

AIFM Directive – Update on UK Implementation Measures – Implications for non-EU Managers Marketing to UK Investors

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In our [April 2013 Client Alert](#), we provided a short update to our [November 2010 Client Alert](#) on the implications of the Alternative Investment Fund Managers Directive (the “**Directive**”) for non-EU based alternative investment fund manager (“**AIFMs**”). In our previous alerts, we highlighted the importance for non-EU based AIFMs to keep abreast of developments in EU Member States (and in particular EU Member States into which they intend to market their funds) as the Directive is implemented into national law.

Her Majesty’s Treasury recently published the revised draft Alternative Investment Fund Managers Regulations 2013 (the “**UK Regulations**”), which, along with certain UK Financial Conduct Authority (the “**FCA**”) rules to be adopted, will be the implementing regulations transposing the Directive into UK law.

In this Client Alert, we focus on the transitional provisions of the UK Regulations and in particular the effect that they will have on the ability of non-EU AIFMs to market their funds to UK based investors. For the purposes of this Alert, we have focussed on non-EU AIFMs that are above the thresholds for “small” non-EU AIFMs (i.e., AIFMs (including related group company AIFMs) whose assets under management exceed either: (i) €500m (provided that their alternative investment funds are not leveraged and investors have no redemption rights in the first five years — i.e., classic private equity funds); or (ii) €100m (including assets acquired through the use of leverage)).

As used in this Client Alert, “**non-EU AIFM**” refers to a non-EU based alternative investment fund manager and “**EU AIFM**” refers to its EU based counterpart. “**AIF**” refers to an alternative investment fund as defined under the UK Regulations.

The UK Perspective

The UK Regulations have provided clarity as to the UK Government’s approach to the Directive and the overall approach appears to be pragmatic and helpful for non-EU AIFMs (particularly with regard to marketing and the transitional provisions). As we set out in our previous alerts, non-EU AIFMs will be subject to certain administrative procedures in each EU Member State into which they intend to market their AIF(s) and this will certainly be the case as regards marketing in the UK going forwards. In the immediate future (i.e., up until 22 July 2014), these administrative procedures will be alleviated in the UK by certain concessions (see below “*Marketing for non-EU AIFMs during the “Transitional Period”*”).

Maintenance of a Private Placement Regime in the UK / Advance FCA Notification

Non-EU AIFMs can take comfort from the fact that the UK will retain a form of private placement regime. However, the private placement regime will be subject to some alteration in that non-EU AIFMs will need to comply with the Directive's minimum standards (such as notifying the FCA in advance of any marketing to UK investors, certain disclosure and transparency requirements, certain specific requirements of the Directive applicable to private equity (i.e., the rules relating to asset stripping and disclosure obligations), and other on-going reporting obligations to the FCA).

The notification to the FCA in advance of any marketing to UK investors must include a statement confirming that the following are met:

- the AIFM is the person responsible for complying with the implementing provisions relating to the marketing of the AIF;
- the AIFM complies with the transparency requirements of the Directive (Articles 22 to 24) in so far as such provisions are relevant to the AIFM and the AIF to be marketed;
- if applicable, the AIFM complies with the private equity specific reporting/disclosure requirements in the UK Regulations in relation to the AIF to be marketed;
- applicable cooperation agreements are in place (between the jurisdictions of the AIFM/AIF and the UK); and
- the country where the non-EU AIFM and, if applicable, the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by the Financial Action Task Force.

It will not be necessary to await approval from the FCA before marketing may take place.

Any planned material changes to the information provided in the notification to the FCA mentioned above must be notified to the FCA in writing at least one month before implementing the change and unplanned material changes must be notified immediately after such unplanned change has occurred.

Marketing for non-EU AIFMs during the "Transitional Period"

The UK government's proposal that all AIFMs should be entitled to a one year transitional period has been adopted in the UK Regulations. This means that AIFMs will have until 22 July 2014 (at the latest) to get authorised by the FCA, cease marketing/managing funds in the UK, or otherwise comply with the Directive.

In relation to non-EU AIFMs, the UK position is that provided the non-EU AIFM markets an AIF in the EU "immediately before 22nd July 2013", then that AIFM may benefit from the one year transitional period with regard to marketing in the UK. This means that the Directive's marketing requirements will not apply until the earlier of: (i) 22 July 2014; or (ii) the date on which the non-EU AIFM notifies the FCA that it intends to market in the UK. In practice, this means that non-EU AIFMs that are marketing AIFs in the EU before 22 July 2013 should be able to make full use of the one year transitional period in order to comply with the UK Regulations. Managers should note that certain other EU jurisdictions are looking to implement similar transitional rules and it is likely to be beneficial to accelerate marketing of funds in EU Member States prior to 22 July 2013.

There is no need for an AIFM to make any specific application or go through any procedures with the FCA to benefit from the transitional provisions, although evidence should be retained that the requisite marketing has indeed occurred prior to 22 July 2013.

The Launch and Marketing of New Funds during the Transitional Period by non-EU AIFMs

A non-EU AIFM that qualifies for and is able to benefit from the transitional provisions may launch and market new AIFs during the transitional period without losing the benefit of the transitional provisions. While this is helpful in relation to marketing by non-EU AIFMs in the UK, it will be important for managers to confirm the position in relation to other EU Member States which may not adopt the same rules.

Funds in Run-Off and With Limited Life

The UK Regulations also confirm that AIFMs managing certain closed-end funds which: (i) are in run-off (i.e., make no additional investments after 22 July 2013) do not need to comply with the UK Regulations; or (ii) have a limited life which expires by 22 July 2016 and whose subscription period ended before 22 July 2011, will only be subject to the private equity specific reporting/disclosure requirements and the need to produce an annual report from 22 July 2014.

Conclusion

The UK Government's approach to the implementation of the Directive is broadly helpful for the industry and, while marketing in the UK may continue without significant interruption until 22 July 2014, other EU countries may not be so accommodating.

Please contact us if you wish to discuss how the Directive may impact your business or if further detail is required on any of the points discussed in this Client Alert.

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