

Financial Services and Markets

Countdown to AIFMD – ESMA final report on guidelines on key concepts of the AIFMD and update on other recent developments

The European Securities and Markets Authority ("**ESMA**") has published its final report on guidelines on key concepts of the Alternative Investment Fund Managers Directive ("**AIFMD**" or "**the Directive**"). The final report contains both the feedback statement to ESMA's December 2012 consultation and the final version of the guidelines. ESMA's final report is available [here](#). The guidelines will now be translated into the official languages of the EU and the final texts will be published on ESMA's website. National Member State regulators must confirm to ESMA whether they comply or intend to comply with the guidelines (and give reasons for non-compliance) within two months of the date of the guidelines' publication in translation.

There have been a number of other developments in recent weeks. These include the approval by ESMA of a number of supervisory co-operation agreements between EU national regulators and non-EU regulators, the publication by ESMA of a consultation paper on reporting obligations under the AIFMD and the issue by the FCA of a draft AIFM application pack. With just under seven weeks to go until implementation, there is much to be done by firms which need early authorisation in order to stay up-to-date and on track.

ESMA final report on guidelines on key concepts of the AIFMD – what is an alternative investment fund?

On 23 February 2012, ESMA published a discussion paper on key concepts of the AIFMD which was followed, on 19 December 2012, by the publication of a consultation paper on guidelines on key concepts of the AIFMD. The consultation paper set out formal proposals for guidelines intended to ensure common, uniform and consistent application of the concepts of an alternative investment fund ("**AIF**"). ESMA's final report, published on 24 May 2013, sets out the final text of these guidelines, together with a feedback statement to its December consultation.

The guidelines, which apply to both AIFMs and national regulators, explain the meaning of 'collective investment undertaking', 'raising capital', 'number of investors' and 'defined investment policy'. Whilst the final guidelines are, in most respects, consistent with the draft of the guidelines contained in ESMA's December consultation paper (discussed in detail in our briefing note entitled '*Countdown to AIFMD – two ESMA papers on scope*' (available [here](#))), there have been the following material changes:

- The guidelines are now clearer that, in order for there to be capital raising, this must form part of a 'commercial activity'.
- ESMA has removed the guidelines which suggested that seeking co-investment from members of the governing body or risk-taker employees of the undertaking or its manager (such as members of a private equity manager's investment committee) would not amount to capital raising (although this must still be part of a 'commercial activity').
- ESMA has made clear that, when determining whether or not an undertaking has a defined investment policy, leaving full discretion to make investment decisions to the legal person managing the undertaking does not necessarily mean that there is no defined investment policy and, "*should not be used as a mean[s] to circumvent the provisions of the AIFMD*".

Whilst publication of the final guidelines is helpful, UK firms are unlikely to be able to reach new conclusions until the FCA publishes its final perimeter guidance. It is understood that the FCA intends to publish both this guidance, and the final rules necessary for implementation, shortly.

Whilst it had been intended that the FCA would publish a third consultation paper on the AIFMD ("**CP 3**") in May 2013, the FCA does not now expect to publish CP 3 until September 2013. In particular, the FCA does not propose to issue any further guidance

on pay regulation before 22 July 2013. This will make life difficult for those firms which seek authorisation prior to the publication of final FCA guidance on pay regulation; the rules on pay regulation will apply once the firm has applied for authorisation but such firms will not have the benefit of final FCA guidance in this area.

ESMA approves form of supervisory co-operation agreements

On 30 May 2013, ESMA issued a press release announcing that it has approved the form of 34 supervisory co-operation agreements between EU national regulators and non-EU regulators, including the United States' Securities and Exchange Commission (but not, we understand, the Commodity Futures Trading Commission), the Guernsey Financial Services Commission, the Jersey Financial Services Commission and the Swiss Financial Market Supervisory Authority. ESMA is continuing to negotiate co-operation agreements with further third country regulators in advance of the 22 July 2013 deadline. ESMA's press release is available [here](#).

These co-operation agreements are a key element in allowing EU national regulators to supervise efficiently the way in which non-EU AIFMs comply with the AIFMD, and are a pre-condition in allowing non-EU AIFMs access to EU markets. Whilst ESMA has negotiated the co-operation agreements centrally, they take the form of a bilateral Memorandum of Understanding which must be signed by each EU securities regulator and the relevant non-EU regulator. Once signed, the agreements will apply from 22 July 2013 and will be made available on ESMA's website.

Although the approval by ESMA of these co-operation agreements is to be welcomed, and the FCA has announced that it has signed these agreements, it is currently unclear to what extent they have also been signed by other EU and non-EU regulators.

ESMA publishes consultation paper on guidelines on reporting obligations under Article 3 and Article 24 of the AIFMD

Articles 3 and 24 of the Directive require AIFMs to report to the national competent authority ("NCA") of their home Member State a list of information on the portfolio of AIFs they manage or market in the EU. The Level 2 Regulation provides further details on the frequency of reporting and sets out, in Annex IV, a reporting template which AIFMs will have to use to comply with their reporting obligations. Whilst this reporting template contains detailed information, ESMA is of the view that there is a need to supplement this information with further guidelines. ESMA also believes that the format of the information sent to NCAs by AIFMs should be standardised so as to facilitate the exchange of information between NCAs.

On 24 May 2013, ESMA published a consultation paper setting out draft guidelines on reporting obligations. Whilst the guidelines apply only to NCAs, they are intended to provide AIFMs with clarity on the information they will have to report to the relevant NCA. The guidelines apply to NCAs on a "comply or explain" basis. The consultation paper is available [here](#). The consultation closes on 1 July 2013.

The guidelines establish reporting periods (see below) and explain how AIFMs will be required to report on: specific types of AIFs (including master and feeder AIFs); the main instruments in which an AIF is trading; the geographic focus of the investments of an AIF; the value of turnover in each asset class over the reporting period; and an AIF's risk profile. The reporting obligations do not apply until an AIFM is authorised or registered. Reporting will be required by 31 January 2014 for those AIFMs which become authorised or registered prior to that date.

A particular concern for some AIFMs is likely to arise in respect of the proposed reporting periods. Although the Level 2 Regulation defines the frequency of reporting (quarterly, half-yearly or yearly (based on the total value of assets under management)), it does not specify reporting periods. ESMA is of the view that it is necessary to establish common reporting periods and considers that reporting periods should be aligned with the calendar year (rather than an AIFM's fiscal year or, as most of our clients would prefer, the fiscal year of each AIF). This is likely to be problematic for those managers and funds whose financial years are not aligned to the calendar year; it will be both impracticable and costly to report at dates other than existing year-end dates.

Draft FCA AIFM application pack sent to certain firms

On 31 May 2013, the FCA emailed a link to a draft AIFM application pack to those firms which have already indicated their need for early authorisation. The FCA explains that final application forms will not be available until 22 July 2013 but that it will, prior to that date, accept applications from prospective AIFMs based on the draft pack and that completing a draft application will help to ensure that authorisation under the AIFMD can be granted on or close to 22 July 2013.

Once the UK legislation implementing the AIFMD has come into force, and the final AIFM application pack is issued, the FCA will ask firms to confirm that they want it to determine their application based on the information provided in the draft application. Only at this point will the FCA consider firms to have formally applied for authorisation or a variation of permission. The FCA notes that although it will endeavour to grant authorisation under the AIFMD as close to 22 July 2013 as possible, the formal three month period (or six month period in specific circumstances) which it has under the Directive for determining applications will not officially commence until 22 July 2013.

Those firms which require authorisation from 22 July 2013 are advised to submit a draft application as soon as possible but this must be balanced with the need to ensure that applications are complete; the FCA has stated that if incomplete applications are received, it is likely that an authorisation will not be completed in time for 22 July 2013. In addition, the FCA has stated that it will

review all applications to ensure that firms do need early authorisation and, where it believes this is not the case, it will be challenging those firms.

FCA publishes draft variation of permission form for AIF depositaries

On 31 May 2013, the FCA published a draft of the variation of permission ("**VoP**") form for depositaries of AIFs, together with a new webpage relating to depositaries. The draft of the VoP form and the webpage are available [here](#). The FCA is seeking feedback on the draft form and has requested that comments should be submitted to AIFMD-Forms-Comments@fca.org.uk by 28 June 2013.

Publication of certain implementing regulations in Official Journal

Finally, on 16 May 2013, two European Commission implementing regulations required under the AIFMD were published in the Official Journal of the European Union (the "**OJ**"). They are:

- Regulation 447/2013 of 15 May 2013, which establishes the procedure for AIFMs which choose to "opt in" to the AIFMD; and
- Regulation 448/2013 also of 15 May 2013, which establishes a procedure for determining the Member State of reference of a non-EU AIFM – relevant to non-EU managers marketing non-EU AIFs in the EU from 2015 at the earliest.

Each regulation will come into force on the twentieth day following publication in the OJ and will apply from 22 July 2013.

Our other recent briefing notes on the countdown to AIFMD

[The countdown to AIFMD – \[the first\] Treasury consultation](#)

[The countdown to AIFMD - Second Treasury consultation](#)

[The countdown to AIFMD implementation: FSA consultation](#)

[The countdown to AIFMD – Second FSA consultation](#)

[Countdown to AIFMD – Level 2 Regulation](#)

[Countdown to AIFMD – two ESMA papers on scope](#)

[Countdown to AIFMD – UK Treasury's implementation Q&As](#)

[Countdown to AIFMD – UK Treasury's revised implementing Regulations](#)

For detailed advice in relation to any of the issues discussed above, or any other aspect of AIFMD, please contact any of the financial services partners named below.

Travers Smith LLP
10 Snow Hill
London EC1A 2AL

T +44 (0)20 7295 3000
F +44 (0)20 7295 3500



Margaret Chamberlain

margaret.chamberlain@traverssmith.com
+44 (0)20 7295 3233



Tim Lewis

tim.lewis@traverssmith.com
+44 (0)20 7295 3321



Jane Tuckley

jane.tuckley@traverssmith.com
+44 (0)20 7295 3238



Phil Bartram

phil.bartram@traverssmith.com
+44 (0)20 7295 3437