

European Union: ESMA updates the AIFMD Q&A on reporting to national competent authorities by non-EU AIFMs

The 2011 Alternative Investment Fund Managers Directive (AIFMD) is a regulatory framework for alternative investment fund managers (AIFMs), including managers of hedge funds, private equity firms and investment trusts.¹ With a few exceptions, the AIFMD covers the management, administration and marketing of alternative investment funds (AIFs). An AIF is a ‘collective investment undertaking’ that is not subject to the UCITS regime. It comprises *inter alia* hedge funds, private equity funds, retail investment funds, investment companies and real estate funds. The AIFMD provides EU-wide harmonised rules for monitoring and supervising risks posed by AIFMs and the AIFs they manage, and for strengthening the internal market in alternative funds. It also includes specific requirements for firms acting as a depositary for an AIF. The AIFMD pursues three main objectives:

- to improve supervisory practices among competent authorities in the European Economic Area (EEA) to support timely and pre-emptive action to prevent market instability and the build-up of systemic risk in the European financial system;
- to enhance investor protection by imposing new depositary standards and enhanced transparency through new investor disclosure rules and mandatory reporting to competent authorities; and
- to further efficiency and cross-border competition by deregulating national barriers and creating level playing fields through harmonised rules on an EEA-wide passport for full-scope EEA AIFMs to market and manage AIFs.

The AIFMD includes the following requirements:

- the authorisation of the fund manager (full scope AIFM) or, alternatively, registration subject to a lighter regime for AIFMs managing AIFs with ‘assets under management’ below certain thresholds;
- conduct of business (fair treatment of investors, conflicts of interest, remuneration, risk management, valuation, disclosure to investors and regulators);
- regulatory capital – initial capital, ‘own funds’ and professional indemnity insurance requirements;
- the safekeeping of investments (via the mandatory appointment of depositaries and custodians);
- controls over delegation of certain tasks, including portfolio management and risk management;
- the marketing of AIFs to professional investors within the EEA; and
- the use of leverage by AIFMs for all AIFs under management. EEA regulators will have new powers to intervene, placing restrictions on leverage and other supervisory restrictions where needed to avoid the build-up of systemic risk.

Since 2014, the European Securities and Markets Authority (ESMA) has published successive versions of a questions and answers paper (Q&A) on the application of the AIFMD. The Q&A aims to promote common supervisory approaches in the application of the AIFMD and offer clarity as to the content of the AIFMD rules to AIFs and AIFMs. On 16 December 2016, the ESMA published the latest version of the Q&A. It amends Section III on “Reporting to national competent authorities (NCAs) under Articles 3, 24 and 42”. In addition, it details rules relating to the reporting to be performed by non-EU AIFM under National Private Placement Regime (NPPR). According to the Q&A, non-EU AIFMs which market AIFs without passport in an EU Member State and report information to the national competent authority of that Member State under Article 42 of the AIFMD (which spells out the minimum requirements for NPPR) must only take into account the AIFs marketed in the considered Member State for the purpose of the reporting. ESMA points out that, when the Member State applies ESMA’s opinion on collection of additional information under Art. 24(5) of the AIFMD², AIFMs need also to report information on non-EU master AIFs not marketed in the EU that have an EU feeder AIFs or non-EU feeder AIFs marketed in the EU under Article 42 of the AIFMD.

ESMA specifies that this obligation similarly apply to non-EU AIFMs if the master AIF established in the EU is not marketed in the EU. As a consequence, they must report information about the master AIF to the NCA. The updated Q&A on the application of the AIFMD is available under the following web [link](#).

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 1095/2010² Opinion on collection of information for the effective monitoring of systemic risk under Article 24(5), first sub - paragraph, of the AIFMD, October 1, 2013 (ESMA /2013 / 1340)