

Q15. Is there any other information which should be requested as part of the notification process, or any information that is unnecessary, overly burdensome or duplicative?

22. Article 3(3)(b) requires the identification of beneficial owners of trust property. This should be limited to cases where such beneficial owners are directly identifiable and should not apply to a trust which has been formed for a class of beneficiaries. Further, even where beneficiaries and their respective shares in distribution are identifiable, an element of proportionality should be introduced requiring, for example, only beneficiaries with an interest of 25% or more to be identified. The current draft RTS would require an acquirer which is a pension fund formed as a trust to disclose the identities of all participants in the fund.

23. Article 4(2)(j) requires newly established entities to provide financial forecasts for three years. This is onerous and we would suggest shortening the period to one year. For comparison, in the UK an entity applying to become authorised as an investment firm needs to supply financial forecasts for only one year. The requirements for an acquirer should not be more onerous.

24. Article 4(2)(k) appears to us to be potentially onerous: it should be clarified that it should only apply to organisations that already have a credit rating and does not impose a requirement on unrated entities to seek a formal credit rating.

25. Article 7(2)(e) requires information on assets of the proposed acquirer or target entity which "are to be sold in the short term". This is vague and may lead to different interpretations in

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different jurisdictions. We are of the view that the provision of such information is unnecessary, however, should it be included in the RTS, Article 7(2)(e) should be clarified to specify:

- the assets to which such a requirement applies, e.g. by specifying a minimum value of an asset for these purposes;

- the meaning of "short term"; in this respect, we believe 6 months would be an appropriate timeframe;

- it should be restricted to assets that the acquirer intends to sell at the time of the notification. Disposal opportunities may arise at short notice or sales of assets may even be required under merger rules for an acquisition to be authorised; in both cases, acquirers should not be restricted from making such disposals or sales.

26. Article 8(1) should be expressly limited, in the situation where a proposed acquirer does not intend to significantly change the operations of the target which are regulated under MiFID, to require only a statement as to how the acquisition will affect the operations of the target which are regulated under MiFID, rather than requiring a full business plan.

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About EVCA

The EVCA is the voice of European private equity.

Our membership covers the full range of private equity activity, from early-stage venture capital to the largest private equity firms, investors such as pension funds, insurance companies, fund-of-funds and family offices and associate members from related professions. We represent 650 member firms and 500 affiliate members.

The EVCA shapes the future direction of the industry, while promoting it to stakeholders such as entrepreneurs, business owners and employee representatives.

We explain private equity to the public and help shape public policy, so that our members can conduct their business effectively.

The EVCA is responsible for the industry's professional standards, demanding accountability, good governance and transparency from our members and spreading best practice through our training courses.

We have the facts when it comes to European private equity, thanks to our trusted and authoritative research and analysis.

The EVCA has 25 dedicated staff working in Brussels to make sure that our industry is heard.