Commission Delegated Regulation (EU) 2015/514 of 18 December 2014 on the information to be provided by competent authorities to the European Securities and Markets Authority pursuant to Article 67(3) of Directive 2011/61/EU of the European Parliament and of the Council (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2015/514

of 18 December 2014

on the information to be provided by competent authorities to the European Securities and Markets Authority pursuant to Article 67(3) of Directive 2011/61/EU of the European Parliament and of the Council

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2011/61/EU of the European Parliament and the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010[(1)], and in particular Article 67(5) thereof,

Whereas:

(1) It is necessary to specify the contents of the information that the competent authorities of Member States have to provide quarterly to the European Securities and Market Authority (ESMA) in accordance with Article 67(3) of Directive 2011/61/EU to enable it to evaluate the functioning of the passport for EU alternative investment fund managers (EU AIFMs) managing or marketing EU alternative investment funds (EU AIFs) in the Union, the operating conditions for AIFs and their managers and the potential impact of an extension of the passport.

(2) It is important to ensure that information provided by competent authorities is pertinent and capable of supporting an informed assessment. All competent authorities should therefore provide information that allows a consistent assessment throughout the Union, while retaining the possibility to also provide any additional information that they might consider useful for assessing the overall functioning of the EU passport, of the national rules governing private placements, as well as any potential impact of extending the passport to third country funds and managers. In order to ensure that a uniform set of reporting requirements applies directly to all competent authorities it is necessary to lay down rules on the information to be provided to ESMA in the form of a Regulation.

(3) In order to assess the use made of the EU passport, it is important to gather quantitative data on AIFMs and AIFs using the passports provided in Articles 32 and 33 of Directive 2011/61/EU, data on the jurisdictions where cross-border activities take place, as well as on the types of cross-border activities.

Changes to legislation: *There are outstanding changes not yet made to Commission Delegated Regulation (EU) 2015/514. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(4) Effective cooperation among competent authorities is an essential aspect of the overall functioning of the EU passport. To assess effectiveness, it is essential to collect information on the cooperation between competent authorities in executing their responsibilities in accordance with Articles 45 and 50 of Directive 2011/61/EU. This implies assessing the instances when the different competences were triggered, the responsive measures taken, as well as efficacy of cooperation in terms of timing, pertinence and detail.

(5) The EU passport is based on the notification system provided for in Articles 32 and 33 of Directive 2011/61/EU. Competent authorities should therefore provide information as to the operation of such system, especially in terms of timing, smoothness, quality of information notified and any potential divergences arising from its application.

(6) In order to allow for an objective assessment, competent authorities should be required to provide information on the functioning of the passport also from investors' perspective, particularly in terms of impacts on the investor protection. Competent authorities should also provide information on complaints filed by investors about AIFMs or AIFs established in other Member States than the one where the investor is domiciled, queries from investors related to the distribution of competencies between competent authorities from different Member States and any issues raised in relation to marketing arrangements.

(7) The assessment of the functioning of the passport needs to take due account of ESMA's role in resolving divergences between competent authorities as regards cross-border management or marketing. Competent authorities should therefore communicate their views on the usefulness, the timing, the quality or any other issues related to ESMA's involvement.

(8) To assess the functioning of the current national regimes allowing non-EU AIFMs and non-EU AIFs to operate in individual Member States, it is necessary to be fully aware of the details of the legal frameworks adopted by individual Member States, their specificities and differences as compared to the rules applicable to EU AIFMs and EU AIFs. It is also important to gather quantitative information as to the numbers of non-EU AIFs marketed in Member States and non-EU AIFMs managing or marketing AIFs in Member States. Such information should also contain data on enforcement and supervisory actions, as well as on additional information received from non-EU supervisory authorities upon request.

(9) Competent authorities should communicate information on any cooperation arrangements with third country supervisory authorities that are not already known by ESMA following its involvement in the negotiation of multilateral memoranda of understanding. To be able to assess the operation of cooperation arrangements, it is important to gather information about the effectiveness of such cooperation arrangements, such as quantitative and qualitative information on the use made of the various powers foreseen in those arrangements. This includes requests for information, on-site visits and information sharing. Effectiveness of cooperation should be assessed in terms of relevance, detail, timing and completeness of the assistance received.

***Changes to legislation:** There are outstanding changes not yet made to Commission Delegated Regulation (EU) 2015/514. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(10) Competent authorities should give information on any features of the third country regime that, de facto or de jure, create restrictions or difficulties for the exercise of supervisory functions by the competent authority of a Member State or to the direct receipt of information from non-EU entities. Furthermore, information should be collected on complaints by investors as well as measures taken by the competent authorities in response to such complaints.

(11) The assessment of the interaction between the two systems established for managing or marketing of AIFs should be based on evidence that reflects the overall situation in the internal market, as well as on short-term and long-term assessments as to the development of the market, including possible market disruptions or distortions of competition. Assessments should be made on the basis of evidence as to whether there is a level-playing field between Member States and individual third countries, for instance in terms of regulatory burden, conditions of competition or supervision. Competent authorities should provide concrete information as to general or specific issues concerning individual third countries and indicate the source of such issues.

(12) When submitting information on possible market disruptions and distortions of competition, competent authorities should take into account all collective investment undertakings and their managers. It is important to determine whether, and the extent to which, both EU AIFs and undertakings for collective investment in transferable securities established under Directive 2009/65/EC of the European Parliament and of the Council[(2)], as well as their managers are potentially affected by the introduction of the third country passport. This is particularly important given that the definition of non-EU AIFMs in Directive 2011/61/EU covers all collective investment undertakings established in third countries, including those which would have been subject to Directive 2009/65/EC if they had been established in a Member State. Furthermore, in order to be able to gauge the overall impact on the market, it is necessary to identify the potential impact on other intermediaries operating in the asset management sector, such as depositaries or service providers,

HAS ADOPTED THIS REGULATION:

Article 1

Competent authorities shall pursuant to Article 67(3) of Directive 2011/61/EU provide the following information to the European Securities and Markets Authority (ESMA):

(a) information concerning the functioning of the EU passport for EU alternative investment fund managers (AIFMs) managing and/or marketing EU alternative investment funds (AIFs), as set out in Articles 2 to 7;

(b) information concerning the functioning of the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the applicable national regimes, as set out in Articles 8 to 13;

(c) information concerning the impact of the functioning of the systems referred to in points (a) and (b) of this paragraph, as set out in Article 14.

Changes to legislation: *There are outstanding changes not yet made to Commission Delegated Regulation (EU) 2015/514. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

Article 2

With regard to the use made of the passport, the competent authorities shall provide the following information:

(a) the number of EU AIFMs authorised in accordance with Article 7 of Directive 2011/61/EU;

(b) the number of EU AIFMs that market units or shares of EU AIFs pursuant to Article 32 of Directive 2011/61/EU, the number of EU AIFs and compartments of AIFs marketed pursuant to Article 32 of Directive 2011/61/EU, and the breakdown by home and host Member State;

(c) the number of EU AIFMs that manage EU AIFs pursuant to Article 33 of Directive 2011/61/EU, the number of EU AIFs managed pursuant to Article 33 of Directive 2011/61/EU and the breakdown by home and host Member State;

(d) the number of EU AIFMs that manage EU AIFs established in other Member States pursuant to Article 33 of Directive 2011/61/EU by establishing a branch and the number of EU AIFM that manage directly EU AIFs established in other Member States pursuant to Article 33 of Directive 2011/61/EU.

Article 3

With regard to problems encountered regarding effective cooperation among competent authorities, competent authorities shall provide the following information:

(a) the number of cases in which a competent authority has notified to the competent authority of the home Member State of an AIFM a situation as described in Article 45(5) of Directive 2011/61/EU, indicating the type of situation;

(b) the number of cases in which a competent authority, after being notified as described in Article 45(5) of Directive 2011/61/EU by the competent authority of the host Member State, has taken the measures set out in Article 45(5) of that Directive, indicating the type of measures taken;

(c) the number of cases in which a competent authority, after notifying the competent authority of the home Member State of an AIFM of a situation as described in Article 45(5) of Directive 2011/61/EU, has taken the measures set out in Article 45(6) of that Directive, indicating the type of measures taken;

(d) the number of cases in which a competent authority has notified to the competent authority of the home Member State of an AIFM a situation as described in Article 45(7) of Directive 2011/61/EU, indicating the type of situations;

(e) the number of cases in which a competent authority, after being notified as described in Article 45(7) of Directive 2011/61/EU by the competent authority of the host Member State, has taken measures in accordance with Article 45(7) of that Directive, indicating the type of measures taken;

(f) the number of cases in which a competent authority, after notifying the competent authority of the home Member State of an AIFM of a situation as described in Article 45(7) of Directive 2011/61/EU, has taken the measures set out in Article 45(8) of that Directive, indicating the type of measures taken;

***Changes to legislation:** There are outstanding changes not yet made to Commission Delegated Regulation (EU) 2015/514. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(g) the number of notifications sent and of notifications received under Article 50(5) of Directive 2011/61/EU, indicating the actions taken as a consequence of the notification;

(h) as regards the requests for assistance issued by the competent authority:
- the number and type of requests,
- the number of requests rejected and the reasons for rejection,
- the degree of satisfaction with the assistance received and the difficulties encountered,
- the average time for receiving a response;

(i) as regards the requests for assistance received by the competent authority from competent authorities in other Member States:
- the number and type of requests,
- the number of requests rejected and the reasons for rejection,
- the average time for issuing a response;

(j) the number of on-the-spot verifications or investigations that the competent authority has undertaken in another Member State in accordance with Article 54(1) of Directive 2011/61/EU and the number of requests for on-the-spot verifications or investigations in another Member State that were refused.

Article 4

With regard to problems encountered regarding the effective functioning of the notification system provided for in Articles 32 and 33 of Directive 2011/61/EU, competent authorities shall provide the following information:

(a) the average time between the receipt of the complete notification file from an AIFM and the moment when the recipient competent authority notifies the competent authority of the host Member State;

(b) the average time for notification to the AIFM that it can undertake cross-border activities by the competent authority of its home Member State, calculated from the date of the transmission of the notification file to the competent authority of the host Member State;

(c) the number of requests for clarification from the competent authority of the host country in relation to the notification;

(d) the number of disputes involving the competent authorities of the home and of the host Member State in relation to the notification process.

Article 5

With regard to issues of investor protection in relation to AIFs marketed or managed from another Member State as well as AIFs marketed under Article 43 of Directive 2011/61/EU, competent authorities shall provide the following information:

(a) the number and type of complaints by investors addressed to the competent authority in relation to AIFs marketed or managed by an AIFM established in another Member State, the reasons invoked and how such complaints were solved;

(b) evidence as to the lack of clarity amongst investors as regards the distribution of supervisory tasks between the competent authorities of the home and the host country;