

ALERTS

Reminder for UK Private Fund Managers: The AIFM Directive Takes Effect on 22 July 2013

9 July 2013

Summary

The Alternative Investment Fund Managers Directive (“AIFM Directive”) of the European Union (“EU”) must be implemented into the national law of all EU countries by 22 July 2013. The AIFM Directive, which sets forth rules for the authorisation, operation and transparency (i.e., disclosure requirements) of managers of alternative investment funds (“AIFs”), will apply to any private fund manager (defined under the AIFM Directive as an alternative investment fund manager or “AIFM”) that:

(2) Markets^[1] one or more AIFs (EU or non-EU) to investors in the EU.

(1) Manages one or more EU AIFs; or

In our previous *Briefings*,^[2] we have provided detailed guidance and summaries of the requirements for AIFMs. The same issues and principles as are discussed in our *Briefings* remain relevant, but as we approach 22 July 2013, the date that the AIFM Directive becomes effective in all EU member states, we are beginning to see final rules published in certain EU member states, including the UK. These final rules are leading to further action items becoming apparent, which UK AIFMs may wish to consider. Some of these action items relate to the existence of transitional periods in certain EU countries and reverse solicitation procedures — both of which may be critical for UK AIFMs if they wish to be able to market their AIFs in the EU during the transitional period before they register with the

UK Financial Conduct Authority (“FCA”) as authorised AIFMs — without having to comply with the AIFM Directive’s onerous requirements for notification filings/registration, statutory disclosures, and regulatory reporting (together, the “Marketing Compliance Requirements”).[3]

United Kingdom

Although we do not yet have all of the final rules that will be required to implement the AIFM Directive in UK law and regulation, the following two papers have recently been published by the UK authorities which give a great deal of detail about the manner in which the AIFM Directive is being implemented in the UK and the FCA’s guidance on many of the concepts and issues under the AIFM Directive:

- *HM Treasury*. Alternative Investment Fund Managers Regulations 2013 (the “Regulations”);[4] and
- *FCA*. Policy Statement 13/5 — Implementation of the Alternative Investment Fund Managers Directive (“PS13/5”).[5]

It must be emphasised that the Regulations and PS 13/5 relate only to the position as regards the implementation of the AIFM Directive in the UK. Other EU member states will implement the AIFM Directive under their own regulations and there may be variances between one EU member state’s approach and that taken in another EU member state. If in doubt, the advice and assistance of local counsel should be sought. However, notwithstanding the fact that each EU member state could take a slightly different approach to implementation, there are some significant concepts in the Regulations and PS 13/5 that UK AIFMs should be aware of.

Transitional Period. The Regulations confirm that there will be a one-year transitional period for the implementation of the AIFM Directive in the UK. This one-year transitional period applies to those UK AIFMs that are already managing an AIF in the UK on 22 July 2013.

To be “managing” an AIF in the UK on 22 July 2013, the UK AIFM would have to be: (1) already authorised by the FCA as an investment manager under the current MiFID rules;[6] and (2) managing an AIF that is already trading. Assuming that the UK AIFM is able to satisfy these requirements, it will be able to take another full year during which to submit its variation

of permission (“VoP”) application to the FCA to change its status from being an authorised MiFID firm and instead to be an authorised AIFM.[7]

During the transitional period:

- A UK AIFM managing a non-EU AIF will be able to continue marketing its AIF(s) in the UK in accordance with the UK’s national private placement rules (i.e., the FCA’s financial promotion rules). In other EU member states, the UK AIFM, if it wished to market its non-EU AIFs, would have to comply with the national private placement rules in the relevant member state and any additional requirements imposed by the local regulator under the AIFM Directive. It is probable that some other EU member states will likely also have a one-year transitional period for marketing, so the specific requirements should be assessed on a member-state-by-member-state basis.[8]
- A UK AIFM managing a UK AIF will be able to market its AIF(s) in the UK in accordance with the UK’s national private placement rules until such time as the UK AIFM becomes regulated by the FCA as an authorised AIFM. However, a UK AIFM that has not yet become regulated by the FCA as an authorised AIFM will NOT be able to market its EU AIF(s) in other EU member states until such time as the UK AIFM is authorised as an authorised AIFM and can thereby obtain the marketing passport for that EU AIF.[9] EU AIFs will ONLY be able to be marketed in the EU under the marketing passport after 22 July 2013 — unless a particular country has adopted a transitional period for marketing purposes. However, once the marketing passport is obtained, the UK AIFM would then be able to market the EU AIF freely around the EU to any professional investors without consideration as to the national private placement rules, which would cease to be of relevance after the passport is obtained.

Marketing. The FCA’s recent guidance on the AIFM Directive in PS 13/5 has commented that “marketing” means more than merely providing information on a fund or verbal discussions with a potential EU investor. For “marketing” to have taken place, the units or shares in the AIF must have been made “available for purchase” by the EEA investor — i.e., there has to have been a formal offering or placement of interests in the relevant AIF.

The FCA has noted: “*The terms ‘offering’ or ‘placement’ are not defined in the AIFMD UK regulation but, in our view, an offering or placement takes*

place for the purposes of the AIFMD UK regulation when a person seeks to raise capital by making a unit or share of an AIF available for purchase by a potential investor. This includes situations which constitute a contractual offer that can be accepted by a potential investor in order to make the investment and form a binding contract, and situations which constitute an invitation to the investor to make an offer to subscribe for the investment.”

Reverse Solicitation — or “Passive Marketing.” The AIFM Directive itself and the Regulations specify that the AIFM Directive’s requirements that would otherwise apply to the AIFM for an AIF being marketed in the EEA do NOT apply to an offering or placement of units or shares of an AIF where the marketing activity takes place in the EEA at the initiative of the EEA investor. PS 13/5 refers to such marketing “at the initiative of the investor” as passive marketing, although it will be more familiarly known to most industry participants as “reverse solicitation” marketing or as “reverse inquiry” marketing.

The FCA’s guidance in PS 13/5 states: *“A confirmation from the investor that the offering or placement of units or shares of the AIF was made at its initiative should normally be sufficient to demonstrate that this is the case, provided this is obtained before the offer or placement takes place. However, AIFMs and investment firms should not be able to rely upon such confirmation if this has been obtained to circumvent the requirements of AIFMD.”*

Action Items

UK AIFMs would be advised to consider the following action items:

- *FCA — VoP Application.* Determine when they will be making their VoP application to the FCA to become authorised AIFMs. Various factors will be relevant in making this assessment, including whether or not the AIFM manages an EU AIF (in which case it would be beneficial to become authorised earlier rather than later so as to get the benefit of the pan-EU marketing passport), and if the AIFM has no EU AIF, then one of the key factors will be whether or not the AIFM wishes to become fully compliant with the AIFM Directive (including the potentially onerous remuneration requirements) sooner, or later.[10]
- *Transitional Periods.* Assess which EU jurisdictions will have a transitional period and whether or not the AIFM will be able to take

advantage of it/them so that it will be able to continue marketing in that jurisdiction/those jurisdictions for the duration of the transitional period without having to comply with the Marketing Compliance Requirements.

- *Active Marketing.* Assess in which other EU jurisdictions the AIFM may otherwise wish to conduct active marketing after 22 July 2013 (i.e., marketing at its own initiative in compliance with the AIFM Directive requirements). Such AIFMs will need to assess what the local law requirements will be for the Marketing Compliance Requirements.
- *Reverse Solicitation — Existing Investors.* Review EU investor lists and EU contact lists to assess whether they have already been marketing to those EU persons at their initiative — i.e., whether the UK AIFM has an email, letter or other evidence from the EU investor to show that the marketing relationship with that EU person was as a result of a reverse solicitation.
- *Reverse Solicitation — Ongoing Marketing to Existing Investors.* Consider whether the ongoing materials sent to existing EU investors in the AIFM's AIF(s) are marketing materials and whether existing EU investors have indicated in writing that they wish to receive such marketing materials.
- *Reverse Solicitation — Prospective Investors.* Identify those EU prospective investors with whom the AIFM has been having initial discussions — but to whom the AIFM has not yet sent any formal offer documents/private placement memorandum or subscription documents and determine whether the EU prospective investor has confirmed in writing to the AIFM that they would like the AIFM to send them the formal marketing materials.

Note

This *Alert* identifies action items that UK AIFMs may wish to consider in the period before the AIFM Directive is fully implemented in each EU member state. EU member states have discretion to implement the AIFM Directive under their own national regulations and there may be variances between one EU member state's approach and that taken in another EU member state, which local counsel in the relevant member states can address.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] Under the AIFM Directive, “marketing” means a direct or indirect offering or placement at the initiative of the AIFM, or on behalf of the AIFM of units or shares of an AIF it manages, to or with investors domiciled, or with a registered office, in the EU.

[2] For more information, please see SRZ *Briefings* on the SRZ AIFM Directive Resource Center.

[3] For more information, please see SRZ *Briefing*, Marketing Requirements.

[4]
http://www.legislation.gov.uk/ukdsi/2013/9780111540206/pdfs/ukdsi_9780111540206_en.pdf.
We understand that the Regulations were passed into law by the UK Parliament on 3 July 2013.

[5] <http://www.fca.org.uk/your-fca/documents/policy-statements/ps13-05>.

[6] The Markets in Financial Instruments Directive (Directive 2004/39/EC), which is the existing EU directive regulating investment services firms in the EU.

[7] An authorised UK AIFM must also, from the date it becomes authorised as an AIFM, comply with the FCA AIFM remuneration rules — the details of which are not anticipated to be published by the FCA before the end of September or early October 2013. For more information on the general remuneration principles that the FCA’s remuneration rules will be modeled on, please see SRZ *Briefing*, AIFM Remuneration Rules.

[8] The terms and details of any other EU member states’ transitional periods is not entirely clear at the time of writing.

[9] However, a UK AIFM will be able to continue marketing its EU AIF(s) for the duration of any transitional period in those EU member states that elect to have one (assuming the UK AIFM is able to come within the scope of such transitional period(s)).

[10] We anticipate that many UK AIFMs with non-EU AIFs will likely not submit their VoP applications to the FCA until the first or second calendar quarters of 2014. At the time of writing, the FCA’s processes and the forms

needed to make any VoP application have not been published, although we anticipate that these details will be published during the course of this week (week commencing 8 July 2013).

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