

MEMO# 31017

January 10, 2018

Draft Response on European Commission's ESA Reform Proposal - Delegation; Comments due 16 January

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January 10, 2018 TO: ICI Global Brexit Task Force
ICI Global Regulated Funds Committee RE: Draft Response on European Commission's ESA Reform Proposal - Delegation; Comments due 16 January

As we previously informed you,[\[1\]](#) on 20 September 2017, the European Commission (Commission) proposed a package of measures to revise the European System of Financial Supervision, including the role, competency, governance, funding and operation of the European Securities and Markets Authority (ESMA).[\[2\]](#) The proposed regulation follows an earlier consultation by the Commission, to which ICI Global responded.[\[3\]](#)

Of particular relevance and concern to regulated funds and their managers is the Commission's proposal regarding a strengthened role for the ESAs, including ESMA, to promote convergence in national competent authorities' (NCAs) oversight of the delegation and outsourcing of activities by financial institutions, particularly to third country entities. The proposal is designed to address regulatory arbitrage and financial stability risks that the Commission perceives to arise from variations in Member State approaches. The proposal includes a new competency for ESMA – included as Article 31a – to opine on outsourcing or delegation arrangements to third countries that concern a material part of a fund or manager's activities, and outlines a detailed process through which ESMA would exercise this new competency.

In our response to the proposal, we express our deep concern that Article 31a on third-country delegation will detrimentally affect the prominence of UCITS as global investment vehicles. Our position paper first describes the benefits that UCITS have provided and are providing not only to EU and globally-based investors but also to EU companies and the EU economy. It then explains (1) how the current regulation of delegation provides an appropriate balance of flexibility and proper oversight, (2) how delegation is an integral part of the efficient management of UCITS, (3) how the proposed delegation provision would not provide additional benefits to the UCITS regulatory framework, and (4) how imposing unnecessary burdens on delegation would result in increased costs to investors and may prompt asset managers to find an alternative vehicle to serve the needs of EU and global investors.

We then explain that EU policymakers should not adopt Article 31a for the following reasons:

- Delegation facilitates the efficient operation of UCITS and allows investment expertise to be sourced from where it can be best performed.
- The UCITS Directive recognizes the benefits of delegation to UCITS and their investors and provides strong oversight over this practice to protect investors. The current UCITS framework also allows national competent authorities to regulate appropriately delegation both to non-EU countries and to EU Member States.
- The proposed new provision on delegation is not necessary because ESMA already has all the authority it needs to harmonize standards for delegation.
- Article 31a is a needless detour for ESMA because it should focus its existing powers and resources to tackle challenges that have already been identified and evidenced, such as cross-border distribution of UCITS.
- A change to the current process for approving delegation and potentially limiting a management company's ability to delegate portfolio management outside of the European Union could increase investor costs and/or lessen the quality of the investment expertise that is available for UCITS, which ultimately may lead to poorer performance of the fund.
- Limitations and restrictions on UCITS accessing investment expertise outside of the European Union could limit UCITS offerings, leading investors to forego UCITS and instead look to other types of collective investment vehicles or products to meet their investment needs.

The Commission is accepting feedback on the proposal until 23 January. We would appreciate your feedback on the attached draft position paper by COB Tuesday, 16 January. Feedback can be provided to Eva Mykolenko at emykolenko@ici.org or 202-326-5837.

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[Attachment](#)

endnotes

[1] See Memorandum 30901, dated 6 October 2017, available at <https://www.iciglobal.org/iciglobal/pubs/memos/ci.memo30901.global>.

[2] Proposed ESA Regulation, available from https://ec.europa.eu/info/law/better-regulation/initiative/113085/attachment/090166e5b5347354_en.

[3] See Memorandum 30697, dated 10 May 2017, available at <https://www.iciglobal.org/iciglobal/pubs/memos/memo30697> and Memorandum 30759, dated 29 June 2017, available at <https://www.iciglobal.org/iciglobal/pubs/memos/memo30759>.

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