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HØRINGSSVAR – ESMA SPØRGESKEMA VEDR. SIMPLIFICERING OG ADM. BYRDER

ESMAs (European Securities and Markets Authority) "Investment Services and Markets Committee" har udsendt et spørgeskema, hvor man beder om input til simplificering og reduktion af administrative byrder, som Finanstilsynet har været venlige at videreformidle til Aktive Ejere.

Aktive Ejere afleverede en del input mundtligt på møde i Finanstilsynet 25. marts. Som supplement hertil fremsendes nedenstående bemærkninger – fortrinsvis på engelsk, da det er til brug for ESMA.

Markedsføringspas for semi-professionelle investorer
While the existing passport regime under the AIFMD has played a critical role in enabling cross-border distribution of alternative investment funds to professional investors, it does not currently permit marketing to semi-professional investors—a group that plays an increasingly important role in the European private capital ecosystem.

Semi-professional investors—such as high-net-worth individuals, family offices, and smaller institutional investors—are increasingly active in the alternative investment space. However, under the current AIFMD framework, they often fall into a regulatory grey zone as "semi-professional investors": not qualifying as professional investors, yet clearly more sophisticated and risk-aware than typical retail clients. Excluding these investors from the AIFMD marketing passport leads to unnecessary restrictions and inefficiencies.

Granting semi-professionals access through the passport would better reflect the diversity of the investor landscape and enable proportional access based on experience, capacity, and willingness to bear risk.

The EuVECA Regulation (Regulation (EU) No 345/2013) already acknowledges the appropriateness of marketing to semi-professional investors. Under this framework, AIFMs may market to certain high-net-worth individuals who meet defined conditions—such as a minimum commitment of €100,000 and a signed acknowledgment of investment risk. This approach demonstrates that safeguarded access to alternative investments for semi-professionals is both feasible and aligned with EU regulatory objectives.

In contrast, fully authorised AIFMs—who are subject to significantly more robust regulatory oversight than EuVECA managers—are limited under AIFMD to marketing solely to professional investors. This creates an unjustified regulatory asymmetry: while EuVECA managers can market to semi-professional investors under a tailored framework, AIFMs whose investment strategies fall outside the narrow scope of the EuVECA Regulation are entirely excluded from accessing this investor category, despite being more heavily regulated.

If semi-professionals are deemed suitable counterparties for EuVECA funds, it is both logical and proportionate to extend similar access under the AIFMD passport for authorised AIFMs—subject to equivalent investor safeguards.

Denmark offers a compelling national example of how this extended access can work in practice. Under Danish rules, AIFMs are permitted to market to semi-professional investors—defined in line with the EuVECA criteria—without requiring a license to market to retail investors.

This Danish model is widely regarded as balanced, effective, and well-functioning. It provides AIFM's with access to a broader pool of investors while ensuring that those investors meet minimum thresholds and acknowledge the associated risks. Importantly, it achieves this without compromising investor protection or regulatory integrity.

The Danish experience clearly demonstrates that such a regime can be implemented responsibly and pragmatically and should serve as a strong precedent for EU-wide reform.

Pre-markedsførings pas

The pre-marketing regime was introduced with the intention of harmonizing and facilitating early-stage fund distribution across EU Member States. However, in practice, it has had the opposite effect: it has created legal uncertainty, imposed administrative burdens, and distorted investor dialogue, especially in the private funds sector.

The current regime does not appear to function as intended and the sector would be better served by returning to the previous, more principle-based approach, where early engagement with professional investors was not encumbered by formalistic procedures.

Although originally intended to harmonize and facilitate early-stage fundraising across Member States, the regime has had the opposite effect in practice. It has introduced legal uncertainty, discouraged natural investor dialogue, and added administrative and compliance burdens without delivering corresponding benefits in terms of regulatory oversight or investor protection.

AIFM's face significant ambiguity in interpreting what constitutes permitted pre-marketing versus marketing, particularly due to the vague notion of what is "sufficiently developed" to fall within scope. This uncertainty results in cautious and often costly over-compliance, with many managers refraining from engaging with investors at an early stage to avoid inadvertently breaching rules.

The requirement for EU AIFMs to notify their home regulator within two weeks of initiating pre-marketing adds bureaucracy without any meaningful supervisory outcome. These notifications are formalistic, provide no practical insight for regulators, and serve primarily as a compliance checkbox.

The 18-month rule, which deems any investor subscription during that period as resulting from pre-marketing, is arbitrary and out of touch with the practical realities of fundraising in the private funds space - especially in the current market. Institutional investors often require more than 18 months to complete

due diligence and reach an investment decision, meaning that this rule creates artificial compliance obligations that do not reflect actual marketing activity.

Further the current pre-marketing regime effectively excludes sub-threshold AIFMs in Denmark due to the strict interpretation by the Danish FSA, which allows only authorised AIFMs to pre-market. This approach is not aligned with market practice across the EU and prevents smaller managers from testing investor interest before launching a fund.

In summary, the pre-marketing regime has introduced more friction than facilitation and offers limited practical value in return. It is therefore recommended that the regime be abolished. Eliminating it would reintroduce the flexibility and pragmatism that characterized the previous framework and meaningfully reduce the regulatory burden on AIFM's—without undermining the protection of professional investors. While the recognition of pre-marketing as a legitimate concept is welcomed, formalizing it through a notification procedure adds no real value and unnecessarily complicates the early-stage fundraising process.

Markedsføringspas - offentliggørelse

The current marketing notification process under Article 32 of the AIFMD is often overly burdensome and not reflective of how fundraising for closed-ended funds works in practice. One of the main challenges is the expectation that a wide range of documentation must be submitted upfront — including final versions of offering documents and agreements — even though these materials are frequently still in draft form at the time marketing is initiated. This timing misalignment creates unnecessary delays and administrative overhead for managers who need to act quickly in a competitive market.

In reality, many of the documents submitted are not actively reviewed by National Competent Authorities (NCAs), who in many cases lack the capacity to go through the volume of materials received. This raises the question of whether it is efficient or meaningful to front-load the notification process with documentation that may not be essential for the purpose of supervision. A more proportionate approach would be to allow AIFMs to submit only core information — such as fund name, AIFM details, and target jurisdictions — and let NCAs request additional documentation if - and when -needed.

Importantly, this shift would not compromise regulatory oversight. NCAs would still have the power to request any additional information they deem necessary and take action in response to issues. But moving away from a heavy upfront documentation burden would strike a better balance between investor protection and the practical needs of AIFM's, while also respecting the limited resources of NCAs.

It is therefore recommended to streamline the marketing notification process by limiting the initial submission to essential information only, such as fund and AIFM details, and allowing NCAs to request further documentation on a case-by-case basis. This would reduce unnecessary administrative burden, better reflect how marketing operates in practice, and enable NCAs to allocate resources more effectively — all without compromising investor protection or supervisory oversight.

PRIIPS KID

The PRIIPs Regulation aims to enhance transparency and protect retail investors by requiring a standardized, short-form KID that presents key information.

This works reasonably well for standard, liquid retail products — but it gets complicated when applied to closed-ended private investment funds. As such, applying the PRIIPs KID to these types of funds risks distorting key information and may mislead rather than protect investors.

There are several reasons why the PRIIPs KID is not a workable or appropriate disclosure tool for closed-ended funds:

Illiquidity: The KID assumes the product can be bought and sold freely, which conflicts with the long-term, illiquid nature of closed-ended funds.

Performance Scenarios: The required forward-looking performance scenarios assume a single upfront investment and continuous returns, which does not reflect how private closed-ended funds operate. Capital is called over time and invested gradually, making the PRIIPs methodology unsuitable. Combined with limited historical data and bespoke strategies, this often results in projections that are misleading and disconnected from investors' actual experience.

Cost Disclosure: The cost calculation methodology does not reflect the way fees and expenses operate in private funds, particularly with respect to performance-based compensation such as carried interest.

Target Investor Mismatch: The PRIIPs KID is designed for retail investors, while closed-ended funds are typically marketed to professional or semi-professional investors who conduct thorough due diligence.

Structural Incompatibility: The standardized format of the KID does not accommodate the bespoke terms, capital call structure, and long-term investment horizon of closed-ended funds.

A key challenge in applying the PRIIPs Regulation to closed-ended funds lies in the regulatory misalignment between the AIFMD and the PRIIPs framework. While the AIFMD includes clear exemptions for marketing to certain investor types, the PRIIPs Regulation adopts a much broader scope. The definition of a "PRIP" captures virtually all packaged investment products — including structures such as employee participation schemes exempt under the AIFMD.

Moreover, the PRIIPs Regulation relies on the MiFID II definition of a retail investor. This means that employees, high-net-worth individuals, family offices, and smaller institutional investors — who may be experienced and sophisticated, but do not formally qualify as professional investors under MiFID II — are all deemed retail for PRIIPs purposes. As a result, when closed-ended funds are offered to any of these investor types, the AIFM is required to prepare and provide a PRIIPs KID.

This regulatory disconnect creates both practical and legal challenges. It requires AIFMs to prepare a standardized PRIIPs KID for investor categories that are not the intended beneficiaries of retail investor protections — and who, in practice, already receive more comprehensive and tailored information as part of the fundraising process. As a result, the PRIIPs KID often sits uneasily alongside the fund's private placement memorandum and other offering materials, leading to inconsistencies and potential confusion. In particular, the performance scenarios and cost disclosures presented in the KID frequently do not align with the information communicated elsewhere in the legal documentation or marketing materials. This misalignment complicates compliance with the ESMA Guidelines on marketing communications under the Regulation on cross-border distribution of funds, which require consistency and clarity in investor-facing disclosures.

The PRIIPs Regulation is not well-suited to closed-ended funds. Its standardized disclosures often misrepresent key aspects of these funds and may confuse rather than inform investors.

It is recommended that closed-ended funds be exempted from the PRIIPs Regulation. At a minimum, the scope should be revised so that the obligation to produce a KID does not apply when funds are marketed exclusively to professional and semi-professional investors, which means employees, high-net-worth individuals, family offices, and smaller institutional investors — who may be experienced and sophisticated, but do not formally qualify as professional investors. These investors typically receive tailored, detailed information and do not require a retail-style disclosure document to make informed decisions.

ØVRIGE EMNER, PRIMÆRT VEDR. NATIONAL DANSK PRAKSIS OG REGULERING

Aktive Ejere foreslår en justering af minimumsbeløbet, som fremgår af bekendtgørelsen om lønpolitik og aflønning i forvaltere af alternative investeringsfonde (aflønningsbekendtgørelsen) § 9.

§ 9 i aflønningsbekendtgørelsen giver bestyrelsen i en FAIF mulighed for at beslutte, at udskydelsesprincipperne og instrumentkravet i § 20, stk. 2, nr. 4 og 5 i FAIF-loven ikke finder anvendelse, såfremt den tildelte variable aflønning ikke overstiger 100.000 DKK årligt pr. medarbejder.

Udskydelsesprincipperne og instrumentkravet i FAIF-lovens § 20, stk. 2, nr. 4 og 5 gælder for variabel aflønning af ledelsen eller medarbejdere, som er udpeget som væsentlig risikotagere i FAIF'en, som bl.a. defineret i aflønningsbekendtgørelsens § 3.

Særligt instrumentkravet medfører i praksis betydelige udfordringer for forvaltere, der udelukkende forvalter lukkede fonde. Kravet indebærer, at en væsentlig andel af den variable aflønning skal ske i såkaldte fonde-relaterede instrumenter, som har samme risikoprofil som de fonde, der forvaltes. I lukkede fondsstrukturer – hvor fondene typisk ikke er børsnoterede og ikke udsteder omsættelige ejerandele – er det imidlertid ofte vanskeligt, hvis ikke umuligt, at identificere et egnet instrument, som både lever op til lovgivningens krav og samtidig kan anvendes i en praktisk og operationel kontekst. Det kan f.eks. være svært at fastsætte en markedsværdi for fondsandele, da disse typisk kommer med en indbetalingsforpligtelse for investoren og negativt cash-flow i fondens investeringsperiode.

Dette medfører, at instrumentkravet for denne type forvaltere i realiteten har en begrænset værdi som risikostyringsværktøj, mens det samtidig skaber en betydelig administrativ og juridisk kompleksitet i forhold til at etablere og implementere en compliant incitamentsstruktur.

På den baggrund – og også som udtryk for helt normal §20-lignende årlig prisregulering, som det kendes fra personskattelovgivningen – foreslår vi, at Finanstilsynet overvejer at forhøje deminimis-grænsen i aflønningsbekendtgørelsen. Den nuværende beløbsgrænse blev fastsat i 2013 og har ikke været justeret siden, til trods for udviklingen i lønniveauer og inflation. En opjustering vil være en proportional og pragmatisk tilpasning, som I vores optik vil lette byrden for en række FAIF'er uden at gå på kompromis med intentionerne bag reguleringen.

Med venlig hilsen

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