

Mr Gabriel Bernardino
Chairman
EIOPA
Westhafenplatz 1
60327 Frankfurt am Main
Germany

Ref: Questions raised by EIOPA on the interpretation of the AIFMD

Dear Mr Bernardino,

Under section 11.5.2. of EIOPA's second set of advice to the European Commission on specific items in the Solvency II Delegated Regulation (EIOPA-BoS-18/075), EIOPA addressed several questions to ESMA with respect to the provisions of the Alternative Investment Fund Managers Directive (AIFMD)¹ and its implementing measures. These queries can be summarised as follows:

1. Are Alternative Investment Funds (AIFs) that use
 - a) borrowing arrangements pursuant to Article 6(4) of Commission Delegated Regulation (EU) No 231/2013²
 - b) derivative instruments pursuant to Article 8(7) of Commission Delegated Regulation (EU) No 231/2013considered as 'leveraged' under the AIFMD?
2. Are AIFs that are managed by AIFMs as defined in Article 3(2) of the AIFMD (often referred to as "registered" or "sub-threshold" AIFMs) to be considered as 'AIFs' as defined in Article 4(1)(a) of the AIFMD?

¹ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1–73).

² Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (OJ L 83, 22.3.2013, p. 1–95).

With regard to question 1 a), Article 6(4) of the Commission Delegated Regulation (EU) No 231/2013 lays down the general provisions on the calculation of leverage and states that:

AIFMs shall exclude borrowing arrangements entered into if these are temporary in nature and are fully covered by contractual capital commitments from investors in the AIF.

Therefore, ESMA is of the view that AIFs using borrowing arrangements which comply with these conditions should be considered unleveraged.

With regard to question 1 b), it is worth noting that the AIFMD does not include formal legal definitions of the notions 'leveraged AIFs' or 'unleveraged AIFs'. The Commission Delegated Regulation (EU) No 231/2013 sets out that in order to receive appropriate information for monitoring systemic risks and to gain a complete picture of the use of leverage, information about the exposure of AIFs should be provided to competent authorities and investors both on a gross and on a commitment method basis and all AIFMs should therefore calculate exposure using both the gross and the commitment method. The gross method gives the overall exposure of the AIF whereas the commitment method gives insight in the hedging and netting techniques used; therefore both methods shall be seen in conjunction and provide valuable information to national competent authorities and ESMA³. In this context, recital 11 of the Commission Delegated Regulation (EU) No 231/2013 states the following:

In order to ensure a uniform application of AIFM obligations to grant an objective overview of the leverage used, it is necessary to provide two methods to calculate the leverage. As it results from market studies, the best results can be achieved by combining the so-called 'gross' and 'commitment' methods.

This principle is reflected in the legal text of the Commission Delegated Regulation (EU) No 231/2013 which provides in Article 6 that leverage of an AIF shall be expressed as the ratio between the exposure of an AIF and its net asset value and that AIFMs shall calculate the exposure of the AIFs managed in accordance with the gross method as set out in Article 7 and the commitment method as set out in Article 8.

Consequently, the gross method laid down in Article 7 of the Commission Delegated Regulation (EU) No 231/2013 does not exclude currency hedging for the purposes of calculating exposure, whereas pursuant to Article 8(7) financial derivative instruments used for currency hedging purposes are excluded from the calculation of exposure under the commitment method provided that they do not add any incremental exposure, leverage or other risks.

With regard to question 2, AIFMs below the thresholds set out in Article 3(2) of the AIFMD are subject to registration with the competent authorities of their home Member State and shall provide the information set out in Article 3(3). However, national rules may impose stricter requirements (e.g. the full AIFMD authorisation regime). Notwithstanding the aforesaid, all

³ See recital 12 of the Commission Delegated Regulation.

collective investment undertakings managed by these managers should be considered as 'AIF' provided that they meet the definition set out in 4(1)(a) of the AIFMD.

Yours sincerely,

(Signed)

Steven Maijor