

Group Briefing

November 2016

ESMA Updates AIFMD Q&A

On 16 November 2016 ESMA published an updated Q&A on the application of AIFMD.

The updated Q&A includes four new questions and answers on the cross-border marketing of AIFs and the delegation of functions by an AIFM to AIFs or third parties.

CLARIFICATION ON MARKETING NOTIFICATION REQUIREMENTS

Marketing of a New Share Class in a Host Member State

The Q&A states that where a new share class is set up in an AIF which is already marketed in a host Member State by way of the AIFMD marketing passport (Article 32 of AIFMD) this should not be regarded as a material change requiring a new notification pursuant to Article 32. ESMA has confirmed that the creation of a share class, which is to be marketed cross-border within an already notified (sub-)fund, does not constitute a material change of the notification.

Material Change to an Existing Marketing Notification

The Q&A states that where an AIFM wishes to notify a material change to a notification made to the competent authority in its home Member State

to manage or market an AIF on a cross-border basis (Articles 32(7) or 33(6) of AIFMD), the AIFM must include the full set of documentation required by Article 32 or 33 with the revised notification letter. In addition, ESMA advised that AIFMs are asked to highlight any amendment to the original notification letter and accompanying documentation.

CLARIFICATION ON DELEGATION BY AIFMS

Potential Extension of Responsibility of AIFM for Ensuring Compliance by Third Parties with AIFMD

The Q&A states that where an AIFM does not itself perform the functions set out in Annex I of AIFMD, this does not release the AIFM from its responsibility to ensure compliance of the relevant function(s) with AIFMD. ESMA confirmed that where a third party performs an Annex I function, this function should be considered as having been delegated by the AIFM to the third party. Therefore, the AIFM should be responsible for ensuring compliance with the requirements on delegation set out in Article 20 of AIFMD on the basis that a single AIFM appointed for an AIF is responsible for ensuring compliance with AIFMD. ESMA states that, for

the avoidance of doubt, this applies to all functions listed in Annex I of AIFMD, which include not just portfolio management and risk management but also administration, marketing and certain activities related to the assets of AIFs specified in Annex I.

In an Irish funds context this Q&A raises issues. The AIFM may be, but is not always, a party to the administration and distribution agreements but the administrator and the distributor are in many cases not regarded as delegates of the AIFM. This latest guidance from ESMA could potentially involve a large scale re-papering of existing contractual arrangements. There is also some doubt as to whether the Q&A is consistent with AIFMD itself. Annex I to AIFMD requires that the AIFM carry out the investment management functions of portfolio management and risk management and can delegate part of these functions to other parties. However, AIFMD does not expressly require that an AIFM perform those other functions listed in Annex I (i.e. administration, marketing and activities related to the assets of the AIFs). We will monitor developments in this regard (including any feedback from the Central Bank of Ireland) and provide you with an update on how this aspect of the Q&A impacts Irish funds in due course.

Performance of Investment Management Functions by an Externally-Managed AIF

The Q&A states that an externally-managed AIF cannot itself perform the investment management functions or other functions (including administration) set out in Annex I of AIFMD as externally-managed AIFs are not regulated as AIFMs. The performance of the functions listed in Annex I is only permitted for AIFs which are internally-managed. Where the AIF appoints an external AIFM, the external AIFM, through its appointment as AIFM of the AIF, is responsible for providing the functions listed in Annex I. The external AIFM may delegate to third parties the task of carrying out functions on its behalf in accordance with Article 20 of AIFMD. The externally-managed AIF is, however, not a 'third party' in accordance with Article 20(1) of AIFMD.

KEY CONTACTS

If you have any queries on this briefing, please do not hesitate to contact a member of our team:



KEVIN MURPHY
PARTNER

+353 1 618 0515
kevin.murphy@arthurcox.com



SARAH CUNNIFF
PARTNER

+353 1 618 0508
sarah.cunniff@arthurcox.com



DARA HARRINGTON
PARTNER

+353 1 618 0559
dara.harrington@arthurcox.com



ADRIAN MULRYAN
PARTNER

+44 207 832 0201
adrian.mulryan@arthurcox.com

arthurcox.com

Dublin

+353 1 618 0000
dublin@arthurcox.com

Belfast

+44 28 9023 0007
belfast@arthurcox.com

London

+44 207 832 0200
london@arthurcox.com

New York

+1 212 782 3294
newyork@arthurcox.com

Silicon Valley

+1 650 943 2330
siliconvalley@arthurcox.com