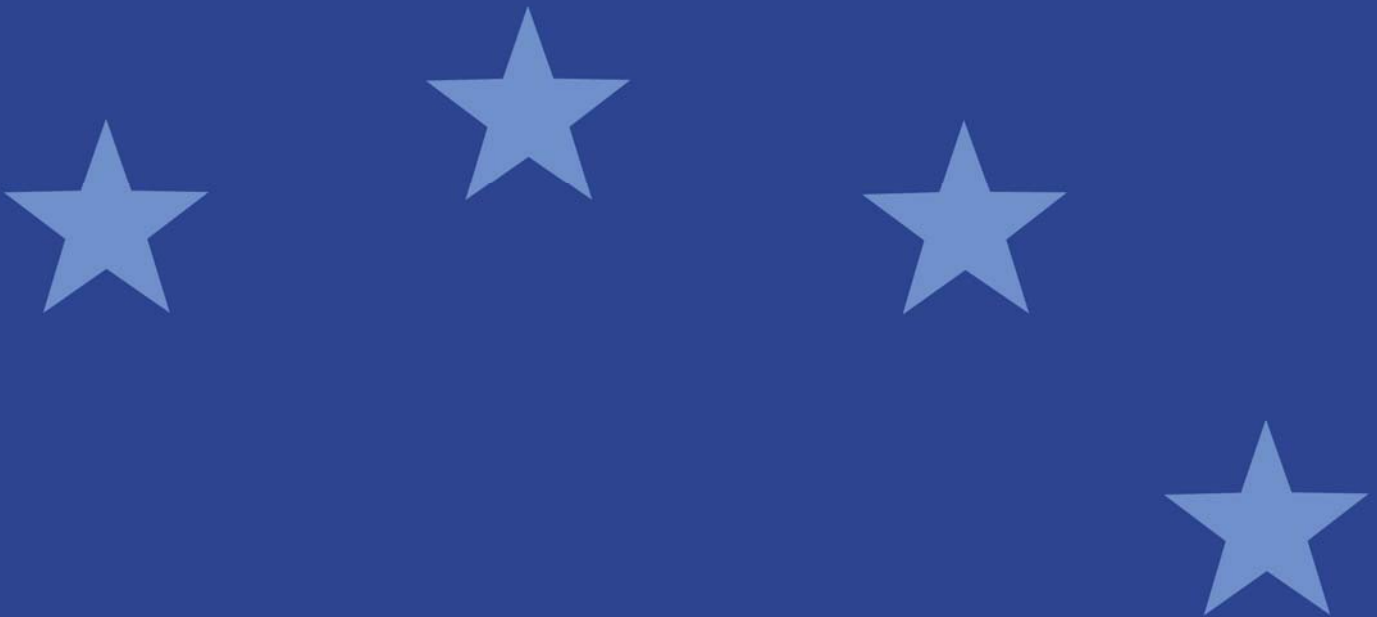




European Securities and  
Markets Authority

# Final report

Draft regulatory technical standards on types of AIFMs



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## Acronyms used

AIF	Alternative Investment Fund
AIFM	Alternative Investment Fund Manager
AIFMD	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 <sup>1</sup>
ESMA	European Securities and Markets Authority
UCITS Directive	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 (UCITS) (recast) <sup>2</sup>

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<sup>1</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF>.

<sup>2</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:EN:PDF>

## **I. Executive Summary**

### **Reasons for publication**

Article 4(4) of the AIFMD (see Annex I of this paper for the full text of this Article) provides that ESMA shall develop draft 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 the AIFMD. On 23 February 2012, ESMA published a discussion paper on key concepts of the Alternative Investment Fund Managers Directive and types of AIFM (ESMA/2012/117) which was followed on 19 December 2012 by the publication of a consultation paper on draft regulatory technical standards on types of AIFMs (ESMA/2012/844). This final report sets out the final text of the draft RTS required by Article 4(4) of the AIFMD.

### **Contents**

Section II sets out the feedback statement to the consultation paper (ESMA/2012/844) previously published by ESMA.

Annex I contains the legislative mandate to develop draft RTS.

Annex II provides for the cost-benefit analysis related to the draft RTS.

Annex III includes the opinion of the Securities and Markets Stakeholder Group on the discussion paper. The Securities and Markets Stakeholder Group did not provide a formal response to the consultation paper.

Annex IV contains the full text of the final draft RTS.

### **Next steps**

The draft RTS in Annex IV will be submitted to the Commission for endorsement and forwarded to the European Parliament and the Council. Within 3 months of receipt of the draft RTS, the Commission shall decide whether to endorse it.

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## **II. Feedback Statement**

1. ESMA received 27 responses to the consultation paper (CP) on draft regulatory technical standards on types of AIFM. Responses were received from asset managers (and their associations), banks (and their associations), an association of investors, law firms, a private equity fund administrator and public authorities.

### **I. General comments**

2. Three respondents mentioned that it was their understanding that the proposed draft regulatory technical standards (RTS) only apply to AIFs and AIFMs and that the proposed definition of “closed-ended” and “open-ended” funds does not apply to UCITS, for which the UCITS Directive also contains investment rules that distinguish open-ended and closed-ended funds.
3. Similarly, three other respondents asked ESMA to clarify that the definition of open-ended and closed-ended funds is relevant in the context of the AIFMD only.
4. A stakeholder asked for clarification on the responsibility of the valuation function (internal and external) under Article 19(10) of the AIFMD.

**ESMA’s response:** ESMA confirms that the definition provided in the draft RTS is relevant for the purpose of the application of the AIFMD only. However, ESMA considered that any further specification on this point in the text of the draft RTS would be unnecessary and confusing since the legal basis for developing draft RTS under Article 4(4) of the AIFMD already clearly implies that the RTS could not go beyond the scope of the AIFMD.

As for the request for clarification on the responsibility of the valuation function under the AIFMD, ESMA considers that that issue goes beyond the scope of this work stream.

## **II. Background**

**Q1: Do you agree with the approach suggested above on the topics which should be included in the draft regulatory technical standards? If not, please state the reasons for your answer and also suggest an alternative approach.**

5. A large number of respondents agreed with the approach followed by ESMA and with the fact that ESMA did not address in the draft RTS the other topics covered in the discussion paper on key concepts of the AIFMD and types of AIFM (ESMA/2012/117) (hereinafter ‘DP’).
6. One respondent called for more work to distinguish the notion of ‘holding companies’ from the one of ‘AIFMs managing AIFs which acquire control of non-listed companies and issuers’, the latter being dealt with under Section II of the AIFMD.
7. Some respondents regretted the fact that some topics included in the DP were not included in the CP. In particular, some of these respondents mentioned the sections relating to the vehicles which are not AIFMs or AIFs or are exempted from the provisions of the AIFMD, the treatment of UCITS management companies and the treatment of MiFID firms and credit institutions. Two asset managers’ associations asked for clarification on the questions raised in relation to these topics in the DP and reiterated the comments made in their feedback on the DP. Two other asset managers’ associations asked for clarification on the appointment of the AIFM, the delegation of tasks and the exempted vehicles.

**ESMA's response:** Given the support received on the topics to be covered in the RTS, ESMA confirmed its proposed approach. As for the requests to provide additional guidance on the topics covered in the DP that were not covered in the CP nor in the separate consultation paper on guidelines on key concepts of the AIFMD (ESMA/2012/845), ESMA is still considering the possibility to develop separate guidelines or other convergence tools (e.g. Q&A) in the future.

### **III. AIFMs of open-ended/closed-ended AIF(s)**

#### **Q2: Do you agree with the proposed definition of AIFMs of open-ended/closed-ended AIFs? If not, do you have any alternative proposal, in particular as regards the relevant frequency of redemptions for the open-ended funds?**

8. Several respondents agreed with the proposed definition.
9. An association of investors mentioned that the definition must not be reduced to the capacity of redemptions and freedom in subscriptions is also important. The same respondent mentioned the example of French employees saving funds in which redemptions are generally restricted for five years (even until the retirement date), but they are still possible for very limited reasons (death, wedding or house acquisition).
10. Two respondents objected to the idea that the redemption policy is the relevant criterion to distinguish between open-ended and closed-ended funds. These respondents pointed out that the distinctive feature between two types of fund is the limited number of shares or investors who join a closed-ended fund during a time-limited placement period (temporary placement or offering period) and, related thereto, the fixed capital of closed-ended funds. According to one of the two respondents, additional characteristics are that (i) the total investment volume of closed-ended funds is usually much lower than the volume of open-ended funds and (ii) closed-ended funds often have a predefined 'lifetime' and the assets are usually held to maturity. Therefore, this respondent suggested transferring the definition of closed-ended/open-ended funds to the competence of the Member States or, alternatively, making a distinction on the basis of whether the fund can permanently raise capital of a third party (open-ended fund) or not (closed-ended fund).

**ESMA's response:** Given the overall support for the proposed definition, ESMA decided not to change its approach of taking the AIF's redemption policy as the key element for distinguishing between AIFMs of open-ended AIFs and AIFMs of closed-ended AIFs.

#### **Article 1(1)**

11. The majority of respondents asked ESMA to modify the proposed Article 1(1) of the RTS to clarify that an AIFM may manage at the same time both open-ended and closed-ended AIFs. The main argument brought forward by these respondents was that Level 1 does not limit an AIFM to the management of either open-ended or closed-ended AIFs. A number of drafting proposals were made to introduce the requested change.

**ESMA's response:** ESMA agrees that Level 1 does not limit an AIFM to the management of either open-ended or closed-ended AIFs. This is reflected in recital 2 of the RTS.

#### **Article 1(2)**

12. An asset manager suggested modifying the wording in order to make clear that the first two criteria (a) and (b) must be fulfilled and that the criterion (c) is not another criterion but a mere explanation of (a).
13. A private equity fund administrator called for the addition of two additional criteria to the definition of open-ended AIF:
  - i) marketing of the AIF should be intended to be on-going throughout the life of the AIF;
  - ii) in an open-ended AIF ordinary rights should be represented by units or shares: this would emphasise the difference between vehicles where investors' rights are represented by units or shares in the vehicle itself (whether open-ended or closed-ended) and those where investors are participating through contractual commitments (howsoever the particular cash-in/cash-out mechanism is structured).

**ESMA's response:** ESMA saw merit in restructuring Article 1(2) of the draft RTS in the CP in order to clarify that the criterion under item (c) was a mere explanation of item (a). However, given the support from other stakeholders for the proposed wording, ESMA did not see merit in including the additional criteria suggested by the above-mentioned respondent.

#### Article 1(2)(a)

14. Two respondents had no objections to the proposed frequency of redemptions used for the definition of open-ended AIFs.
15. An asset managers' association asked what designation would apply to AIFs that have classes with different liquidities.

**ESMA's response:** Given the support received, ESMA decided not to change the redemption frequency proposed in the CP. As for AIFs having share classes with different liquidities, ESMA considered it appropriate to clarify that in the case of an AIF with different liquidities at the level of the share classes, as long as at least one class has a redemption frequency of at least yearly, the whole AIF should be regarded as open-ended for the purpose of the AIFMD rules.

#### Article 1(2)(b)

16. The following comments were made on issues that were considered unclear in the proposed wording:
  - i) A few respondents asked ESMA to clarify whether the reference "at the time of the transaction" means when the order is accepted, executed or finally settled. These respondents suggested clarifying that this means the time when the investor's entitlement is determined or calculated in accordance with the fund rules; similarly, a law firm suggested modifying the wording as follows in order to avoid uncertainties arising from the difference between price used at the time of redemption and the actual pay-out to the investor: "*the redemption price does not vary significantly from the net asset value per unit/share of the AIF available at the time of the exercise of the right of redemption*";
  - ii) A few respondents asked ESMA to clarify how a dealing spread or redemption charge would be construed in this context (i.e. the spread can be material and result in the redemption price varying significantly from the net asset value per unit/share). These respondents sug-

gested the use of the phrase “*realised on a basis calculated wholly or mainly by reference to the value of the AIF’s assets*” in order to clarify that a spread/redemption should not be taken into account in determining whether the redemption price varies significantly from the net asset value per unit/share. A law firm suggested introducing a general quantitative standard for the assessment of the variance as significant (“*Variations of up to 25% from the net asset value of the unit/share of the AIF shall not generally be considered significant*”). Furthermore, some respondents asked ESMA to clarify that account may be taken of factors other than the value of the AIF’s assets that may result in the sum realised failing to reflect the true net asset value, including the payment by the investor of charges and/or of an early redemption penalty. Similarly, an asset managers’ association asked for clarification that redemption fees are not to be taken into account when assessing compliance with Article 1(2)(b) of the draft RTS.

**ESMA’s response:** ESMA saw merit in simplifying the wording in this part of the RTS by referring to the key concepts of “redemption” and “price”. As for the request for clarification on how a dealing spread or redemption charge would be considered, ESMA saw merit in excluding only the redemption fee for the purpose of the determination of whether the redemption price varies significantly from the net asset value of the AIF.

#### Article 1(2)(c)

17. Some respondents agreed that special arrangements for the management of liquidity risk should not be taken into account for determining whether the right of redemption is exercisable by investors at least once a year.
18. An asset managers’ association mentioned that while events such as side pockets, gates and suspensions arise from the illiquidity of assets, lock-ups may not and there is no limitation proposed on the length of such lock-ups. This respondent argued that the length of a lock-up period should be a determining factor in terms of the consideration of whether a fund is open-ended or closed-ended.
19. Three asset managers’ associations mentioned that lock-up periods of more than one year should be taken into account when determining the open-ended/closed-ended nature of an AIF. Other respondents argued that in order to for an AIF to qualify as open-ended, the length of the initial lock-up period should be restricted to a timeframe one could reasonably expect in relation to the open-ended fund model. An asset managers’ association mentioned that, if lock-up periods are disregarded, non-tradeable closed-ended funds would be defined as open-ended funds years after their creation and considering these funds as open-ended would imply a completely different legal environment, especially for the significant amount of funds with retail customers.
20. In particular, several respondents referred to the provisions in Articles 3(2)(b) and 21(3) third subparagraph of the AIFMD according to which AIFs that “*have no redemption rights exercisable during a period of 5 years following the date of initial investment*” are subject to specific rules tailored to their closed-ended nature. Some members of an asset managers’ association argued that an initial lock-up period of 5 years or more represents an appropriate borderline for differentiating closed-ended from open-ended AIFs. A bank suggested having a fixed limitation between 3 to 5 years for the initial lock-up periods for open-ended funds. An asset managers’ association added that in German practice of closed-ended funds it is very common to set up vehicles with very long initial lock-up periods of 10, 15 or even 20 years which usually accord with the point of time at which the fund initiator expects the fund assets to be ready for sale; after this period, investors are often granted annual termination rights



upon 6-month notice. Another asset managers' association mentioned that the right to redeem could be partial and this should be taken into account when determining whether the fund is open-ended or closed-ended (e.g. 20% of the value could be paid within one year and 80% after more than one year).

21. Some members of an asset managers' association suggested a differentiation based on the nature of the assets held by the AIFs and mentioned the approach followed in some Member States where 6-monthly redemptions for a liquid securities fund would not be treated as open-ended, but redemption every 6 months or annually would be reasonable for less liquid assets.

**ESMA's response:** ESMA saw merit in modifying the draft RTS in order to recognise that events such as side pockets, gates and suspensions or other similar arrangements arise from the illiquidity of assets, while lock-up periods do not necessarily arise from the illiquid nature of the AIF's assets.

ESMA considered that the length of any lock-up period should be irrelevant for the purpose of determining whether an AIFM manages an open-ended or a closed-ended AIF. Indeed, the open-ended or closed-ended nature of a managed AIF should be determined by an AIFM from the outset (i.e. at the time the AIF is created or starts its activities) and the end of a lock-up period should not be relevant for such an assessment. However, ESMA recalls that the relevant AIFMD Level 1 and Level 2 provisions provide that the systems and procedures to be put in place by the AIFM for liquidity management and valuation procedures have to be appropriate (see in particular Article 16(1) of Level 1 and Articles 46 to 49 for liquidity management and Article 19(1) of Level 1 and Article 67(1), second subparagraph of Level 2 for the valuation procedures).

#### Article 1(3)

22. A public authority mentioned that the paragraph should be redrafted as follows: "*An AIFM of closed-ended AIF(s) shall be an AIFM managing AIF(s) other than the type described in paragraph 2*" as the AIF described in paragraph 2 is a type of AIF.

**ESMA's response:** ESMA saw merit in this comment and redrafted the relevant paragraph along the lines suggested.

#### **Q3: Please provide qualitative and quantitative data on the costs and benefits that the proposed definition of AIFMs of open-ended/closed-ended AIFs would imply.**

23. An asset managers' association mentioned that they could cope with the proposed definition of AIFs of the open-ended/closed-ended type. A law firm mentioned that the proposed definition was appropriate.
24. Another asset managers' association mentioned that the proposed definition is not workable and would seriously harm non-tradeable closed-ended funds.

#### **Q4: Do you consider that any possibility to redeem the AIF's units/shares on the secondary market and not directly from the AIF should be taken into consideration when assessing whether AIFM is an AIFM of open-ended or closed-ended AIF(s)? Or do you consider that, as within the UCITS framework, only any action taken by an AIFM to ensure that the stock exchange value of the units of the AIF it manages does not significantly vary from their net asset value should be regarded as equivalent to granting to unitholders/shareholders the right to redeem their units or shares out of the assets of this AIF?**

25. The majority of the responses to this question favoured an alignment with the approach taken under the UCITS framework (i.e. trading should be deemed as equivalent to direct or indirect redemptions if the AIFM takes action to ensure that the stock exchange values of the AIF does not significantly differ from its net asset value). A respondent mentioned that the so-called repurchase entities or companies may be a possibility to redeem units or shares on a secondary market.
26. However, some respondents favouring the alignment with the UCITS provisions did not believe that the general possibility to dispose of AIF units/shares on the secondary market should have relevance for determining the type of AIF. Similarly, several other respondents were of the view that an AIF is only open-ended where investors have the right to redeem, at their own initiative and on a reasonably frequent basis, the units or shares in the AIF out of the assets of the AIF.
27. Three of the above-mentioned respondents added that redemptions are not relevant in the context of secondary markets since securities are exchanged and not redeemed on secondary markets.
28. An association of investors was of the view that an open-ended fund exists each time that there is a possibility of competition between the markets and the stakeholders on the liquidity of the fund.

**ESMA's response:** Given the support received from the respondents, ESMA decided to align the draft RTS with the provisions of the UCITS Directive and to provide that any action taken by an AIFM to ensure that the stock exchange value of the units of the AIF it manages does not significantly vary from their net asset value should be regarded as equivalent to granting to unitholders/shareholders the right to redeem their units or shares out of the assets of this AIF.

**Q5: Do you agree with the proposed approach as regards the treatment of hybrid structures? If not, please explain why and, if possible, provide alternative proposals.**

29. A bank disagreed with the proposed approach on hybrid structures and argued that a change in the redemption policy during the life cycle of a product from closed-ended to open-ended, or vice versa, should not entail a change in the applicable liquidity management and valuation regime.
30. The large majority of the responses to this question were supportive of the approach proposed in Article 1(4) of the draft RTS. However, a few of these respondents asked ESMA to limit the requirement to adapt the new rules when the type of AIF changes. Along the same lines, an asset managers' association noted that the Level 1 provisions on liquidity management and valuation anticipate that the systems and procedures to be established by AIFMs are tailored to the specific AIFs (i.e. Level 1 says "for each AIF they manage") and it is not required that the liquidity management and valuation procedures apply without further differentiation to all AIFs managed by an AIFM.
31. Two respondents asked ESMA to clarify that a modification of the redemption policy in an existing vehicle is solely relevant for the application of liquidity management and valuation rules under the AIFMD.

**ESMA's response:** Given the support received, ESMA did not change its approach, but decided to clarify that, as requested by certain respondents, the requirement to adapt to the new rules is limited to the particular AIF that has changed type.

As for the request to clarify that a modification of the redemption policy in an existing vehicle is solely relevant for the AIFMD rules, see ESMA's response under paragraph 4 above.

#### **IV. Other criteria to determine the application of the AIFMD to certain types of AIFMs**

**Q6: Do you see merit in clarifying further the notion of contracts with prime brokers and/or the notion of internally or externally managed? If so, please provide suggestions. In particular, if your answer is yes for the notion of internally or externally managed, please indicate which of the criteria already in recital (20) of the AIFMD need additional clarifications.**

32. The large majority of respondents to the first part of the question did not see merit in clarifying further the notion of contracts with prime brokers. An asset manager asked ESMA to rather clarify the definition of “prime broker”, which is conceived broadly by the Level 1 provisions.
33. The majority of respondents to the second part of the question did not see merit in clarifying further the notion of internally or externally managed.
34. Three respondents suggested clarifying the notion of internally or externally managed by inserting a part of recital (20) of the AIFMD in the draft RTS in order to increase its legal certainty. Another respondent requested clarification on the notion of internally or externally managed and mentioned, in particular, some uncertainties arising from the fact that the notion of “governing body” in recital (20) of the AIFMD is not a defined notion and the AIFMD does not specify that only AIFs which have a certain legal form (i.e. other than a UK unit trust) can have a governing body. A law firm considered it helpful to clarify that internally managed AIFs include AIFs in which management functions are carried out by separate legal entities naturally in their capacities as governing body of the AIF, as a result of the legal or corporate structure of the AIF.
35. **ESMA’s response:** Considering the feedback received, ESMA did not see merit in further clarifying the notion of contracts with prime brokers and/or the notion of internally or externally managed. As for the request to insert part of recital (20) of the AIFMD in the draft RTS in order to increase its legal certainty, ESMA did not consider this appropriate since this would not clarify any of the criteria in recital (20) of the AIFMD and would only constitute a duplication of equivalent provisions.

**Q7: Do you consider that there is a need to develop further typologies of AIFMs where relevant in the application of the AIFMD? If yes, please provide details on the additional typologies sought.**

36. The majority of respondents on this point saw no need to develop further typologies of AIFMs. In particular, an asset managers’ association was of the opinion that the addition of further sections and carve-outs would lead to even greater complexity of implementation. Another asset managers’ association mentioned that, in any event, the types of AIFMs should definitely not be based on criteria relating to the nature of the assets or the types of fund they manage. A third asset managers’ association suggested the development of further typologies rather at the level of the AIFs than at the level of the AIFMs.
37. Some members of an asset managers’ association saw merit in the development of further typologies for the proper functioning of the AIFM passport (Article 33 of the AIFMD). They suggested a determination based on the applicable investment strategies; these respondents suggested as an alternative a definition based on a possible capital protection. An asset manager also asked to differentiate capital-protected structured AIFs versus non-capital-protected structured AIFs and non-structured AIFs.

38. An asset managers' association felt it would be helpful if examples of typical AIFMs were to be given (e.g. different kinds of property company and investment trust company).
39. In considering the need to develop any further typologies of AIFMs, an asset manager asked ESMA to bear in mind the point on proportionality stressed by the Securities and Markets Stakeholder Group in their response to the DP.
40. An association of investors mentioned that the responses to the present consultation may give new ideas on these subjects.

**ESMA's response:** ESMA took note of the views expressed by the stakeholders on this point and, in the view of this feedback and as already anticipated in the CP, may consider developing in the future further draft RTS in order to establish additional typologies of AIFMs where relevant in the application of the AIFMD.



## **Annex I – Legislative mandate to develop technical standards**

The Regulation (EU) No 1095/2010 establishing ESMA empowered the latter to develop draft regulatory technical standards where the European Parliament and the Council delegate power to the Commission to adopt regulatory standards by means of delegated acts under Article 290 TFEU.

Article 4(4) of the AIFMD provides that: *'The European Supervisory Authority (European Securities and Markets Authority) (ESMA) shall develop draft regulatory technical standards to determine types of AIFMs, where relevant in the application of this Directive, and to ensure uniform conditions of application of this Directive.'*

*Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.*

## **Annex II – Cost-benefit analysis**

1. Having analysed the feedback from stakeholders, ESMA considered it appropriate to update the cost-benefit analysis included in the consultation paper on draft regulatory technical standards on types of AIFMs (ESMA/2012/844). For a complete overview of the approach taken and the analysis carried out, stakeholders should also refer to the cost-benefit analysis in Annex III of that consultation paper.

### **The likely economic impacts of the main amendments introduced in the draft RTS**

2. Certain respondents felt that the draft RTS should clarify that an AIFM may manage at the same time both open-ended and closed-ended AIFs. ESMA agrees that Level 1 does not limit an AIFM to the management of either open-ended or closed-ended AIFs. This is reflected in recital 2 of the RTS.
3. Furthermore, given the positive feedback on the specific question on this point in the consultation, ESMA decided to align the draft RTS with the provisions of the UCITS Directive and to provide that any action taken by an AIFM to ensure that the stock exchange value of the units of the AIF it manages does not significantly vary from their net asset value should be regarded as equivalent to granting to unitholders/shareholders the right to redeem their units or shares out of the assets of this AIF.
4. ESMA noted in the cost-benefit analysis in the consultation paper that it considered it more appropriate to wait for the publication of the AIFMD Level 2 provisions in the *Official Journal of the European Union* before determining whether it was necessary to provide any additional clarification on the notions of “leveraged/employs substantial leverage”. At the time of publication of this final report, the Level 2 provisions have not yet been published in the Official Journal. However, ESMA is of the view that the content of the relevant provisions in the Regulation adopted by the Commission on 19 December 2012 already provide sufficient clarification on these two notions.

### **Costs**

5. The amendments set out above are unlikely to lead to additional costs for regulators or market participants to the extent that they provide clarifications on the Level 1 provisions and do not impose additional obligations beyond those already set by the AIFMD on firms whose compliance has to be supervised.

### **Benefits**

6. In addition to the benefits of the RTS as set out in the cost-benefit analysis in the consultation paper, the alignment with the provisions of the UCITS Directive on the consideration to be given to the possibility for the AIF’s investors to redeem on the secondary market – at a price which is close to the net asset value of the AIF – ensures that an activity that for the AIF’s investors is economically equivalent to a direct redemption is duly taken into account.

## **Annex III – Opinion of the Securities and Markets Stakeholder Group**

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**The SMSG has been asked by ESMA to comment on the discussion paper on key concepts in the AIFMD. The ESMA consultation ended on 23 March, 2012 and while the SMSG was given the possibility of an extended period for responding given that the SMSG was only able to meet on April 26, 2012 as a body, comments are limited to a few key points as outlined below.**

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1. ESMA again has a balancing act of on the one hand providing additional clarity as to what entities are to be considered AIFs and AIFMs while on the other hand avoiding to becoming too descriptive (and narrow, as the reality is already out there; in existence) and looking at defining more commercial terms like e.g. family offices and joint ventures. There is no need to do the latter.

Key elements of the AIF definition in the view of the working group are:

- the raising of capital from external, unaffiliated/third parties (i.e. you are managing other people's money)
  - it needs to be an enterprise with a commercial reason of generating profits for investors
  - there needs to be a business communication by or behalf of the entity seeking capital which results in the transfer of cash or assets to the AIF
  - there should be an express linking of the capital raising with the defined investment policy
  - the capital raising should be done by or on behalf of a "sponsor" which plans (itself or through a group member) to make a profit out of the management of the capital raised from third party/external sources
2. Proportionality needs to be applied to all articles and not only some, as proportionality is a general principle of law and regulation. It must also be borne in mind that size is not the only relevant factor - others mentioned already in the Level1 text are, nature, scope and the complexity of activities as well as internal organisation. This will be especially important for the Remuneration discussion paper as well.
  3. Dual registration. Due to the high number of managers which are currently MIFID firms (in particular for carrying out reception and transmission of orders and investment advice) the possibility of dual registration needs to be considered. Otherwise firms in some member states (where MIFID authorisation is demanded today) may need to restructure their activities while firms in other MS (where MIFID authorisation currently is not demanded) need not.
  4. Delegation. Two aspects on delegation should be clarified by ESMA: Firstly, just because an AIFM itself does not perform certain of the functions in paragraph 2 of Annex 1 of the AIFMD, it does not au-



tomatically imply that they should be considered as delegated as these are not mandatory functions to be performed by an AIFM nor are they functions for which an AIFM needs to have responsibility. Secondly, an AIFM must be able to delegate both portfolio management and risk management as long as the delegation is not to such an extent that the AIFM becomes a letter-box-entity.

5. This opinion will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 26 April 2012

Guillaume Prache

Chair





## **Annex IV – Draft regulatory technical standards**

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

**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**

**of [...]**

**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<sup>3</sup>, and in particular Article 4(4) thereof,

Whereas:

- (1) [Subject-matter] It is important that regulatory technical standards determining types of AIFMs supplement the rules in Directive 2011/61/EU so that the new requirements are applied to AIFMs in a uniform manner.
- (2) [Article 1 – Types of AIFMs] 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, the valuation procedures and the transitional provisions of Directive 2011/61/EU to AIFMs.
- (3) [Article 1 – Types of AIFMs] In making the distinction between an AIFM managing AIFs of the open-ended type and an AIFM managing AIFs of the closed-ended type, it is desirable to determine an appropriate threshold for the frequency of redemption opportunities offered to AIF investors given the particular relevance thereof to the rules on liquidity management and valuation procedures. Taking into account current market practice, it is appropriate to consider as open-ended those AIFs which offer redemption frequencies of at least yearly.
- (4) [Article 1 – Types of AIFMs] It is relevant to consider whether the proximity between the net asset value and the price returned to the unitholder or shareholder is such that the unitholder or shareholder can be considered to have an effective right to redeem units or shares out of the assets of the AIF.

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<sup>3</sup> OJ L 174, 1.7.2011, p. 1.

- (5) [Article 1 – Types of AIFMs] An AIFM managing AIF(s) qualifying as open-ended and providing for a holding period during which unitholders/shareholders do not have the right to redeem their units or shares out of the assets of the AIF should employ an appropriate liquidity management system and ensure that the net asset value calculation and asset valuation are carried out at a frequency which is both appropriate to the assets held by the AIF and its issuance and redemption frequency.
- (6) [Article 1 – Types of AIFMs] 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) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (8) ESMA 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 opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010.
- (9) Pursuant to Article 66(2) of Directive 2011/61/EU, Member States shall apply the laws, regulations and administrative provisions transposing the Directive by 22 July 2013. It is appropriate to align the date of application of this Regulation with that deadline.

HAS ADOPTED THIS REGULATION:

*Article 1- Types of AIFMs*

1. An AIFM may be either of the following:
  - an AIFM of open-ended AIF(s);
  - an AIFM of closed-ended AIF(s).
2. An AIFM of open-ended AIF(s) shall be considered to be an AIFM which manages at least one AIF, some or all of whose unitholders or shareholders have the right to redeem their units or shares out of the assets of the AIF where all the following conditions are present:
  - (a) the right to redeem may be exercised at least once a year;
  - (b) in accordance with the rules or instrument of incorporation of the AIF or any prospectus the redemption is to be carried out at a price that, before any redemption fee is applied, does not vary significantly from the net asset value per unit/share of the AIF available at the time when the price is determined in accordance with the rules or instrument of incorporation of the AIF;
3. For the purposes of paragraph 2(a):

- (a) action taken by an AIFM to ensure that the stock exchange value of the units/shares of the AIF(s) it manages does not significantly vary from their net asset value shall be regarded as equivalent to the right to redeem out of the assets of the AIF;
  - (b) no account is to be taken of any of the following:
    - (i) any holding period provided for in the rules or instrument of incorporation of the AIF or any prospectus during which unitholders/shareholders shall not have the right to redeem their units or shares out of the assets of the AIF, whether that period is set with reference to the date of creation of that AIF or the date of commencement of its activities;
    - (ii) any power provided for in the rules or instrument of incorporation of the AIF or any prospectus to restrict exercise of the right to redeem, in so far as that power, whether it is exercised or not, applies any special arrangements, such as side pockets, gates, suspensions or other similar arrangement arising from the illiquid nature of the AIF's assets.
4. An AIFM of closed-ended AIF(s) shall be an AIFM which manages at least one AIF other than of the type described in paragraph 2.
5. Where a change in the redemption policy of the AIF(s) has the effect of changing the type of AIF(s) an AIFM manages, the rules relevant to the new type of AIF(s) shall be applied to such AIF(s) by the AIFM.

*Article 2 – Entry into force*

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

[This Regulation shall apply from 22 July 2013.]

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

Done at Brussels,

*For the Commission  
The President*

*[For the Commission  
On behalf of the President*

*[Position]*