

ADVISORY | Funds and Investments

May 1, 2013

THE EU ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE: UPDATE ON UK DEVELOPMENTS

On 29 April 2013, the UK Treasury published a Q&A document on the transposition of the Alternative Investment Fund Managers Directive (the “**Directive**”) in the UK. This document provides helpful clarification on the Treasury’s approach to a number of issues in the context of implementation of the Directive in the UK. It confirms the Treasury’s intention to amend certain provisions in the draft UK Alternative Investment Fund Managers Regulations 2013 (the “**Regulations**”) which were published for consultation in January. The final form of the regulations should be available in the next few weeks.

MARKETING: TRANSITIONAL ARRANGEMENTS

Extension to EEA¹ and non-EEA AIFMs: The Treasury has clarified that both existing EEA and existing non-EEA AIFMs will be able to rely on the transitional provisions under Regulation 68, which currently provides that UK AIFMs managing an alternative investment fund (“**AIF**”) immediately before 22 July 2013 have until 22 July 2014 to comply with the provisions of the Directive and to apply for authorisation. This provision will be amended so that it also applies to existing EEA and existing third country AIFMs.

This means that existing EEA AIFMs will be able to market AIFs to UK investors prior to 22 July 2014 without needing to be authorised under the Directive. Existing non-EEA AIFMs will be able to market AIFs to UK investors prior to that date without complying with the mandatory disclosure and reporting obligations imposed by the Directive and would not be subject to the ‘private equity’ notification and anti-asset stripping provisions of the Directive relating to investments in EEA companies.

Co-operation arrangements: The Treasury has clarified that an existing non-EEA AIFM relying on the transitional arrangements under Regulation 68 need not wait for cooperation arrangements between the relevant third country supervisory authorities and the UK Financial Conduct Authority to be put in place before marketing to UK investors.

Similarly, an existing UK or EEA AIFM managing a non-EEA AIF may market the AIF to UK investors without the relevant cooperation agreements being in place while the transitional provisions under Regulation 68 apply. However, once such an AIFM obtains authorisation, the relevant cooperation agreements would need to be in place for the AIFM to continue marketing, even if such authorisation is obtained during the transitional period.

Marketing of new AIFs: Existing AIFMs (including EEA AIFMs and non-EEA AIFMs) relying on the transitional provisions under Regulation 68 will be able to launch and market new AIFs. Marketing of AIFs by existing AIFMs relying on the transitional arrangements will not be confined to AIFs under management as at 22 July 2013.

¹ The EEA includes all countries of the European Union plus Norway, Iceland and Lichtenstein.

MARKETING: SCOPE

Secondary market transactions: The existing marketing restriction under the Regulations sets out a general prohibition on the marketing of an AIF to UK investors without the AIFM of the AIF having obtained a marketing approval from the Financial Conduct Authority (subject to limited exclusions). This restriction would apply to any person marketing an AIF, not just the AIFM, and would apply to existing investors seeking to sell their AIF interests to potential buyers (and intermediaries acting on their behalf) in secondary market transactions.

The Treasury has stated its intention to amend the Regulations so that the marketing restriction will apply only to offering or placement at the initiative of, or on behalf of, the AIFM. Specific provisions will apply to investment firms, but only if they offer or place units or shares of an AIF on behalf of an AIFM. Accordingly, secondary market transactions which are not initiated by the AIFM of an AIF, whether or not intermediated, will not be subject to the marketing restriction.

MARKETING: APPROVALS

Single AIFM requirement for non-EEA AIFMs: The Treasury has clarified that the rationale behind the requirement in the Regulations that there be a “single AIFM” for non-EEA AIFMs to obtain a marketing approval from the Financial Conduct Authority to market AIFs to UK investors is to ensure that a single entity is identified for the purposes of complying with the requirements under the Regulations that would accompany the approval to market. However, the Regulations should not be read as imposing a requirement that there be no other entity which could be considered the AIFM. The Treasury will amend the Regulations to clarify this.

Single depositary requirement for non-EEA AIFs managed by UK AIFMs: The Treasury has also clarified that the Regulations do permit one or more entities to perform depositary functions in relation to a non-EEA AIF (or a feeder AIF for a master AIF which is a non-EEA AIF or is managed by a non-EEA AIFM) managed by a UK AIFM or an EEA AIFM. The Regulations will be amended to clarify this.

AIFM AUTHORISATION

The Q&A document provides the following clarifications in respect of the authorisation requirement under the Directive for existing UK AIFMs relying on the transitional arrangements under the Regulations:

- an existing UK AIFM that does not meet the requirements for authorisation may rely on the transitional arrangements, provided the manager meets the requirements for authorisation and submits an application for authorisation, or is replaced by another authorised AIFM, by 22 July 2014;
- the requirement for existing UK AIFMs to apply for authorisation (or registration as a small AIFM) by 22 July 2014 applies only to UK AIFMs that intend to continue managing an AIF after 21 July 2014; and
- an existing AIFM does not need to make any special application or go through any procedure in order to benefit from the transitional provision.

GRANDFATHERING PROVISIONS

The Treasury has also made the following statements in relation to the application of the grandfathering arrangements under Regulations 70 and 71 relating to existing UK AIFMs that manage AIFs which are closed-ended funds that make no additional investments after 22 July 2013 or closed-ended funds whose subscription periods for investors have closed before 22 July 2013 and whose terms expire before 22 July 2016:

- the Regulations will be amended so that an AIFM may rely on the grandfathering arrangements for AIFs it manages of the type described above, even if the AIFM manages other AIFs;
- the assets of AIFs covered by Regulations 70 and 71 will not be used in calculating an AIFM's assets under management when determining whether an AIFM falls within the full scope of the Directive or within the limited regime applicable to small AIFMs; and
- the provisions of the Directive will not apply in respect of AIFs covered by Regulations 70 and 71, even where managed by an AIFM which is authorised under the Directive.

TRANSITIONAL PROVISION FOR DEPOSITARIES

The Treasury is proposing to include an additional transitional provision in the Regulations to enable depositaries to act for AIFs during the transitional period prior to obtaining permission from the Financial Conduct Authority to act as a depositary. The depositary requirements under the Directive will, however, start to apply to a depositary of an AIF from the point when the AIFM managing that AIF is authorised under the Directive.

OTHER MATTERS

Additionally:

- The Treasury will amend Regulation 4 to include a more general concept of management as a necessary element of being an AIFM. This is to address concerns that the current definition of an AIFM under Regulation 4 could potentially cover entities which carry on portfolio management or risk management as delegates.
- Addressing the use of "European language" in the Regulations, the Treasury has noted that the expressions used in the Regulations have the same meaning as they have in the Directive, even where such expressions could be taken to mean something different under UK law.

If you have any questions concerning the material discussed in this client advisory, please contact the following members of our Funds and Investments practice group:

Simon Currie	+44.(0)20.7067.2011	scurrie@cov.com
Hilary Prescott	+44.(0)20.7067.2008	hprescott@cov.com
Loretta Shaw-Lorello	+1.212.841.1073	lshawlorelo@cov.com
Kerry Burke	+1.202.662.5297	kburke@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.

© 2013 Covington & Burling LLP, 265 Strand, London WC2R 1BH. All rights reserved.