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NEWSLETTER

AIFMD II update: ESMA consultation paper on open-ended loan-originating AIFs

On 12 December 2024, the European Securities and Markets Authority ("ESMA") published a consultation paper on draft regulatory technical standards ("RTS") on open-ended loan-originating alternative investment funds ("LO AIFs") in accordance with the Alternative Investment Fund Managers Directive 2011/61/EU as amended by Directive (EU) 2024/927 ("Amending Directive") (in its revised form "AIFMD II").

The final text of the Amending Directive was published on 26 March 2024. The EU Member States now have until 16 April 2026 to implement the new AIFMD II provisions. The deadline for transposing certain reporting obligations into national law, however, is one year later. ESMA's consultation is open until 12 March 2025. According to the consultation paper, ESMA intends to finalise the draft RTS by Q3/Q4 2025.

AIFMD II is introducing the LO AIF as a novel statutory category of investment fund within the AIFMD framework. Article 4(1) point (at) AIFMD II defines LO AIFs as AIFs "whose investment strategy is mainly to originate loans" or "whose originated loans have a notional value that represents at least 50% of its net asset value". As a rule, LO AIFs must be closed-ended, but they are allowed to be open-ended provided that the AIFM demonstrates to the competent national authorities that the LO AIF's "liquidity risk management system is compatible with its investment strategy and redemption policy" (Article 16(2a) AIFMD II).

The RTS will provide further guidance on the requirements LO AIFs must comply with to maintain an open-ended structure:

1. Sound liquidity management system

Articles 46 to 49 of Commission Delegated Regulation (EU) No 231/2013 set out general rules on liquidity management applicable to all open-ended AIFs. As a level 2 measure, the RTS will complement those general rules by establishing specific parameters for open-ended LO AIFs. In its consultation paper, ESMA underscores that AIFMD II does not create a "bespoke regime" for open-ended LO AIFs but rather allows the possibility to derogate from the general obligation that LO AIFs be closed-ended if the AIFM can prove to the competent regulator that the LO AIF can operate as an open-ended fund. To that end, ESMA aims to issue RTS that provide a harmonised regulatory framework tailored to LO AIFs that AIFMs as well as national supervisory authorities will consider when assessing whether an LO AIF can maintain an open-ended structure.

Article 1(4) of the draft RTS explicitly refers to the new provision of Article 16(2b) AIFMD II, pursuant to which AIFMs managing open-ended AIFs must select at least two appropriate liquidity management tools out of those mentioned in Annex V, points 2 to 8, AIFMD II.

2. Appropriate redemption policy

Article 2 of the draft RTS lists 15 factors that AIFMs must "at least" consider to ensure that the redemption policy of an envisaged open-ended LO AIF is appropriate, including the redemption frequency offered to investors, the target investors, the length of the AIF's notice period and the amount of liquid assets to be held by the fund.

3. Availability of liquid assets

Under the draft RTS, AIFMs would be required to determine an appropriate proportion of liquid assets that an open-ended LO AIF must target in order to meet redemption requirements. Article 3(1) of the draft RTS provides a list of 16 factors that AIFMs will "at least" take into account in making that determination. Some of the enumerated factors are the expected cash flow generated by the loans granted (which will be considered as liquid pursuant to Article 3(2) of the draft RTS), the AIF's redemption policy, the maturities and number of loans granted, estimated default rates and rescheduling, the length of the AIF's notice period and anticipated behaviours of the targeted investors. In addition, the AIFM may also consider investments as liquid that can be converted into cash over the duration of the notice period without significantly decreasing their value (Article 3(3) of the draft RTS).

4. Liquidity stress testing

In this regard, ESMA explicitly points to the ESMA Guidelines on liquidity stress testing in UCITS and AIFs dated 16 July 2020 (ESMA34-39-897), which contain a section specifically devoted to the liquidity stress testing of less liquid assets, which is applicable to LO AIFs. According to Article 4(1) of the draft RTS, liquidity stress tests are to be conducted at least on a quarterly basis, unless a higher or lower frequency is justified for the relevant open-ended LO AIF. The scenarios to be used for the liquidity stress tests are to be conservative, and the AIFMs will be expected to consider a range of potential scenarios including those with low probability but high impact (Article 4(4) Draft RTS).

5. Ongoing monitoring

AIFMs that manage an open-ended LO AIF will be obliged to have the necessary arrangements in place to assess and monitor the evolution and behaviour of key elements of the fund. To ensure that the liquidity risk management system remains compatible with the investment strategy and the redemption policy, AIFMs will in particular have to monitor the performance of the loans granted, such as their repayment, early signals of possible defaults, the level of liquid assets and the behaviour of the investors (Article 5 of the draft RTS).

In Germany, loan originating funds may currently only be established as closed-ended funds under the current statutory rules of the German Capital Investment Code (*Kapitalanlagegesetzbuch*), the draft legislation initiated by the still acting German government under the heading "*Fondsmarktstärkungsgesetz*" (Act on the Strengthening of the Fund Market), however, also provides for open-ended LO AIF. The RTS in their final form will constitute part of an EU-wide harmonised legal framework for loan funds introduced by AIFMD II, which may strengthen the European market for private debt funds and facilitate companies' access to financing across the European Union.

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