ALERTS

Reminder for US and Other Non-EU Private Fund Managers: The AIFM Directive Takes Effect on 22 July 2013

8 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 US and other non-EU private fund manager (defined under the AIFM Directive as an alternative investment fund manager or "AIFM") that:

(1) Manages one or more EU AIFs; or

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

In our previous *Briefings,*[2] we have provided detailed guidance and summaries of the requirements for AIFMs, including the specific issues of relevance to US private fund managers[3] and other non-EU private fund managers.[4] 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 US and other non-EU AIFMs may wish to consider — particularly where the US or non-EU AIFM is not managing an

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EU AIF and is only marketing its non-EU AIFs in the EU. 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 US or non-EU AIFMs if they wish to be able to market their AIFs in the EU 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").[5]

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 UK regulator's guidance on many of the concepts and issues under the AIFM Directive:

- *HM Treasury*. Alternative Investment Fund Managers Regulations 2013 (the "Regulations");[6] and
- *Financial Conduct Authority* ("FCA"). Policy Statement 13/5 — Implementation of the Alternative Investment Fund Managers Directive ("PS 13/5").[7]

It must be emphasized 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 US and non-EU 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 not only to those UK AIFMs that are already managing an AIF in the UK on 22 July 2013, but also to US and non-EU AIFMs that are marketing a specific fund in the European Economic Area ("EEA")[8] before 22 July 2013. Such marketing activity

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need not necessarily have taken place in the UK — any marketing activities within the EEA will be sufficient. In addition, while the draft Regulations referenced marketing "immediately" before 22 July 2013, the final Regulations do not now use the word "immediately."

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 taken the position that providing draft offering documentation does not constitute marketing.

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 (other than if the AIFM can come within the scope of the one year transitional period) 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 of 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.*"

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Action Items

US and non-EU AIFMs would be advised to consider the following action items:

- *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.

- *Full Compliance*. 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 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 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 US and non-EU 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

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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.

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[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*, *Implications of the AIFM Directive for US Private Fund Managers*.

[4] For more information, please see SRZ *Briefing*, *Implications of the AIFM Directive for Non-EU Fund Managers* .

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

[6] 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.

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

[8] The EEA comprises the member states of the EU as well as Iceland, Norway and Liechtenstein.

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