FINANCIAL REGULATORY QUICK START GUIDE

THE ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE (AIFMD): AN OVERVIEW

OVERVIEW

The AIFMD entered into force on 22 July 2013. It aims to provide a harmonised regulatory framework for alternative investment fund managers (AIFMs) and the management, administration and marketing of the alternative investment funds (AIFs) that they manage.

The scope of the AIFMD is broad and includes requirements relating to authorisation, administration, remuneration, managing, marketing and depositary oversight of funds. It focuses on regulating the manager rather than the fund itself.

The AIFMD had to be transposed into the national legislation of each EEA Member State, which has led to some significant divergences in practice and interpretation of key parts of the AIFMD (particularly with respect to the marketing of AIFs by non-EEA AIFMs).

The AIFMD was introduced as a reaction to the financial crisis, in a bid to bring greater transparency and oversight to the institutional funds sector.

Geographical scope

The AIFMD applies to:

- EEA AIFMs; and
- Non-EEA AIFMs who market their (EEA or non-EEA) AIFs into the EEA.

Prior to the AIFMD, in many EEA Member States institutional funds and their managers were subject to relatively "light-touch" regulation, compared to the more stringent regulation of "retail" funds.

KEY AIMS OF THE AIFMD

- To enhance supervisory practices across the EU.
- To improve investor protection (through enhanced transparency, mandatory reporting, disclosure requirements, safekeeping of assets requirements, and depositary oversight).
- To foster efficiency and cross-border competition by removing national barriers and creating level playing fields through harmonised rules.

CURRENT STATUS

The European Commission has been conducting a review of the application, impact and scope of the AIFMD, and published a first report in January 2019. The Commission is expected to submit its final report in 2020, which is likely to lead to a revision of the rules.

In July 2019, amendments to the marketing provisions of the AIFMD were finalised. In particular, the amendments will introduce a harmonised definition of "pre-marketing", limiting the marketing activities that can be undertaken before making a formal marketing notification. This will apply from 2 August 2021. There is no current timetable for the proposed extension of the marketing passport to non-EEA AIFMs.

SCOPE

AIFM – an AIFM is a legal person whose regular business is to manage one or more AIFs.

This will cover managers of hedge funds, private equity firms and investment trusts.

AIF – an AIF is a "collective investment undertaking" that is not a UCITS, which:

(a) Raises capital from a number of investors
(b) With a view to investing that capital in accordance with a defined investment policy
(c) For the benefit of those investors

Exemptions – the AIFMD exempts several entities from being AIFs, including family investment vehicles, holding companies, certain joint ventures and other vehicles. Further, AIFMs that manage funds where the investors consist only of the AIFM and/or the AIFM's group companies are excluded.

Small managers regime – a different (less intensive) regime applies to EEA AIFMs that meet the definition of a "small AIFM". The definition includes consideration of assets under management, use of leverage, and redemption rights.

Non-EEA AIFMs - are subject to a lighter-touch regime than full-scope EEA AIFMs. However, they are unable to use the AIFMD marketing passport and instead have to comply with each individual EEA Member State's national private placement regime.

IMPACT OF THE AIFMD ON CORPORATE TRANSACTIONS

The impact of the AIFMD should be considered in corporate transactions that involve any structures that involve the pooling of capital, as well as more traditional funds. Key impact areas, or areas which should be considered, include:

- **Portfolio company disclosure regime** – an AIFM must disclose to certain regulators (and others) all acquisitions of "control" and "material" stakes in EEA portfolio companies.

- **Asset stripping** – an AIFM will need to comply with asset stripping provisions (which restrict, for example, certain distributions, capital reductions, share redemptions and acquisitions of own shares) in respect of EEA portfolio companies for a period of two years following acquisition of "control" of an EEA portfolio company.

- **Structuring** – the AIFMD may impact the way in which firms choose to structure a deal, so should be considered at the outset of the transaction.

- **Other considerations –** it may be necessary to consider, for example, whether the intended deal creates an AIF, change in control requirements, leverage limits, depositaries, and the remuneration provisions.

KEY REQUIREMENTS OF THE AIFMD

Requirement	Overview
Authorisation	EEA AIFMs must be subject to supervision in their home Member State. Broadly, the AIFMD requires an AIFM to be authorised or registered, depending on the size of the manager.
Management and Marketing	The AIFMD imposes strict requirements on the management and marketing of AIFs in the EEA.
Capital	EEA AIFMs must meet the minimum capital requirements in relation to both initial capital and "own funds", and must also meet the requirements in relation to professional indemnity insurance.
Conduct	EEA AIFMs must comply with the governance and conduct of business requirements set out in the AIFMD relating to risk management, valuation, disclosures, liquidity and conflicts.
Remuneration	EEA AIFMs must have the prescribed remuneration policies and practices in place.
Depositaries	The AIFMD sets out certain requirements in relation to depositaries, and makes service providers (including depositaries) subject to robust regulatory standards.
Transparency	The AIFMD imposes transparency and disclosure obligations on AIFMs in respect of information to investors, regulators and other key stakeholders. The reporting requirements set out under the AIFMD can be onerous and time intensive.
Other	The AIFMD introduces certain procedures for independent valuation of AIF assets and use of leverage, imposes restrictions on delegation of AIFM functions (portfolio & risk management functions) and affords regulators wide powers of inspection and intervention.

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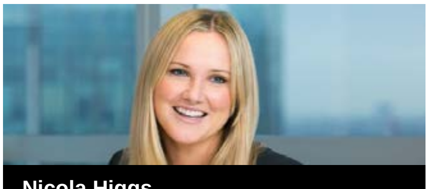

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