

Investment Management Alert

July 5, 2013

AIFMD Update – German Private Placement Rules

Our Investment Funds group has received an update on the changes to the private placement rules for marketing of alternative investment funds (“AIFs”) in Germany following the implementation of the Alternative Investment Fund Managers Directive (“AIFMD”) on July 22, 2013.

We understand that the new German rules for marketing AIFs distinguish between three categories of investors: (1) professional investors which include banks, investment firms, insurance companies, national and regional governments and large corporate entities; (2) semi-professional investors, which include investors who invest at least EUR 10,000,000, or at least EUR 200,000 (if they also meet the suitability test), or executives and employees of the relevant AIF or its manager (“AIFM”); and (3) retail investors.

Distribution to professional investors by AIFMs established in countries outside the European Union (e.g., U.S. managers) is subject to the following conditions:

- the non-EU AIFM must notify BaFin of its intention to market in Germany. The notification must include a comprehensive list of information and documents. BaFin will then have up to two months (from the date of submission of complete documents) to review and approve the notification
- the non-EU AIFM must appoint an independent entity performing the functions of a depositary set out in the AIFMD and inform BaFin of the identity of such a depositary
- the non-EU AIFM must comply with certain initial and ongoing investor disclosure requirements
- the non-EU AIFM must comply with reporting obligations to BaFin
- cooperation agreements must be in place between BaFin and the regulator of the jurisdictions of both the non-EU AIFM (e.g., United States) and the non-EU AIF (e.g., Cayman Islands) marketed in Germany. In addition, the home jurisdictions of both the AIFM and the AIF must not be on the list of non-cooperative countries or territories designated by the Financial Action Task Force.

AIFMs that make private equity investments in German companies must also comply with special notification and disclosure requirements and provisions against asset-stripping.

AIFMs wishing to distribute to semi-professional investors are required to comply with all of the provisions of the AIFMD (in addition to the conditions above) and the notification must include additional information on the AIFM. Distribution to retail investors is subject to further product-related requirements (including prospectus requirements).

Non-EU AIFMs can continue to market under the existing private placement rules until July 21, 2014, provided that they can demonstrate that the relevant fund was marketed in Germany before July 22, 2013. As the availability of the transitional relief is dependent on the particular fund having been marketed in Germany (rather than the manager's prior marketing activities generally), managers should, wherever possible, commence (and document) marketing of the relevant fund in Germany before July 22, 2013.

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