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ESMA Recommends Key Changes to the AIFMD

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On 19 August 2020, the European Securities and Markets Authority ("**ESMA**") published a letter ("**Letter**") received by the European Commission ("**Commission**") making several recommendations with regard to the Commission's upcoming review of the Alternative Investment Fund Managers Directive 2011/61/EU ("**AIFMD**").

Since the implementation of the AIFMD, EU financial regulators have identified areas of improvement to the AIFMD. The Commission's impending review provides an opportunity for the recommendations to be considered in more depth and in due course, potentially enacted.

Proposed key changes...

Key changes proposed by ESMA in its Letter to the Commission include:

- harmonizing certain aspects of the AIFMD and the Undertakings for the Collective Investment in Transferable Securities (2009/65/EC) ("**UCITS**") regimes, to avoid divergences in regulatory outcomes without justification;
- increasing the use of digitalised communication;
- making additional liquidity management tools available to all AIFMs in all EU member states;
- amending leverage calculation methodologies;
- a new framework under the AIFMD for loan origination funds, which will be of interest to managers of credit funds, in particular;
- changes to delegation arrangements, including limits on the use of delegation, the application of AIFMD standards to delegates (including where such delegates are outside the EU) and an extension of activities caught by the delegation rules;
- increased scrutiny and scope of regulation applicable to "host AIFMs";
- further clarification and consistency applied with regard to the definition of a "professional investor" in relation to which the AIFMD marketing passport is available, even if a new definition of "semi-professional investor" is introduced;

- a harmonised and consistent approach to “reverse solicitation”;
- extending the scope of AIFMD supervision to sub-threshold alternative investment fund managers; and
- changes to the AIFMD reporting regime and data use.

Next steps...

ESMA has highlighted that it encourages the Commission to support the areas identified in the Letter in order to improve the effectiveness and soundness of the AIFMD. The above considerations are likely to be useful to the Commission when carrying out its review of the AIFMD, however, there will likely be some “push-back” to some of these proposals from the asset management industry and from certain EU Member States – particularly with regard to the proposals relating to delegation arrangements.

From a UK perspective, many sponsors will be using or seeking to use delegation arrangements as part of their post-Brexit planning and it will be important to such firms that any amendments made to the delegation regime do not have an adverse impact on such arrangements.

While ESMA’s proposals are intended to enhance regulatory supervision and investor protection, business arrangements will also need to be preserved so as to allow the investment management industry to continue to operate effectively and provide investors with the advantages afforded by the European regulatory framework.

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