

PRESS RELEASE

ESMA seeks views on future rules for alternative investment fund managers

ESMA publishes today a consultation paper (ESMA/2011/209) setting out its proposals for the detailed rules underlying the Alternative Investment Fund Managers Directive (AIFMD). This is in response to the request for assistance which the European Commission sent to ESMA's predecessor, CESR, in December 2010. ESMA has to deliver its final advice to the Commission by 16 November 2011.

Steven Maijoor, Chair of ESMA, said:

"Delivery of the advice to the Commission on the AIFMD is one of ESMA's top priorities for 2011 and today's publication is a crucial step in achieving that objective. Indeed when finalised, these rules will increase transparency for investors and supervisors, and will significantly contribute to tackling the potential build-up of systemic risk. Input from all stakeholders to this consultation will be particularly vital for ESMA in shaping the final rules that will govern the European alternative investment fund industry."

The proposals published in ESMA's consultation paper (CP) today cover three broad areas:

1. General provision for managers, authorisation and operating conditions

As well as clarifying certain issues regarding the thresholds that determine whether a manager is subject to the Directive, this section includes such topics as valuation and delegation. On the issue of valuation, ESMA sets out draft advice on criteria for the proper valuation of assets by identifying general principles that should guide managers in developing and implementing policies and procedures for a proper and independent valuation of the assets of an alternative investment fund (AIF). As these are general principles, they can be adapted to the types of asset in which an AIF may invest.

As far as delegation is concerned, ESMA has been asked to identify the criteria for objective reasons justifying a delegation. Here the proposals set out two options for consultation: the first takes a flexible approach according to which a delegation can be justified where the manager can demonstrate that the delegation is done for the purposes of a more efficient conduct of the management of the fund; while the second option sets out an indicative, non-exhaustive list of criteria to be used when making the assessment.

2. Governance of AIFs' depositaries

This part of the advice sets out ESMA's proposals on the framework governing depositaries of AIFs. In addition to the advice on the content of the written contract evidencing the appointment of the depositary and the clarification on the depositary's oversight duties, ESMA makes proposals on the key issue of depositary liability. The first element of this relates to the circumstances in which a financial instrument held in custody should be considered as 'lost'; this assessment is crucial in determining whether a depositary



must subsequently return an asset. ESMA's proposals identify three conditions, at least one of which would have to be fulfilled in order for an asset to be considered lost. Another important concept which ESMA's advice aims to clarify relates to which events would constitute external events beyond the reasonable control of the depositary. Finally, the advice considers options for the objective reasons that would allow a depositary to contractually discharge its liability, such as legal constraints that give the depositary no choice but to delegate its custody duties to a third party.

3. Transparency requirements and leverage

One of the key objectives of the AIFMD is to help prevent the build-up of systemic risk. With this aim in mind, ESMA's proposals cover several issues related to leverage e.g. the definition of leverage, how it should be calculated and in what circumstances a competent authority should be able to impose limits on the leverage a particular manager may employ. Given the wide range of funds covered by the Directive and the diverse nature of the assets in which such funds invest, ESMA considers it appropriate to prescribe two different calculation methodologies for the leverage (commitment and gross methods) as well as a further option that can be used by managers on request and subject to certain criteria.

The AIFMD also aims to increase transparency of alternative investment funds and managers. In this context, ESMA's advice specifies the form and content of information to be reported to competent authorities and to investors. The advice also addresses the content and format of the annual report to be prepared for each fund. In this regard, ESMA's approach has been to recognise the existence of national and international accounting standards already in place and to develop a compatible framework.

Next steps

Stakeholders have two months in which to give their feedback to ESMA. In light of the feedback received from respondents by the deadline of 13 September, ESMA will finalise its advice to the Commission in time for submission by 16 November.



Notes for editors

1. In April 2009, the European Commission adopted a proposal for a Directive on Alternative Investment Fund Managers (AIFMD) with the objective of creating a comprehensive and effective regulatory and supervisory framework for AIFMs at European level.
2. On 11 November 2010, a political agreement was reached by the European Parliament and the Council of Ministers on the legislative text. Following this political agreement, on 2 December 2010 the Commission sent a provisional request for technical advice on Level 2 measures concerning the future Directive to the Committee of European Securities Regulators (CESR). The provisional character of this mandate arose from the fact that at that time, the AIFMD was still awaiting its final adoption. The final Directive (2011/61/EU) has since been adopted and published in the Official Journal of the European Union.
3. Due to the significant number of implementing measures foreseen by the Directive, the provisional request is divided into four parts: Part I covers general provisions, authorisation and operating conditions; Part II relates to implementing measures regarding the depositary; Part III covers transparency requirements and leverage; and Part IV concerns implementing measures on supervision. The document published today sets out ESMA's draft advice on most of the elements covered under Parts I to III of the Commission's request.
4. Certain of the implementing measures foreseen under Part IV of the request are less urgent as they relate to the introduction of a passport for third country entities, which would not be operational until at least two years following the transposition deadline for the AIFMD. However, the co-operation arrangements referred to in the implementing measures under Articles 34(1), 36(1) and 42(1)(b) have to be in place as from the first day the national laws transposing the AIFMD take effect in 2013. ESMA has been working on developing draft proposals for these implementing measures, which will be contained in a separate consultation to be published later in the summer, with a view to submitting the advice to the Commission by 16 November.
5. ESMA is an independent EU Authority that was established on 1 January 2011 according to EU Regulation No. 1095/2010 as published on December 15, 2010, in the Official Journal of the European Union (L 331/84). The Authority contributes to safeguarding the stability of the European Union's financial system by ensuring the integrity, transparency, efficiency and orderly functioning of securities markets, as well as enhancing investor protection. In particular, ESMA fosters supervisory convergence both amongst securities regulators, and across financial sectors by working closely with the other European Supervisory Authorities competent in the field of banking (EBA), and insurance and occupational pensions (EIOPA).
6. ESMA's work on securities legislation contributes to the development of a single rule book in Europe. This serves two purposes; firstly, it ensures the consistent treatment of investors across the Union, enabling an adequate level of protection of investors through effective regulation and supervision. Secondly, it promotes equal conditions of competition for financial service providers, as well as ensuring the effectiveness and cost efficiency of supervision for supervised companies. As part of its role in standard setting and reducing the scope of regulatory arbitrage, ESMA strengthens international supervisory co-operation. Where requested in European law, ESMA undertakes the supervision of certain entities with pan European reach.



7. ESMA also contributes to the financial stability of the European Union, in the short, medium and long-term, through its contribution to the work of the European Systemic Risk Board, which identifies potential risks to the financial system and provides advice to diminish possible threats to the financial stability of the Union. ESMA is also responsible for coordinating actions of securities supervisors or adopting emergency measures when a crisis situation arises.
8. ESMA replaced the Committee of European Securities Regulators (CESR), an advisory body comprised of EU securities regulators that advised the European Commission from 2001 to 2010 on policy issues around securities legislation.

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