EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKETS UNION

Brussels, 8 February 2018

NOTICE TO STAKEHOLDERS

WITHDRAWAL OF THE UNITED KINGDOM AND EU RULES IN THE FIELD OF ASSET MANAGEMENT

The United Kingdom submitted on 29 March 2017 the notification of its intention to withdraw from the Union pursuant to Article 50 of the Treaty on European Union. This means that, unless a ratified withdrawal agreement[1] establishes another date, all Union primary and secondary law will cease to apply to the United Kingdom from 30 March 2019, 00:00h (CET) ('the withdrawal date').[2] The United Kingdom will then become a 'third country'.[3]

Preparing for the withdrawal is not just a matter for EU and national authorities but also for private parties.

In view of the considerable uncertainties, in particular concerning the content of a possible withdrawal agreement, stakeholders, including managers of investment funds and investors are reminded of legal repercussions which need to be considered when the United Kingdom becomes a third country.

Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU rules in the field of asset management, in particular Directive 2009/65/EC on Undertakings for Collective Investment in Transferable Securities[4] and Directive 2011/61/EU on Alternative Investment Funds Managers[5] no longer apply to the United Kingdom.

This has in particular the following consequences:[6]

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1 Negotiations are ongoing with the United Kingdom with a view to reaching a withdrawal agreement.

2 Furthermore, in accordance with Article 50(3) of the Treaty on European Union, the European Council, in agreement with the United Kingdom, may unanimously decide that the Treaties cease to apply at a later date.

3 A third country is a country not member of the EU.

4 Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) OJ L 302, 17.11.2009, p. 32.

5 Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers, OJ L 174, 1.7.2011, p. 1.

6 See also the "Notice to stakeholders – Withdrawal of the United Kingdom and EU rules in the field of Markets in Financial Instruments" (https://ec.europa.eu/info/brexit/brexit-preparedness_en).

1. UK ASSET MANAGEMENT ACTIVITY

- UK UCITS management companies and UK AIF managers will no longer benefit from authorisation[7] (they will lose the so-called "EU passport") and will be treated as third-country AIF managers. This means that those UK entities will no longer be able to manage funds and market funds in the EU on the basis of their current authorisations:
    - For UCITS, EuVECA, EuSEF and ELTIF, both the investment funds and their managers must be established and registered or authorised in the EU to manage and market funds to retail[8] and professional investors across the Union.
    - AIF managers need to be established and authorised in the EU to be allowed to manage and market AIFs to professional investors across the EU.

- As a consequence, all collective investment undertakings registered or authorised in the United Kingdom will be non-EU alternative investment funds (non-EU AIFs). This applies to:
    - Undertakings for Collective Investment in Transferable Securities (UCITS)
    - Alternative investment funds (AIFs)
    - European Venture Capital Funds (EuVECA);[9]
    - European Social Entrepreneurship Funds (EuSEF);[10]
    - European Long Term Investment Funds (ELTIF);[11] and
    - Money Market Funds (MMF).[12]

- Member States may allow AIF managers who are not established and authorised in the EU to market AIFs (EU AIFs and non-EU AIFs) only in their territory under the so-called National Private Placement regimes[13] (hereafter "NPPR"). Directive 2011/61/EU provides Member States with discretion as to whether to activate NPPR and allow for stricter rules in addition to the minimum requirements in that Directive. Some Member States do not allow for the NPPR, while other Member States only allow marketing to professional investors.

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7 Article 6 of Directive 2009/65/EC, Article 6 of Directive 2011/61/EU.

8 EuVECA and EuSEF can only be marketed to retail investors subject to limitations in Article 6 of Regulation (EU) No 345/2013 and Article 6 of Regulation (EU) No 346/2013. ELTIF can only be marketed to retail investors subject to limitations in Article 28 of Regulation (EU) 2015/760.

9 Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds, OJ L 115, 25.4.2013, p. 1.

10 Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds , OJ L 115, 25.4.2013, p. 18.

11 Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds, OJ L 123, 19.5.2015, p. 98.

12 Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds, OJ L 169, 30.6.2017, p. 8.

13 Under NPPRs, third country entities do not benefit from the EU passports in the single market framework as each NPPR is valid only for the Member State concerned. Directive 2011/61/EU includes a minimum set of conditions under NPPR for (i) third country entities (e.g. non-EU managers should comply with some requirements of Directive 2011/61/EU such as annual report, disclosure to investors and reporting), and (ii) for the third country (e.g. appropriate cooperation agreements must be in place between the EU competent authority and the relevant third country authorities).

- UCITS management companies or AIF managers authorised by EU-27 competent authorities in accordance with Article 6 of Directive 2009/65/EC or Article 6 of Directive 2011/61/EU which are subsidiaries of entities established in the United Kingdom (legally independent companies established in EU-27 controlled by or affiliated to entities established in the United Kingdom) can continue to operate on the basis of their authorisation as UCITS management companies or AIF managers in the EU-27.

- Branches of UK managers (permanent presences which are not legally independent from the AIF manager) in the EU will be treated as branches of a non-EU AIF managers as of the withdrawal date. These branches will be subject to the requirements of NPPRs, where available.

2. EU ASSET MANAGEMENT ACTIVITY

- As of the withdrawal date, UCITS and AIFs authorised or registered in the United Kingdom in accordance with the Directive 2009/65/EC or Directive 2011/61/EU will be non-EU AIFs (see above). EU-27 UCITS management companies managing those (former) UCITS authorised in the UK will need to obtain an authorisation according to Article 6 of Directive 2011/61/EU to manage non-EU AIFs.

- The management, by AIF managers established and authorised or registered in the EU, of non-EU AIFs that are not marketed in the EU must comply with Directive 2011/61/EU (except depositary and annual report rules) and cooperation agreements for exchange of information between EU competent authorities and the relevant third country authorities (Article 34 of Directive 2011/61/EU).

- According to Article 36 of Directive 2011/61/EU, the marketing of non-EU AIFs managed by an AIF manager established and authorised or registered in the EU is subject to the NPPR, which is an option for Member States. Stricter rules may be imposed on this category of AIF managers by Member States.

- According to the rules on disclosure to investors in Directive 2009/65/EC and Directive 2011/61/EU, UCITS management companies and AIF managers must take a number of steps to inform investors of the consequences of the withdrawal of the United Kingdom from the EU, in particular:

    - According to Article 22 of Directive 2011/61/EU, AIF managers must include in the annual report any material change to the information to be disclosed to investors, which includes, but is not limited to, the legal implications of the contractual relationship.

    - According to Article 78 of Directive 2009/65/EC, UCITS management companies must prepare a key investor information document whose essential elements must be kept up to date. This includes information on Member States in which the management company is authorised, where the UCITS is managed or marketed cross-border.

Therefore, UCITS management companies and AIF managers must assess whether the change of the legal status of the investment fund would still be compliant with the investment strategy of the fund as communicated earlier to investors.

- As regards the assets in which EU funds invest, Directive 2009/65/EC and Directive 2011/61/EU do not prohibit investment in eligible assets located outside the EU. Nevertheless, there will be restrictions to fund-of-funds structures; in particular UCITS authorised in the EU-27 must assess the eligibility of (former) UCITS authorised in the United Kingdom.[14]

- EU investors should review their investment criteria to assess compliance with the change in the legal status of the funds they invested into (e.g. non-EU AIF instead of UCITS).

- The delegation of certain operational functions to providers established in the United Kingdom may be undertaken provided that the relevant requirements in Directive 2009/65/EC and Directive 2011/61/EU are complied with.[15] In particular, where the delegation concerns portfolio management or risk management (or investment management for UCITS) and is conferred on an undertaking established in a third country, a cooperation agreement between the competent authority of the home Member State of the UCITS management company or AIF manager and the supervisory authority of the undertaking carrying out the delegated function in the third country must be in place. Moreover, the European Securities and Markets Authority (ESMA) has issued an opinion with specific clarifications on these matters, in particular on the risks of letter-box entities which may arise from the use of outsourcing arrangements or from the use of non-EU branches for the performance of functions/services with respect to EU clients. The use of non-EU branches needs to be based on objective reasons linked to the services provided in the non-EU jurisdiction and may not result in a situation where such non-EU branches perform material functions or provide material services back into the EU.[16]

- According to Article 21 of Directive 2011/61/EU and Article 23 of Directive 2009/65/EC, the depository of EU AIF and UCITS authorised in the EU must be located in the home Member State of the fund. Article 22a of Directive 2009/65/EC and Article 22(11) of Directive 2011/61/EU lay down requirements for delegation of safekeeping functions to a third party. Where the safekeeping functions have been delegated to an entity established in the United Kingdom, the following applies *inter alia*:

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14 Assessment of eligibility in accordance with Articles 52 and 55 of Directive 2009/65/EC.

15 Article 20 of Directive 2011/61/EU specified by Articles 75 to 82 of the Commission Delegated Regulation (EU) No 231/2013 and Article 13 UCITS. As part of the review of the European Supervisory Authorities ("ESAs") adopted on 20 September 2017, the Commission has proposed reinforced coordination by the ESAs in relation to delegation and outsourcing of activities as well as of risk transfers (COM(2017)536 final).

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16 ESMA opinion to support supervisory convergence in the area of investment management in the context of the United Kingdom withdrawing from the European Union (13 July 2017) (https://www.esma.europa.eu/document/opinion-support-supervisory-convergence-in-area-investment-management-in-context-united).

- UCITS depositaries need to demonstrate objective reasons for delegation and to ensure that in the event of an insolvency of that third party, the assets held in custody are unavailable for distribution among, or realisation for the benefit of, its creditors;[17]

- Non-EU AIF managed by an AIF manager established and authorised in the EU can appoint a depositary in the third country of the non-EU AIF subject to specific requirements.[18]

This notice is without prejudice to the "third country passport" regime laid down in the Directive 2011/61/EU.[19]

The website of the Commission on investment funds (https://ec.europa.eu/info/business-economy-euro/growth-and-investment/investment-funds_en) provides for general information concerning asset management. These pages will be updated with further information, where necessary.

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[17] Article 17 of Commission Delegated Regulation (EU) 2016/438.

[18] Article 21(6) of Directive 2011/61/EU.

[19] Articles 37 and 40 of Directive 2011/61/EU for the marketing of non-EU AIFs by non-EU AIF managers, Articles 37 and 39 of Directive 2011/61/EU for the management of EU AIFs or marketing of EU AIFs by non-EU AIF managers.