

Investment Management Alert

Monday, June 17, 2013

Final Draft of UK Transitional Rules for Marketing and Managing Alternative Investment Funds Passed on for Parliamentary Approval

The final draft of the U.K. regulations implementing the Alternative Investment Fund Managers Directive (“AIFMD”) has been published. The regulations clarify conditions that must be met by U.K. and non-EU managers wishing to benefit from the transitional relief for marketing and managing their funds until July 22, 2014.

The Alternative Investment Fund Managers Regulations 2013 (the “U.K. Implementing Regulation”)

On June 12, 2013, the final draft of the U.K. Implementing Regulation was published. The U.K. Implementing Regulation is the main statutory instrument that implements the AIFMD in the U.K., coming into force on July 22, 2013. The U.K. Implementing Regulation will be supplemented by policy statements, final rules and guidance, which are to be published by the Financial Conduct Authority (“FCA”) in the coming weeks.

By and large, the U.K. Implementing Regulation does little more than create the statutory framework for the FCA’s detailed rules and guidance on the practical implementation of AIFMD. The most significant area where it does provide clarity on what has, to date, been an unresolved issue, is how the U.K. will deal with application of the new rules to those managing and marketing AIFs during the transitional period between July 22, 2013, and July 22, 2014.

Eligibility for Transitional Relief for U.K. AIFMs Managing AIFs

As expected, U.K. managers (“U.K. AIFMs”) who are managing an AIF immediately before July 22, 2013, will not have to comply with the post AIFMD rules in respect of either their marketing or management activities in the U.K. They have the option to “opt-in” to the regime sooner (for example, to take advantage of the pan-European marketing passport) by re-registering themselves as an AIFM with the FCA at any point after July 22, 2013, but otherwise they may continue to manage and market AIFs in the U.K. in accordance with existing rules until July 22, 2014.

AIFMs from other EU member states will also benefit from transitional relief, provided that they have been managing their funds before July 22, 2013.

Eligibility for Transitional Relief for Non-EU AIFMs Marketing AIFs in the U.K.

The most significant new provision in the U.K. Implementing Regulation extends this transitional relief from compliance with the new rules to non-EU managers (“non-EU AIFMs”) marketing AIFs in the U.K. Provided they have been both “managing an AIF” and “marketing that AIF in an EEA state” before July 22, 2013, non-EU AIFMs will be permitted to continue marketing in the U.K. under the current financial

promotion rules, rather than having to comply with the new rules on marketing AIF's set out in the U.K. Implementing Regulation.

As drafted, it would appear to be the case that eligibility for transitional relief is determined in respect of the AIFM and not any particular AIF. That is, if a non-EU AIFM manages and markets at least one AIF by July 22, 2013, it is provided with a blanket exemption to market any new funds in the U.K. under the existing rules until July 2014. This would mean, for example, that a U.S. manager currently marketing its existing range of funds in the U.K., under the current financial promotion regime would be able to launch a new fund after July 22, 2013, and market it in the U.K. pursuant to the current financial promotion rules up to July 2014. It is possible that the FCA will provide further clarity on this point when it publishes its perimeter guidance on AIFMD shortly.

It remains somewhat unclear from the drafting whether or not the marketing needs to be ongoing as of July 22, 2013, or whether it is sufficient that the relevant non-EU AIFM has marketed at least one fund in the EEA at any point in time prior to that date. Again, it is hopefully the case that the FCA will provide some clarification on this point in its perimeter guidance.

Those non-EU managers wishing to be able to take advantage of the transitional provision will need to ensure that they have adequate records of their pre-July 22, 2013, marketing activities to demonstrate their eligibility for the transitional period. In addition, disclaimers regarding U.K. marketing rules will need to be updated to refer to the basis on which the relevant manager has qualified for the transitional period.

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