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COVER NOTE

From: Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director

To: Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union

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Subject: COMMISSION DELEGATED REGULATION (EU) .../... of 15.12.2023 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be notified in relation to the cross-border activities of managers of alternative investment funds (AIFMs)

Delegations will find attached document C(2023) 8706 final.

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EUROPEAN
COMMISSION

Brussels, 15.12.2023
C(2023) 8706 final

COMMISSION DELEGATED REGULATION (EU) .../...

of 15.12.2023

**supplementing Directive 2011/61/EU of the European Parliament and of the Council
with regard to regulatory technical standards specifying the information to be notified
in relation to the cross-border activities of managers of alternative investment funds
(AIFMs)**

(Text with EEA relevance)

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EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

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 1095/2010 (AIFM Directive)¹ contains provisions allowing alternative investment fund managers (AIFMs) to market in host Member States the units or shares of alternative investment funds (AIFs) they manage.

The Directive allows AIFMs to carry out activities in host Member States under the freedom of establishment and / or the freedom to provide services.

In order to foster convergence and to standardise the transmission of notifications for cross-border marketing and the cross-border management activities of AIFs throughout the EU, the AIFM Directive contains provisions mandating the European Securities and Markets Authority (ESMA) to develop draft regulatory technical standards (RTS) and draft implementing technical standards (ITS) for the exchange of information and related communication between competent authorities (NCAs). These RTS and ITS should specify the information to be provided, as well as the content and format of notification letters that AIFMs submit to NCAs if they wish to undertake cross-border marketing or cross-border management activities and to provide services in host Member States. The RTS and ITS should also further specify the procedure for the communication of the notification file by the relevant home NCA to the host NCA of the Member States where these activities are envisaged.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

On 17 May 2022, ESMA published a Consultation Paper on the proposed draft RTS and ITS. The public consultation closed on 9 September 2022.

ESMA received eight responses, six from asset managers and their associations, one from an independent advisory firm and one from a public body. The respondents to the consultation generally welcomed the draft. Some respondents suggested changes to the content of the forms. The respondents commented on the possible costs of this standardisation and the regular updates that are to be provided. Another issue was the divergence in communication channels that the NCAs offer to their respective asset managers. The detailed content of these responses and ESMA's feedback is outlined in the feedback section of ESMA's final report on draft technical standards on the notifications for cross-border marketing and cross-border management of AIFs and UCITS that is available on ESMA's website².

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The obligation for the Commission to adopt level 2 measures (delegated acts) on marketing communication derives from Article 4 of Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014 (CBDF Regulation). The CBDF Regulation should be read in conjunction with Directive 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to

¹ OJ L 174, 1.7.2011, p. 1.

² ESMA document number: ESMA 34-45-1648 of 15 December 2022.

cross-border distribution of collective investment undertakings (CBDF Directive), which is an amending directive for both the undertakings for collective investment in transferable securities directive (UCITS Directive³) and the AIFM Directive. Both texts regulate the same procedures concerning cross-border notifications and de-notifications by undertakings for collective investment in transferable securities (UCITS) management companies and AIFMs.

The empowerments to adopt further RTS are in the AIFM Directive⁴ rather than in the CBDF Directive itself. The notification procedures designed in this Delegated Regulation are intended to remain as closely aligned as possible for UCITS and AIF products in order to ensure fast and consistent communication between NCAs. Since the empowerments for the RTS are not combined in one Level 1 act but split into two different Directives, it is however legally not advisable to combine the respective rules in one single RTS. Other than originally suggested by ESMA, the Commission will therefore generate two different sets of RTS and ITS, one under the AIFM Directive and one under the UCITS Directive.

³ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (OJ L 302, 17.11.2009, p. 32.).

⁴ Article 33(7) of the AIFM Directive.

COMMISSION DELEGATED REGULATION (EU) .../...

of 15.12.2023

supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be notified in relation to the cross-border activities of managers of alternative investment funds (AIFMs)

(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 1095/2010, and in particular Article 33(7), second subparagraph, thereof,

Whereas:

- (1) The scope and content of the information to be notified to competent authorities under Article 33(2) and (3) of Directive 2011/61/EU, vary depending on the purpose and form of the notification. It is therefore appropriate to specify the information to be notified by managers of alternative investment funds ('AIFMs') for each type of notification.
- (2) To ensure that competent authorities are at all times informed of the activities of AIFMs and to enable those competent authorities to properly exercise their supervisory powers, they should be informed about every change in the notified information. That includes any withdrawal of, cancellation of, or change to the authorisation initially granted to an AIFM.
- (3) The competent authorities should be provided with information about persons responsible for the management of the branch and their contact details. Persons should be considered responsible for the management of the branch if they have the empowerment to set the branch's strategy, objectives, and overall direction, to effectively direct the business of the branch or if they are responsible for the day-to-day business of the branch in a managerial capacity. To avoid any gaps, it should be ensured that for every part of the branch's activities, business areas and management functions, the persons in the respective leading position are notified.
- (4) The International Securities Identification Number (ISIN) and the Legal Entity Identifier (LEI) of an alternative investment fund (AIF) are extremely important to enable a unique identification of the AIF by electronic means. This Regulation therefore includes the mandatory notification of the ISIN and the LEI where they have been assigned to the AIF and are therefore available.
- (5) This Regulation is based on draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority.
- (6) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is

based, analysed the potential related costs and benefits, and requested the advice of the Securities and Markets Stakeholder Group that was established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁵.

- (7) The provisions in this Regulation are closely linked since they deal with the form and content of the information to be exchanged between AIFMs and the national competent authorities of home and host Member States where the AIFM intends to provide cross-border services. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and efficient access for AIFMs and national competent authorities, it is appropriate to include them in a single regulation.
- (8) This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, and notably the right of protection of personal data. The processing of personal data in the context of this Regulation shall comply with Regulation (EU) 2016/679⁶.
- (9) The European Data Protection Supervisor was consulted in accordance with Article 42 of Regulation (EU) 2018/1725⁷ and delivered an opinion on 10.10.2023.
- (10) To enable AIFMs and competent authorities to adapt to the new requirements laid down in this Regulation, it is appropriate to defer its application,

HAS ADOPTED THIS REGULATION:

Article 1

Information to be communicated under Article 33(2) of Directive 2011/61/EU

- 1. The information that AIFMs are to communicate under Article 33(2), point (a), of Directive 2011/61/EU shall contain all the following:
 - (a) the name, address, LEI and contact details of the AIFM;
 - (b) the name and contact details of the department or contact point at the AIFM that is responsible for exchanging information with the competent authority of the AIFM's home Member State.
- 2. The information that AIFMs are to communicate under Article 33(2), point (b), of Directive 2011/61/EU shall contain all the following:
 - (a) the particular activities of collective portfolio management set out in Annex I to Directive 2011/61/EU and of the particular services set out in Article 6(4) of that Directive that will be provided;

⁵ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

⁷ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

- (b) the business strategy of the AIFM in the host Member State, and in particular the categories of targeted clients and investors with which the AIFM will be dealing in the host Member State and how the AIFM will deal with those investors;
- (c) a summary of the controls over delegation arrangements with third parties in connection with the activities carried out in the host Member State;
- (d) information on the AIFs that the AIFM intends to manage in the host Member State, including all the following:
 - (a) the name, home Member State, legal form, investment strategy and, if applicable, duration of the AIF;
 - (b) the national identification code, the International Securities Identification Number (ISIN) and the Legal Entity Identifier (LEI) of the AIF, where available;
 - (c) in case of master-feeder structures, the name of the master AIF, where available its LEI, and, where the AIFM of the master AIF is different from the AIFM of the AIF to be managed, the AIFM of the master fund, its home Member State and, where available, its LEI.

Article 2

Information to be provided under Article 33(3) of Directive 2011/61/EU

1. The information that AIFMs are to provide under Article 33(3), point (b), of Directive 2011/61/EU shall contain the name, address, where available national identification codes, and contact details of the department or contact point within the branch that is responsible for exchanging information with the competent authorities of the AIFM's home Member State or with the competent authorities of the Member State where the branch is established.
2. The information that AIFMs are to provide under Article 33(3), point (c), of Directive 2011/61/EU about persons responsible for the management of the branch shall contain the name, position, email address, and telephone number of individuals performing key functions in a leading position in relation to the branch.
3. The information on the organisational structure of the branch that AIFMs are to provide under Article 33(3), point (a), of Directive 2011/61/EU shall contain all the following:
 - (a) whether the AIFM is a member of a group;
 - (b) an explanation of how the branch will contribute to the strategy of the AIFM, or the AIFM's group;
 - (c) the following information on the organisation of the branch:
 - (a) functional, geographical, and legal reporting lines;
 - (b) a description of how the branch fits into the corporate structure of the AIFM, or, where the AIFM is a member of a group, into the corporate structure of the group;
 - (c) the rules for reporting by the branch to the AIFM;

- (d) a description of the risk measurement and management process put in place by the AIFM at the level of the branch under Article 45 of Commission Delegated Regulation (EU) No 231/2013⁸;
- (d) a summary of the systems and controls that will be put in place, including all the following:
 - (a) procedures put in place and the human and material resources allocated, to comply with the rules drawn up by the AIFM's host Member State pursuant to Articles 12 and 14 of Directive 2011/61/EU;
 - (b) procedures put in place and the human and material resources allocated, to comply with anti-money laundering and counter financing of terrorism obligations laid down in Directive (EU) 2015/849/EU of the European Parliament and of the Council⁹;
 - (c) controls over delegation arrangements with third parties in connection with the activities carried out by the branch;
- (e) forecast statements for both, profit or loss and cash flow, for the first 36-month.

Article 3

Notification of any changes to the information communicated or provided under Article 33(2), (3) and (6) of Directive 2011/61/EU

1. AIFMs shall notify the competent authorities of their home Member State about any change to the information referred to in Articles 1 and 2.
2. AIFMs shall inform the competent authorities of their home Member State about the planned termination of a branch established in another Member State, and shall provide those competent authorities with all the following:
 - (a) the name, email address and telephone number of the person or persons who will be responsible for the process of terminating the operation of the branch;
 - (b) the schedule for the planned termination;
 - (c) the details of, and processes proposed for, winding down the business operations, including details about how investor interests will be protected, complaints will be resolved, and any outstanding liabilities will be discharged.

Article 4

Entry into force and application

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

⁸ Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (OJ L 83, 22.3.2013, p. 1).

⁹ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

This Regulation shall apply from ... [PO please insert the date = 3 months after the publication in the OJ].

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

Done at Brussels, 15.12.2023

*For the Commission
The President
Ursula VON DER LEYEN*