



Legal Update

ESMA Updates AIFMD Q&A

The European Securities and Markets Authority (ESMA) recently updated its Q&A on the Alternative Investment Fund Managers Directives (AIFMD) on 13 June 2023. The clarifications made by ESMA relate to AIFM passporting rules, AIF cessation requirements, leverage calculations and pre-marketing.

Background

With a stated primary goal of protecting investors, the AIFMD is EU legislation that applies to alternative investment fund managers and sets standards for marketing, governance, remuneration policies, risk monitoring and reporting, as well as overall accountability and other issues.

Passporting requirements

ESMA has clarified in Question 6 that when an AIFM intends to provide the activities or services for which it has been authorised in a host Member State, it may not passport only the ancillary functions that an AIFM may additionally perform, referred to in point (2) of Annex I to the AIFMD, without also passporting investment management functions. Marketing is an example of such an ancillary service.

It was also clarified that pursuant to Article 33(2) point (b) AIFMD, an AIFM intending to manage EU AIFs established in another Member State must communicate to the competent authorities of its home Member State a program of operations referring to the services it intends to provide and the EU AIFs it intends to manage, which must include investment management services foremost among such services.

Pre-marketing

Question 9 of the Q&A clarifies that where an investment strategy is developed by a third party (the fund initiator), the obligations set out in Article 30a AIFMD apply. Therefore, pre-marketing can be conducted by the EU AIFM or by an authorised third party on its behalf and that third party will also be subject to the pre-marketing conditions set out in Article 30a.

Cessation requirements

Question 11 clarifies that even where there are no investors from a host Member State, AIFMs wishing to de-notify the arrangements previously made for marketing the units or shares of EU AIFs they manage there must still comply with the obligations set out in Article 32a(1) AIFMD.

Calculating leverage

ESMA confirms in Question 8 that when calculating the leverage on an AIF those core investment policy is to invest in real estate directly or indirectly, the AIFM must include the exposure contained in financial or legal structures involving third parties controlled by that AIF under Article 6(3) of Delegated Regulation (EU) 231/2013, where these structures are specifically set up to increase the exposure directly or indirectly at the level of the AIF.

The exemption for AIFs whose core investment policy is to acquire control of non-listed companies or issuers, provided for in Article 6(3) of the Delegated Regulation, applies solely to non-listed companies provided that the AIF or the AIFM on its behalf does not have to bear the potential losses beyond its investment in the respective company or issuer. That exemption should not therefore apply to AIFs which acquire real estate assets indirectly through non-listed companies.

How can Clerkin Lynch help?

The Q&A does not constitute legal advice but rather is a helpful guide. Clerkin Lynch has a strong history of assisting with the structuring, establishment and ongoing operation of alternative investment funds in Ireland. Please contact us for a no-obligation discussion to find out more about our team and services.



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