**Appendix A: Practical implications of certain elements of the EBA’s approach**

While we strongly believe that private equity funds are not shadow banking entities and should not be caught by the EBA’s definition and the EBA Guidelines, we nonetheless encourage the EBA to consider the practical difficulties of certain elements of the approach suggested in the consultation paper.

1. **Inclusion of a "no fire-sale" provision**

We note that in the EBA's discussion of the principal and fallback approaches in the Guidelines, the EBA states that the "portfolio [of the relevant institution] must be adjusted" if the exposure limits that must be applied by the institution are lower than its current exposures. This implies that institutions may need to sell or transfer assets, or otherwise abruptly adjust their exposures, in order to comply with the relevant limits with the Guidelines enter into effect.

We are concerned that this could lead to "fire-sales" of assets and/or sudden reductions in exposures to clients or counterparties which could cause significant market disruption. We would suggest that the EBA should include a "no fire-sale" provision in the Guidelines which is based on a similar provision included in Recital 69 and Article 54 the Alternative Fund Managers Directive Level 2 Regulation (Commission Delegated Regulation (EU) No. 231/2013) in connection with securitisation retention requirements. Our suggested drafting for such a provision is as follows:

"*Where the exposures of an institution exceed any applicable limit on exposures to shadow banking entities that result from the application of either the principal or fallback approaches, the institution shall take such corrective action as may be in its best interests. This corrective action should not involve any direct obligation to reduce the exposure immediately after the breach of the limit has become apparent, thereby avoiding a "fire-sale" of an asset or significant disruption to the relevant client or counterparty. The institution should take the breach into account when considering whether to incur any future exposure."*

1. **Requirements for disclosure of information by shadow banking entities**

The Guidelines impose a number of obligations on institutions which are likely to require them to obtain very detailed information from shadow banking entities to whom they have exposures. These include:

* The identification of all potential risks resulting from individual exposures to shadow banking entities;
* The application of the institution's internal risk management framework, with analyses of the business of the shadow banking entity performed by risk officers;
* The identification of the risks arising from exposures to shadow banking entities in the institution's ICAAP and capital planning;
* The identification of interconnectedness between shadow banking entities themselves and between shadow banking entities and the institution, using a "robust process"; and
* The need to use a wide range of information about the shadow banking entity in order to qualify for the more flexible principal approach.

We are concerned that it is likely to be impractical to require the disclosure by the shadow banking entity of information at this level detail. Much of this information may be proprietary in nature and there is a possibility that the institution and the relevant shadow banking entity may be competitors in other contexts, meaning that disclosure may be harmful to the business of the shadow banking entity. Even if there is no direct risk of competition, many shadow banking entities would still have legitimate concerns about sharing highly sensitive and confidential information with counterparties or investors who are institutions subject to the Guidelines and in certain cases, there may be legal restrictions on doing so.

To the extent that the Guidelines require institutions to use information relating to shadow banking entities as part of the risk analysis or the application of the principal or fallback approaches, such a requirement must be applied in a proportionate manner, taking into account the practical, legal and commercial limitations on the nature of information that can be shared between entities.

**Appendix B: UCITS / AIFMD Overview Table**

| **Directive 2009/65** | **Requirements applicable at fund level** | **Directive 2011/61** |
| --- | --- | --- |
| Articles 5 and 27 | Prior authorisation of the UCITS is required. / Prior authorisation of the AIF internally managed required.  | Article 5 |
| Article 14 b para. 3 | Remuneration policy principles apply at fund level.  | Article 13 |
| Article 15 | Investment companies must have appropriate procedures in place to deal properly with investor complaints. | (professional investors - not retail, Article 43) |
| Article 22 | Appointment of a single depositary by the fund is mandatory. | Article 21 |
| Article 25 para 2 | In carrying out their functions, the fund and the depositary must act fairly and solely in the interest of the UCITS. | Article 21 |
| Article 29 para 1 | A UCITS without management company must hold higher initial capital, and respect additional rules (disclosure of information, rules on conflict of interest). / An internally managed AIF must hold higher initial capital.  | Article 9 |
| Article 30 | Requirements applicable to the managing companies will apply to the UCITS if it has not designated a managing company. UCITS may only manage assets of their own portfolio. | - |
| - | In cases of failure of an AIFM to ensure compliance with the applicable requirements of an AIF, the competent authorities can require the AIFM to resign as manager of that AIF. | Recital 11 and Article 5(3) |
| Article 51 para 1 | Risk management processes must be in place, including risk limits for AIFs.  | Article 15 |
| Articles 52 et s. | Requirements on diversification of assets, concentration of exposure, and limits on acquisition of voting rights apply. | - |
| - | Liquidity management systems must be in place.  | Article 16 |
| - | Securitisation requirements apply.  | Article 17 |
| Articles 68 et s. | Disclosure requirements apply.  | Articles 22 and 23 |
| Article 76 | Regular reports must be published regarding the issue, sale, repurchase or redemption price of the UCITS’ units. / Valuation requirements apply for each AIF managed by an AIFM.  | Article 19 |
| Article 83 | Prohibition of borrowing. There may be temporary exceptions to that principle. / Limits on leverage used by the AIFM are supervised by the competent authority.  | Article 25 |
| Article 84 | UCITS are open-ended: they must repurchase or redeem its units at the request of any unit-holder. / AIFs may be open-ended or closed-ended.  | Article 2 (2) (a) |
| Article 88 | UCITS shall not grant loans or act as a guarantor on behalf of third parties.  | - |

| **Directive 2009/65** | **Requirements applicable at manager level** | **Directive 2011/61** |
| --- | --- | --- |
| Article 6 para 1 | MCs/AIFMs must obtain prior authorisation from national authorities to acquire their “passport”. | Articles 6(1) and 7 |
| Article 6 para 2 | MCs/AIFMs may engage in investment management, administration and marketing activities. Exceptionally, they may undertake discretionary portfolio management service.  | Article 6(2) to (4) |
| Article 7 para 1 | MCs/AIFMs must have initial capital, and additional own funds depending on portfolio value. | Article 9 |
| Articles 7 and 12, para 1 | MCs/AIFMs must respect rules regarding conflict of interests. | Articles 12 (1) (d) and 14 |
| Article 8 (1) and 12 para 1 | MCs/AIFMs must insure the sound and prudent management of the management company. | Articles 8 (1) and 12 |
| Article 13 | Delegation of functions by the MCs/AIFMs is possible, provided it does not become a letter-box entity.  | Article 20 |
| Article 14 | MCs/AIFMs must act in the best interests of the fund it manages, avoid conflicts of interests.  | Article 12 |
| Articles 14a and 14b  | MCs/AIFMs must implement remuneration policies that are consistent with sound and effective risk management.  | Article 13 |
| Article 15 | MCs must establish appropriate procedures and arrangements to deal properly with investor complaints. | (professional investors - not retail, Article 43) |
| Article 18 para 1 and 4 | Any MC undertaking activities under the freedom to provide services must inform its (home) authority. | Article 33 |
| Article 19 para 4 | The MC must comply with the fund rules, the instruments of incorporation, and the prospectus*.* | Article 18 |
| Article 20 para 1 and 4 | A MC which applies to manage a UCITS established in another Member State must provide the competent authorities of the UCITS home Member State with documentation regarding the depositary and delegation arrangements. | Article 33 |
| Article 22 | A MC must ensure that a single depositary is appointed. | Article 21 para 1 |
| Article 25 para 2 | In carrying out their [respective] functions, the MC/AIFM [and the depositary] must act fairly and in the interest of the fund and its investors.  | Article 21 para 10 |
| Article 51 para 1 | Risk management processes/systems must be in place.  | Article 15 |
| Article 56 para 1 | A MC must not acquire any shares carrying voting rights which would enable it to exercise significant influence over the management of an issuing body. / Additional obligations apply in case of acquisition of control by an AIF managed by an AIFM.  | Articles 26 to 30 |
| Article 68 para 1 and 2, 69 para 1,2,3,4; 70 para 1 and 2,3,71,72 | A MC/AIFM must disclose information to investors. | Articles 22 and 23 |
| Article 83 para 1 | The MC is prohibited from borrowing or granting loans. / Limits on leverage used by the AIFM are supervised by the competent authority.  | Article 15(4) and Article 25 |