167 Fleet Street, London EC4A 2EA, UK
+44 (0)20 7822 8380
info@aima.org

Banca D'Italia
Servizio Regolamentazione e Analisi Macroprudenziale
Divisione Regolamentazione II
Via Nazionale, 91
00184 Roma
Italia

By courier
By email to servizio.ram.regolamentazione2@bancaditalia.it

12 September 2016

Dear Sir/Madam,

The Alternative Credit Council's comments on the Bank of Italy's draft rules on loan origination and direct lending by credit funds

The Alternative Credit Council[1] welcomes the opportunity to submit its comments and suggestions in relation to the materials published by the Bank of Italy on its website in July 2016 for the purpose of launching a public consultation (the 'Public Consultation') on, *inter alia*, the draft rules on loan origination and direct lending by credit funds (the 'Draft Rules') to be incorporated in the Bank of Italy regulation on collective asset management (*Regolamento sulla gestione collettiva del risparmio*) of 19 January 2015 (the 'BoI Regulation').

Please note that (i) you will receive this note in Italian from Mario Lisanti, partner of Norton Rose Fulbright Studio Legale, who has been instrumental in preparing the substance of this note for us; (ii) the comments/statements set out in this letter should

[1] The AIMA Alternative Credit Council – a group of senior representatives of alternative asset management firms – was established to provide direction on the developments and trends in the alternative and private credit strategy space, with a view to securing sustainable development of the Sector.

The ACC is the sole global trade association representing the interests of the private credit and non-bank finance participants in asset management. Its main activities comprise of though leadership, research, education, high-level advocacy, and policy guidance.

not to be considered exhaustive and conclusive legal analysis of the relevant matters, and (iii) we, as well as ACC members and Mario Lisanti, are available to discuss further any of the matters dealt with in this letter, in a conference call or in a meeting or in any other manner that you think fit.

Preliminary queries

The objective of the Draft Rules is to implement Article 46-ter of Legislative Decree No. 58 of 24 February 1998 (as amended and supplemented, the 'Italian Financial Act'), i.e., one of the new provisions added to the Italian Financial Act by Article 17 of Law Decree No. 18 of 14 February 2016 (the 'Law Decree').

The Law Decree was published in the Italian Official Gazette on 15 February 2016 and entered into force on 16 February 2016. It was converted into law by the Italian Parliament by passing the Law No. 49 of 8 April 2016 (the 'Final Law'), which was published in the Italian Official Gazette on 14 April 2016 and is now in full force and effect.

It is not clear whether, pending the issuance of the implementing regulations by the Bank of Italy, the new rules on EU alternative investment funds ('AIFs') set out in the Italian Financial Act, especially those relating to the new regulatory conditions subject to which EU AIFs shall be entitled to originate and make loans in Italy, may be applied in practice.

Given this uncertainty, we would appreciate if the Bank of Italy would provide their views on these crucial matters. In particular, we would welcome clarifications as to whether (i) the new requirements and restrictions are already operational, and (ii) the new regime set out in Article 46-ter of the Italian Financial Act covers, in addition to the origination and advancing of new loans in the Italian market, also the acquisition of loan receivables on the secondary market in Italy (e.g. through a transfer certificate or an assignment agreement).

Comments and suggestions on the Draft Rules

Our comments and suggestions on the Draft Rules are set out below:

1. **Page V.3.31/32 (risk diversification covenant for credit funds reserved to professional investors)**: We agree with the proposed change, i.e. the possibility to test the covenant by reference – also - to the "commitments" of the investors in the fund. However, we have the following concerns:

a. 10% is too low and is not in line with the thresholds set in other European jurisdictions; in some countries, there is no legal covenant on risk diversification, especially in relation to funds reserved to professional investors;

b. It is not clear what "*patrimonio*" (estate) means in this context; it would be helpful if you would could clarify this concept and/or include a definition of "*patrimonio*" for the purpose of the calculation of this covenant; and

c. We note that – under the BoI Regulation - newly-created funds are not bound by this requirement in the first six months of their life. We would suggest that this clause be deleted in full and that the risk diversification covenant be tested only as from the end of the investment period of the fund (otherwise it would be almost impossible to comply with this covenant);

2. **Page VI.4.7 (paragraph 2.1):** For a number of different reasons, credit funds often use wholly-owned subsidiaries to carry out their investments (i.e., one dedicated subsidiary per deal/investment). Please can you confirm that these structures are compliant with the Italian law requirements, i.e., that these wholly-owned subsidiaries will be allowed to lend into Italy, to the extent their parent/EU AIF meets all conditions set out under Italian law;

3. **Page VI.4.7 (paragraph 2.1(a)):** In certain EU countries credit funds do not need a formal authorisation to carry out investment and lending activities (e.g., the UK). It is unclear how this requirement may be tested and met in those cases. We would welcome your view on these matters;

4. **Page VI.4.7 (paragraph 2.1(b)):** There are some open ended funds that have very rigid and strict redemption mechanics. Would these funds be eligible to meet the relevant requirement from a substantial point of view? We would welcome your view on these matters;

5. **Page VI.4.8 (paragraph 2.1(c)):** This paragraph deals with the "equivalence condition", i.e., the laws of the home country of the EU AIF on matters such as risk mitigation and risk diversification, including limitations on the leverage ratio, must be equivalent to the Italian law provisions that govern the same matters and apply to the domestic AIFs that invest in loans; equivalence may be assessed also by reference to specific provisions set out in the by-laws or other constitutional documents of the EU AIF, to the extent that compliance with those provisions is monitored by the competent supervisory authority of the home country of the EU AIF. Please can you clarify if, when testing the equivalence requirement, partial discrepancies between the Italian law restrictions, on the one side, and the foreign laws or the fund documents, on the other side, will be allowed (e.g., is any

headroom/deviation allowed in relation to the leverage ratio caps?). Italian law requires that the loans, in which the credit fund invests, cannot have a maturity date falling after the final expiry date of the fund. We note that this requirement is not present in most European jurisdictions and is problematic from an operational point of view (what if the final maturity date of the loan is postponed? Is the fund forced to sell the asset in these situations?). Please can you make this requirement not applicable to EU AIFs wishing to lend into Italy by including a specific carve out in the Draft Rules;

6. **Page VI.4.8 (paragraph 2.2(1) and 2.2(2)):** As noted earlier, in certain EU countries' credit funds do not need a formal authorisation to carry out lending activities (e.g., the UK). It is unclear how these documents may be produced in those cases. We would welcome your view on these matters; and

7. **Page VI.4.8 (paragraph 2.2(4)):** Producing legal opinions may be a formal and fairly expensive requirement. Can a confirmation letter be produced by the legal advisers or the AIFM or the EU AIF itself (having taken appropriate legal advice)?

Comments and suggestions on the Centrale Rischi

Under Article 46-ter, third paragraph, of the Italian Financial Act, the Bank of Italy has the discretion to request that (i) the EU AIFs investing in loans in Italy participate in the risk database maintained by the Bank of Italy ('Centrale dei Rischi') and (ii) this participation is achieved through a bank or a financial intermediary listed in the roll (albo) under Article 106 of the Italian Banking Act.

In the context of the Public Consultation, we have noted that the Bank of Italy has made clear that it does intend to request that also EU AIFs investing in loans in Italy participate in the *Centrale dei Rischi* ('CR'). In relation to the queries posed by the Bank of Italy on these matters, we note as follows:

1 We confirm that participation in the CR may be problematic and cumbersome for foreign asset managers; in fact, these managers will need to draft and submit documents in Italian and will have to incur additional costs to comply with these requirements;

2 A potential solution would be, as also suggested by the Bank of Italy, to set a *de minimis* threshold (in terms of volume of loans per year) under which the participation in the CR would not be mandatory; for instance, a foreign asset manager would be subject to CR filing obligations only if the principal amount of all loans made to Italian borrowers by EU AIFs managed by it were, in the aggregate, higher than a given amount (e.g., euro 300 million).

It is not clear to us how the indirect participation in the CR (i.e., through a bank or a financial intermediary listed in the roll (*albo*) under Article 106 of the Italian Banking Act) would work. Please can you clarify these matters.

We hope you find our comments useful and would be more than happy to answer any questions you may have in relation to this letter.

We have also enclosed/attached a copy of AIMA's recently published paper entitled *Financing the Economy 2016*, which focuses on the value alternative lenders deliver to borrowers and investors. We hope that you will find this to be of interest.

Yours sincerely,

Jiří Król
Deputy Chief Executive Officer
Global Head of Government Affairs