



FSMA_2014_03 of 23/06/2014

Entry into force of the Law of 19 April 2014 on alternative investment funds and their managers

Scope:

This Communication applies to alternative investment funds (AIFs) and to their managers, as referred to in Article 3, 2°, and Article 3, 13°, respectively, of the Law of 19 April 2014 on alternative investment funds and their managers (hereafter referred to as “the AIFM Law”).

Summary/Objectives:

This document is intended to inform the sector of the entry into force of the AIFM Law, to set out the scope of the AIFM Law and to explain the legal effects of its entry into force.

Moreover, the updated Annex to Communication FSMA_2013_11 of 2/07/2013 “Directive 2011/61/EU on Alternative Investment Fund Managers: questions and answers on the transitional period” is annexed hereto.¹

Structure:

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1. Entry into force of the AIFM Law

This Communication follows upon Communication FSMA_2013_11 of 2/07/2013 “*Directive 2011/61/EU on Alternative Investment Fund Managers: questions and answers on the transitional period*”.

By way of reminder, Directive 2011/61/EU on Alternative Investment Fund Managers (hereafter the “AIFMD”) is intended to regulate the activities of alternative investment fund managers. It thus applies to self-managed alternative investment funds and to AIFMs considered ‘external’, i.e. management companies which manage one or more AIFs.

¹ The Annex is titled FSMA_2013_11-1 of 2/07/2013 “*Questions and answers on the transitional period provided for by Directive 2011/61/EU, and on the Belgian national provisions for transposing this Directive*”.

The term "alternative investment fund" (AIF)² is used in the AIFMD to mean investment funds other than undertakings for collective investment governed by the UCITS Directive.³

Since the entry into force of the AIFM Law on 27 June 2014, the questions and answers found in the Annex to Communication FSMA_2013_11 of 2/07/2013 titled "*Directive 2011/61/EU on Alternative Investment Fund Managers: questions and answers on the transitional period*" have been updated. They are annexed to this document.

2. Principal parts and scope of the AIFM Law

The AIFM Law transposes the AIFM Directive. Furthermore, it contains all the provisions of the Law of 3 August 2012⁴ applicable to AIFs⁵ whose units are offered to the public and to management companies of such public AIFs that are not already covered by the AIFMD or by Delegated Regulation (EU) No 231/2013 supplementing the AIFMD⁶ (the "AIFM Regulation").

Specifically, the AIFM Law comprises the following three main parts:

- Part II contains the harmonised provisions applicable to AIF managers: these provisions are taken from the AIFMD and contain an "authorization/registration" component and a "passport" component:
 - the "authorization/registration" component applies to managers governed by Belgian law who are required to submit an application for authorization or registration⁷ to the FSMA;
 - the "passport" component applies (i) to managers governed by Belgian law which market units in AIFs in Belgium or in the European Economic Area ("EEA") and/or which manage AIFs governed by the law of a Member State of the EEA via a branch or under the freedom to provide services and (ii) managers governed by the law of another Member State of the EEA which manage AIFs governed by Belgian law via a branch or under the freedom to provide services and/or which market units of AIFs in Belgium.

It should be noted that the passport provided for pursuant to Part II of the AIFM Law applies only to AIFs whose units are not offered to the public in Belgium. With regard to the marketing or

² See Article 4.1.a) of the AIFMD, which defines Alternative Investment Funds as follows: "*collective investment undertakings, including investment compartments thereof, which (i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and (ii) do not require authorization pursuant to Article 5 of Directive 2009/65/EC*".

³ Directive 2009/65/EEC of 13 July 2009 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

⁴ Law of 3 August 2012 on certain forms of collective management of investment portfolios.

⁵ The term AIF applies to all undertakings for collective investment other than those which meet the conditions of the UCITS Directive.

⁶ Commission Delegated Regulation (EU) 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.

⁷ An application for registration must be made by managers who are below the thresholds referred to in Article 106 of the AIFM Law and that do not manage public AIFs within the meaning of Article 110 of the AIFM Law.

management of AIFs that are the subject of an offer to the public in Belgium, Parts III and/or IV of the AIFM Law apply in addition to Part II of the AIFM Law.

- Part III contains the non-harmonized provisions on AIFs: they are taken from the Law of 3 August 2012 and apply to AIFs that are subject to supervision, namely:
 - AIFs governed by Belgian law or by foreign law that are offered to the public in Belgium, and;
 - non-public AIFs governed by Belgian law that have opted for one of the institutional or private AIF statuses (institutional closed-ended real estate investment companies [*sicafi/bevaks*], institutional open-ended investment companies [*sicav/beveks*] or private investment companies investing in non-listed or growth companies [*private pricaf/privaks*]).
- Part IV contains the non-harmonized provisions on AIF management companies: they are taken from the Law of 3 August 2012 and apply to management companies governed by Belgian or foreign law which manage public AIFs governed by Belgian law.

The rules governing third countries are not set out here as they have not yet entered into force. In the meantime, the system of private placements provided for in Articles 494 to 499 of the AIFM Law applies. As regards public offerings, the provisions of Articles 503 and 504 will apply.

3. Other applicable legal and regulatory provisions

In addition to the AIFM Law, AIFs and their managers must also comply with the AIFM Regulation.

Moreover, Article 515 of the AIFM Law specifies that existing decrees and regulations continue to apply as long as they are not contrary to the new legal provisions.

As a result, the provisions of the Royal Decree of 12 November 2012 on certain public undertakings for collective investment that are relevant to AIFs and not covered by the AIFM Regulation or the AIFM Law continue to apply. Thus, for purely indicative purposes and without being exhaustive:

- Articles 1 to 7 on the general provisions and on the contents of the fund rules or instruments of incorporation continue to apply;
- Article 8, paragraph 2, Article 9, and Article 10, § 1, 3°, and § 2, 2°, 3°, 4°, 5°, 7° and 8° on the depository continue to apply. The other provisions of these articles have already been covered by Article 55 of the AIFM Law and by Articles 92 to 97 of the AIFM Regulation;
- Articles 11 to 13 on master-feeder structures continue to apply. However, in accordance with Articles 3, 45° and 46° of the AIFM Law, the master and feeder must both be governed by Belgian law;
- Articles 14 to 21 do not apply to AIFs since they concern undertakings for collective investment which opt for investments that meet the conditions of the UCITS Directive;

- Article 22, Article 23, § 3, 2° and 6° and § 4, Article 24, § 1, paragraph 3, 1°, Article 25, §1, 1° and 2°, and Article 26, § 1, paragraph 1, 2° and paragraph 2 on administrative procedures and on supervisory mechanisms continue to apply. The other provisions of these articles are already covered by Article 27 of the AIFM Law and/or by Articles 38 to 49 of the AIFM Regulation;
- Articles 27 to 28 on the statutory auditor continue to apply. However, in accordance with Article 3, 45° and 46° of the AIFM Law, the master and feeder must both be governed by Belgian law;
- Articles 29 to 34 on the prospectus and key investor information continue to apply;
- Articles 35 to 46 on notices, advertisements and other documents relating to a public offer of units continue to apply.
- Articles 47 to 50 containing the general rules on investment policy continue to apply;
- the rules governing the investment policy provided for in Articles 51 to 68 do not apply to AIFs, whereas those provided for in Articles 69 to 87 continue to apply;
- Articles 88 to 114 on master-feeder structures continue to apply, with the exception of the provisions that apply specifically to cross-border master-feeder structures (intended for undertakings for collective investment which meet the conditions of the UCITS Directive but not for AIFs);
- Articles 115, 116, 117, 118, § 3, § 4, § 5 and 120 on fees and commissions continue to apply. These articles are to be applied in conjunction with Article 24 of the AIFM Regulation;
- the majority of the provisions of Articles 121 to 127 on conduct of business rules are already covered by Articles 17, 18, 23, 25 to 28, 30, 31, 33, 34, 37 and 67 to 75 of the AIFM Regulation, with the exception of Articles 121, 122, § 1 and 124, § 2, 5°, 6°, 7°, 10° and § 3;
- the rules on conflicts of interest referred to in Articles 128 to 133 do not apply, since they are already covered by Articles 30 to 37 of the AIFM Regulation, whereas the rules referred to in Articles 134 to 137 continue to apply;
- Articles 138 to 146 on other prohibitions and obligations continue to apply;
- Articles 147 to 188 on dissolution, winding-up, mergers and other forms of restructuring continue to apply. However, the rules governing mergers and other forms of restructuring apply only if at least one AIF is involved in such an operation. In such a case, the hypotheses referred to in Article 160, 2° to 6°, are not relevant to AIFs;
- Articles 189 to 206 on the issuing and public offer of securities continue to apply;
- Articles 207 to 209 on the periodic and accounting information continue to apply;

- Articles 210 to 213 on the marketing in another Member State of units of undertakings for collective investment that meet the conditions of the UCITS Directive no longer apply. The same is true for Articles 217 to 220, which apply only to undertakings for collective investment governed by the law of another Member State of the European Economic Area and meeting the conditions of the UCITS Directive;
- Articles 214 to 216 and 221 to 225 applicable to AIFs governed by foreign law continue to apply;
- annexes A (Contents of the prospectus), B (Commentary on certain types of information to be included in the prospectus and other documents relating to the public offering of units) and C (Contents of the fund rules or instruments of incorporation) continue to apply.

The other royal decrees implementing the Law of 3 August 2012, the Law of 20 July 2004 or the Law of 3 December 1990 continue to apply to public⁸ and non-public⁹ AIFs, in accordance with the principle laid down in Article 515 of the AIFM Law.

4. Submitting an application for authorization/registration

As indicated in the questions and answers in the Annex to this document, AIF managers established before the entry into force of the AIFM Law must take all the necessary measures to comply immediately with the AIFM Law and submit an application for authorization or registration by 22 July 2014 at the latest.

AIFMs established after the entry into force of the AIFM Law are required to comply immediately with the AIFM Law as soon as they have been established, and thus they must obtain authorization from or register with the FSMA before beginning operations.

For information about the contents of the authorization dossier, please consult the Annex to this document. Moreover, the template provided for the request for authorization as a portfolio management company (version 06/2013 available via the following link: http://www.fsma.be/~media/Files/fsmafiles/memorandum/nl/2013-06-18_memorandum.ashx or http://www.fsma.be/~media/Files/fsmafiles/memorandum/fr/2013-06-18_mémorandum.ashx) may also be used.

⁸ Principally the Royal Decree of 10 November 2006 on the bookkeeping, annual accounts and periodic reports of certain undertakings for collective investment of the open-ended type, the Royal Decree of 7 March 2006 on securities lending by certain undertakings for collective investment, the Royal Decree of 18 April 1997 on investment companies investing in non-listed or growth companies (*pricaf/privaks*), and the Royal Decree of 7 December 2010 on real estate investment companies (public *sicafi/bevaks*).

⁹ Principally the Royal Decree of 23 May 2007 on private investment companies investing in non-listed or growth companies (*pricaf/privaks*), the Royal Decree of 7 December 2007 on open-ended institutional undertakings for collective investment in the category of investments authorized by Article 7, first paragraph, 2°, of the Law of 20 July 2004 and the Royal Decree of 7 December 2010 on closed-ended real estate investment companies (institutional *sicafi/bevaks*).

As regards the contents of the registration application dossier, please see Article 107 of the AIFM Law.

Applications for authorization and registration may be sent to the following addresses:

- intro.AIF@fsma.be (for internal AIF managers);
- e-notification.passporting@fsma.be (for external AIF managers).

Annex : FSMA 2014_03-1 / Law of 19 April 2014 on alternative investment funds and their managers: questions and answers on the entry into force of the AIFM Law