

## Corporate & Financial Weekly Digest

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### **ESMA Issues Draft Advice on Possible AIFMD Implementing Measures in Relation to Supervision and Third Countries**

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On August 23, the European Securities and Markets Authority (ESMA) published consultation paper ESMA/2011/270 (Consultation on ESMA's draft technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive in relation to supervision and third countries.)

The draft advice contained in the consultation paper covers three broad areas with respect to detailed rules on supervision and third country entities underlying the EU Alternative Investment Fund Managers Directive (AIFMD).

Supervisory co-operation and exchange of information. ESMA's draft advice under this heading focuses on the relationships between EU regulatory authorities and third country regulators. ESMA envisages that the arrangements should take the form of written agreements allowing for exchange of information for both supervisory and enforcement purposes. The agreements to be put in place should impose a duty on each relevant third country authority to assist the relevant EU regulator where it is necessary to enforce EU or national legislation. Finally, ESMA considers it important that the arrangement make provision for exchange of information for the purposes of systemic risk oversight.

Delegation of portfolio or risk management functions to third country entities. This section of the draft advice sets out ESMA's proposals for additional requirements which would apply when fund managers delegate all or part of the portfolio or risk management functions to an entity outside the EU. The proposals focus on provisions to be included in the applicable written agreement to be put in place with relevant third country regulators which, under ESMA's proposals, would need to allow for access to information, the possibility of on-site inspections of the entity to which functions are delegated and the carrying out of enforcement actions in the case of a breach of the regulations.

Assessment of equivalence of third country depositary frameworks. Under the AIFMD, the depositary of a relevant fund may be established in a non-EU third country subject

to certain conditions. In this part of the draft advice, ESMA sets out its proposals on the matters to be taken into account when assessing whether the prudential regulation and supervision applicable to a depositary established in a third country (i) has the same effect as the provisions of the AIFMD; and (ii) can be considered as effectively enforced. ESMA states that it has identified a number of criteria for this purpose, such as the independence of the relevant regulatory authority, the requirements on eligibility of entities wishing to act as depositary, equivalence of capital requirements and the existence of sanctions in the case of violations.

Concerning the arrangements to be put in place with third country authorities in general, ESMA notes its preference for a single agreement to be negotiated by ESMA in each case in order to ensure consistency and avoid a proliferation of bilateral agreements between EU national regulators and third country regulators. Responses to the consultation are requested by September 23, in order for ESMA to finalize its advice to the European Commission by the November 16 deadline given to ESMA by the Commission.

To view the consultation paper, click [here](#).

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