

**MEMO# 35523**

December 6, 2023

## **AIFMD and UCITS Review Final Text**

[35523]

December 06, 2023

TO: ICI Global Members SUBJECTS: International/Global  
MiFID, EMIR, AIFMD, UCITS V RE: AIFMD and UCITS Review Final Text

Following an extended period of trilogue negotiations and the adoption of a provisional agreement in July 2023, the final texts reflecting revisions to the Alternative Investment Fund Managers Directive (AIFMD) and the Directive on Undertakings for Collective Investments in Securities (UCITS Directive) were approved at the Ambassadors' level (COREPER) on 8 November and by the Economic and Monetary Affairs Committee in the European Parliament (EP) on 28 November.[\[1\]](#)

Launched in November 2021 as part of a broader Capital Markets Union package of legislative proposals, the review of the AIFMD was billed as a "targeted" review. However, despite the more limited number of topics or areas of reform, the proposal covered several key areas of regulation in the AIFMD, such as delegation requirements, liquidity management tools (LMTs), reporting, depositaries, and loan originating funds. Further, the review was expanded to include conforming changes to the UCITS Directive in many areas.

ICI Global focused its advocacy on the changes to the UCITS Directive. We advocated against those aspects of the proposal that may have led to a restriction in the use of delegation, which has served the UCITS brand well for decades and on which much of the industry relies to access expertise globally on behalf of the end investor and take advantage of economies of scale. ICI Global was also keenly aware of the potential downsides of the Commission's more prescriptive approach to the selection and use of LMTs and worked towards safeguarding managers' ability to determine which tools are appropriate for their UCITS, and under which conditions to activate them.

The final text must be signed off at the Ministerial level in the Council (expected in Q1 2024) and the EP Plenary (scheduled for 5 February 2024), before publication in the Official Journal of the EU (OJEU) and entry into force.

Member States will have 24 months to apply the UCITS Directive and AIFMD changes into national rules, meaning that implementation can be expected by early 2026.

## **Final Text - Key Provisions**

Described below are the key changes to the UCITS Directive that will impact our members.

### **Delegation Requirements**

Delegation by UCITS management companies to third parties will remain possible under the new rules, but additional qualitative and quantitative information will need to be reported. Further, management companies will be required to have at least two full-time employees or executive members who are domiciled in the European Union. The final text that was agreed differs from the text originally proposed by the Commission, which would have required, among other things, national competent authorities (NCAs) to provide quarterly to the European Securities and Markets Authority (ESMA) detailed information regarding the delegation arrangements in situations where a management company delegates to a third country entity more portfolio or risk management than it retains.

Specifically, under the revised UCITS Directive Article 7 (Authorization), all management companies (rather than just those delegating to third-country entities) will be required to report to the NCA specified qualitative information on their delegation arrangements (i.e., whether delegation is "full or partial"). This is in line with what ICI Global had advocated for. Under the revised UCITS Directive Article 20a (Reporting) a management company will be required to report additional information on delegation arrangements, including certain quantitative information (i.e., the percent and amount of assets under management (AUM) that has been delegated to each delegate/sub-delegate). However, the agreement does not include any maximum threshold for delegation or any geographic restrictions to delegation. Additionally, the requirement for NCAs to report to ESMA delegation arrangements to third countries where more has been delegated than retained has not been included in the final text.

Recital 8 blunts the impact of the UCITS Directive Article 20a quantitative requirements by clarifying that "the data collected on the amounts and percentages of the assets...that are subject to delegation arrangements concerning the portfolio management functions is for the purposes of providing a greater overview of the operation of delegation and is not on its own an evidential indicator for determining the adequacy of substance or risk management, or the effectiveness of oversight or control arrangements at the level of the manager."

ESMA will be required to produce a report to the Council and the European Parliament on delegation and market practices within five years after the text has entered into force.

### **Liquidity Management Tools**

In order to ensure that management companies can adequately manage significant outflows during periods of financial stress, the legislative package includes new rules relating to the selection, activation, and use of liquidity management tools by UCITS management companies and AIFMs managing open-ended alternative investment funds. These rules will operate in the context of the policy recommendations that are expected to soon be finalized by IOSCO and the Financial Stability Board on the management of liquidity mismatch in open-ended funds.

Under UCITS Directive Article 18a, (i) Member States will be required to make available in their respective jurisdictions eight specified LMTs and (ii) management companies will be required to select for each UCITS at least two of those LMTs (only one for money market funds) that are deemed appropriate given the fund investment strategy, liquidity profile, and redemption policy. ESMA will be empowered to specify the characteristics of those

tools, taking into account the diversity of investment strategies and underlying assets of UCITS. ESMA will also be tasked with developing guidelines on the selection and calibration of the LMTs by UCITS for liquidity risk management and financial stability risks, with the understanding that LMTs remain primarily the management company's responsibility,

but the responsibility to activate them will remain with the managers. NCAs will have to power to suspend redemptions only in times of stress.

## **Reporting**

New UCITS Article 20a will require a UCITS management company to report detailed information about the UCITS, including information on the instruments and markets in which it trades, as well as the liquidity and risk profile of the UCITS. ESMA will be tasked with developing regulatory technical standards specifying the details of such reporting.

## **Independent Directors**

Recital 5a, but not the body of the legislation, include a reference to the desirability of having at least one non-exec on the board of a UCITS management company or the UCITS (if a corporate entity). This will not be a binding requirement, but the legislation will require the European Commission to undertake a review of the impacts of a mandatory requirement if it were introduced.

## **Undue Costs**

Recital 52(b) provides that ESMA should prepare a report assessing costs charged to retail investors and that, in order to support this endeavor, NCAs should collect cost data to be shared with ESMA.

## **Fund Names**

Recital 52(c) provides that ESMA should develop guidelines to specify situations where the name of a UCITS could be unfair, unclear or misleading to the investor.

## **Next Steps**

Following the publication of the final text in the OJEU in 2024, ESMA will begin the formal preparation of its various Level 2 mandates.

Eva M. Mykolenko  
Associate Chief Counsel - Securities Regulation

## **Notes**

[1] The final text is available at:  
<https://data.consilium.europa.eu/doc/document/ST-15250-2023-INIT/en/pdf>.