

## Deloitte regulatory news alert

### AIFMD key updates – hot off the press



We would like to inform you about recent important developments in the implementation of the AIFMD directive.

This publication will focus on clarification published by ESMA on the remuneration rules, the updated CSSF FAQ as well as the European Commission Q&A on MiFID services passporting.

#### 1. Remuneration

On 17 February 2014, the European Securities and Markets Authority (ESMA) published a **Questions & Answers** document to promote a common approach and practices on the application of the AIFMD. This alert provides a brief summary of the major points raised regarding remuneration rules.

##### First application of the remuneration rules

###### For AIFMs performing AIFMD activities before 22 July 2013

ESMA reiterated that AIFMs performing activities under the AIFMD before 22 July 2013 have one year to submit an application and they become subject to the relevant rules on remuneration as of the date of authorisation.

Nevertheless, the rules on variable remuneration for identified staff (under Sections XI and XII of the Remuneration Guidelines) should apply for the first time to the first full performance period following the date of authorisation. ESMA provided the following examples to ensure common application of this principle for an existing AIFM whose accounting period ends on 31 December:

- When authorisation is obtained between 22 July 2013 and 31 December 2013, the AIFMD rules on variable remuneration should apply to the calculation of payments relating to the 2014 accounting period.
- When authorisation is obtained between 1 January 2014 and 22 July 2014, the AIFMD rules on variable remuneration should apply to the calculation of payments relating to the 2015 accounting period.
- However, when application for authorisation is submitted by 22 July 2014 and authorisation is obtained after that date (including after 31 December 2014), the AIFMD rules on variable remuneration should apply to the calculation of payments relating to the 2015 accounting period.

###### For AIFMs not performing AIFMD activities before 22 July 2013

AIFMs not performing AIFMD activities before 22 July 2013 and obtaining an authorisation under the AIFMD after 22 July 2013 are subject to the same principles as described above: although they become subject to the relevant rules on remuneration as of the date of authorisation, the rules on variable remuneration for identified staff should apply first to the first full performance period following the date of authorisation.

ESMA clarified that in practice, an AIFM submitting an application for authorisation in the year N (after 22 July 2013), should apply the AIFMD remuneration regime on variable remuneration only to the calculation of payments relating to the accounting period for year N+1.

## **Remuneration rules in case of delegation of portfolio management or risk management activities**

ESMA clarified the following principles with regard to remuneration practices in delegated entities:

- “Appropriate contractual arrangements” to ensure that there is no circumvention of the remuneration rules (paragraph 18(b) of the Remuneration Guidelines) should be in place only in respect of the delegate’s identified staff with a material impact on the risk profile of the AIFs it manages as a result of the delegation, and only in respect of such delegated activities.
- In a delegation arrangement where the delegate is subject to CRD rules, the delegate can be considered to be subject to regulatory requirements that are equally as effective as those applicable under the Remuneration Guidelines, provided that the staff of these entities who are identified staff are subject to the CRD rules.

## **2. Update of CSSF FAQ document**

The CSSF published on 21 February 2014 its updated **Frequently Asked Questions (FAQ)** and gave additional clarification on the valuation of AIF assets and the disclosure of transaction costs.

### **Valuation of AIF assets**

The Law of 2013 transposing the AIFMD foresees that the AIFM may perform the valuation function itself or appoint one or several external valuers. The CSSF has confirmed as foreseen by Level 2 that the administrator of an AIF can be considered as an external valuer if they provide tailor-made valuation for individual assets, specifically those requiring subjective judgement on the value of the assets.

Accordingly, an AIFM may prefer not to consider administrators, who go no further than gathering prices from external sources as external valuers and keep the function internally within the AIFM itself.

Additionally, the AIFM may appoint the depositary as external valuer provided that the depositary has functionally and hierarchically separated its depositary functions from its task as external valuer.

### **Transaction costs**

The CSSF confirms that AIFs established under Part II of the Law of 2010 must disclose transaction costs in their financial reports following Schedule B of the Annex I of this Law.

### 3. MiFID services passporting

The European Commission, in its Q&A published on 27 March 2013, clarifies that an AIFM authorization would be incompatible with an authorization for a credit institution or for a firm subject to the Directive 2004/39/EC (a MiFID firm). Nonetheless, the AIFMD set forth the possibility for an AIFM to perform non-core services comprising:

- (i) investment advice;
- (ii) safe-keeping and administration in relation to shares or units of collective investment undertakings;
- (iii) reception and transmission of orders in relation to financial instruments.

The question hence raised by market players was whether such services may benefit from an EU passport. The position of the European Commission in its Q&A was that the AIFM passport only applies to management and marketing activities, and not to these non-core activities.

This position has since been challenged, in particular in the United Kingdom and in France, and on 12 February 2014, the **Financial Conduct Authority (FCA)** published an announcement on its website relating to the ability to passport these non-core services. The FCA explains that this decision follows the agreement reached during the recent EU negotiations on the proposed revision of the Markets in Financial Instruments Directive (MiFID 2). This agreement concerns the introduction of an amendment to Article 33 of the AIFMD and will make explicit that the right to passport AIFM services includes the non-core services.

We should stress that, up until now, the European Commission has not officially adopted a revised position and ESMA has not confirmed the FCA position, however it is likely that this opinion will be shared very soon by other EU regulators.

We trust this information is of assistance and remain at your disposal for any further questions.

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Please contact your AIFMD Hot line at +352 451 454 357 or your usual Deloitte representative project leads for further information.

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