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Commission Implementing Regulation (EU) No 448/2013 of 15 May 2013 establishing a procedure for determining the Member State of reference of a non-EU AIFM pursuant to Directive 2011/61/EU of the European Parliament and of the Council

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## COMMISSION IMPLEMENTING REGULATION (EU) No 448/2013

of 15 May 2013

**establishing a procedure for determining the Member State of reference of a non-EU AIFM pursuant to Directive 2011/61/EU of the European Parliament and of the Council**

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 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 <sup>(1)</sup>, and in particular Article 37(14) thereof,

Whereas:

- (1) In the situations referred to in point (b), point (c)(i), points (e) and (f) and point (g)(i) of Article 37(4) of Directive 2011/61/EU, more than one Member State could be considered as a possible Member State of reference of a non-EU manager of alternative investment funds (AIFMs) intending to manage EU alternative investment funds (AIFs) and, as the case may be, or market AIFs managed by it in the Union. In those cases the non-EU AIFM has to submit a request to the competent authorities of those Member States to determine its Member State of reference. The request should be accompanied by all the relevant information and documentation necessary for determining the Member State of reference for this AIFM. A joint decision should be adopted by the competent authorities concerned to determine the Member State of reference. A procedure to be followed by the relevant competent authorities when determining the Member State of reference needs to be established. Whilst the appointment of the Member State of reference is the joint responsibility of the competent authorities of the Member States concerned, the European Securities and Markets Authority (ESMA) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council <sup>(2)</sup> should ensure that all possible Member States of reference are duly involved in such decision-making and should assist in reaching an agreement.
  - (2) The procedure for determining the Member State of reference is different from the procedure for applying for a passport under Directive 2011/61/EU. Once the Member State of reference has been determined the non-EU AIFM concerned has to apply for authorisation to the competent authority of that Member State, following the same procedure and subject to the same conditions as applicable to AIFMs under Articles 7 and 8 of Directive 2011/61/EU.
  - (3) Directive 2011/61/EU obliges Member States to apply the laws, regulations and administrative provisions which transpose that Directive from 22 July 2013. Without prejudice to the delegated act required in Article 67(6) of Directive 2011/61/EU, the application of this Regulation is therefore also deferred to the same date.
  - (4) The measures provided for in this Regulation are in accordance with the opinion of the European Securities Committee,
- HAS ADOPTED THIS REGULATION:

#### *Article 1*

##### **Procedure for determining the Member State of reference from among several possible Member States of reference**

1. Where a non-EU alternative investment fund manager (AIFM) intending to manage EU alternative investment funds (AIFs) without marketing them or intending to market AIFs managed by it in the Union submits a request to determine its Member State of reference pursuant to the second subparagraph of Article 37(4) of Directive 2011/61/EU, that request shall be in writing and shall be addressed to each of the competent authorities of the Member States that are possible Member States of reference. The request shall list all the possible Member States of reference.
2. The request by the non-EU AIFM shall include the information and documentation necessary for determining the Member State of reference.
3. In the situation referred to in Article 37(4)(b) of Directive 2011/61/EU, such information and documentation shall include:
  - (a) indication of the Member States where the AIFs managed by the non-EU AIFM are established;
  - (b) indication of the Member States where assets are managed by the non-EU AIFM;
  - (c) the amounts of assets under management of the non-EU AIFM in the different Member States.
4. In the situation referred to in point (c)(i) of Article 37(4) of Directive 2011/61/EU, such information and documentation shall include:
  - (a) indication of the Member State where the AIF managed by the non-EU AIFM is established;
  - (b) indication of the Member States where the non-EU AIFM intends to market the AIF.
5. In the situations referred to in point (e) and point (g)(i) of Article 37(4) of Directive 2011/61/EU, such information and documentation shall include:
  - (a) indication of the Member States where AIFs managed by a non-EU AIFM are established;
  - (b) a description of the marketing strategy capable of proving the intention of the non-EU AIFM to market a certain AIF or several AIFs in a particular Member State or in several Member States, and to develop effective marketing in particular Member States, indicating at least:
    - (i) the Member States where the distributors (and the AIFM in case of self-distribution) are going to promote units or shares of AIFs, which are managed by the AIFM, including the expected share, in terms of assets under management, in the overall promotion in the Union;
    - (ii) an estimate of the expected number of investors targeted having their domicile in the Member States where the AIFM intends to market its AIFs;
    - (iii) the official languages of Member States into which the offering and promotional documents have been or are to be translated;
    - (iv) the distribution of marketing activities across the Member States where the AIFM intends to market its AIFs taking into account in particular the prominence and frequency of advertisements and road shows.
6. In the situation referred to in Article 37(4)(f) of Directive 2011/61/EU, such information and documentation shall include information stipulated in paragraph 5(b) of this Article.

7. The competent authorities addressed by a non-EU AIFM as competent authorities of possible Member States of reference shall immediately upon receipt of the request referred to in paragraph 1 of this Article, and no later than three business days following the receipt of the request, contact each other and the European Securities and Markets Authority (ESMA) in order to decide whether any other competent authorities in the Union are potentially involved pursuant to Article 37(4) of Directive 2011/61/EU.

Upon ESMA's request, the competent authorities shall immediately provide ESMA with the complete request made by the non-EU AIFM.

8. Where it is decided that other competent authorities in the Union could be involved, ESMA shall immediately inform them and ensure that the complete request made by the non-EU AIFM is transmitted to them.

9. Each competent authority involved in the procedure and ESMA may request from the non-EU AIFM relevant additional information and documentation necessary for determining the Member State of reference.

Such request of additional information or documentation shall be in writing, shall include reasons and shall be simultaneously communicated to all other competent authorities concerned and to ESMA.

Once the requesting competent authority or ESMA receives the additional information or documentation, the requesting authority shall transmit that information or documentation immediately to all other authorities concerned and ESMA, as the case may be.

10. Within one week from the receipt of the request referred to in paragraph 1 by the competent authorities addressed by the AIFM or, where applicable, by any other competent authorities in the Union pursuant to paragraph 8, all competent authorities concerned shall submit an opinion to each other and to ESMA with regard to the determination of the appropriate Member State of reference.

11. Subsequently, all competent authorities shall jointly determine the Member State of reference. The determination shall be made at the latest one month after the receipt of the request by the competent authorities identified by the non-EU AIFM or, where applicable, by the other competent authorities in the Union pursuant to paragraph 8.

Where additional information is requested, the time limit referred to in the first subparagraph shall be extended to include the period between the request for additional information and documentation referred to in paragraph 9 and the receipt of such information or documentation.

12. ESMA shall assist the relevant competent authorities and, where necessary, facilitate the determination of the Member State of reference pursuant to Article 31 of Regulation (EU) No 1095/2010.

13. The competent authority of the Member State that is determined as the Member State of reference shall inform in writing and without undue delay the non-EU AIFM about that determination.

14. In the event that the requesting non-EU AIFM is not informed in writing within seven days of the determination or the relevant competent authorities have not determined the Member State of reference within the time limit referred to in the first subparagraph of paragraph 11 of this Article, the requesting non-EU AIFM may choose itself its Member State of reference in accordance with the criteria set out in the second subparagraph of Article 37(4) of Directive 2011/61/EU.

The non-EU AIFM shall immediately inform in writing all the competent authorities originally addressed and ESMA about its choice of the Member State of reference.

15. Where the Member State of reference chosen by the non-EU AIFM and the Member State of reference determined by the competent authorities, are different, the competent authorities concerned shall inform the non-EU AIFM about the determination as soon as possible, but no later than two business days after being informed about the choice of the AIFM according to paragraph 14. In this case, the determination shall prevail.

## *Article 2*

### **Entry into force**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall apply from 22 July 2013.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 15 May 2013.

*For the Commission*

*The President*

José Manuel BARROSO


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<sup>(1)</sup> OJ L 174, 1.7.2011, p. 1.


<sup>(2)</sup> OJ L 331, 15.12.2010, p. 84.

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