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As the Deadline Approaches…
AIFMD: Marketing by Non-EEA Managers

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The AIFMD is due to take effect on July 22, 2013. Yet countries across the EEA — with less than a week until the deadline — are at different stages of transposing the AIFMD into national laws. A number will miss the implementation deadline. Those who are expected to be "on time" are interpreting the AIFMD in different ways. This note summarises some key recent developments, and action items, for non-EEA managers looking to market funds to EEA investors.

General Rule

The provisions of the Alternative Investment Fund Managers Directive (the "AIFMD") are triggered on any offering or placement of interests in a fund to professional investors in the European Economic Area (the "EEA"),[1] as discussed briefly below. This is "marketing" within the meaning of the AIFMD. Subject to the availability of transitional periods and of a reverse marketing exclusion (each discussed below), any marketing on or after July 22, 2013 will trigger disclosure and reporting requirements.[2] In many cases marketing cannot take place without prior notification to or approval of the relevant EEA regulator.

Note that Switzerland is not part of the EEA and is therefore not required to implement the terms of the AIFMD.[3]

1 Although a European Union directive, the AIFMD is also to be implemented in due course by Iceland, Liechtenstein and Norway (the three EEA members that are not also members of the EU).

2 For a more detailed analysis of these transparency requirements, you may with to refer to our prior publication, available at http://www.shearman.com/application-of-the-aifmd-to-non-eu-alternative-investment-fund-managers-06-24-2013/. Smaller managers may not be required to comply with all the transparency obligations.

3 It is worth noting that, separate from the AIFMD, recent legislation in Switzerland has altered the regime for marketing of funds into Switzerland.

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Transitional Periods for Non-EEA Managers

Non-EEA managers that already market funds into the EEA may be able to benefit from transitional periods.[4] **The result is that fund managers should consider, if not done already, actively marketing one or more of their funds into relevant EEA countries before July 22, 2013 — noting that this marketing must be conducted in accordance with local law requirements.**

Each EEA country's implementing laws need to be considered closely. At the time of writing, a number of countries including the UK, Germany, the Netherlands, Luxembourg, Ireland, France, Sweden and Denmark have either confirmed the existence of transitional arrangements for non-EEA managers marketing their funds, or are rumoured to be planning to introduce them.

Where a transitional period is available for non-EEA managers' marketing activities:

- In ***all*** cases, it appears to require that the AIFM has existed and marketed a fund at some point prior to July 22, 2013 (a new AIFM established on/after July 22 will not benefit, and being in the same corporate group as another AIFM that previously marketed may not be enough). A number of private equity fund houses use a single "sponsor" but create a separate general partner with investment authority for each new fund. Some of these fund houses may need to ensure that the sponsor can be treated as an AIFM in order to take advantage of transitional periods.
- In ***many*** cases, it requires that the AIFM has previously marketed to investors in the particular country (in the UK it will be enough to show that investors in any EEA country have been targeted).
- In ***some*** cases, the marketing activity must have occurred very recently (e.g., during 2013, or even immediately before July 22, 2013), while in others marketing activity stretching back several years may be sufficient to enable a manager to take advantage of the transitional period.
- In ***some*** cases, it attaches to the fund, and not the AIFM (i.e., if a particular fund has been marketed pre-July 2013, it can continue to be marketed until July 2014).
- In ***some*** cases, it attaches to the AIFM, and not a particular fund (i.e., if the AIFM has marketed a fund pre-July, it can market that fund or another fund managed by it).

The European Securities and Markets Authority ("ESMA") has been consulting on the periodic reporting element of the AIFMD's transparency requirements. At the time of writing, it remains possible that a non-EEA manager taking advantage of a transitional period that lasts until July 2014 will nevertheless be required to file its initial periodic report during that transitional period.

[4] These must not be confused with the transitional period offered to EEA managers. Existing EEA managers will separately benefit from a transitional period, effectively allowing them to defer — until July 2014 — full authorisation under the AIFMD. The existence of this transitional arrangement for EEA managers does not mean that non-EEA managers will automatically benefit from an equivalent transitional period for marketing funds.

Reverse Marketing

The AIFMD explicitly notes that marketing "at the initiative of the investor" (reverse marketing) is not treated as marketing for purposes of the AIFMD.

However, individual EEA member states can separately regulate private placement by non-EEA managers in whatever way they choose. Effectively, this allows them to define their own parameters for reverse marketing (e.g., Germany has indicated that it will not recognise reverse marketing in relation to some types of investor).

At the time of writing, there is no pan-European guidance on what does, and does not, constitute reverse marketing. In the UK, the Financial Conduct Authority ("FCA") has recently confirmed that it will usually be sufficient for the manager to obtain written confirmation from the investor that indicates that the investor initiated the marketing activity – providing that the confirmation is received before marketing activity begins.[5] Understandably, this is likely to result in an increase in the practice of obtaining written confirmations from EEA investors, although a number of fund managers already do this as part of the process of signing up investors. Cooling-off periods and similar means are also being adopted to evidence reverse marketing. Yet, in reality, whether or not particular marketing activity constitutes reverse marketing will be very much a fact-based analysis within the definitions adopted by the particular country.

Who is the Investor and is it an EEA Investor?

The AIFMD captures marketing to investors domiciled or registered in the EEA. On its face, then, marketing to such an investor will be captured even if that marketing activity takes place outside of the EEA. That does not necessarily mean that all fund subscriptions submitted by EEA investors must be rejected by a manager that has not taken steps for AIFMD compliance.

In the UK, the position taken by legislators is that only marketing "in the United Kingdom" is captured, although it is noted that other EEA legislators and regulators may not take the same approach.

Determining who the "investor" is — and whether the investor is therefore registered or domiciled in the EEA — will be an essential part of complying with the marketing rules. In the UK, the FCA has suggested that a manager should usually treat as the "investor" the person who makes the decision to invest in the fund. This will of course often be the beneficial owner of the fund interests. But where another person (such as a discretionary manager) decides to invest in the fund on behalf of the underlying beneficiary — without consulting the beneficiary — there should not be any look-through to the beneficiary, according to the FCA. The decision maker, such as the discretionary manager, should be treated as the "investor". Again, this is just the approach in the UK and there is no guarantee that other EEA legislators and regulators will adopt a similar position.

[5] See the new paragraph 8.37.11 in Annex P of the FCA's Perimeter Guidance manual, set out in the FCA's policy statement on AIFMD implementation which, at the date of writing, is available at: http://www.fca.org.uk/your-fca/documents/policy-statements/ps13-05. This reverse marketing guidance is subject to a general anti-avoidance provision.

Conclusion

Unless a transitional period is available to a fund manager, marketing a fund in some EEA countries on or after July 22, 2013 will require advance approval from local regulators. This could delay capital raising activities significantly. Transitional periods may well soften the full impact of the AIFMD on fund marketing in some EEA countries. As a result, managers should urgently consider whether their previous marketing activities are sufficient to give them the benefit of transitional periods. If those activities are not sufficient, managers should consider marketing into relevant EEA countries — *before 22 July 2013* and in compliance with existing local law — with a view to obtaining the benefit of the transitional periods.

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