

AIFMD Set to Take Effect in July 2013

June 2013

Introduction

This alert is a reminder to our clients of the Alternative Fund Manager's Directive ("AIFMD"), which goes into effect as of July 21, 2013 for most European Union ("EU") Member States, and its implications from the perspective of a US manager¹ that manages non-EU domiciled funds².

Managers who intend to "market" (see definition below) in the EU should contact us for assistance in coordinating with EU counsel if they have not already done so.

Timeline

US managers are not eligible for a "marketing passport"³ under the AIFMD until at least 2015, and until at least 2018, US managers managing non-EU funds should still be able to market in the EU pursuant to the current private placement regimes.

However, effective July 21, 2013 (the "Effective Date"), the AIFMD requires US managers marketing in the EU to provide certain disclosures to investors, to distribute annual reports with specified information and to make certain regulatory filings, including a filing similar to Form PF (the "Disclosures/Reports"). The most controversial disclosures relate to manager remuneration (including disclosure of the aggregate amount of remuneration paid by the manager to its staff overall and to its senior management) and side letter information (including disclosure of preferential treatment of investors and a description of investors who receive such treatment). Managers marketing in the EU must determine whether they are required to update their funds' offering documents to include the requisite AIFMD disclosures and must make any such updates by the Effective Date.

¹ US manager would include a non-EU management company with offices in the US.

² The AIFMD covers only funds that are non-UCITS collective investment undertakings which raise capital from a number of investors and exempts certain categories of investment vehicles.

³ A "marketing passport" allows a manager that is authorized and registered in a EU Member State pursuant to the AIFMD to market its funds in other EU Member States without having to become authorized in such EU Member States.



What Does Marketing Mean?

The AIFMD defines “marketing” as the direct or indirect offering or placement of interests in a fund at the initiative of the manager or on behalf of the manager to or with investors domiciled or with a registered office in the EU. However, individual EU Member States may implement the AIFMD with differing interpretations of “marketing”.

Marketing at the initiative of a prospective investor does not constitute “marketing” within the meaning of the AIFMD, and qualifies for the “reverse solicitation” exemption. However, whether a prospective investor qualifies for this exemption depends on the facts and circumstances and managers should consult counsel regarding this exemption. US managers should note that attending industry or capital introduction conferences in the EU and other similar activities may, depending on the jurisdiction, constitute “marketing” for purposes of AIFMD.

A lingering question, which may have significant implications for US managers, is whether the AIFMD applies when the manager markets to a person with an EU domicile or registered office but the investment in the manager’s fund is made via an investment vehicle or nominee account with a Cayman Islands (or another non-EU jurisdiction) domicile or registered office.

Recent UK Developments

In a recent Q&A, the United Kingdom (UK) regulators indicated that US managers marketing in the UK may continue doing so under the existing UK private placement regime without being subject to the Disclosures/Reports until July 22, 2014. It remains to be seen whether other EU Member States will follow suit.

Other Disclosures/Filings Relating to EU Investments

The AIFMD requires certain disclosures/filings when investments are made in EU private companies (subject to certain investment thresholds). A US manager that is subject to the AIFMD may be required to make such disclosures/filings with respect to one or more of its funds.



Conclusion

Managers that intend to continue to engage in activities that may constitute marketing in the EU should contact us for assistance in analyzing these issues and engaging EU counsel.

To discuss further, please contact your primary Kleinberg Kaplan attorney or:

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