

## **MoU concerning consultation, cooperation and the exchange of information related to the supervision of AIFMD entities**

In view of the growing globalization of the world's financial markets and the increase in cross-border operations and activities of Managers of alternative investment funds, the Office of the Comptroller of the Currency and the Board of Governors of the Federal Reserve System on one side and the Estonian Financial Supervision Authority (Estonia) on the other side have reached this Memorandum of Understanding (MoU) regarding mutual assistance in the supervision and oversight of Managers of alternative investment funds, their delegates and depositaries that operate on a cross-border basis in the jurisdictions of the Authorities. The Authorities express, through this MoU, their willingness to cooperate with each other in the interest of ensuring compliance with the AIFMD.

### **Article 1. Definitions**

For the purpose of this MoU:

- a) "Authority" means a signatory to this MoU or any successor.
- b) "Requested Authority" means the Authority to whom a request is made under this MoU.
- c) "Requesting Authority" means the Authority making a request under this MoU.
- d) "EU Competent Authority" means any Authority appointed in an EU Member State in accordance with Article 44 of the AIFMD for the supervision of Managers, Delegates, Depositaries and, where applicable, Covered Funds.<sup>1</sup>
- e) "AIFMD" means the Directive 2011/61/EU of the European Parliament and of 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.
- f) "Manager" means a legal person whose regular business includes managing one or more Covered Funds in accordance with the AIFMD.
- g) "Covered Fund" means a collective investment undertaking, including investment compartments thereof, which: (i) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and (ii) is not a UCITS.
- h) "UCITS" means an undertaking for collective investment in transferable securities authorised in accordance with Article 5 of Directive 2009/65/EC.
- i) "Delegate" means an entity to which a Manager delegates the tasks of carrying out the portfolio management or risk management of one or more Covered Funds under its management in accordance with Article 20 of the AIFMD.
- j) "Depositary" means an entity appointed to perform the depositary functions of a Covered Fund in accordance with Article 21 of the AIFMD.

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<sup>1</sup> Some EU Member States have more than one competent authority designated to carry out the duties provided under the AIFMD.

- k) "Operate on a cross-border basis" means the following situations: when a) EU Managers manage non-EU Covered Funds, b) EU Managers market non-EU Covered Funds in an EU Member State, c) non-EU Managers market EU and/or non-EU Covered Funds in an EU Member State, d) EU Managers market non-EU Covered Funds in the EU with a passport, e) non-EU Managers manage EU Covered Funds in the EU, f) non-EU Managers market EU Covered Funds in the EU with a passport, g) non-EU Managers market non-EU Covered Funds in the EU with a passport and h) EU Managers market Covered Funds in the US. Insofar as there is a link to the activity of the Managers and the Covered Funds, the MoU also covers Delegates and Depositaries as defined in letters i) and j) of this Article.
- l) "Covered Entity" means a Manager, Covered Fund where applicable, and, insofar as there is a link to the Manager and the Covered Fund, Delegates and Depositaries as defined in letters i) and j) of this Article, including the Persons employed by such entities.
- m) "Cross-border on-site visit" means any supervisory visit by one Authority to the premises of a Covered Entity located in the other Authority's jurisdiction, for the purposes of on-going supervision under the AIFMD.
- n) "Governmental Entity" means the Ministry of Finance, the Central Bank and any other national prudential authority (which in the United States would mean state and federal financial supervisors and regulators) in the jurisdiction of the relevant Authority.
- o) "Local Authority" means the Authority in whose jurisdiction a Covered Entity operates.
- p) "Emergency Situation" means the occurrence of an event that could materially impair the financial or operational condition of a Covered Entity, Covered Fund investors or the markets, independent from a decision of the European Council within the meaning of Article 18 of the European Securities and Markets Authority ("ESMA") Regulation (Regulation 1095/2010/EU).
- q) "Laws and Regulations" mean the provisions of the laws of the jurisdictions of the Authorities, the regulations promulgated thereunder, and other regulatory requirements that fall within the competence of the Authorities, concerning the Covered Entities as defined in this MoU.
- r) "Person" means a natural or legal person, or unincorporated entity or association, including corporations and partnerships.

## **Article 2. General provisions**

- 1) This MOU is a statement of the Authorities' intent to consult, cooperate and exchange information in connection with their assessment and enforcement of compliance with the requirements of the AIFMD and its implementing measures by Covered Entities that operate on a cross-border basis in the jurisdictions of the Authorities, in a manner consistent with, and permitted by, the laws and requirements that govern the Authorities. The Authorities anticipate that cooperation will be primarily achieved through on-going, informal, oral consultations, supplemented by more in-depth, ad hoc cooperation. The provisions of this MoU are intended to support such informal and oral communication as well as to facilitate the written exchange of non-public information where necessary.
- 2) This MoU does not create any legally binding obligations, confer any rights, or supersede domestic laws. This MoU does not confer upon any Person the right or ability directly or



indirectly to obtain, suppress, or exclude any information or to challenge the execution of a request for assistance under this MoU.

- 3) This MoU does not intend to limit an Authority to taking solely those measures described herein in fulfilment of its supervisory, oversight, or enforcement functions. In particular, this MoU does not affect any right of any Authority to communicate with, or obtain information or documents from, any Person or Covered Entity subject to its jurisdiction that is established in the territory of the other Authority.
- 4) This MoU does not alter the terms and conditions of any existing arrangements concerning cooperation in securities and banking matters.
- 5) The Authorities will, within the framework of this MoU, provide one another with the fullest cooperation permissible under applicable laws in relation to compliance by the Covered Entities with the AIFMD. Following consultation, cooperation may be denied:
  - a) Where the cooperation would require an Authority to act in a manner that would violate domestic law;
  - b) Where a request for assistance is not made in accordance with the terms of this MoU; or
  - c) On the grounds of national public interest.
- 6) The Authorities represent that no domestic banking secrecy, blocking laws or regulations should prevent an Authority from providing assistance to another Authority.
- 7) The Authorities will periodically review the provisions of this MoU with a view to improving its operation and resolving any issues that may arise. In particular, the Authorities will consult in the event of:
  - a) A significant change in market or business conditions or in legislation where such change is relevant to the operation of the provisions of this MoU;
  - b) A demonstrated change in the willingness or ability of an Authority to meet the provisions of this MoU; and
  - c) Any other circumstance that makes it necessary or appropriate to consult, amend or extend this MoU in order to achieve its purposes.
- 8) *To facilitate cooperation under this MoU, the Authorities hereby designate contact persons as set forth in Appendix A.*

### **Article 3. Scope of cooperation**

- 1) The Authorities recognize the importance of close communication concerning Covered Entities and intend to consult at the staff level where appropriate regarding: (i) supervisory and enforcement issues, as they may relate to Covered Entities' compliance with the requirements of the AIFMD; (ii) issues relevant to the operations, activities, and regulation of Covered Entities under the AIFMD; and (iii) any other areas of mutual supervisory interest relevant to the AIFMD.
- 2) Cooperation will be most useful in, but is not limited to, the following circumstances where issues relevant to the AIFMD may arise:

- a) The initial application of a Covered Entity for authorization, registration or exemption from registration in another jurisdiction;
  - b) The on-going oversight of a Covered Entity;
  - c) Regulatory approvals or supervisory actions taken in relation to a Covered Entity by one Authority that may impact the operations of the Covered Entity in the other jurisdiction; or
  - d) Enforcement actions taken against a Covered Entity.
- 3) Each Authority will inform the other Authority as soon as practicable of:
- a) Any known material event that could, in its reasonable opinion, adversely impact a Covered Entity's ability to comply with the AIFMD; and
  - b) Enforcement or supervisory actions or sanctions, including the revocation, suspension or modification of relevant licenses or registration, concerning or related to a Covered Entity which may have, in its reasonable opinion, material effect on the Covered Entity's ability to comply with the AIFMD.
- 4) To supplement informal consultations, each Authority intends to provide the other Authority, upon written request, with assistance in obtaining information not otherwise available to the Requesting Authority, and, where needed, interpreting such information so as to enable the Requesting Authority to assess compliance with the AIFMD. The information covered by this paragraph includes, without limitation, information such as:
- a) Information that would permit the Requesting Authority to verify that the Covered Entities comply with the relevant obligations and requirements of the national law of the Requesting Authority;
  - b) Information relevant for monitoring and responding to the potential implications of the activities of an individual Manager, or Managers collectively, for the stability of systemically relevant financial institutions and the orderly functioning of markets in which Managers are active;
  - c) Information relevant to the financial and operational condition of a Covered Entity, including, for example, reports of capital reserves, liquidity or other prudential measures, and internal control procedures;
  - d) Relevant regulatory information and filings that a Covered Entity is required to submit to an Authority including, for example: interim and annual financial statements and early warning notices; and
  - e) Supervisory reports prepared by an Authority, including for example: examination reports, findings, or information drawn from such reports regarding Covered Entities to the extent such reports or information are relevant to a Covered Entity's compliance with the AIFMD.

#### **Article 4. Cross-border on-site visits**

- 1) Authorities should discuss and reach understanding on the terms regarding cross-border on-site visits conducted to assess compliance with the requirements of the AIFMD and its implementing measures, taking into full account each other's sovereignty, legal framework



and statutory obligations, in particular, in determining the respective roles and responsibilities of the Authorities. The Authorities will act in accordance with the following procedure before conducting a cross-border on-site visit.

- a) The Authorities will consult with a view to reaching an understanding on the intended timeframe for and scope of any cross-border on-site visit. The Local Authority shall decide whether the visiting officials of the other Authority shall be accompanied by the officials of the Local Authority during the visit.
- b) When establishing the scope of any proposed cross-border on-site visit, the Authority seeking to conduct the visit will give due and full consideration to the supervisory activities of the other Authority and any information that was made available or is capable of being made available by that other Authority.
- c) The Authorities will assist each other in reviewing, interpreting and analysing the contents of public and non-public documents and obtaining information from directors and senior management of Covered Entities or any other relevant Person.

#### **Article 5. Execution of requests for assistance**

- 1) To the extent possible, a request for information should be made in writing and addressed to the relevant contact person identified in Appendix A. A request generally should specify the following:
  - a) The information sought by the Requesting Authority, including specific questions to be asked and an indication of any sensitivity about the request;
  - b) A concise description of the facts underlying the request and why such information is necessary to determine compliance with the AIFMD, including the applicable regulations and relevant provisions behind the supervisory activity;
  - c) The desired time period for reply and, where appropriate, the urgency thereof; and
  - d) Any information known to, or in the possession of, the Requesting Authority that might assist the Requested Authority in identifying either the Persons believed to possess the information or documents sought or the places where such information may be obtained.
- 2) In Emergency Situations, the Authorities will endeavour to notify each other of the Emergency Situation and communicate information to the other as would be appropriate in the particular circumstances, taking into account all relevant factors, including the status of efforts to address the Emergency Situation. During Emergency Situations, requests for information may be made in any form, including orally, provided such communication is confirmed in writing as promptly as possible following such notification.

#### **Article 6. Cooperation on enforcement**

- 1) The Requested Authority should, as far as its national law permits, assist the Requesting Authority where it is necessary to enforce the AIFMD or its implementing measures breached by a Covered Entity established in its jurisdiction. In particular, the Requested Authority should provide to the Requesting Authority its assistance in at least the following situations:



- a) When the Requesting Authority has required a Covered Entity established in the jurisdiction of the Requested Authority to cease any practice that is contrary to the provisions adopted in the implementation of the AIFMD and its implementing measures. In this situation, and at the request of the Requesting Authority, the Requested Authority should provide information that would allow the Requesting Authority to verify compliance with the request by the Covered Entity.
  - b) When the Requesting Authority has requested the freezing or the sequestration of assets of a Covered Fund that is established in the jurisdiction of the Requested Authority. In this situation the Requested Authority should endeavour to the extent possible to inform the Requesting Authority on the legal procedures that lead to that result.
  - c) When the Requesting Authority has requested the temporary prohibition of professional activity in relation to a Covered Entity established in the jurisdiction of the Requested Authority. In this situation, and at the request of the Requesting Authority, the Requested Authority should provide information that would allow the Requesting Authority to verify whether the temporary prohibition is being observed by such Covered Entity.
  - d) When the Requesting Authority has adopted any type of measure to ensure that Covered Entities established in the jurisdiction of the Requested Authority continue to comply with the requirements of the AIFMD and its implementing measures. In this situation, and at the request of the Requesting Authority, the Requested Authority should provide information that would allow the Requesting Authority to verify whether such Covered Entities observe the measure adopted by the Requesting Authority.
  - e) When, in the interest of the investors or of the public, the Requesting Authority has required the suspension of the issue, repurchase or redemption of units or shares of Covered Funds established in the jurisdiction of the Requested Authority. In this situation, and at the request of the Requesting Authority, the Requested Authority should provide information that would allow the Requesting Authority to verify that such Covered Funds comply with the request of suspension.
- 2) In addition to the reasons set forth in Article 2.5 of this MoU, a request for assistance for the purpose of enforcing and securing compliance with the AIFMD may be denied by the Requested Authority where a criminal proceeding has already been initiated in the jurisdiction of the Requested Authority based upon the same facts and against the same Persons, or the same Persons have already been the subject of final punitive sanctions on the same facts by the Competent Authorities of the jurisdiction of the Requested Authority, unless the Requesting Authority can demonstrate that the relief or sanctions sought in any proceedings initiated by the Requesting Authority would not be of the same nature or duplicative of any relief or sanctions obtained in the jurisdiction of the Requested Authority.
- 3) Where a request for assistance is denied, or where assistance is not available under domestic law, the Requested Authority will endeavour to provide the reasons for not granting the assistance and consult pursuant to Article 2.7 of this MoU. Assistance will not be denied based on the fact that the type of conduct under investigation would not be a violation of the Laws and Regulations of the Requested Authority.



- 4) The Authorities intend to, within the framework of the provisions of this MoU, provide each other with the fullest assistance permissible to secure compliance with the AIFMD. The assistance available under the provisions of this section includes, without limitation:
  - (a) Providing information and documents held in the files of the Requested Authority regarding matters set forth in the request for assistance.
  - (b) Obtaining information and documents regarding the matters set forth in the request for assistance, including:
    - i. Contemporaneous records sufficient to reconstruct all relevant securities and derivatives transactions, including relevant records of all funds and assets transferred into and out of bank and brokerage accounts relating to these transactions;
    - ii. Records that identify: the beneficial owner and controller, and for each transaction, the account holder; the amount purchased or sold; the time of the transaction; the price of the transaction; and the individual and the bank or broker and brokerage house that handled the transaction; and
    - iii. Information identifying Persons who beneficially own or control non-natural Persons organized in the jurisdiction of the Requested Authority.
- 5) Requests for assistance under this Article will be made in accordance with the requirements set forth in Article 5 of this MoU.
- 6) Upon request, the Requested Authority will endeavour to produce documents identified in Article 6.4(b) of this MoU from (i) any Person designated by the Requesting Authority, or (ii) any other Person who may possess the requested information or documents. Upon request, the Requested Authority will endeavour to obtain other information relevant to the request.
- 7) Upon request, the Requested Authority will endeavour to seek responses to questions from any Person involved, directly or indirectly, in the activities that are the subject matter of the request for assistance or who is in possession of information that may assist in the execution of the request.
- 8) Unless otherwise arranged by the Authorities, information and documents requested under this Article will be gathered in accordance with the procedures applicable in the jurisdiction of the Requested Authority and by Persons designated by the Requested Authority.

#### **Article 7. Permissible uses of non-public information**

- 1) The Requesting Authority may use non-public information obtained under this MoU solely for the purpose of seeking to ensure compliance by Covered Entities with the AIFMD, which may include civil or administrative enforcement proceedings.
- 2) Non-public information received under this MoU from a Requested Authority that, in the judgment of the Requested Authority, reflects the judgment, analysis, opinion or findings of the Requested Authority may be used by a Requesting Authority as the basis for or in any enforcement investigation, proceeding, or civil action only with the written consent of the Requested Authority and subject to Article 8 of this MoU. In considering whether to

grant consent under this paragraph, the Requested Authority will take into account, among other things, the public interest and the need to protect the judgments, analyses, opinions, and findings in the information, in order to preserve the integrity of the supervisory and examination processes.

- 3) Non-public information other than information referred to in Paragraph 2 of this Article 7 that is obtained from a Requested Authority may be used by a Requesting Authority as the basis for or in any enforcement investigation, proceeding, or civil action subject to Article 8 of this MoU. This paragraph does not apply to information obtained by an Authority directly from a Covered Entity subject to its jurisdiction, even if such information also was received from a Requested Authority.

#### **Article 8. Confidentiality and onward sharing of non-public information**

- 1) Except for disclosures in accordance with this MoU, each Authority will keep confidential to the extent permitted by law non-public information shared under this MoU, requests made under this MoU, the contents of such requests, and any other matters arising under this MoU. The terms of this MoU are not confidential.
- 2) To the extent legally permissible, the Requesting Authority will notify the Requested Authority of any legally enforceable demand from a third party for non-public information that has been furnished under this MoU. Prior to compliance with the demand, the Requesting Authority intends to assert all appropriate legal exemptions or privileges with respect to such information as may be available.
- 3) In certain circumstances, and as required by law, it may become necessary for the Requesting Authority to share non-public information obtained under this MoU with other Governmental Entities in its jurisdiction. In these circumstances and to the extent permitted by law:
  - a) The Requesting Authority will notify the Requested Authority.
  - b) Prior to disclosing the information, the Requested Authority will receive adequate assurances concerning the Governmental Entity's use and confidential treatment of the information, including, as necessary, assurances that the information will not be shared with other parties without getting the prior consent of the Requested Authority.
- 4) Except as provided in Paragraph 2 of this Article 8, the Requesting Authority must obtain the prior consent of the Requested Authority before disclosing non-public information received under this MoU to any non-signatory to this MoU. If consent is not obtained from the Requested Authority, the Authorities will discuss the reasons for withholding approval of such use and the circumstances, if any, under which the intended use by the Requesting Authority might be allowed.
- 5) The Authorities intend that the sharing or disclosure of non-public information, including but not limited to deliberative and consultative materials (e.g., judgment, analysis, opinion or findings), pursuant to the terms of this MoU, will not constitute a waiver of privilege or confidentiality of such information.

#### **Article 9. Special rules on onward sharing of non-public information in the EU internal market**

- 1) Article 8 of this MoU does not apply in certain cases where the EU Competent Authorities are required to share non-public information with other EU Competent Authorities, the



European Systemic Risk Board ("ESRB") and ESMA under the AIFMD. In particular, Article 8 of this MoU does not apply in the following circumstances:

- a) In accordance with Article 25(2) of the AIFMD, an EU Competent Authority may need to share non-public information received from a non-EU Authority with other EU Competent Authorities where a Manager under its responsibility or a Covered Fund managed by that Manager could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions in other EU Member States.
  - b) In accordance with Article 50(4) of the AIFMD, the EU Competent Authority of the Member State of reference of a non-EU Manager<sup>2</sup> shall forward the information received from non-EU Authorities in relation to that non-EU Manager to the Competent Authority of the host Member States, as defined in Article 4(1)(r) of the AIFMD.
  - c) In accordance with Article 53 of the AIFMD, an EU Competent Authority shall communicate information to other EU Competent Authorities, the ESRB or ESMA, where this is relevant for monitoring and responding to the potential implications of the activities of an individual Manager or Managers collectively for the stability of systemically relevant financial institutions and the orderly functioning of markets on which the Managers are active.
- 2) In the cases mentioned in Paragraph 1 of this Article 9, the following conditions would apply:
- a) In accordance with Article 47(3) of the AIFMD, all the information exchanged between the EU Competent Authorities, the ESRB and ESMA shall be considered confidential, except where the Requested Authority states at the time of communication that such information may be disclosed or where such disclosure is necessary for legal proceedings.
  - b) The EU Competent Authorities, ESMA and the ESRB shall only use the information for the purposes envisaged in the AIFMD and in accordance with the founding regulations of ESMA and the ESRB.

#### **Article 10. Termination of the MoU; Successor authorities**

- 1) If an Authority wishes to terminate the MoU, it shall give written notice to the relevant counterparty. ESMA would coordinate the action of EU Authorities in this regard. Cooperation in accordance with this MoU will continue until the expiration of 30 days after an Authority gives written notice to the others. If an Authority gives such notice, cooperation will continue with respect to all requests for assistance that were made under the MoU before the effective date of notification until the Requesting Authority terminates the matter for which assistance was requested. In the event of termination of this MoU, non-public information obtained under this MoU will continue to be treated in a manner prescribed under Articles 7 to 9 of this MoU.
- 2) Where the relevant functions of an Authority are transferred or assigned to another authority or authorities, the terms of this MoU shall apply to the successor authority or

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<sup>2</sup> The Member State of reference is the EU Member State in charge of the authorisation of a non-EU Manager in accordance with Article 37 of the AIFMD.

authorities performing those relevant functions without the need for any further amendment to this MoU or for the successor to become an Authority. This shall not affect the right of the successor Authority and its counterparty to terminate the MOU as provided in this Article 10 if it wishes to do so.

**Article 11. Effective date of application**

Cooperation in accordance with this MoU will begin on 22 July 2013.

**Signatures**

Estonian Financial Supervision  
Authority (Estonia)

A stylized handwritten signature in blue ink, consisting of a large 'R' followed by a long horizontal stroke and a final 'X' shape.

Office of the Comptroller of  
the Currency

A handwritten signature in blue ink, appearing to start with 'Munt' followed by a stylized 'A' and several vertical strokes.

Board of Governors of the  
Federal Reserve System

A handwritten signature in blue ink, appearing to be 'M. J. G.' followed by a stylized flourish.