

## Investment Management Alert

December 5, 2014

### ESMA Consults on Guidelines on Asset Segregation Under AIFMD

On December 1, 2014, the European Securities and Markets Authority (“ESMA”) published a Consultation Paper (ESMA/2014/1326) on asset segregation under the Alternative Investment Fund Managers Directive (2011/61/EU) (“AIFMD”). ESMA is proposing to issue guidelines addressing questions that have arisen as to the practical application of the segregation requirements under the AIFMD when the safekeeping of Alternative Investment Fund (“AIF”) assets is delegated by the appointed depositary of an AIF to a third party.

The rules on asset segregation by depositaries and their delegates are set out in Article 21 of the AIFMD and Article 99 of the AIFMD Level 2 Regulation (Regulation 231/2013). Article 21 of the AIFMD requires Alternative Investment Fund Managers (“AIFMs”) to ensure that they appoint a single depositary for each AIF they manage and that the assets of the AIF are entrusted to the depositary for safekeeping. Such depositary may delegate its functions to a third party provided that the third party segregates the assets of the depositary’s clients from its own assets and from the assets of the depositary in such a way that they can, at any time, be clearly identified as belonging to clients of a particular depositary (Article 21(11) AIFMD).

Article 99(1) of the Level 2 Regulation states that the depositary must verify that the third party keeps such records and accounts as are necessary to enable it, at any time and without delay, to distinguish assets of the depositary’s AIF clients from its own assets, assets of its other clients, assets held by the depositary for its own account and assets held for clients of the depositary that are not AIFs.

Although Recital 40 of the AIFMD recognizes that the delegated third party can hold an account for multiple AIFs (an “omnibus account”), questions have arisen as to whether the assets that can be held in such an account are those coming only from the same delegating depositary or, alternatively, whether the omnibus account can hold assets for AIF clients coming from different delegating depositaries.

ESMA has put forward two options that seek to address these questions and asks for opinions on each:

- 1) Option 1: the account on which the AIF’s assets are to be kept by the delegated third party may comprise only assets of the AIF and assets of other AIFs of the same delegating depositary.
- 2) Option 2: a delegated third party holding assets for multiple depositary clients would be permitted to hold the AIF assets of each of the delegating depositaries in a single omnibus account.

The deadline for responses to the consultation is January 30, 2015. ESMA will consider the feedback it receives; it intends to publish its finalized guidelines in the second quarter of 2015.

Although Option 1 might provide a greater level of protection for AIF investors, we expect that both depositaries and AIFMs would prefer that Option 2 is pursued, since it will likely result in third country depositaries/custodians being more willing to act as delegates (therefore resulting in greater protection) while continuing to offer protection for the AIF investors. We would be interested in the views of our clients, and will reflect those views in a response to the Consultation Paper.

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