

PRESS RELEASE

ESMA consults on future rules for alternative investment fund managers and the treatment of third country entities

ESMA publishes today a consultation paper (ESMA/2011/270) setting out its proposals for the detailed rules on supervision and third country entities underlying the Alternative Investment Fund Managers Directive (AIFMD). These rules reflect the global nature of the alternative investment management industry and the need to put in place a framework for entities outside the EU. Today's publication, which complements the draft advice published for consultation in July (ESMA/2011/209), is in response to the European Commission's request for assistance 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:

"The third country and supervisory co-operation aspects of the AIFMD are a key element in the overall framework. It is important that the co-operation arrangements with authorities outside the EU work smoothly and allow for a comprehensive exchange of information, both from the perspective of day-to-day supervision by competent authorities as well as systemic risk. We particularly look forward to receiving input from third country authorities in response to our proposals."

The proposals published in ESMA's consultation paper today cover three broad areas.

- **Supervisory co-operation and exchange of information**

With a view to ensuring the smooth functioning of the new requirements, the AIFMD puts in place an extensive framework regarding supervisory co-operation and exchange of information. ESMA's draft advice focuses on the relationships between EU competent authorities and third country authorities. ESMA envisages that the arrangements should take the form of written agreements allowing for exchange of information for both supervisory and enforcement purposes. The agreements should also impose a duty on the third country authority to assist the relevant EU authority where it is necessary to enforce EU or national legislation. Finally, ESMA considers it important that the arrangement make provision for exchange of information for the purposes of systemic risk oversight.

- **Delegation of portfolio or risk management functions to third country entities**

This part of the advice sets out ESMA's proposals on the additional requirements to be applied when alternative investment fund managers delegate the portfolio or risk management functions to an undertaking in a third country. The proposals focus on the content of the written agreement to be put in place with the competent authority of the third country, which under ESMA's proposals would have to allow for access to information, the possibility of on-site inspections of the entity to which functions are delegated and the carrying out of enforcement actions in the case of a breach of the regulations.



- **Assessment of equivalence of third country depositary frameworks**

Under the AIFMD, the depositary of the fund may be established in a third country subject to certain conditions. In this section of the advice, ESMA sets out its proposals on the elements to be taken into account when assessing whether the prudential regulation and supervision applicable to a depositary established in a third country:

- i) has the same effect as the provisions of the AIFMD; and
- ii) can be considered as effectively enforced.

ESMA has identified a number of criteria for this purpose, such as the independence of the relevant authority, the requirements on eligibility of entities wishing to act as depositary, equivalence of capital requirements and the existence of sanctions in the case of violations.

Concerning the arrangements to be put in place with third country authorities in general, ESMA notes its preference for a single agreement to be negotiated by ESMA in each case in order to ensure consistency and avoid a proliferation of bilateral agreements. ESMA has also identified two documents produced by the International Organization of Securities Commissions (IOSCO) as benchmarks for the written agreements.

Next steps

Responses to the consultation are requested by 23 September, in order to ensure ESMA can finalise its advice to the Commission by the deadline of 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 Part IV of the Commission's request. ESMA's advice on Parts I to III was contained in the consultation paper published on 13 July 2011 (ESMA/2011/209), responses to which are sought by 13 September.
4. 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).
5. 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.
6. 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.
7. 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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