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Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Capital requirements

Additional Legal Reference
Directive 2009/65/EC of the European Parliament and of the Council (UCITS)

Subject Matter
Initial capital and additional own funds

Question
Are internally managed AIFs and self-managed UCITS investment companies required to maintain initial capital and additional own funds, respectively, pursuant to Article 9 of AIFMD and Articles 7 and 29 of the UCITS Directive, that are kept separate from the collective investment undertaking's assets, meaning that the initial capital and the additional own fund should not be included in the fund's net asset value (NAV)?

ESMA Answer

18-06-2024

Original language

Answer provided by the European Commission

Yes. Internally managed AIFs and self-managed UCITS investment companies shall adopt procedures and systems to ensure compliance at all times with the requirements related to own funds under the UCITS and AIFM Directives.

As explained in recital 23 of AIFMD, minimum capital requirements imposed on AIFMs pursuant to Article 9 aim to “ensure the continuity and the regularity of the management of AIFs provided by an AIFM and to cover the potential exposure of AIFMs to professional liability in respect of all their activities”. Article 11(c) of AIFMD provides that the competent authorities of the home Member State of the AIFM may withdraw the authorisation issued to an AIFM where that AIFM no longer meets the conditions under which authorisation was granted, including as regards own funds. Recital 9 and Article 29 of the UCITS Directive mirror AIFMD requirements.

Article 31 of the UCITS Directive and Article 18 of AIFMD demonstrate the differences in affectation and purpose between an investment company’s own funds and its assets, as they require investment companies to have adequate internal control mechanisms, including rules for the holding or management of investments in financial instruments in order to invest their own funds, which should be separate from assets of the investment company that should be invested according to the instruments of incorporation and the investment policy of that investment company.

As a result, an investment company’s own funds should be neither invested in accordance with the funds’ investment strategy nor distributed to the redeeming investors, but instead they should be preserved to cover exposures from the investment company’s professional liability and they should always remain within the limits of the minimum capital requirements.

On the contrary, the assets of UCITS and AIFs should be invested according to the UCITS' or AIF's investment policy and objectives (Article 4(1)(a), 18(1) of AIFMD, Article 60(2) of Commission Delegated Regulation 231/2013, Article 1(2)(a), 5(2), 51(2) and 30 of UCITS D, Article 9(2) of Commission Directive 2010/43/EU).

The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.