

PRESS RELEASE

ESMA details future rules for alternative investment fund managers

ESMA publishes today its final advice (ESMA/2011/379) on the detailed rules underlying the Alternative Investment Fund Managers Directive (AIFMD). The rules proposed by ESMA will establish a comprehensive framework for alternative investment funds, their managers and depositaries. They are also designed to help achieve the AIFMD's objective of increased transparency and tackling systemic risk, ultimately contributing to a more sound protection of investors. ESMA's advice follows a 2010 request by the Commission, originally sent to ESMA's predecessor, CESR, asking ESMA to deliver its final advice by 16 November 2011.

Steven Maijoor, Chair of ESMA, said:

"The AIFMD was a major piece of legislation designed to implement lessons learned from issues behind the financial crisis. By increasing transparency for both investors and supervisors and helping tackle the potential build-up of systemic risk, the new rules will put in place a comprehensive and balanced regime for the alternative fund sector. ESMA's advice is a crucial element in the establishment of that new framework and was one of our top priorities for 2011."

Today's rules will also bring greater clarity on the application of the thresholds that determine the scope of the AIFMD. The provisions foreseen on operating conditions, meanwhile, will ensure stronger organisational requirements and rules of conduct for alternative investment fund managers (AIFMs). These are complemented by proposed reporting requirements to investors and regulators and the rules applicable on leverage. For depositaries of alternative investment funds (AIFs), the advice sets out clear duties on such issues as monitoring the cash flows of the AIF and the consequences when an asset held in custody is lost. In addition, the advice establishes the framework under which third country firms and managers will be able to operate.

ESMA's advice covers four broad areas:

1. General provisions for managers, authorisation and operating conditions

The first part (p.16-135) of the advice clarifies the operation of the thresholds that determine whether a manager is subject to the Directive. ESMA proposes to require AIFMs to have additional own funds and/or professional indemnity insurance to cover risks arising from professional negligence. Many of the rules in this section, such as on conflicts of interest, record keeping and organisational requirements are based on the equivalent provisions of the MiFID and UCITS frameworks.

2. Governance of AIFs' depositaries

This part of the advice (p. 136-187) sets out the framework governing depositaries of AIFs. Key issues include the criteria for assessing whether the prudential regulation and supervision applicable to a depositary established in a third country has the same effect as the provisions of the AIFMD. ESMA has identi-



fied 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 and the existence of sanctions in the case of violations.

Another crucial point is the liability of depositaries, the first element of which 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 advice proposes three conditions, at least one of which would have to be fulfilled in order for an asset to be considered lost. These are that a stated right of ownership of the AIF is uncovered to be unfounded because it either ceases to exist or never existed; the AIF has been permanently deprived of its right of ownership over the financial instruments; or the AIF is permanently unable to directly or indirectly dispose of the financial instruments. 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 clarifies the objective reasons that would allow a depositary to contractually discharge its liability.

3. Transparency requirements and leverage

One of the key objectives of the AIFMD is to help prevent the build-up of systemic risk. To help achieve this aim, ESMA's advice clarifies (p. 188-239) 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 AIFM may employ. ESMA considers it appropriate to prescribe two different calculation methodologies for the leverage (commitment and gross methods) as well as a further option (the advanced method) that can be used by managers on request and subject to certain criteria. The AIFMD also aims to increase transparency of AIFs and their managers. In this context, ESMA's advice specifies the form and content of information to be reported to competent authorities and investors, as well as of the information to be included in the annual report.

4. Third countries

With a view to ensuring the smooth functioning of the new requirements with respect to third countries, the AIFMD puts in place an extensive framework regarding supervisory co-operation and exchange of information. ESMA's advice (p. 240-246) envisages that the arrangements between EU and non-EU authorities should take the form of written agreements allowing for exchange of information for both supervisory and enforcement purposes.

Next steps

ESMA was asked to submit its advice to the Commission by 16 November. It is now for the Commission to prepare the implementing measures on the basis of this advice.



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 alternative investment fund managers (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) was published in the Official Journal of the European Union on 1 July 2011.
3. Due to the significant number of implementing measures foreseen by the Directive, the provisional request was 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 final report published today sets out ESMA's advice on all four parts of the Commission's request.
4. ESMA consulted on its draft advice in two stages. The first stage was the publication of a consultation paper (CP) in July covering Parts I to III of the Commission's request (ESMA/2011/209), followed by a second CP in August that addressed Part IV of the request (ESMA/2011/270). ESMA received 104 and 49 responses to the two CPs respectively (the non-confidential responses are available on ESMA's website¹). Open hearings on the two consultations were held at the ESMA premises in Paris; the first on Friday 2 September, the second on Monday 26 September.
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.

Further information:

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