



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 8 January 2014
(OR. en)**

5112/14

**Interinstitutional File:
2009/0064(COD)**

**EF 3
ECOFIN 10
DELECT 1**

COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
To:	Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union
No. Cion doc.:	C(2013) 9098 final
Subject:	COMMISSION DELEGATED REGULATION (EU) No .../.. of 17.12.2013 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to regulatory technical standards determining types of alternative investment fund managers

Delegations will find attached document C(2013) 9098 final.

Encl.: C(2013) 9098 final



Brussels, 17.12.2013
C(2013) 9098 final

COMMISSION DELEGATED REGULATION (EU) No .../..

of 17.12.2013

**supplementing Directive 2011/61/EU of the European Parliament and of the Council
with regard to regulatory technical standards determining types of alternative
investment fund managers**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 4(4) of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 empowers the Commission to adopt, following submission of draft standards by the European Securities and Markets Authority (ESMA), and in accordance with Article 10 to 14 of Regulation (EU) No 1095/2010, delegated acts on regulatory technical standards (RTS) to determine types of AIFMs, where relevant in the application of the AIFMD, and to ensure uniform conditions of application of this Directive.

ESMA sent a draft RTS to the Commission on 2 April 2013. In accordance with Articles 10(1) of Regulation (EU) No 1095/2010 establishing ESMA, the Commission decided within three months of receipt of the draft standard not to endorse the draft submitted to it and sent it back to ESMA explaining why it does not endorse it. In accordance with Article 10 (1) of the Regulation (EU) No 1095/2010, within a period of 6 weeks, ESMA amended the draft regulatory technical standard on the basis of the Commission's proposed amendments and resubmitted it to the Commission on 13 August 2013.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA has carried out a public consultation on the draft technical standard submitted to the Commission in April 2013. A consultation paper was published on 19 December 2012, with a deadline for feedback of 1 February 2013. Prior to the publication of the consultation paper, ESMA released a discussion paper which represented a first step, inter alia, in the elaboration of the draft RTS under Article 4(4) of the AIFMD. This document presented preliminary views and possible options for the development of the draft technical standards ESMA is required to develop. Moreover, ESMA asked the Securities and Markets Stakeholder Group (SMSG) for comments on the discussion paper.

During the preparation of the revised draft RTS, ESMA consulted the SMSG and the Consultative Working Group (CWG). Comments from these groups were taken into account in the subsequent preparation of the draft RTS.

3. ANALYSIS OF COSTS AND BENEFITS

Together with the draft technical standard, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA has submitted an analysis of the costs and benefits related to the draft technical standard submitted to the Commission. This analysis is available on the ESMA website¹. The analysis examines the main benefits and costs that have been identified by ESMA in relation to the draft technical standard.

The Commission Services have considered the analysis of costs and benefits identified by ESMA in the light of the revised version of the draft RTS. The Commission Services consider that ESMA's conclusions on cost implications on regulators and supervised entities are still

¹ <http://www.esma.europa.eu/consultation/Consultation-Draft-regulatory-technical-standards-types-AIFMs> - cost and benefits are outlined on pages 13-16.

valid. The main benefit – providing a legally sound and practicable clarification for assessing the type of manager – is more present in the revised version of the draft RTS.

4. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 specifies in detail the characteristics of AIFMs managing open-ended AIFs. It is important to determine whether an AIFM is managing open-ended or closed-ended AIFs because AIFMs have to follow specific rules under the AIFMD depending on whether or not they manage AIFs which are of the closed- or open-ended nature. In particular, it is important to differentiate between the management of open-ended or closed-ended AIFs to apply correctly the rules on liquidity management or the rules on valuation.

In principle Article 1 foresees that an AIFM of an open-ended AIF shall be considered to be an AIFM which manages an AIF the shares or units which are to be repurchased or redeemed at the request of any of the shareholders or unitholders.

An AIFM of a closed-ended AIF is then an AIFM which manages an AIF other than an open-ended AIF.

For the purposes of Article 61 (3) and (4) of Directive 2011/61/EU account should be taken of the legal structures under which closed-ended AIFs were established before 22 July 2013. When the Directive was adopted no harmonised definition existed in the Union regarding the legal structure of closed-ended AIFs, which varied between Member States. This reality is reflected in the text of the Directive, which qualifies as closed-ended AIFs certain existing legal structures that have no redemption rights exercisable during the period of 5 years from the date of the initial investment. Article 61(3) and (4) of Directive 2011/61/EU provides for transitional periods during which existing AIFMs, in so far as they manage closed-ended AIFs that are in an advanced or final stage of their investment cycle, as evidenced by their expiring date or by their impossibility to make any additional investment after 22 July 2013, can continue to manage such AIFs without authorisation or without having to comply with a significant part of the Directive. Consequently, in order to preserve the scope of those provisions as intended in light of this objective and the above mentioned background, it should be also considered to be an AIFM of a closed-ended AIF for the purposes of Article 61(3) and (4) of Directive 2011/61/EU, each AIFM in so far it manages AIFs whose shares or units are repurchased or redeemed after an initial period of at least 5 years during which redemption rights are not exercisable.

Furthermore, Article 2 sets out the entry into force of the Regulation

COMMISSION DELEGATED REGULATION (EU) No .../..

of 17.12.2013

**supplementing Directive 2011/61/EU of the European Parliament and of the Council
with regard to regulatory technical standards determining types of alternative
investment fund managers**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010², and in particular Article 4(4) thereof,

Whereas:

- (1) It is important that regulatory technical standards determining types of AIFMs supplement the rules in Directive 2011/61/EU so that certain requirements of the Directive are applied to AIFMs in a uniform manner.
- (2) It is desirable to distinguish whether an AIFM is managing AIFs of the open-ended or closed-ended type or both in order to apply correctly the rules on liquidity management and the valuation procedures of Directive 2011/61/EU to AIFMs.
- (3) The distinguishing factor in determining whether an AIFM is managing AIFs of the open-ended or closed-ended type should be the fact that an open-ended AIF repurchases or redeems its shares or units with its investors, at the request of any of its shareholders or unitholders, prior to the commencement of its liquidation phase or wind-down and does so according to 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 of the AIF, should not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type.
- (4) The repurchases or redemptions which should be relevant for determining whether an AIFM is managing AIFs of the open-ended or closed-ended type should only be the

² OJ L 174, 1.7.2011, p. 1.

ones made out of the assets of the AIF. Therefore, whether an AIF's shares or units can be negotiated on the secondary market and are not repurchased or redeemed by the AIF should not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type.

- (5) An AIFM that manages one or more open-ended AIFs and one or more closed-ended AIFs at the same time should apply to each AIF the specific rules relating to the relevant type of AIF.
- (6) Any change in the redemption policy of an AIF implying that the AIF may be considered no longer as being an AIF of the open-ended type or an AIF of the closed-ended type, should lead the AIFM to cease to apply the rules relating to the old redemption policy of the AIF it manages and to apply the rules relating to the new redemption policy of such AIF.
- (7) For the purposes of Article 61 (3) and (4) of Directive 2011/61/EU account should be taken of the legal structures under which closed-ended AIFs were established before 22 July 2013. When the Directive was adopted no harmonised definition existed in the Union regarding the legal structure of closed-ended AIFs, which varied between Member States. This reality is reflected in the text of the Directive, which qualifies as closed-ended AIFs certain existing legal structures that have no redemption rights exercisable during the period of 5 years from the date of the initial investment. Article 61(3) and (4) of Directive 2011/61/EU provides for transitional periods during which existing AIFMs, in so far as they manage closed-ended AIFs that are in an advanced or final stage of their investment cycle, as evidenced by their expiring date or by their impossibility to make any additional investment after 22 July 2013, can continue to manage such AIFs without authorisation or without having to comply with a significant part of the Directive. Consequently, in order to preserve the scope of those provisions as intended in light of this objective and the above mentioned background, it should be also considered to be an AIFM of a closed-ended AIF for the purposes of Article 61(3) and (4) of Directive 2011/61/EU, each AIFM in so far it manages AIFs whose shares or units are repurchased or redeemed after an initial period of at least 5 years during which redemption rights are not exercisable.
- (8) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (9) ESMA has conducted open public consultations in relation to the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010,

HAS ADOPTED THIS REGULATION:

Article 1

Types of AIFMs

1. An AIFM may be either or both of the following:
 - an AIFM of open-ended AIF(s);
 - an AIFM of closed-ended AIF(s).
2. 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.

3. An AIFM of a closed-ended AIF shall be an AIFM which manages an AIF other than of the type described in paragraph 2.
4. Where a change in the redemption policy of the AIF has the effect of changing the type of AIF(s) an AIFM manages, the rules relevant to the new type of AIF shall be applied to that AIF by the AIFM.
5. For the purposes of Article 61(3) and (4) of Directive 2011/61/EU, an AIFM in so far as it manages AIFs whose shares or units 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 AIFs after an initial period of at least 5 years during which redemption rights are not exercisable shall also be considered to be an AIFM of a closed-ended AIF.

Article 2

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 17.12.2013

For the Commission
The President
José Manuel BARROSO