Insights Skadden

Excerpted from *2014 Insights*. The complete publication is available at www.skadden.com.

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A COLLECTION OF COMMENTARIES ON THE CRITICAL LEGAL ISSUES IN THE YEAR AHEAD

The Future of Marketing Non-EU Alternative Investment Funds in Europe

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Adopted by the European Parliament in 2010 and implemented by EU member states in July 2013, the Alternative Investment Fund Managers Directive (the Directive) seeks to protect investors and mitigate market instability by regulating alternative investment fund (AIF) managers[1] in the EU.

Marketing Passport Restrictions

Under the Directive, EU managers can market EU AIFs to EU investors[2] through the use of a pan-European marketing passport. However, this marketing passport will not be available to non-EU managers of AIFs, or EU managers of non-EU AIFs, until at least 2015. If they wish to market actively to EU investors, such managers will need to rely on individual member states' national private placement regimes (NPPRs), which the Directive allows to be maintained.

In addition to NPPR compliance, marketing a non-EU AIF to EU investors also will trigger a requirement to comply with applicable parts of the Directive, which defines marketing as a direct or indirect offering or placement solicited at the initiative or on behalf of the manager. Raising capital from EU investors by way of reverse solicitation, where the investor takes the initiative, will not trigger a requirement to comply with the Directive because there is no marketing "at the initiative of" the manager. However, the Directive does not specify what this means. Member states may have different interpretations as to the precise activities that constitute marketing (and therefore when a requirement to comply with the Directive arises) and reverse solicitation.

NPPR Compliance — Additional Directive Conditions

Minimum Conditions. The Directive requires that managers satisfy additional conditions to market to professional investors in the EU,[3] including:

- **The manager must disclose certain information to investors before they invest.** Much of this information typically would be contained in a private placement memorandum (PPM) (*e.g.*, fees and leverage disclosures). However, some specific disclosures typically are not contained in PPMs (*e.g.*, information "on the existence

[1] AIFs are alternative investment funds that include private equity, hedge, real estate and infrastructure funds. AIFs can be open-ended or closed-ended, listed or unlisted. The following are not AIFs (and therefore fall outside the scope of the Directive): UCITS funds, single-investor funds, holding companies and SPVs (although advice should be sought on a case-by-case basis to ensure that any relevant criteria are met). The manager, or AIFM, is the legal person (*i.e.*, not an individual) that is responsible for performing portfolio management and risk management functions with respect to an AIF.

[2] The Directive regulates marketing to "professional investors" (which includes investment firms, credit institutions, pension funds and institutional investors whose main activity is to invest in financial instruments). Individual member states may permit marketing to nonprofessional investors at their discretion, subject to compliance by the manager with the Directive rules relating to marketing to professional investors and any additional rules imposed by those member states.

[3] The Directive allows member states to impose stricter requirements on marketing AIFs to retail investors in their territories.

or not of any legal investments providing for the recognition and enforcement of judgments in the territory where the AIF is established") and either can be added to the PPM or inserted in a supplement.

- **The manager provides an annual report in respect of the AIF to the regulators of each member state in which the AIF is marketed and to investors on request.** In addition to the usual information found in an annual report, the document must disclose the total amount of remuneration paid by the manager to its staff, including any carried interest paid by the AIF. Remuneration must be divided into fixed and variable. Certain other disclosures also are required.
- **The manager provides regular reports to the regulators of each member state in which the AIF is marketed.** These reports are broadly similar to Form PF, although differences exist. Frequency of reporting ranges from quarterly to annual depending on quantum of assets under management and other criteria.
- **The regulator of the non-EU AIF and the regulator of each member state in which the AIF is being marketed must enter into cooperation agreements.**[4] Most EU member states have entered into cooperation agreements with regulators from the most common fund jurisdictions. The SEC and CFTC, for example, have entered into agreements with all but a handful of member states. However, some member states have not entered into cooperation agreements with certain offshore Caribbean jurisdictions (for example, at the time of writing, Spain and Italy have not concluded agreements with the Cayman Islands).
- **The non-EU AIF is not established in a country that is listed as a Non-Cooperative Country and Territory by the Financial Action Task Force.** In addition, if the manager is not in the EU and registered in a jurisdiction different from that of the non-EU AIF, the manager must not be established in a country that is listed as a Non-Cooperative Country and Territory by FATF.

Additional Member State Conditions. The Directive allows member states to impose additional conditions for AIFs to be marketed under the NPPRs (if any) of their territories.

- The U.K. requires a manager to notify the U.K. Financial Conduct Authority (FCA) of its intention to market in the U.K. This is effected by submitting the applicable electronic notification form that appears on the FCA's website.[5] The FCA's consent is not required before marketing can commence. Once the FCA has processed the notification form, it will issue the manager a notification number and request that a modest fee is paid. The manager is entitled to start marketing the AIF once it has submitted the notification form; however, the FCA states that managers may wish to wait until they have received confirmation from the FCA that the notification has been successfully processed.
- Other member states, such as Ireland, have imposed similar notification requirements. Germany and France impose more stringent obligations, which involve compliance with certain additional Directive requirements and, in Germany, a manager must obtain approval from the BaFin, the country's financial regulator.

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[4] In addition, if the manager is not EU-based and registered in a jurisdiction different from that of the non-EU AIF, cooperation agreements must be in place between the manager's home regulator and the home regulator of each member state in which the AIF is being marketed.

[5] The FCA's notification forms are available at http://www.fca.org.uk/firms/markets/international-markets/aifmd/nppr.

Transitional Relief

Some member states have implemented transitional provisions, which allow marketing to continue under the applicable NPPR without having to comply with the Directive's minimum conditions for a period of 12 months (subject to certain conditions being met). A non-EU manager can market its AIFs to investors in the U.K. if it managed an AIF immediately before July 22, 2013, and marketed that same AIF in any member state prior to that date. However, starting July 22, 2014, all transitional provisions implemented by member states will expire and the Directive's minimum conditions will need to be satisfied to market to EU investors under the NPPRs.

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At a time when the JOBS Act has lifted the ban on general solicitation in the U.S., the marketing restrictions in the Directive can have a significant impact on marketing strategies that managers might otherwise pursue. For example, where managers are opening up their websites to potential investors, they should consider whether this could be construed as marketing under the Directive, triggering a requirement to comply or, if not, whether it could impact an investor's ability to reverse-solicit investments.