



UK Implementation of AIFMD: UK Private Placement Regime and non-EU Fund Managers

By July 22, 2013, EU member states must adopt the provisions of the Alternative Investment Fund Managers Directive (the “AIFMD”). On May 13, 2013, the UK’s HM Treasury further clarified how AIFMD will affect alternative investment fund managers (“AIFMs”), including those based outside the European Economic Area (the “EU”) with respect to UK private placements and UK marketing activities.

In addition, on June 28, 2013, the UK’s Financial Conduct Authority published its Policy Statement on the Implementation of the Alternative Investment Fund Managers Directive in the UK¹. This Policy Statement sets out the FCA’s final rules for such implementation, as well as responding to the feedback it received from its earlier consultation papers.

This alert summarizes the updated HM Treasury materials, consisting of responses to two recent consultations, revised draft implementing regulations (the “Regulations”)² and a brief question and answer section³, with a particular focus on their application to non-EU AIFMs seeking to market non-EU alternative investment funds (“AIFs”) in the UK. We also summarize the parts of the FCA’s Policy Statement that supplement those applicable provisions.

Application of the AIFMD following July 22, 2013

HM Treasury takes the view that AIFMD’s Article 68 transitional arrangements should extend to both EU and non-EU AIFMs. Thus, a non-EU AIFM that sells non-EU AIFs in the UK has a grace period, applicable in respect of any of its AIFs, to comply with the conditions for UK marketing activities, so long as the AIFM has “marketed” one or more AIFs in an EEA member state immediately before July 22, 2013.

Therefore, a non-EU AIFM that can satisfy this condition will be wholly exempt from the AIFMD, in respect of its marketing activities in the UK, until July 21, 2014. After that date, however, all non-EU AIFMs must fully comply with the minimum conditions for the UK’s private placement regime (see below) in order to carry on their UK marketing activities.

To benefit from the compliance transition period, a non-EU AIFM must satisfy the definition of the term “marketing”, which is contained in the AIFMD itself, but which is narrowly interpreted by the Financial Conduct Authority (“FCA”). To fall within the “marketing” definition, the AIFM, or someone on its behalf, must have made a direct or indirect offering or placement of an AIF to an investor domiciled or registered in an EEA member state,

¹<http://www.fca.org.uk/your-fca/documents/ps13-5-implementation-of-the-aifmd>.

²https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/198211/aifm_regulations_090513.pdf.

³https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193490/aifmd_questions_and_answers_010513.pdf.

at the initiative of the AIFM. In the FCA's view, an offering or placement takes place 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 making a contractual offer that a potential investor can accept to form a binding contract, and also situations that constitute an invitation to the investor to make an offer to subscribe for investment. As such, the FCA's view is that an offering or placement cannot take place on the basis of draft, or incomplete, disclosure documents, such as a draft private placement memorandum. However, the FCA acknowledges that regulations in other EEA member states may take a different view on this point.

The FCA has also clarified that secondary trading in an AIF's units or shares is generally not caught by the above terms, nor is the mere listing of an AIF's shares or units.

The transitional proposed UK provisions do not require the AIFM to have previously marketed the same AIF that it wishes to market during the transitional period. HM Treasury has taken the view that, so long as the AIFM has marketed any AIF in an EEA member state immediately prior to July 22, 2013, it can rely on these transitional provisions to market any AIF in the UK during the grace period.

While the UK has broadly interpreted the AIFMD's transitional provision concerning marketing efforts, other member states may interpret the provision more narrowly. For example, a member state may consider only pre-July 22, 2013 marketing efforts in its own jurisdiction, in deciding which AIFMs can utilise the one-year grace period.

Marketing under Article 42 AIFMD

Regardless of whether an AIFM can take advantage of the grace period in the Regulations, eventually the AIFM must comply with the AIFMD's requirements if it continues its marketing efforts in the UK. Therefore, from July 22, 2013 (or July 22, 2014, if it qualifies for the one-year grace period), a non-EU AIFM that proposes to market an AIF within the UK will be required to:

- a) notify the FCA in accordance with the Regulations prior to such marketing; and
- b) comply with the Article 42 Marketing Minimum Conditions (discussed below).

FCA Notification Procedure

Article 59 of the draft Regulations, which implement Article 42 of the AIFMD, requires a non-EU AIFM to notify the FCA in writing before marketing in the UK an AIF that it manages. The notification must confirm that the AIFM is the person responsible for complying with the provisions of the AIFMD related to the marketing of the AIF and must contain a self-certification that the Minimum Conditions (discussed below) have been satisfied.

The AIFM's notification must contain information required by the FCA in the format that the FCA specifies. The FCA is expected to publish the form of the notification and related documents before July 22, 2013. It is not necessary for an AIFM to receive approval from the FCA before beginning to market the AIF in the UK.

Article 42 Marketing Minimum Conditions

The Minimum Conditions for marketing under the UK's private placement regime, pursuant to Article 42 AIFMD are summarised below:

- a) **Compliance with Transparency and Disclosure Conditions**—The AIFM must comply with a number of obligations under Articles 22 to 24 of AIFMD. These obligations include the submission and publication of an annual report for each AIF managed/marketed by it, the disclosure to investors, prior to

investment, of key information relating to each AIF and regular reporting of key information to the FCA. These conditions require on-going compliance.

- b) **Existence of Co-operation Arrangements**—Co-operation arrangements and information exchange agreements must be in place between (i) the FCA (and the competent authorities of any other EU Member State where the AIF is to be marketed); (ii) the competent authority or supervisory authority of the domicile of the AIF; and (iii) the supervisory authority of the country where the non-EU AIFM is established. These arrangements allow for information on the AIF and non-EU AIFM to be exchanged efficiently allowing the FCA to carry out its supervisory duties effectively. The European Securities and Market Authority (“ESMA”) has recently approved the form of co-operation arrangements between EU securities regulators and 34 global counterparts, including USA, India, Australia and Hong Kong. Although successful negotiation has taken place centrally with ESMA, these agreements are bilateral and must actually be signed between the FCA and the parties in (i), (ii) and (iii) above.
- c) **Not linked to a Non-cooperative Country and Territory**—At the time of marketing, neither the AIF nor the AIFM may be authorised or registered in a country which is listed as a “Non-cooperative Country and Territory” by the Financial Action Task Force on anti-money laundering and terrorist financing (“FATF”). Countries currently appearing on that list include Iran and the Democratic People’s Republic of Korea.

Private Equity Provisions

In addition to the minimum conditions stated above, further requirements and restrictions apply to AIFMs that manage a fund that, either individually or jointly on the basis of a control agreement, acquires a majority (or, in some cases, less than a majority) of the voting rights in a non-listed company (or, in the case of some of the requirements, a listed company) that has its registered office in the EU. These extra provisions involve:

- Notification requirements including an obligation on the AIFM to inform the relevant member state’s regulators, the shareholders of the acquired company, employees of the acquired company and the company itself, of the acquisition of a significant equity stake;
- A requirement to disclose certain information to the acquired company, its shareholders and the regulators including the identity of the AIFM, their intentions regarding the company’s future business and developments and the implications on employment and conditions of employment; and
- Restrictions on distributions, capital reductions, share redemptions or the purchases of own shares by itself or by someone acting on its behalf within the first two years of the AIFM’s acquisition of the listed or non-listed company in order to restrict asset stripping.

Reverse Solicitation

The AIFMD defines ‘marketing’ with the stated aim that the regulation is not intended to affect professional investors who are investing *‘in alternative investment funds on [their] own initiative’*.

As the AIFMD provides no further guidance in the AIFMD as to when it deems an investor to be acting on its own initiative, each individual member state must clarify how to apply the ‘marketing’ definition. The UK is one of only a few EU member states to have issued guidance on the subject.

The FCA’s Policy Statement states that the marketing conditions do not apply to an offering or placement of units or shares in an AIF to an investor, which is made at the initiative of that investor. Further, it states that an express confirmation from the investor that the offering or placement was made at its initiative should normally be

sufficient to demonstrate that this is the case, so long as the confirmation is obtained before the offer or placement takes place.

This simple approach of the FCA is helpful, though the Policy Statement expressly states that abuse of this approach to circumvent the requirements of the AIFMD will not be permitted. Therefore, the prudent approach for UK marketing will be to rely on an investor confirmation of this nature only when the offering or placement is clearly made at the investor's initiative.

Marketing in other European Member States

Non-EU AIFMs must determine, for each EEA jurisdiction in which they propose to market an AIF, the private placement conditions and restrictions that will apply in that jurisdiction after July 22, 2013, including the specific definitions of reverse enquiry/solicitation used by those jurisdictions. It is possible that other member states will impose requirements on AIFMs that are more restrictive than the minimum requirements of Articles 22 to 24 of the AIFMD, or remove the possibility of using the national private placement regime in their jurisdiction altogether.

In particular, the transitional provisions detailed above apply only to marketing in the UK and do not necessarily apply across Europe. Therefore, even if exempt from the UK's AIFMD implementing legislation until July 21, 2014, it may still be necessary for an AIFM to comply with the Article 42 Marketing Minimum Conditions (and any further conditions imposed by the relevant member states), in order to market in other European member states after July 22, 2013.

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