

## AIFM DIRECTIVE

### Briefing

#### AIFs, AIFMs and EU Authorisation Requirements

May 2013

##### Summary

The Alternative Investment Fund Managers Directive (“[AIFM Directive](#)”) was agreed in November 2010, came into force in the European Union (“EU”) on 21 July 2011 and must be implemented into the national law of all EU countries by 22 July 2013. The AIFM Directive sets forth rules for the authorisation, operation and transparency (i.e., disclosure requirements) of managers of alternative investment funds (“AIFs”).

This *Briefing* covers the scope of the AIFM Directive, which funds are AIFs and which fund managers are alternative investment fund managers (“AIFMs”), as well as discusses what the registration requirements are for any AIFMs that are within the scope of the new rules.

##### Introduction

The AIFM Directive is merely a framework and requires the European Commission (“Commission”) to prepare detailed rules (in the form of subordinate legislation) on a large number of topics. Many<sup>1</sup> of the detailed rules, which expand upon the principles set forth in the AIFM Directive’s initial framework, were adopted by the Commission on 19 Dec. 2012 in the form of a delegated regulation (the “Delegated Regulation”).<sup>2</sup> The Delegated Regulation and the other subordinate legislation under the AIFM Directive are known as the “Level 2 Measures” (with the AIFM Directive itself sometimes also referred to as “Level 1”).

The Delegated Regulation expands in detail upon a number of concepts in the AIFM Directive: the conditions and procedure for the determination and authorisation of AIFMs (including the capital requirements applicable to AIFMs), operating conditions for AIFMs (including rules on remuneration, conflicts of interest, risk management, liquidity management, investment in securitisation positions, organisational requirements, rules on valuation), conditions for delegation, rules on depositaries (including the depositary’s role and liability), reporting requirements and leverage calculation, as well as rules for cooperation arrangements and other issues relating to AIFs and AIFMs which are established outside the EU. The Delegated Regulation has been adopted into EU law.

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<sup>1</sup> Not all of the Level 2 Measures were adopted by the Commission on 19 Dec. 2012; several significant elements of the subordinate legislation still need to be adopted — most notably the new remuneration rules for AIFMs operating within the EU.

<sup>2</sup> See [http://ec.europa.eu/internal\\_market/investment/docs/20121219-directive/delegated-act\\_en.pdf](http://ec.europa.eu/internal_market/investment/docs/20121219-directive/delegated-act_en.pdf). In implementing the detailed rules in the form of an EU regulation, the Commission has ensured that every country of the EU will have the same requirements for the management and marketing of AIFs as an EU regulation, once it comes into effect, is the *de facto* law of every country of the EU – without needing to be implemented or adopted into national law.

## Scope of the AIFM Directive

The AIFM Directive will only apply directly to AIFMs who manage AIFs; it does not directly regulate AIFs and does not generally regulate or restrict the assets in which an AIF can invest, except in relation to securitisations.<sup>3</sup> The AIFM Directive also applies in relation to the marketing of AIFs within the EU.

Fund managers, wherever in the world they operate, will need to consider whether (i) they are managing an AIF, (ii) they are the AIFM of that AIF, and (iii) they are within the scope of the AIFM Directive's rules. The physical location of the AIFM and the AIF are significant factors in assessing how relevant the AIFM Directive will be for any particular fund manager, with the key assessment being whether the AIFM or the AIF are within the EU or not. The AIFM Directive applies to the following types of fund managers:

- (1) EU AIFMs managing one or more AIFs (irrespective of whether or not the AIFM markets those AIFs to persons within the EU);
- (2) Non-EU AIFMs managing EU AIFs; and
- (3) Non-EU AIFMs marketing AIFs to investors within the EU.

Not every fund manager will be an AIFM. Where there are multiple entities within a management group, an assessment will need to be made as to which entity is the AIFM – since an AIF can only have a single AIFM. Also, where the AIFM and the AIF are both outside the EU, the AIFM Directive will only be relevant where the AIFM wishes to market the AIF to investors in the EU.<sup>4</sup>

## AIFs

The core elements of the AIFM Directive's definition of "AIF" are that the relevant fund:

- (1) Is a collective investment undertaking (other than a UCITS fund regulated under the UCITS Directive<sup>5</sup>); and
- (2) Raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy, for the benefit of those investors.

The reference to "collective" requires that for it to be an AIF there must be a minimum of two investors in the relevant fund. However, draft guidance<sup>6</sup> from the European Securities and Markets Authority ("ESMA"), published on the same date as the Commission adopted the Level 2 Measures, states that (i) it should be for EU regulators to determine whether or not an undertaking is actually a collective investment undertaking,<sup>7</sup> and (ii) ESMA proposes to clarify that an undertaking would be considered to be raising capital from a number of investors unless there is an enforceable obligation which restricts the sale of units/shares to a single investor — even if, in fact, there is only a single investor in the fund. In addition, where there is a single investor and that investor is a nominee, feeder fund or fund of funds, there should be a "look-through" to determine whether there is more than one investor.

There is no requirement that an AIF must spread risk, meaning that funds that invest in a single asset could be defined as an AIF. An AIF may be open- or closed-ended and may be formed or incorporated as a

<sup>3</sup> For more information on the specific requirements relating to securitisations under the AIFM Directive, see the "Requirements for Investing in Securitizations" section in the [SRZ Briefing, Operational Requirements for AIFMs](#).

<sup>4</sup> For more information on the AIFM Directive's marketing provisions, see the [SRZ Briefing, Marketing Requirements](#).

<sup>5</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast) ([http://www.esma.europa.eu/system/files/L\\_302\\_32.pdf](http://www.esma.europa.eu/system/files/L_302_32.pdf)).

<sup>6</sup> See <http://www.esma.europa.eu/system/files/2012-845.pdf> – paragraphs 19 to 28.

<sup>7</sup> Unfortunately the AIFM Directive's definition of "AIF" starts with the EU concept of a "collective investment undertaking" - which is itself not a clear or widely understood concept in the EU; various EU directives (including the Prospectus Directive (2003/71/EC), the Transparency Directive (2004/109/EC), the UCITS IV Directive (2009/65/EU) and the Markets in Financial Instruments Directive (2004/39/EC)) use the term "collective investment undertaking" without providing a clear definition. In UK legislation (Section 235 Financial Services and Markets Act 2000) there is a clear definition which captures most funds as well as investment trusts, venture capital trusts, some other corporate structures, and certain types of carried interest scheme, co-investment scheme and structured products — all of which are collective investment schemes that could potentially be defined as AIFs.

company, a trust, under a contract or a statute or in any other legal form. There is no specific requirement for the AIF to have separate legal personality.

*Exempt investment vehicles:* The AIFM Directive states that segregated managed accounts, family offices and similar private investment vehicles, joint venture schemes, insurance contracts, certain securitisation special purpose vehicles (“SPVs”), employee participation schemes, employee savings schemes and holding companies<sup>8</sup> are *not* to be considered as AIFs.

### **AIFMs**

Each AIF within the scope of the AIFM Directive must have a single identified AIFM. An AIF can be either “externally or internally managed.” An AIF will be internally managed where the management function (see below) is undertaken by the governing body (board of directors) or by an internal resource (such as if the AIF is managed by its own employees). In the typical hedge fund/private fund structure this will not be the case. Where a third party undertakes the management function, the AIF would be deemed to be “externally managed.” Where the AIF is internally managed, the AIF is itself the AIFM. Where it is externally managed, the external manager is the AIFM.

*The management function:* “Managing” an AIF means providing at least portfolio management services and risk management services for one or more AIFs.

- (1) Portfolio management means managing portfolios of financial instruments on a discretionary basis in accordance with a client’s (i.e., the AIF’s) mandate.
- (2) Risk management involves identifying, measuring, managing and monitoring all risks relevant to the AIF’s investment strategy.<sup>9</sup>

Firms which have portfolio and risk management responsibilities for an AIF should assess whether they have been appointed by or on behalf of that AIF or if they are merely a delegate of the person so appointed (see below); if they are only a delegate of another entity (which is not itself a “letter-box entity” — see below) they will be a delegated portfolio manager and *not* the AIF’s AIFM.<sup>10</sup>

The AIFMs for any EU AIFs and non-EU AIFs that are marketed into the EU are responsible for compliance with the requirements of the AIFM Directive. If an EU AIFM (or a non-EU AIFM that has (after 2015) elected to register and become authorised in the EU)<sup>11</sup> is unable to comply with any of the provisions of the AIFM Directive, it is required to inform immediately its EU regulator. Where the AIF is an EU AIF, an AIFM that is unable to comply with a specific provision of the AIFM Directive must also notify the EU AIF’s regulator. Where non-compliance with AIFM Directive provisions persists for an EU AIFM or an EU AIF, the EU AIFM will be required to resign as AIFM of that EU AIF and the AIF will no longer be permitted to be marketed in the EU. If a non-EU AIFM managing a non-EU AIF is unable to comply with specific AIFM Directive requirements relating to a non-EU AIFM with a non-EU AIF, the AIF will not be permitted to be marketed in the EU. In the case of a non-EU AIFM managing an EU AIF where that non-EU AIFM cannot or will not comply with the AIFM Directive requirements, the EU AIF’s regulator will require that the non-EU AIFM take the necessary

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<sup>8</sup> The AIFM Directive defines “holding company” as a company with shareholdings in one or more other companies, the commercial purpose of which is to carry out a business strategy or strategies through its subsidiaries, associated companies or participations in order to contribute to their long-term value, and which is either a company: (i) operating on its own account and whose shares are admitted to trading on a regulated market in the EU; or (ii) not established for the main purpose of generating returns for its investors by means of divestment of its subsidiaries or associated companies, as evidenced in its annual report or other official documents.

<sup>9</sup> Many management agreements and investment management agreements relate wholly or mainly to the portfolio management activities required for the AIF and consequently many fund managers will not have been explicitly appointed to provide risk management services to an AIF.

<sup>10</sup> EU fund managers that are delegates of a non-EU AIFM manager would be identified as investment firms under the Markets in Financial Instruments Directive (“MiFID”). However, most EU AIFMs will almost certainly be registered and authorised in the EU as MiFID investment firms – an AIFM that has been appointed to manage an AIF will not be deemed to be providing MiFID “portfolio management”, but instead “collective portfolio management” under the AIFM Directive. A firm cannot be authorised as both a MiFID firm and as an AIFM.

<sup>11</sup> If the European Commission makes the marketing passport available to non-EU AIFMs. For more information on the possible extension of the EU registration regime to non-EU AIFMs, see the [SRZ Briefing, Marketing Requirements](#).

steps to remedy the situation and in cases where remedial action is not taken the EU AIF would be prohibited from being marketed in the EU.

*Delegation by an AIFM.*<sup>12</sup> An AIFM is allowed to delegate certain of its functions as long as in doing so it does not delegate so many functions that it would no longer be considered to be the manager of the AIF and would be defined as a “letter-box entity.” The Delegated Regulation clarifies that an AIFM would be deemed a letter-box entity and would no longer be considered to be the manager of the AIF in *any* of the following situations:

- (1) The AIFM no longer retains or does not have the necessary expertise and resources to supervise the delegated tasks effectively and manage the risks associated with the delegation;
- (2) The AIFM no longer has the power to take decisions in key areas which fall under the responsibility of the senior management or no longer has the power to perform senior management functions in particular in relation to the implementation of the general investment policy and investment strategies;
- (3) The AIFM loses its contractual rights to inquire, inspect, have access or give instructions to its delegates or the exercise of such rights becomes impossible in practice; or
- (4) The AIFM delegates the performance of investment management functions to an extent that exceeds by a substantial margin the investment management functions performed by the AIFM itself. When assessing the extent of delegation, EU regulators will be required to assess the entire delegation structure taking into account not only the assets managed under delegation but also the following qualitative criteria:
  - (a) The types of assets the AIF or the AIFM acting on behalf of the AIF is invested in, and the importance of the assets managed under delegation for the risk and return profile of the AIF;
  - (b) The importance of the assets under delegation for the achievement of the investment goals of the AIF;
  - (c) The geographical and sectoral spread of the AIF’s investments;
  - (d) The risk profile of the AIF;
  - (e) The type of investment strategies pursued by the AIF or the AIFM acting on behalf of the AIF;
  - (f) The types of tasks delegated in relation to those retained; and
  - (g) The configuration of delegates and their sub-delegates, their geographical sphere of operation and their corporate structure, including whether the delegation is conferred on an entity belonging to the same corporate group as the AIFM.

As a result of the foregoing, it will be for the relevant EU regulator to determine whether a fund manager that has delegated to a third-party manager is the AIFM or not. Under the delegation rules in the AIFM Directive, any AIFM that is delegating any of its functions (other than purely administrative or technical functions) must notify its EU regulator of its intent to delegate and provide details of the delegation together with the identity of the delegate and a description of any potential conflicts of interest. EU regulators will therefore be “on guard” as to any delegations that leave the defined AIFM as a letter-box entity — meaning that there could be scope for the relevant EU regulator to either object to the delegation or, potentially, to determine that either one of the delegates must be the AIFM, or the board of the AIF itself is determined to be its own AIFM. At present, although ESMA has issued guidance/regulatory technical standards on the types of AIFMs that are covered by the requirements of the AIFM Directive,<sup>13</sup> there is no guidance for EU regulators on how they are to determine which entity is the AIFM after the initially identified AIFM delegates its functions to the extent that it becomes a letter-box entity. The AIFM Directive requires that the Commission must review the application of these delegation rules and, after two years, if necessary, take measures to specify further the conditions. It notes also that ESMA may issue guidelines to ensure a consistent assessment of delegation structures across the EU.

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<sup>12</sup> For more information on the delegation by AIFMs, see the [SRZ Briefing, Operational Requirements for AIFMs](#).

<sup>13</sup> See <http://www.esma.europa.eu/system/files/2012-844.pdf>.

*Application to sample management group structures: Cayman manager & UK-based investment manager:* In this structure, as is common for many UK-based hedge fund/private fund managers, the Cayman manager has limited substance (including not having any employees) and would be likely to be defined as a letter-box entity. As a result, it would be the UK-based investment manager that would be defined as the AIFM as it would be the sole entity within the management group that had substance and could actually conduct the risk management and the portfolio management activities. If the Cayman manager had substance and employees and retained the risk management function, with oversight of the portfolio management activities conducted by the delegated investment manager in the UK, it would be possible to define the Cayman manager as the AIFM.

*US manager & UK-based investment manager:* In this structure, as is common for many US-based hedge fund/private fund managers with a UK subsidiary/sub-adviser, the US manager has substance and personnel and retains the risk management function and some of the portfolio management function, with only a portion of the portfolio management function delegated to the UK investment manager. The US manager would be likely to be viewed as a bona fide manager and not as a letter-box entity. As a result, the US manager would likely be defined as the AIFM and the UK-based investment manager/sub-adviser would merely be a delegate (subject to MiFID).

*Cayman manager & UK, US and Hong Kong co-investment managers:* In a structure such as this, if the Cayman manager has no real substance and the risk management and portfolio management has all been delegated to the co-investment managers, the Cayman manager would be likely to be defined as a letter box entity. As a result, an analysis would have to be undertaken to assess which of the UK, US and Hong Kong entities conducts the majority of the risk management and portfolio management functions; one would need to consider where the chief investment officer is located, where the risk management function is located and where the majority of the investment decisions are made. Every case would have to be assessed on its own facts and circumstances to assess which entity was the AIFM for the relevant AIF — and it may be possible, where the US and Hong Kong co-investment managers are true co-investment managers with comparable roles, to select which of the co-investment managers is defined as the AIFM for the AIF.

*US and UK co-managers:* In a structure like this, if the two managers are truly equal co-managers, with each having a co-chief investment officer and each entity having responsibility to manage half the portfolio and conducting half the risk management function, it would be necessary to assess all applicable factors to assess which entity was to be defined as the AIFM. In a scenario with a true 50:50 division of responsibilities, it might be possible for the two co-managers to elect which one was the AIFM.

### **Exemptions from Registration for EU AIFMs**

The AIFM Directive provides exemptions from registration as an AIFM for supranational institutions, national central banks, certain bodies or institutions for occupational retirement provision, national, regional and local governments and bodies or other institutions which manage funds supporting social security and pension systems.

Two limited partial exemptions from registration are available:

- (1) *Small AIFM exemption:* Those EU AIFMs that are deemed to be “small AIFMs” will not be required to be authorised/regulated by their EU regulator as an AIFM where they are only managing AIFs with assets under management (“AUM”) which in total do not exceed either of the following:
  - (a) EUR 100 million (including assets acquired through leverage); or
  - (b) EUR 500 million, provided the AIFs are not leveraged and investors have no redemption rights for five years from the date of their initial investment.

Both of the thresholds above are cumulative thresholds for AUM managed by a “small AIFM” — in cases where an AIFM manages more than one AIF, the AIFM would be required to aggregate the AUM for each of its AIFs to assess whether the exemption was available. The Delegated Regulation sets forth detailed rules regarding how the small AIFM’s total AUM is to be calculated and clarifies that (i) any UCITS funds that the small AIFM manages are excluded for the purposes of the calculation, (ii) any derivative positions, including those held as hedges, are to be calculated as an

equivalent position in the underlying assets and that the value of the equivalent position must be used for calculating total AUM, (iii) where an AIF managed by the small AIFM invests in other AIFs managed by the same AIFM, that investment may be excluded from the calculation, and (iv) the assessment of the total AUM must be monitored on an ongoing basis. Occasional and temporary breaches of the AUM threshold (which the Delegated Regulation defines as a period of three months or less) shall be permitted as long as the small AIFM provides notification to its regulator with supporting information to justify the small AIFM's assessment of the temporary nature of the situation, together with a description of the situation and an explanation of the reasons for considering it temporary.

A small AIFM in the EU that wishes to rely on the exemption will be required by the AIFM Directive to register with its EU regulator and will be subject to certain regulatory reporting requirements, though each EU country will have discretion as to what other national law requirements they wish to impose on small AIFMs in their country. Significantly, small AIFMs that are only subject to national registration will *not* be able to take advantage of the AIFM Directive's management or marketing passports unless they choose to opt in to all the requirements of the AIFM Directive and become fully registered. Where a small AIFM chooses not to become fully registered as an AIFM it would only be able to conduct marketing for its AIFs under national private placement rules and could not take advantage of the marketing passport until such time as it became a fully registered and authorised AIFM in the EU.<sup>14</sup>

- (2) *Closed-end AIF in run-off exemption:* Those AIFMs that only manage closed-ended AIFs which either (a) make no further investments after 22 July 2013, or (b) will expire before 22 July 2016 and have closed their subscription period before 21 July 2011 are exempt from AIFM Directive registration requirements and the majority of the operational requirements relating to AIFMs with the exception of requirements to produce annual reports for its AIFs and comply with AIFM Directive requirements for AIFM managing AIFs that acquire substantial stakes in EU companies.

### **Limits on AIFM Activities**

*Internally managed AIF:* An AIF that is determined to be an internally managed AIF will be identified as its own AIFM, as is explained above. Such internal AIFMs can only manage their own assets, administer and conduct marketing for their own fund and carry on activities related to the underlying assets of the fund. They may not be authorised as the external manager of other AIFs.

*External AIFM:* External AIFMs may provide (directly or through a delegated manager) portfolio management and risk management services to its AIFs and may also conduct:

- (1) Administration activities for the AIFs they manage (including (a) legal and fund management accounting services; (b) customer inquiries; (c) valuation and pricing, including tax returns; (d) regulatory compliance monitoring; (e) maintenance of unit-/shareholder register; (f) distribution of income; (g) unit/shares issues and redemptions; (h) contract settlements, including certificate dispatch; and (i) record keeping);
- (2) Marketing activities for the AIFs for which they are the AIFM; and
- (3) Activities relating to the assets of the AIF (which the AIFM Directive explains means services necessary to meet the fiduciary duties of the AIFM, facilities management, real estate administration activities, advice to undertakings on capital structure, industrial strategy and related matters, advice and services relating to mergers and the purchase of undertakings and other services connected to the management of the AIF and the companies and other assets in which it has invested.)<sup>15</sup>

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<sup>14</sup> A small AIFM that wishes to market its AIF(s) in the EU using national private placement rules would still be required to comply with the general marketing rules, including the existence of co-operation agreement between the relevant EU countries where the AIF is being marketed, the AIF's jurisdiction and the jurisdiction of the small AIFM, if it is a non-EU AIFM. For more information on marketing under the AIFM Directive, see the [SRZ Briefing, Marketing Requirements](#).

<sup>15</sup> The AIFM Directive provides discretion to EU countries' regulators to authorise external AIFMs to also act as a discretionary portfolio manager on a client-by-client basis (including acting as manager of pension funds), and where an external AIFM is so authorised, the EU regulator is also permitted to allow the AIFM to provide the following services (described in the AIFM Directive as "non-core services") to its clients (a) providing investment advice, (b) providing custody services in relation to shares or units of collective investment undertakings (i.e., other interests in funds), and (c)

In addition, where an external AIFM is also authorised by an EU regulator as a UCITS fund manager, the AIFM may also manage UCITS funds.

### **Applying for Authorisation Under the AIFM Directive**

*EU AIFMs:* From 22 July 2013, EU AIFMs that (i) are already in existence and operating as fund managers and which (ii) are not “small AIFMs” will be required to become authorised by the regulator of the EU country in which they have their registered office. The AIFM Directive includes a transitional period of one year for such AIFMs giving them until 21 July 2014 to become authorised with their EU regulator.<sup>16</sup>

Those EU-based managers that are already authorised as MiFID investment managers prior to 22 July 2013 will remain MiFID firms until such time as their re-registration as AIFMs is complete, and, so, will be able to continue to provide their management services until the re-registration process is finalised. However, those firms applying to obtain authorised AIFM status and who have not previously been authorised as MiFID firms will have to wait until after their regulated AIFM status is confirmed before they can conduct any management or other regulated activities.

*Non-EU AIFMs:* Before 2015,<sup>17</sup> non-EU AIFMs will not be eligible to register in the EU under the AIFM Directive (although those non-EU AIFMs that are managing EU AIFs may be required to register under the national regulations of the country in which their EU AIFs are established, although this is not a requirement of the AIFM Directive and is subject to local law requirements). Until non-EU AIFMs are able to become authorised in the EU, they are permitted to manage EU AIFs and market EU AIFs and non-EU AIFs in the EU in accordance with national private placement rules — subject to compliance with the AIFM Directive’s rules on (i) annual reports, (ii) the content of the AIF’s offering memorandum, (iii) disclosures to EU regulators and (iv) where relevant, rules on the acquisition of substantial stakes in EU companies.

After 2015, if the marketing passport is made available to non-EU AIFMs, non-EU AIFMs that wish to manage EU AIFs or to market EU AIFs or non-EU AIFs in the EU could become authorised by the regulator of their EU Member State of Reference or they could choose not to register, in which case their marketing activities in the EU would have to comply with the AIFM Directive’s marketing disclosure and transparency rules and national private placement rules.<sup>18</sup>

*Application mechanics:* The mechanics of the application process will involve an AIFM providing its EU regulator with a large volume of information about itself and about the AIFs it is managing, including:

- (1) Information on the AIFM:
  - (a) Information on the persons effectively conducting the business of the AIFM;

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arranging deals in investments. However, it should be noted that an AIFM undertaking these activities (which are defined in exactly the same terminology as they are under MiFID), will not have a cross-border EU passport for these specific activities.

<sup>16</sup> The UK legislative body responsible for implementing the AIFM Directive in the UK (HM Treasury) has confirmed that the UK will take advantage of the one-year transitional period. In early May HM Treasury further confirmed it also intends to extend the scope of the transitional period so that non-UK AIFMs that are in existence and operating as AIFMs for their AIF(s) before 22 July 2013 can also avoid having to comply with the AIFM Directive’s requirements in the UK for the duration of the one-year period. This means that any non-UK AIFMs that wish to market their AIFs into the UK will be able to continue marketing in the UK under UK marketing rules and not be concerned with any additional AIFM Directive requirements before 22 July 2014. The UK appears to be the only EU jurisdiction that will take advantage of the one-year transitional period, meaning that marketing activities in other EU countries will have to be conducted in accordance with the AIFM Directive’s requirements.

For more information on HM Treasury’s intentions to extend the one-year transitional period to non-UK AIFMs, see the SRZ *Client Alert*, “US Private Fund Advisers Likely to Have Another Year to Comply with the AIFM Directive for Marketing in the UK,” available at: [http://www.srz.com/US\\_Private\\_Fund\\_Advisers\\_Likely\\_to\\_Have\\_Another\\_Year\\_to\\_Comply\\_with\\_the\\_AIFM\\_Directive\\_for\\_Marketing\\_in\\_the\\_UK](http://www.srz.com/US_Private_Fund_Advisers_Likely_to_Have_Another_Year_to_Comply_with_the_AIFM_Directive_for_Marketing_in_the_UK).

<sup>17</sup> The specific date is yet to be determined and depends on a number of factors including a positive opinion from ESMA as to the functioning of the marketing passport for EU AIFMs and a decision by the Commission to amend the AIFM Directive.

<sup>18</sup> For more information on marketing under the AIFM Directive, see the [SRZ Briefing, Marketing Requirements](#).

- (b) Information on the identities of the AIFM's shareholders or members, whether direct or indirect, natural or legal persons, that have interests of 10 percent or more in the voting rights or "control" over the AIFM;<sup>19</sup>
  - (c) The organisational structure of the AIFM, including information on how the AIFM intends to comply with its obligations under the AIFM Directive – including compliance procedures and arrangements in relation to delegation, valuation, liquidity risk management and depositaries;
  - (d) Information on the AIFM's remuneration policies and practices; and
  - (e) Information on arrangements made by the AIFM for the delegation of any of its functions.
- (2) Information on the AIFs it manages:
- (a) Information about the investment strategies including the types of underlying funds if the AIF is a fund of funds, and the AIFM's policy as regards the use of leverage (and any arrangements for collateral or the re-use of assets), and the risk profiles and other characteristics of the AIFs it manages or intends to manage, including information about the EU countries or third countries in which such AIFs are established or are expected to be established;
  - (b) Information on where the master AIF is established if the AIF is a feeder AIF;
  - (c) The rules or instruments of incorporation of each AIF the AIFM intends to manage; and
  - (d) Information on the arrangements made for the appointment of the depositary for each AIF the AIFM intends to manage and any arrangements for collateral or the re-use of assets.

AIFMs will also have to satisfy their regulator that they are satisfactorily capitalised, with internally managed AIFs being required to maintain an initial capital requirement of at least EUR 300,000 (or equivalent) and external AIFMs being required to maintain initial capital of at least EUR 125,000 (or equivalent). These figures represent a minimum amount — as where the value of the portfolios of AIFs managed by the AIFM exceeds EUR 250 million (or equivalent), the AIFM will be required to provide an additional amount of "own funds" equal to 0.02 percent of the amount by which the value of the portfolios of the AIFM exceeds EUR 250 million (subject to a cap of EUR 10 million).

*Authorisation timing:* Upon receipt of a complete application for authorisation, the relevant EU regulator will have three months within which to provide its written consent or written reasons for its refusal to provide consent.<sup>20</sup> An EU regulator can extend this period by a further three months if the regulator in question considers an extension necessary due to the specific circumstances of the case and notifies the AIFM accordingly. An AIFM may start managing AIFs upon receipt of its written authorisation from its EU regulator (though, if any information was missing from its application, it may be required to wait one month before commencing its activities as AIFM).

For more information on the issues set forth in this *Briefing*, please contact your attorney at Schulte Roth & Zabel or one of the following attorneys: [Christopher Hilditch](#) and [Steven Whittaker](#).

<sup>19</sup> Any person wishing to hold or acquire 10 percent or more control (whether ownership control or voting rights or otherwise) must obtain prior consent from the applicable EU regulator before acquiring such control.

<sup>20</sup> AIFMs becoming authorised in the UK may find that they are able to become authorised in half the time that the FSA currently takes, since at present the FSA has up to six months within which to determine an application for authorisation.



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