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10/09/2025

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Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
AIFMD scope

Subject Matter
Application of the delegation requirements foreseen under Article 1(9)(b) AIFMD II, respectively, Article 2(4)(b) AIFMD II

Question
It follows from Article 1(9)(b) and Article 2(4)(b) AIFMD II that the AIFM or UCITS management company shall ensure that the performance of the functions in Annex

I or II of the respective directives, as well as the provision of the services referred to in Articles 6(4) or 6(3), complies with the requirements of AIFMD II. Considering that portfolio management and risk management may be delegated to entities located in the EU or to regulated entities located in third countries, to which extent are delegates or subdelegates of AIFMs or UCITS management companies subject to the AIFMD and UCITS Directive?

ESMA_QA_2637

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10/09/2025

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Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
AIFMD scope

Subject Matter
Impact of the new exemptions foreseen for distributors in Article 20 (6a) AIFMD and Article 13(3) UCITS Directive on Article 4 CBDF Regulation

Question
In cases where a distributor is acting on its own behalf, as referred to under Article 1(9)(d) and Article 2(4)(b) AIFMD II , is the AIFM or UCITS management company

exempted from the requirements regarding marketing communications in Article 4 Regulation (EU) 2019/1156 on facilitating cross-border distribution of collective investment undertakings (the “CBDF Regulation”)?

ESMA_QA_2636

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10/09/2025

Status: Forwarded to EC/Public Consultation/Other

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
AIFMD scope

Additional Legal Reference
New exemption foreseen for distributors under Article 20(6a) AIFMD and Article 13(3) UCITS Directive

Subject Matter
Questions on the new exemption foreseen for distributors under Article 20(6a) AIFMD and Article 13(3) UCITS Directive

Question

It follows from Article 1(9)(d) and Article 2(4)(b) AIFMD II that where the marketing function of an AIFM or UCITS management company is performed by one or several distributors, which are acting on their own behalf, such function shall not be considered to be a delegation subject to the requirements set out in those Articles. In which cases is a distributor considered to be acting on its own behalf?

In cases where a distributor of an investment fund manager is acting on its own behalf, as referred to under Article 1(9)(d) and Article 2(4)(b) AIFMD II, the AIFM or UCITS management company is exempted from applying the provisions set out in Article 20 AIFMD and Article 13 UCITS Directive. In such cases, is the AIFM or UCITS management company required to monitor the distributor? What is the approach for insurance-based investment products marketed in accordance with Directive (EU) 2016/97? What is the approach for distributors located in a third country marketing UCITS or AIFs in the EU?

ESMA_QA_2374

Submission Date
13/12/2024

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Level 2 Regulation
AIFMD - Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision

Level 3 Regulation
ESMA Guidelines on funds' names using ESG or sustainability-related terms (ESMA34-1592494965-657)

Topic
Funds' names

Subject Matter
Guidelines on funds' names

Question
Is there a minimum level for investment funds with the term “sustainable” in their name to be considered to be investing “meaningfully” in sustainable investments?

ESMA Answer

13-12-2024

Original language

The third indent of paragraph 18 of the Guidelines foresees that funds using “sustainable” terms should commit to invest meaningfully in sustainable investments referred to in Article 2(17) of the SFDR. While national competent authorities should carry out a case-by-case analysis of how any sustainability-related term is used in the name of a fund, they may find that investment funds with "sustainable" terms in their names investing less than 50% of the proportion of investments in sustainable investments are not "meaningfully investing in sustainable investments". That amount could be higher, subject to the circumstances of the case.

ESMA_QA_2372

Submission Date
13/12/2024

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Level 2 Regulation
AIFMD - Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision

Level 3 Regulation
ESMA Guidelines on funds' names using ESG or sustainability-related terms (ESMA34-1592494965-657)

Topic
Funds' names

Subject Matter
Guidelines on funds' names

Question
How should the exclusions related to controversial weapons referred to in Commission Delegated Regulation (EU) 2020/1818 be interpreted for different types of controversial weapons?

ESMA Answer

13-12-2024

Original language

For the purpose of applying the exclusions referred to in paragraphs 16-18 of the Guidelines related to Article 12(1)(a) of Commission Delegated Regulation (EU) 2020/1818 (companies involved in any activities related to controversial weapons), national competent authorities may, in the absence of any other clarification in that Delegated Regulation, refer to the list of controversial weapons provided in indicator 14 of Table 1 of Annex I of Commission Delegated Regulation (EU) 2022/1288, namely “anti-personnel mines, cluster munitions, chemical weapons and biological weapons”.

ESMA_QA_2370

Submission Date
13/12/2024

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Level 2 Regulation
AIFMD - Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision

Level 3 Regulation
ESMA Guidelines on funds' names using ESG or sustainability-related terms (ESMA34-1592494965-657)

Topic
Funds' names

Subject Matter
Guidelines on funds' names

Question
When applying the exclusions referred to in paragraphs 16-18 of the guidelines, can fund managers consider the underlying project for use of proceeds instruments or should the manager always consider the whole issuer?

ESMA Answer

13-12-2024

Original language

With regard to European Green Bonds that have been issued under the European Green Bonds Regulation (Regulation (EU) 2023/2631), investments in such instruments do not need to be assessed under the exclusions of investments referred to in paragraphs 16-18 of the Guidelines, because the Guidelines are intended to be read in conjunction with Level 1 legislation such as the European Green Bonds Regulation and should consider the high level of protection guaranteed by the EU legal framework for such investments.

With regard to investments in any other type of use of proceeds instruments, such as green bonds not issued under the European Green Bonds Regulation, the exclusions referred to in paragraphs 16-18 of the Guidelines should apply on a look-through basis to the economic activities financed by such instruments. The look-through approach should determine that the instrument invested in does not finance any activities referred to in Article 12(1)(a-b) and (d-g) of Commission Delegated

Regulation (EU) 2020/1818. Investments in companies excluded under Article 12(1)(c) of Commission Delegated Regulation (EU) 2020/1818 would not be able to benefit from this look-through approach (i.e. those companies are always excluded under the exclusions referred to in paragraphs 16-18 of the Guidelines).

ESMA_QA_2230

Submission Date
05/07/2024

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
MiFID services under Article 6(4) of the AIFMD

Additional Legal Reference
Article 6(4)

Subject Matter
AIFMs safekeeping client money

Question

Are AIFMs permitted to hold client money, taking into account also the wording of Article 6(4)(b)(ii) of the AIFMD?

Will the situation change in light of the legislative amendments introduced following the AIFMD Review (Directive 2024/927/EU)?

ESMA Answer

06-01-2025

Original language

Answer from the European Commission:

No.

Article 6(4)(b)(ii) of Directive 2011/61/EU (“AIFMD”) states that an AIFM may be authorized to provide safekeeping services in relation to shares or units of collective investment undertakings but does not permit AIFMs to safekeep clients’ money. Such a service is, therefore, not compatible with Article 6(4)(b)(ii) of AIFMD.

The situation will not change as a result of the extension of the scope of ancillary services under Article 6(4)(b) of the revised AIFMD (Directive (EU) 2024/927).

The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal

persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

ESMA_QA_2229

Submission Date
05/07/2024

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Delegation

Additional Legal Reference
Article 20(1)(c)(d)

Subject Matter
Permission of AIFMs to delegate portfolio or risk management to non-supervised undertakings established outside of the EU

Question

Are AIFMs allowed to delegate portfolio or risk management to non-supervised undertakings established outside of the EU?

ESMA Answer

06-01-2025

Original language

Answer from the European Commission:

No.

Under point (d) of Article 20(1) of Directive 2011/61/EU, the delegation of portfolio or risk management functions to an undertaking established outside the EU requires that cooperation between the national competent authorities of the AIFM's home Member State and the supervisory authority of the third-country undertaking is ensured. Article 78(3) of Commission Delegated Regulation (EU) No 231/2013 sets out the minimum conditions necessary to ensure this cooperation.

The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot

prejudge the position that the European Commission might take before the Union and national courts.

ESMA_QA_2227

Submission Date
02/07/2024

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Capital requirements

Additional Legal Reference
Directive 2009/65/EC of the European Parliament and of the Council (UCITS)

Subject Matter
Initial capital and additional own funds

Question

Are internally managed AIFs and self-managed UCITS investment companies required to maintain initial capital and additional own funds, respectively, pursuant to Article 9 of AIFMD and Articles 7 and 29 of the UCITS Directive, that are kept separate from the collective investment undertaking's assets, meaning that the initial capital and the additional own fund should not be included in the fund's net asset value (NAV)?

ESMA Answer

18-06-2024

Original language

Yes. Internally managed AIFs and self-managed UCITS investment companies shall adopt procedures and systems to ensure compliance at all times with the requirements related to own funds under the UCITS and AIFM Directives.

As explained in recital 23 of AIFMD, minimum capital requirements imposed on AIFMs pursuant to Article 9 aim to "ensure the continuity and the regularity of the management of AIFs provided by an AIFM and to cover the potential exposure of AIFMs to professional liability in respect of all their activities". Article 11(c) of AIFMD provides that the competent authorities of the home Member State of the AIFM may withdraw the authorisation issued to an AIFM where that AIFM no longer meets the conditions under which authorisation was granted, including as regards own funds. Recital 9 and Article 29 of the UCITS Directive mirror AIFMD requirements.

Article 31 of the UCITS Directive and Article 18 of AIFMD demonstrate the differences in affectation and purpose between an investment company's own funds and its assets, as they require investment companies to have adequate internal

control mechanisms, including rules for the holding or management of investments in financial instruments in order to invest their own funds, which should be separate from assets of the investment company that should be invested according to the instruments of incorporation and the investment policy of that investment company.

As a result, an investment company's own funds should be neither invested in accordance with the funds' investment strategy nor distributed to the redeeming investors, but instead they should be preserved to cover exposures from the investment company's professional liability and they should always remain within the limits of the minimum capital requirements.

On the contrary, the assets of UCITS and AIFs should be invested according to the UCITS' or AIF's investment policy and objectives (Article 4(1)(a), 18(1) of AIFMD, Article 60(2) of Commission Delegated Regulation 231/2013, Article 1(2)(a), 5(2), 51(2) and 30 of UCITS D, Article 9(2) of Commission Directive 2010/43/EU).

The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

ESMA_QA_2176

Submission Date
08/05/2024

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Costs and fees

Additional Legal Reference
ESMA guidelines on performance fees in UCITS and certain types of AIFs

Subject Matter
Performance fees

Question

Can the manager of a Fund of Funds (FoF) charge performance fees?

ESMA Answer

24-05-2024

Original language

In line with paragraph 18 of the Guidelines, the manager of a FoF should be able to demonstrate to the NCA that the performance fee model of a fund it manages constitutes a reasonable incentive for the manager and is aligned with investors' interests.

Against this background, as a general principle, where the investment policy of a FoF requires the active management of the FoF and the determination of the allocation in the underlying funds has a material impact on the FoF performance, performance fees for the manager of the FoF could be considered as justified.

The assessment on how performance fees are justified in light of the investment policy of the FoF should be reflected in the fund documentation, including the fund rules or the instruments of incorporation and may be reviewed, where needed, by the NCA on a case-by-case basis.

ESMA_QA_2174

Submission Date
08/05/2024

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Costs and fees

Additional Legal Reference
ESMA guidelines on performance fees in UCITS and certain types of AIFs

Subject Matter
Performance fees

Question

Where a manager applies an additional reference indicator to the performance fee model (e.g.: a hurdle rate on top of the High-Water Mark model or the benchmark model), should the minimum performance reference period be applied to the additional reference indicator?

ESMA Answer

24-05-2024

Original language

The minimum performance reference period in accordance with paragraph 40-42 of the Guidelines should be applied to the performance fee model. However, the manager is not required to apply the minimum performance reference period to the additional reference indicator, considering that (a) the final combination (i.e.: the performance fee model plus the additional reference indicator) does not result in increased fees for investors compared to the use of the performance fee model alone and (b) the performance fee model (excluding the additional reference indicator) is consistent with the fund’s investment objectives, strategy and policy, in line with Guideline 2. In line with paragraph 46 of guidelines, appropriate disclosure should be provided in the prospectus.

ESMA_QA_1073

Submission Date
12/06/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Level 2 Regulation
AIFMD - Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision

Topic
Leverage

Additional Legal Reference
Article 6 of Delegated Regulation (EU) 231/2013

Subject Matter
Calculation of the leverage of AIFs investing in real estate

Question
When calculating the leverage of an AIF whose core investment policy is to invest in real estate directly or indirectly, shall the AIFM include the exposure contained in financial or legal structures involving third parties controlled by that AIF as referred to in Article 6(1) and (3) of Delegated Regulation (EU) 231/2013?

ESMA Answer

13-06-2023

Original language

[ESMA34-32-352, Section VII, Q&A 8]

Yes. Under Article 6(3) of Delegated Regulation (EU) 231/2013, an AIFM must include the exposure contained in financial or legal structures involving third parties controlled by the AIF when calculating the leverage of such AIF, where these structures are specifically set up to directly or indirectly increase the exposure at the level of the AIF. For instance, financial or legal structures involving third parties (eg. special purpose vehicles controlled by the AIF), put in place to acquire real estate assets, which obtain leverage for that purpose, directly or indirectly create leverage at the level of the AIF investing in real estate.

The exemption referred to in the second sentence of Article 6(3) of Delegated Regulation (EU) 231/2013 for AIFs whose core investment policy is to acquire

control of non-listed companies or issuers, applies solely to non-listed companies (mostly venture capital and private equity funds), provided that the AIF or the AIFM acting on behalf of the AIF does not have to bear potential losses beyond its investment in the respective company or issuer. Therefore, that exemption should not apply to AIFs, which acquire real estate assets indirectly through non-listed companies, as such non-listed companies are being utilised by the AIF with the purpose of implementing the AIF's investment policy, which is the acquisition of real estate assets.

The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

ESMA_QA_1072

Submission Date
12/06/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
AIFMD scope

Additional Legal Reference
Article 33 of Directive 2011/61/EU

Subject Matter
Scope of activities that an AIFM may carry out in a host Member State

Question

When an AIFM intends to provide the activities and services for which it has been authorised in a host Member State, either directly or through a branch, may that AIFM passport in that host Member State only the other functions that an AIFM may additionally perform in the course of the collective management of an AIF, which are referred to in point (2) of Annex I to the AIFMD, without also passporting investment management functions?

ESMA Answer

13-06-2023

Original language

[ESMA34-32-352, Section IV, Q&A 6]

No. The AIFMD passporting regime is linked to the management of an EU AIF. Annex I lists the investment management functions which an AIFM shall at least perform when managing an AIF (point 1) and the other functions that an AIFM may additionally perform in the course of the collective management of an AIF (point 2). The activities referred to in Annex I, point 2 are therefore ancillary to the activities referred to in Annex I, point 1 and cannot be exercised independently from those. That is also the case when AIFM passport their services in another Member State. Furthermore, pursuant to Article 33(2), point (b), AIFMD, an AIFM intending to manage EU AIFs established in another Member State is to 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 AIF it intends to manage. That requirement cannot be interpreted otherwise than referring to investment management foremost whereas auxiliary services remain as such auxiliary and are to be performed only in addition to the management of an EU AIF.

The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

ESMA_QA_1071

Submission Date
12/06/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Cross-border distribution of funds

Additional Legal Reference
Article 32a(1) of DIrective 2011/61/EU

Subject Matter
De-notification in the absence of investors in the host Member State

Question

In case there are no investors in a host Member State, do AIFMs wishing to de-notify the arrangements previously made for marketing the units or shares of the EU AIFs they manage have to comply with the obligations set out in Article 32a(1) of the AIFMD?

ESMA Answer

13-06-2023

Original language

[ESMA34-32-352, Section II, Q&A 11]

Yes. Article 32a(1), point (a), AIFMD lays down an explicit exemption referring to closed-ended European long-term investment funds governed by Regulation (EU) 2015/760. In all other cases not covered by that exemption, all the conditions laid down in Article 32a(1) AIFMD are to be complied with, making sure that there are no investors uninformed about the AIFM's market exit, that all marketing is publicly terminated and any marketing arrangements with the third parties are terminated or modified to prevent any further marketing of the de-notified AIF. Finally, Article 32a(1), second subparagraph, AIFMD remains applicable. That provision requires the AIFM to cease any new or further marketing of units or shares of the AIF it manages in the Member State in respect of which it has submitted a de-notification.

The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent

authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

ESMA_QA_1070

Submission Date
12/06/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Cross-border distribution of funds

Additional Legal Reference
Article 30a(1) of Directive 2011/61/EU

Subject Matter
Pre-marketing by registered AIFMs

Question

Are registered AIFMs referred to in Article 3(2) of the AIFMD, which do not qualify as EuSEF manager or EuVECA manager, subject to the obligation to notify pre-marketing pursuant to Article 30a(1) of the AIFMD?

ESMA Answer

13-06-2023

Original language

[ESMA34-32-352, Section II, Q&A 10]

No, unless it is required otherwise under national rules. Article 30a AIFMD applies to the authorised EU AIFMs. Sub-threshold EU AIFMs covered by Article 3(2) AIFMD, which have not opted in under Article 3(4) AIFMD, are referred to as registered AIFMs in AIFMD, which do not have the EU-wide AIFM passport to exert asset management activities across the borders. Except for Article 3(3) and (4) and Article 46 AIFMD activities of sub-threshold EU AIFMs are governed by the national rules, including those on pre-marketing.

The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that

the European Commission might take before the Union and national courts.

ESMA_QA_1069

Submission Date
12/06/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Cross-border distribution of funds

Additional Legal Reference
Article 30a of Directive 2011/61/EU

Subject Matter
Pre-marketing by third-parties

Question

Where an investment strategy is developed by a third party (the fund initiator), are the obligations set out in Article 30a of the AIFMD applicable to this third party?

ESMA Answer

13-06-2023

Original language

[ESMA34-32-352, Section II, Q&A 9]

Yes. Pursuant to Article 30a(3) AIFMD, pre-marketing can be conducted by the EU AIFM or by a third party on behalf of an authorised EU AIFM only if that third party is authorised as an investment firm in accordance with Directive 2014/65/EU, as a credit institution in accordance with Directive 2013/36/EU, as a UCITS management company in accordance with Directive 2009/65/EC, as an AIFM in accordance with AIFMD, or acts as a tied agent in accordance with Directive 2014/65/EU. Moreover, such third party is subject to the conditions for pre-marketing set out in Article 30a AIFMD.

The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that

the European Commission might take before the Union and national courts.

ESMA_QA_711

Submission Date
28/03/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Cross-border distribution of funds

Subject Matter
Notification upon establishment of a branch

Question
When an AIFM sets up a branch in another Member State for the sole purpose of carrying out any activity referred to in point (2)(c) of Annex I to the AIFMD, such as real estate administration activities, does the establishment of the branch have to

be notified by the AIFM to the competent authorities of its home Member State pursuant to Article 33 (2) and (3) of the AIFMD?

ESMA Answer

18-06-2024

Original language

No. Article 33 (1)(a), (2) and (3) AIFMD requires an EU-authorised AIFM to notify the competent authorities of its home Member State when it intends, either directly or by establishing a branch, to manage EU AIFs established in another Member State.

Point 1 of Annex I to AIFMD lists the investment management functions which an AIFM must at least perform when managing an AIF and which must be notified to the competent authorities of the AIFM's home Member State when they are carried out in another Member State either directly or through a branch.

The functions listed in point 2 of Annex I AIFMD may be additionally performed by an AIFM in the course of the collective management of an AIF. These functions are ancillary to the activities referred to in point 1 of Annex I to AIFMD and cannot be exercised independently from those.

Therefore, when an AIFM intends to carry out in another Member State solely the functions referred to in point 2 of Annex I to AIFMD either directly or through establishing a branch, a notification under Article 33(2) and (3) AIFMD is not required.

However, the AIFM may still need to provide information to the competent authorities of its home Member State under different legal bases (e.g. Article 7(2)(c) on the requirement to provide upon authorisation a program of activity setting out the organisational structure of the AIFM).

The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

ESMA_QA_707

Submission Date
28/03/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Cross-border distribution of funds

Additional Legal Reference
Directive (EU) 2019/1160

Subject Matter
Whether the rules governing pre-marketing, which are set out in Directive (EU) 2019/1160 on cross-border distribution of funds, apply to non-EU AIFMs.

Question

Are non-EU AIFMs allowed to carry out pre-marketing activities pursuant to Article 30a of the AIFMD?

ESMA Answer

26-05-2023

Original language

[ESMA34-32-352 Section XVII Q&A 1]

No, Article 30a of the AIFMD does not cover premarketing activities by non-EU AIFMs. Therefore, non-EU AIFMs should not be allowed to carry out pre-marketing activities pursuant to the AIFMD. However, national laws, regulations and administrative provisions may allow non-EU AIFMs to carry-out pre-marketing activities at national level and where this is the case, non-EU AIFMs do not benefit from a passport allowing them to carry out these activities in other Member States.

In line with recital 12 of Directive (EU) 2019/1160, such national laws, regulations and administrative provisions should not in any way disadvantage EU AIFMs vis-à-vis non-EU AIFMs.

ESMA_QA_697

Submission Date
10/03/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
AIFMD scope

Subject Matter
Notion of ‘substantive direct or indirect holding’ in Article 3(2) of the AIFMD

Question
Article 3(2) AIFMD states the following: “Without prejudice to the application of Article 46, only paragraphs 3 and 4 of this Article shall apply to the following AIFMs: (a) AIFMs which either directly or indirectly, through a company with which the

AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 million; or
(b) AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management in total do not exceed a threshold of EUR 500 million when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF".

How should the notion of 'substantive direct or indirect holding' in Article 3(2) of the AIFMD be interpreted. In particular, is there a quantitative threshold above which the criterion of substantive direct or indirect holding could be considered as met, and, if yes, what this threshold would be?"

ESMA Answer

10-03-2023

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 16, 1]

Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation [1]

As mentioned in Article 3(2)(a) AIFMD, the notion of "substantive direct or indirect holding" refers to situations where the AIFM manages the portfolios of AIFs through its direct or indirect holding in a company. This covers, for instance, situations whereby the AIFM de facto has the power to impose decisions on the AIF portfolio composition, its asset allocation or its risk management. Article 3(2)(a) AIFMD does

not set a quantitative threshold. The notion of “substantive direct or indirect holding” shall be assessed on a case-by-case basis by AIFMs supervisors.

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[1] The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

ESMA_QA_672

Submission Date
02/02/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Costs and fees

Additional Legal Reference
Section XV: ESMA’s guidelines on performance fees in UCITS and certain types of AIFs

Subject Matter
Performance fees

Question

Question 7 [last update 16 July 2021]: In case the authorised AIFM has delegated the portfolio management function to different delegated portfolio managers, would it be admissible to pay a performance fee to those delegated portfolio managers who have overperformed during the performance reference period, despite a global underperformance of the fund during the same performance reference period?

ESMA Answer

16-07-2021

Original language

No. Based on paragraph 37 of the guidelines, performance fees:

- should be paid only where positive performance has been accrued during the performance reference period
- could be paid in case the fund has overperformed the reference benchmark but had a negative performance.

The above also applies in case of delegation by the authorised AIFM to different delegated portfolio managers. Therefore, in case of a global underperformance of the fund, performance fees should not be paid to those delegated portfolio managers who have overperformed.

ESMA_QA_671

Submission Date
02/02/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Costs and fees

Additional Legal Reference
Section XV: ESMA’s guidelines on performance fees in UCITS and certain types of AIFs

Subject Matter
Performance fees

Question

Question 6 [last update 28 May 2021]: How should the performance reference period be
set in case of a merger where the receiving AIF is a newly established fund with no performance history and it is in effect a continuation of the merging AIF?

ESMA Answer

28-05-2021

Original language

In order to ensure that the merger is not conducted with the aim of resetting the performance reference period, in the case of a merger where the receiving AIF is a newly established fund with no performance history and the competent authority of the receiving AIF assesses that the merger does not substantially change the AIF's investment policy, the performance reference period of the merging AIF should continue applying in the receiving AIF.

Footnote: Based on the scope section of the guidelines, "In case Member States allow AIFMs to market to retail investors in their territory units or shares of AIFs they manage in accordance with Article 43 of the AIFMD, the guidelines also apply to AIFMs of those AIFs, except for: (a) closed-ended AIFs; and (b) open-ended AIFs that are EuVECAs (or other types of venture capital AIFs), EuSEFs, private equity AIFs or real estate AIFs".

ESMA_QA_670

Submission Date
02/02/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Costs and fees

Additional Legal Reference
Section XV: ESMA’s guidelines on performance fees in UCITS and certain types of AIFs

Subject Matter
Performance fees

Question

Question 5 [last update 20 May 2022]: Based on paragraph 40 of the Guidelines on performance fees, how should the performance reference period for the benchmark model be set?

ESMA Answer

20-05-2022

Original language

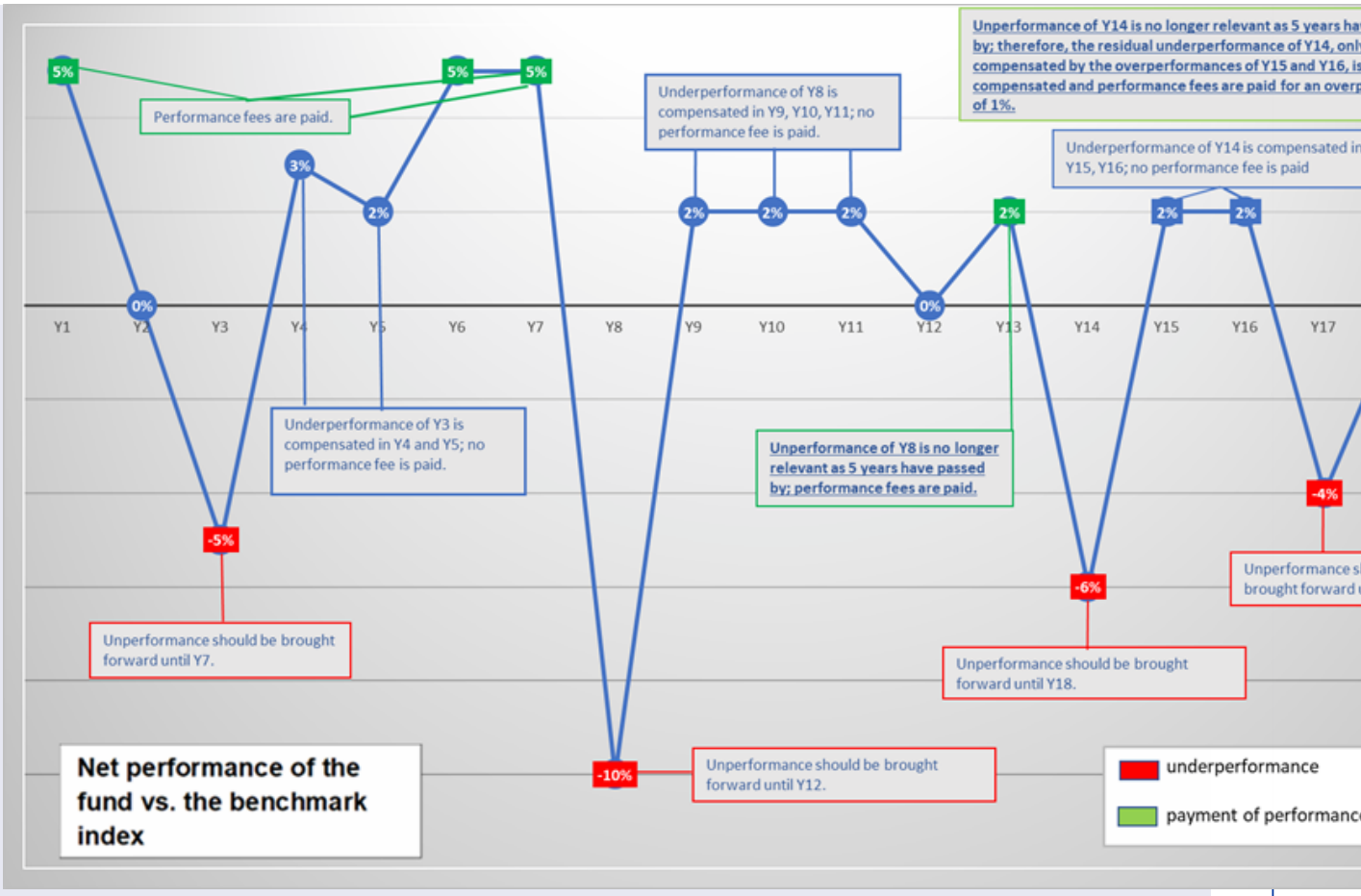
Paragraph 40) of the guidelines recommends that:

1. any underperformance of the fund compared to the benchmark index should be clawed back before any performance fee becomes payable; and
2. the length of the performance reference period, if this is shorter than the whole life of the fund, should be set equal to at least 5 years.

In order to comply with the above recommendations, it should be ensured that any underperformance is brought forward for a minimum period of 5 years before a performance fee becomes payable, i.e. fund managers should look back at the past 5 years for the purpose of compensating underperformances.

In case the fund has overperformed the benchmark index, the fund manager should be able to crystallise performance fees.

The following example illustrates the principles above (please note that the two tables below relate to the same example, the first one illustrated through a graphical representation, while the second one displayed in numerical terms):



	Net performance	Underperformance to be compensated in the following year	Payment of performance fees
Y1	5%	0%	YES
Y2	0%	0%	NO
Y3	-5%	-5%	NO
Y4	3%	-2%	NO
Y5	2%	0%	NO
Y6	5%	0%	YES
Y7	5%	0%	YES
Y8	-10%	-10%	NO
Y9	2%	-8%	NO
Y10	2%	-6%	NO

Y11	2%	-4%	NO
Y12	0%	0%[1]	NO
Y13	2%	0%	YES
Y14	-6%	-6%	NO
Y15	2%	-4%	NO
Y16	2%	-2%	NO
Y17	-4%	-6%	NO
Y18	0%	-4%[2]	NO
Y19	5%	0%	YES

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[1] The underperformance of Y12 to be taken forward to the following year (Y13) is 0% (and not -4%) in light of the fact that the residual underperformance coming from Y8 that was not yet compensated (-4%) is no longer relevant as the 5-year period has elapsed (the underperformance of Y8 is compensated until Y12).

[2] The underperformance of Y18 to be taken forward to the following year (Y19) is 4% (and not -6%) in light of the fact that the residual underperformance coming from Y14 that was not yet compensated (-2%) is no longer relevant as the 5-year period has elapsed (the underperformance of Y14 is compensated until Y18).

The following are additional examples aimed at further clarifying the mechanism of compensation of underperformances:

1. in the case the net performance of the fund in Y18 was equal to 2% (instead of 0%), the underperformance to be carried forward to the following year (Y19) would be equal to -4%. This is in light of the fact that during Y18, the underperformance of -2% coming from Y14 should still be compensated and, in addition to that, the performance of -4% coming from Y17 should be brought forward to the following year.
2. in the case the net performance of the fund in Y18 was equal to 5% (instead of 0%), the underperformance to be carried forward to the following year (Y19) would be equal to -1%. This is in light of the fact that the residual

underperformance coming from Y17 that was not yet compensated (-1%) should be brought forward to the following year (Y19).

3. in the case the net performance of the fund in Y18 was equal to 7% (instead of 0%), the net performance of the fund would compensate the underperformance of -6% coming from Y17. The positive accrual of performance fees for the 1% difference would therefore be crystallised in the payment of the performance fees to the management company. There would be no underperformance to be carried forward to Y19.

This is in line with the principle in the guidelines that underperformance in a given year (e.g. Y14) should still be compensated during a period which includes the fifth year following that underperformance (Y18), while not be brought forward to the sixth year (Y19).

Footnotes: ESMA32-384-5209 Public Statement on SPACs

Performance reference period: See Chapter XI of the UCITS Directive

Benchmark model: This is defined as a performance fee model whereby the performance fees may only be charged on the basis of outperforming the reference market index. See the definitions Section of the Guidelines on performance fees.

ESMA_QA_669

Submission Date
02/02/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Costs and fees

Additional Legal Reference
Section XV: ESMA’s guidelines on performance fees in UCITS and certain types of AIFs, question 4

Subject Matter
Performance fees

Question

Question 4 [last update 28 May 2021]: Are registered AIFMs referred to in Article 3(2) of the
AIFMD subject to ESMA's Guidelines on performance fees while marketing to retail investors
units or shares of AIFs they manage?

ESMA Answer

28-05-2021

Original language

Answer 4 [last update 28 May 2021]: The Guidelines on performance fees do not apply to registered AIFMs referred to in Article 3(2) of the AIFMD. Such registered AIFMs are only subject to the requirements referred to in that Article, which are outside the scope of the Guidelines. However, Member States may decide to impose stricter requirements on registered AIFMs and to allow them to market AIFs to retail investors in their territory, in accordance with Articles 3(3) and 43(1) of the AIFMD. In such cases, National Competent Authorities may also decide to apply the Guidelines to registered AIFMs.

ESMA_QA_666

Submission Date
31/01/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Costs and fees

Additional Legal Reference
ESMA34-39-992 Guidelines on Performance fees

Subject Matter
Performance fees

Question

Question 3 [last update 30 March 2021]: Are ELTIFs in scope of the Guidelines on performance fees?

ESMA Answer

30-03-2021

Original language

The Guidelines on performance fees apply to managers of UCITS and, in case Member States allow AIFMs to market to retail investors in their territory units or shares of AIFs they manage in accordance with Article 43 of the AIFMD, they also apply to AIFMs of those AIFs, except for:

a) closed-ended AIFs; and

b) open-ended AIFs that are EuVECAs (or other types of venture capital AIFs), EuSEFs, private equity AIFs or real estate AIFs.

Therefore, ELTIFs marketed to retail investors that do not have a closed-ended structure, within the meaning of Article 1(2) of the Delegated Regulation 694/2014 , and are not venture capital/private equity or real estate AIFs are in scope of the guidelines.

Footnote: Article 1(2) of the Delegated Regulation 694/2014 states that “An AIFM of an open-ended AIF shall be considered to be an AIFM which manages an AIF the shares or units of which are, at the request of any of its shareholders or unitholders, repurchased or redeemed prior to the commencement of its liquidation phase or wind-down, directly or indirectly, out of the assets of the AIF and in accordance with the procedures and frequency set out in its rules or instruments of incorporation, prospectus or offering documents. A decrease in the capital of the AIF in connection with distributions according to the rules or instruments of incorporation of the AIF, its prospectus or offering documents, including one that has been authorised by a

resolution of the shareholders or unitholders passed in accordance with those rules or instruments of incorporation, prospectus or offering documents, shall not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type. Whether an AIF's shares or units can be negotiated on the secondary market and are not repurchased or redeemed by the AIF shall not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type".

ESMA_QA_665

Submission Date
31/01/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Costs and fees

Additional Legal Reference
Guidelines on performance fees

Subject Matter
Performance fees

Question

Question 2 [last update 30 March 2021]: Paragraphs 40 and 41 of the Guidelines on
performance fees recommend that the length of the performance reference period (if this is
shorter than the whole life of the fund) should be set equal to at least 5 years. How should the
performance reference period be set for the first time in light of the application date of the
guidelines?

ESMA Answer

30-03-2021

Original language

Managers of any funds already compliant with paragraphs 40) and 41) of the Guidelines on performance fees before the application date of the guidelines should look at the past 5 years/whole life of the fund for the purpose of setting the performance reference period (i.e. they should not reset the performance reference period after the application date of the guidelines). In all the other cases, managers should apply the performance reference period starting from the beginning of the financial year following 6 months from the application date of the Guidelines (i.e. the performance reference period should start at the beginning of the financial year following 5 July 2021; by way of example, if the financial year of the fund starts on 1 September 2021, the period 1 September 2021 – 1 September 2022 should be considered as the first year of the performance reference period).

Re. paragraph 40 see also Public Statement (ESMA32-384-5209 on SPACs

Re. paragraph 41 see also Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (“European Markets Infrastructure Regulation”)

Re. Performance reference period: This is defined as “the time horizon over which the performance is measured and compared with that of the reference indicator, at the end of which the mechanism for the compensation for past underperformance (or negative performance) can be reset”.

ESMA_QA_664

Submission Date
31/01/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Level 3 Regulation
Performance Fees - Guidelines on performance fees in UCITS and certain types of AIFs - ESMA34-39-968

Topic
Costs and fees

Additional Legal Reference
Guidelines on performance fees in UCITS and certain types of AIFs

Subject Matter
Performance fees

Question
Section XV: ESMA’s guidelines on performance fees in UCITS and certain types of AIFs Question 1 [last update 30 March 2021]: Based on paragraphs 40 and 41 of the guidelines on performance fees in UCITS and certain types of AIFs (“Guidelines on performance fees”),
should performance fees be paid only at the end of the performance reference period of 5 years?

ESMA Answer

30-03-2021

Original language

No. The Guidelines on performance fees do not prevent to pay performance fees during the performance reference period of 5 years and/or in the first years of a fund's existence, in case the fund has not existed for 5 years. By way of example, if on the crystallisation date of the fund (e.g. at the end of the second year of existence of the fund), the fund has overperformed the reference indicator and there is a positive accrual of performance fees those can be paid. In this case, the accrual will be crystallised in the payment of the performance fees to the management company. On the contrary, if on the crystallisation date of the fund (e.g. at the end of the third year of existence of the fund) the fund has underperformed the reference indicator and as a consequence there are no accrued performance fees,

this underperformance is brought forward for the purpose of the calculation of performance fees the following year. In this way, compensation of negative performances is ensured over the years during a reference period of 5 years.

Example:

• **Crystallisation date: end of the second year of existence of the fund**

Performance of the fund: 10%

Performance of the reference indicator: 5%

Overperformance: 5%

Performance fees can be paid to the management company

• **Crystallisation date: end of the second year of existence of the fund**

Performance of the fund: 10%

Performance of the reference indicator: 10%

Overperformance: 0%

No crystallisation of performance fees

• **Crystallisation date: end of the third year of existence of the fund**

Performance of the fund: 5%

Performance of the reference indicator: 10%

Underperformance: -5% (this underperformance should be taken into account in the subsequent calculation of performance fees)

Not only performance fees cannot be paid but the underperformance of -5% should be brought forward to the following year and clawed back before any performance

fee can be paid (see below)

• **Crystallisation date: end of the fourth year of existence of the fund**

Performance of the fund: 8%

Performance of the reference indicator: 5%

Overperformance: 3%

Underperformance from year 3 -5%

Global net performance: -2%

Not only performance fees cannot be paid but the underperformance of -2% should be brought forward to the following year and clawed back before any performance fee can be paid

This should not prevent NCAs to require funds to apply stricter rules (e.g. to crystallise fees only after 5 years or to apply reference periods longer than 5 years), bearing in mind that any specific provision applying at national level in addition to the provisions set out in the guidelines should not jeopardise the rules regarding funds' cross border distribution (See Chapter XI of the UCITS Directive) and the split of competences between the home and host competent authority (See Chapter XI of the UCITS Directive) to this regard.

Paragraph 40) of the Guidelines on performance fees states that "In case the fund employs a performance fee model based on
a benchmark index, it should be ensured that any underperformance of the fund compared to the benchmark is clawed back
before any performance fee becomes payable. To this purpose, the length of the performance reference period, if this is shorter
than the whole life of the fund, should be set equal to at least 5 years."

Paragraph 41) of the Guidelines on performance fees states that "Where a fund utilises a HWM model, a performance fee should be payable only where, during the performance

reference period, the new HWM exceeds the last HWM. The starting point to be considered in the calculations should be the initial offering price per share. For the HWM model, in case the performance reference period is shorter than the whole life of the fund, the performance reference period should be set equal to at least five years on a rolling basis. In this case, performance fee may only be claimed if the outperformance exceeds any underperformances during the previous five years and performance fees should not crystallise more than once a year.

ESMA_QA_663

Submission Date
31/01/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
AIFMD scope

Additional Legal Reference
ESMA Public Statement (ESMA32-384-5209)

Subject Matter
Scope SPACs

Question

Question 3 [last update 16 December 2022]: Are managers of special purpose acquisition companies (“SPACs”) subject to the AIFMD?

ESMA Answer

18-04-2023

Original language

SPACs are not yet legally defined in Union law. In its Public Statement (ESMA32-384-5209) ESMA has described SPACs as shell companies that are admitted to trading on a trading venue with the intention to acquire a business. ESMA has also listed the three stages of the typical life-cycle of a SPAC: (i) the Initial Public Offering (“IPO”); (ii) the SPAC searches for a target company to acquire and (iii) the business combination with the target company, typically through a merger (“business combination”). However, the structure of SPAC transactions is complex and there are significant variations between the general structuring of relevant vehicles and concrete modalities of their transactions.

In light of this, it is important to assess on a case-by-case basis:

- whether SPACs meet the definition of an “AIF” as legally defined in Article 4(1)(a) of the AIFMD, and

- whether SPACs qualify as a “holding company” in accordance with Article 4(1)(o) of the AIFMD. This assessment should take into account the specific features and characteristics of the individual structure of the SPAC and it should be based on substance, not form, paying close attention to the guidance provided in the ESMA Guidelines on key concepts of the AIFMD (ESMA/2013/611). ESMA also

notes that during the life-cycle of a SPAC, there might be circumstances which may be relevant when assessing if a SPAC qualifies as AIF, as follows:

- a SPAC does not raise capital through the IPO with a view to investing it in accordance with a defined investment policy;

- all, or substantially all, the proceeds of the IPO are used for the business combination;

- following the business combination, the SPAC has a general commercial or industrial purpose as defined in the ESMA Guidelines on key concepts of the AIFMD.

The occurrence of some or all of these circumstances may indicate that a SPAC is not an AIF as it might not meet all the elements described in the ESMA Guidelines on key concepts of the AIFMD.

ESMA_QA_660

Submission Date
31/01/2023

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Level 2 Regulation
AIFMD - Regulation 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision

Topic
Depositaries

Subject Matter
Depositaries - tri-party collateral manager

Question

Question 16 [last update 20 July 2022]: According to Article 89(1)(c) of Commission Delegated Regulation (EU) No 231/2013 as modified by Commission Delegated Regulation
(EU) 2018/1618 and Article 13(1)(c) of Commission Delegated Regulation (EU) 2016/438 as
modified by Commission Delegated Regulation (EU) 2018/1619 reconciliations are conducted
as frequently as necessary between the depositary's internal accounts and records and those
of any third party to whom safekeeping has been delegated. What does this mean in case of
use of a tri-party collateral manager, which is not the depositary?

ESMA Answer

18-04-2023

Original language

Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation

In this case the tri-party collateral manager is appointed by the asset manager in accordance with Article 20 of Directive 2011/61/EU or in accordance with Article 13 of Directive 2009/65/EC; it also needs to be the delegate of the depositary in accordance with Article 21(11) of Directive 2011/61/EU or in accordance with Article 22a(2) of Directive 2009/65/EC. The triparty collateral manager is required to transmit the end-of-day positions on a fund-by-fund basis or, if applicable, on a compartment-by-compartment basis. The information provided allows the depositary to record the end-of-day positions and allows it to comply with the

provisions (a) of Article 98(2a)(a) (as inserted by Delegated Regulation (EU) 2018/1618) and in particular point (ii) thereof, and (b) with the provisions under Article 15(2a)(a) (as inserted by Delegated Regulation (EU) 2018/1619), and in particular point (ii) thereof. Thus, the information provided allows the depositary (for both Regulations) to verify that the quantity of the identified financial instruments recorded in the financial instruments accounts opened in its books matches the quantity of the identified financial instruments held in custody by the third party.

ESMA_QA_1028

Submission Date
16/12/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
AIFMD scope

Subject Matter
Scope

Question
Are managers of special purpose acquisition companies (“SPACs”) subject to the AIFMD?

ESMA Answer

16-12-2022

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 11, 3]

SPACs are not yet legally defined in Union law.

In its Public Statement (ESMA32-384-5209)[1] ESMA has described SPACs as shell companies that are admitted to trading on a trading venue with the intention to acquire a business. ESMA has also listed the three stages of the typical life-cycle of a SPAC: (i) the Initial Public Offering ("IPO"); (ii) the SPAC searches for a target company to acquire and (iii) the business combination with the target company, typically through a merger ("business combination").

However, the structure of SPAC transactions is complex and there are significant variations between the general structuring of relevant vehicles and concrete modalities of their transactions.

In light of this, it is important to assess on a case-by-case basis:

- whether SPACs meet the definition of an "AIF" as legally defined in Article 4(1)(a) of the AIFMD, and
- whether SPACs qualify as a "holding company" in accordance with Article 4(1)(o) of the AIFMD.

This assessment should take into account the specific features and characteristics of the individual structure of the SPAC and it should be based on substance, not form, paying close attention to the guidance provided in the ESMA Guidelines on key concepts of the AIFMD (ESMA/2013/611).

ESMA also notes that during the life-cycle of a SPAC, there might be circumstances which may be relevant when assessing if a SPAC qualifies as AIF, as follows:

- a SPAC does not raise capital through the IPO with a view to investing it in accordance with a defined investment policy;
- all, or substantially all, the proceeds of the IPO are used for the business combination;
- following the business combination, the SPAC has a general commercial or industrial purpose as defined in the ESMA Guidelines on key concepts of the AIFMD.

The occurrence of some or all of these circumstances may indicate that a SPAC is not an AIF as it might not meet all the elements described in the ESMA Guidelines on key concepts of the AIFMD.

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[1] https://www.esma.europa.eu/sites/default/files/library/esma32-384-5209_esma_public_statement_spacs.pdf

ESMA_QA_1026

Submission Date
20/07/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Delegation

Subject Matter
Delegation

Question
When the marketing of an AIF or a UCITS is not performed by the AIFM or UCITS management company but by a third party distributor, does the responsibility for ensuring that marketing communications comply with the requirements set out in

Article 4(1) of Regulation (EU) 2019/1156 lie with the AIFM or the UCITS management company where there is a contractual relationship between the AIFM or the UCITS management company and the third party distributor? Conversely, does the responsibility for ensuring that marketing communications comply with the requirements set out in Article 4(1) of Regulation (EU) 2019/1156 still lie with the AIFM or the UCITS management company in case there is no contractual relationship with the third party distributor?

ESMA Answer

20-07-2022

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 8, 4]

***Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation*[1]**

Marketing is one of the functions included in the management of funds, and therefore subject to the provisions on delegation (Article 13 of Directive 2009/65/EC and Article 20 of Directive 2011/61/EU), which themselves govern the conditions for that delegation under the principle of full responsibility of fund managers.

Article 1 of Regulation (EU) 2019/1156 specifies that the aim of this Regulation is to establish uniform rules on the publication of national provisions concerning marketing requirements for collective investment undertakings and on marketing communications addressed to investors. These requirements are laid down in Article 4 of this Regulation, and are further clarified in ESMA Guidelines.

Fund managers are responsible for the compliance with Article 4 of Regulation (EU) 2019/1156, irrespective of who is the actual entity marketing the fund, and of the relationship it has with the third party distributor (whether it is contractual or not).

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[1] The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

ESMA_QA_1025

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20/07/2022

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Depositaries

Subject Matter
Depositaries

Question
According to Article 89(1)(c) of Commission Delegated Regulation (EU) No 231/2013 as modified by Commission Delegated Regulation (EU) 2018/1618 and Article 13(1)(c) of Commission Delegated Regulation (EU) 2016/438 as modified by

Commission Delegated Regulation (EU) 2018/1619 reconciliations are conducted as frequently as necessary between the depositary's internal accounts and records and those of any third party to whom safekeeping has been delegated. What does this mean in case of use of a tri-party collateral manager, which is not the depositary?

ESMA Answer

20-07-2022

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 6, 16]

Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation[1]

In this case the tri-party collateral manager is appointed by the asset manager in accordance with Article 20 of Directive 2011/61/EU or in accordance with Article 13 of Directive 2009/65/EC; it also needs to be the delegate of the depositary in accordance with Article 21(11) of Directive 2011/61/EU or in accordance with Article 22a(2) of Directive 2009/65/EC. The tri-party collateral manager is required to transmit the end-of-day positions on a fund-by-fund basis or, if applicable, on a compartment-by-compartment basis. The information provided allows the depositary to record the end-of-day positions and allows it to comply with the provisions (a) of Article 98(2a)(a) (as inserted by Delegated Regulation (EU) 2018/1618) and in particular point (ii) thereof, and (b) with the provisions under Article 15(2a)(a) (as inserted by Delegated Regulation (EU) 2018/1619), and in particular point (ii) thereof. Thus, the information provided allows the depositary (for

both Regulations) to verify that the quantity of the identified financial instruments recorded in the financial instruments accounts opened in its books matches the quantity of the identified financial instruments held in custody by the third party.

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[1] The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

ESMA_QA_1024

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Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Depositaries

Subject Matter
Depositaries

Question
According to Article 89(1)(c) of Commission Delegated Regulation (EU) No 231/2013 as modified by Commission Delegated Regulation (EU) 2018/1618 and Article 13(1)(c) of Commission Delegated Regulation (EU) 2016/438 as modified by

Commission Delegated Regulation (EU) 2018/1619 reconciliations are conducted as frequently as necessary between the depositary's internal accounts and records and those of any third party to whom safekeeping has been delegated. What does this mean for an AIF or UCITS with a weekly dealing frequency which trades on a daily basis?

ESMA Answer

20-07-2022

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 6, 15]

***Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation*[1]**

The reconciliation frequency depends not only on the dealing frequency of the relevant AIF or UCITS, but also on any trade which occurs even outside the dealing frequency. Therefore, if an AIF or UCITS with a weekly dealing frequency trades on a daily basis, daily reconciliations are required.

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[1] The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or

implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

ESMA_QA_1027

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17/12/2021

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Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
AIFMD scope

Subject Matter
Scope

Question
Are managers of undertakings investing in crypto-assets subject to the AIFMD?

ESMA Answer

17-12-2021

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 11, 2]

It is important to assess on a case-by-case basis whether the relevant undertaking meets the definition of an ‘AIF’ as legally defined in Article 4(1)(a) of the AIFMD. In this context, market participants and NCAs should pay attention to the guidance provided in the ESMA Guidelines on key concepts of the AIFMD (ESMA/2013/611).

Collective investment undertakings raising capital from a number of investors to invest in crypto-assets in accordance with a defined investment policy for the benefit of those investors will qualify as ‘AIF’ in accordance with Article 4(1)(a) of the AIFMD. As the AIFMD does not provide for a list of eligible or non-eligible assets, AIFs may in principle invest in any traditional or alternative assets as long as the AIFM can ensure compliance with the AIFMD. However, more specific investment and risk diversification requirements for AIFs investing in crypto-assets as well as limitations regarding the target investors of such AIFs may exist at national level.

In this context, ESMA reminds market participants and investors of the high risks involved in investments in crypto-assets as previously stated in the joint ESMA, EBA and EIOPA warning from February 2018 (ESMA50-164-1284).[1] Market participants and investors should therefore be alert to the high risks of buying and/or holding these assets, including the possibility of losing all their money.

[1] https://www.esma.europa.eu/sites/default/files/library/esma50-164-1284_joint_esas_warning_on_virtual_currenciesl.pdf

ESMA_QA_1033

Submission Date
16/07/2021

Status: Published Answer Updated

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Costs and fees

Subject Matter
ESMA’s guidelines on performance fees in UCITS and certain types of AIFs

Question
In case of creation of a new compartment/share class in an existing AIF in the course of its financial year or in case of creation of a new AIF, can performance fees be crystallised after less than 12 months from the date of creation of such a

new AIF/compartment/share class (i.e.: the date in which the share class is launched/seeded)?

ESMA Answer

03-10-2024

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 15, 8]

No. Performance fees, if any, should be crystallised after at least 12 months from the creation of a new AIF/compartment/share class. Moreover, paragraph 35 of the guidelines foresees that the crystallisation date should be the same for all share classes of a fund that levies a performance fee.

16-07-2021

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 15, 8]

No. Performance fees, if any, should be crystallised after at least 12 months from the creation of a new AIF/compartment/share class. Moreover, paragraph 35 of the guidelines foresees that the crystallisation date should be the same for all share classes of a fund that levies a performance fee.

ESMA_QA_1033

Submission Date
16/07/2021

Status: Published Answer Updated

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Costs and fees

Subject Matter
ESMA’s guidelines on performance fees in UCITS and certain types of AIFs

Question
In case of creation of a new compartment/share class in an existing AIF in the course of its financial year or in case of creation of a new AIF, can performance fees be crystallised after less than 12 months from the date of creation of such a

new AIF/compartment/share class (i.e.: the date in which the share class is launched/seeded)?

ESMA Answer

03-10-2024

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 15, 8]

No. Performance fees, if any, should be crystallised after at least 12 months from the creation of a new AIF/compartment/share class. Moreover, paragraph 35 of the guidelines foresees that the crystallisation date should be the same for all share classes of a fund that levies a performance fee.

16-07-2021

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 15, 8]

No. Performance fees, if any, should be crystallised after at least 12 months from the creation of a new AIF/compartment/share class. Moreover, paragraph 35 of the guidelines foresees that the crystallisation date should be the same for all share classes of a fund that levies a performance fee.

ESMA_QA_1032

Submission Date
16/07/2021

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Costs and fees

Subject Matter
ESMA’s guidelines on performance fees in UCITS and certain types of AIFs

Question
In case the authorised AIFM has delegated the portfolio management function to different delegated portfolio managers, would it be admissible to pay a performance fee to those delegated portfolio managers who have overperformed during the

performance reference period, despite a global underperformance of the fund during the same performance reference period?

ESMA Answer

16-07-2021

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 15, 7]

No. Based on paragraph 37 of the guidelines, performance fees:

- should be paid only where positive performance has been accrued during the performance reference period;
- could be paid in case the fund has overperformed the reference benchmark but had a negative performance.

The above also applies in case of delegation by the authorised AIFM to different delegated portfolio managers. Therefore, in case of a global underperformance of the fund, performance fees should not be paid to those delegated portfolio managers who have overperformed.

ESMA_QA_1031

Submission Date
28/05/2021

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Costs and fees

Subject Matter
ESMA’s guidelines on performance fees in UCITS and certain types of AIFs

Question
How should the performance reference period be set in case of a merger where the receiving AIF is a newly established fund with no performance history and it is in effect a continuation of the merging AIF?

ESMA Answer

28-05-2021

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 15, 6]

Based on the scope section of the guidelines, “In case Member States allow AIFMs to market to retail investors in their territory units or shares of AIFs they manage in accordance with Article 43 of the AIFMD, the guidelines also apply to AIFMs of those AIFs, except for: (a) closed-ended AIFs; and (b) open-ended AIFs that are EuVECAs (or other types of venture capital AIFs), EuSEFs, private equity AIFs or real estate AIFs”.

In order to ensure that the merger is not conducted with the aim of resetting the performance reference period[1], in the case of a merger where the receiving AIF is a newly established fund with no performance history and the competent authority of the receiving AIF assesses that the merger does not substantially change the AIF’s investment policy, the performance reference period of the merging AIF should continue applying in the receiving AIF.

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[1] This is defined as “the time horizon over which the performance is measured and compared with that of the reference indicator, at the end of which the mechanism for the compensation for past underperformance (or negative performance) can be reset”.

ESMA_QA_1030

Submission Date
28/05/2021

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
Costs and fees

Subject Matter
ESMA’s guidelines on performance fees in UCITS and certain types of AIFs

Question
Are registered AIFMs referred to in Article 3(2) of the AIFMD subject to ESMA’s Guidelines on performance fees while marketing to retail investors units or shares of AIFs they manage?

ESMA Answer

28-05-2021

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 15, 4]

The Guidelines on performance fees do not apply to registered AIFMs referred to in Article 3(2) of the AIFMD. Such registered AIFMs are only subject to the requirements referred to in that Article, which are outside the scope of the Guidelines. However, Member States may decide to impose stricter requirements on registered AIFMs and to allow them to market AIFs to retail investors in their territory, in accordance with Articles 3(3) and 43(1) of the AIFMD. In such cases, National Competent Authorities may also decide to apply the Guidelines to registered AIFMs.

ESMA_QA_1023

Submission Date
28/05/2021

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
AIFMD reporting

Subject Matter
Reporting to national competent authorities under Articles 3, 24 and 42

Question
Which risk is measured by Net Equity Delta? How shall it be reported?

ESMA Answer

28-05-2021

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 3, 86]

Net equity delta is used to analyse portfolio’s sensitivity to movements in equity prices. Assume all equity prices the AIF is exposed to decline by 1% at the end of the reporting period. Report the effect on the total net asset value of the AIF (taking into account all the positions (including derivative positions) of the portfolio) as a monetary value in base currency. In the case of derivative positions, a decline of 1% in the value of the underlying should be considered, and not in the value of the derivative. Hence, it shall report: (i) a negative value if the variation of the net asset value is negative; (ii) a positive value if the variation is positive and (iii) a zero if the AIF is neutral or not exposed at all to this risk. In case a measure of risk is not applicable for an AIF or when AIFM report a zero value, the reasons should be explained in the “Risk Measure Description” (data field 147).

Example:

1. Assume at the quarter-end that the NAV sensitivity of an AIF to a 1% equity price decline is -0.5% and that its NAV is 100M EUR, then the figure to be reported under the field “net equity delta” would be “-500000”.
2. Assume the AIF is fully exposed to fixed-income instruments, then a zero would be reported under the field “net equity delta” and “Not applicable given AIF's predominant type” would be reported in the Risk Measure Description field (147).

ESMA_QA_1022

Submission Date
28/05/2021

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
AIFMD reporting

Subject Matter
Reporting to national competent authorities under Articles 3, 24 and 42

Question
Which risk is measured by NET CS01? How shall it be reported?

ESMA Answer

28-05-2021

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 3, 85]

Net CS01 measures the portfolio’s sensitivity to a change in credit spreads. Assume a general increase in all credit spreads of 1bp at the end of the reporting period. The effect on the total net asset value of the AIF (taking into account all the positions (including derivative positions) of the portfolio) should be reported as a monetary value in base currency for each maturity bucket (< 5 years, 5-15 years and >15 years) as specified in data fields 140-142. Report: (i) a negative value if the variation of the net asset value is negative; (ii) a positive value if the variation is positive and (iii) a zero if the AIF is neutral or not exposed at all to this risk. In case a measure of risk is not applicable for an AIF or when AIFM report a zero value, the reasons should be explained in the “Risk Measure Description” (data field 147). As indicated in the Guidelines, CS01 is defined as in ISDA definition.

For example, assume an AIF with NAV of 100M EUR encountering the following portfolio decline after a general increase of 1bp in all credit spreads: 0.01%, decline for maturity bucket <5 years, 0.02% decline for maturity bucket 5-15 years and 0.03% decline for maturity bucket >15 years. Then for these maturity buckets it should report, in base currency, respectively: “-10000”, “-20000” and “-30000”.

ESMA_QA_1021

Submission Date
28/05/2021

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
AIFMD reporting

Subject Matter
Reporting to national competent authorities under Articles 3, 24 and 42

Question
Which risk is measured by NET DV01? How shall it be reported?

ESMA Answer

28-05-2021

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 3, 84]

Net DV01 should be the value change in price (value) of a portfolio and measures the portfolio's sensitivity to a change in the yield curve. Assume an increase of 1bp in the risk-free rate curve (assume a parallel shift) at the end of the reporting period. The effect on the total net asset value of the AIF (taking into account all the positions (including derivative positions) of the portfolio) shall be reported as a monetary value in base currency for each maturity bucket (< 5 years, 5-15 years and >15 years) as specified in data fields 140-142. Report: (i) a negative value if the variation of the net asset value is negative; (ii) a positive value if the variation is positive and (iii) a zero if the AIF is neutral or not exposed at all to this risk. In case a measure of risk is not applicable for an AIF or when AIFM report a zero value, the reasons should be explained in the „Risk Measure Description" (data field 147). As indicated in the Guidelines, DV01 is defined as in ISDA definition.

For example, assume an AIF with NAV of 100M EUR encountering the following portfolio decline after a general increase of 1bp in the risk-free yield curve: 0.01%, decline for maturity bucket <5 years, 0.02% decline for maturity bucket 5-15 years and 0.03% decline for maturity bucket >15 years. Then for these maturity buckets it should report, in base currency, respectively: "-10000", "-20000" and "-30000".

ESMA_QA_1029

Submission Date
30/03/2021

Status: Answer Published

Additional Information

Level 1 Regulation
Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU

Topic
ELTIF

Subject Matter
ESMA’s guidelines on performance fees in UCITS and certain types of AIFs

Question
Are ELTIFs in scope of the Guidelines on performance fees?

ESMA Answer

30-03-2021

Original language

[ESMA 34-32-352 AIFMD Q&A, Section 15, 3]

The Guidelines on performance fees apply to managers of UCITS and, in case Member States allow AIFMs to market to retail investors in their territory units or shares of AIFs they manage in accordance with Article 43 of the AIFMD, they also apply to AIFMs of those AIFs, except for:

a) closed-ended AIFs; and

b) open-ended AIFs that are EuVECAs (or other types of venture capital AIFs), EuSEFs, private equity AIFs or real estate AIFs.

Therefore, ELTIFs marketed to retail investors that do not have a closed-ended structure, within the meaning of Article 1(2) of the Delegated Regulation 694/2014 [1], and are not venture capital/private equity or real estate AIFs are in scope of the guidelines.

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[1] Article 1(2) of the Delegated Regulation 694/2014 states that “An AIFM of an open-ended AIF shall be considered to be an AIFM which manages an AIF the shares or units of which are, at the request of any of its shareholders or unitholders, repurchased or redeemed prior to the commencement of its liquidation phase or wind-down, directly or indirectly, out of the assets of the AIF and in accordance with the procedures and frequency set out in its rules or instruments of incorporation,

prospectus or offering documents.

A decrease in the capital of the AIF in connection with distributions according to the rules or instruments of incorporation of the AIF, its prospectus or offering documents, including one that has been authorised by a resolution of the shareholders or unitholders passed in accordance with those rules or instruments of incorporation, prospectus or offering documents, shall not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type.

Whether an AIF's shares or units can be negotiated on the secondary market and are not repurchased or redeemed by the AIF shall not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type”.

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