

UK Provides Marketing Grace Period for Alternative Fund Managers

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The U.K. Treasury recently published its **response** to its January 2013 consultation on transposing the EU Alternative Investment Fund Managers Directive (AIFMD). A revised draft version of the **Alternative Investment Fund Managers Regulations 2013** was published on 12 June 2013. The draft regulations make clear that the 12-month transitional provisions in Article 61 of the AIFMD also apply to non-European Economic Area (EEA) alternative fund managers (**non-EEA AIFMs**).

This brings welcome news for non-EEA AIFMs who wish to market alternative investment funds (AIFs) (*i.e.* non-UCITS funds) in the U.K., who have been given a further year to comply with AIFMD marketing requirements due to come into force on 22 July 2013. Non-EEA AIFMs will now be able to market existing AIFs and launch and market new AIFs to U.K. investors up to 22 July 2014 without having to comply with AIFMD marketing requirements. This will give non-EEA AIFMs much needed breathing space and time to ensure that the necessary measures and arrangements are in place to facilitate U.K. marketing of non-EEA AIFs. However, only AIFMs who are marketing AIFs in an EEA state prior to 22 July 2013 can take advantage of the 12-month grace period.

Some other member states, including the Netherlands, Germany and Sweden have indicated that they too will adopt a 12-months' transitional period for non-EEA AIFMs marketing AIFs in the EEA. However, it remains to be seen whether such states will interpret the AIFMD transitional provisions in the same way as the U.K.

Marketing Under the AIFMD

The AIFMD will regulate the managers of AIFs who wish to manage or market such funds in the **EEA**¹. It contains a wide variety of obligations covering regulatory authorisation, executive remuneration, depositary, conduct of business, organisational, prudential and reporting rules. EU law makers were late in making the final regulations giving alternative managers little time to ensure compliance with the new, more onerous obligations under the AIFMD. The AIFMD provides that marketing can only take place where:

- there is an appropriate cooperation agreement in place between relevant EEA regulators and the regulators in the country where the non-EEA AIFM is established and (if different) the country in which the non-EEA AIF is organised;
- the relevant non-EEA countries are not listed as FATF Non-Co-operative Countries and Territories; and
- the non-EEA AIFM complies with AIFMD transparency requirements covering investor and regulatory disclosure and reporting, and, if applicable, private equity "asset stripping" provisions.

¹ From 1 July 2013 the EEA will comprise the 28 member states of the European Union plus Norway, Liechtenstein and Iceland.

Cooperation Agreement Requirement

On 30 May 2013, ESMA, the pan-EU securities regulatory body, announced in a [press release](#) that it has approved cooperation agreements between EEA regulators and 34 of their global counterparts, including those in the USA, Canada, Brazil, India, Switzerland, Australia, Hong Kong, Singapore, Cayman Islands, Guernsey, Jersey and the Isle of Man. ESMA is continuing to negotiate cooperation agreements with further third-countries in order to meet the 22 July 2013 deadline. For example, the Bermuda Monetary Authority announced on 27 March 2013 that it was preparing to sign a cooperation agreement with ESMA.

Although the cooperation agreements have been approved by ESMA, they must be signed by each EEA national securities regulator and the relevant non-EEA authorities. Each EEA regulator is free to decide which non-EEA authority it will enter into a cooperation agreement with.

The Luxembourg regulator, the Commission de Surveillance du Secteur Financier, and the U.K.'s Financial Conduct Authority (**FCA**) have both announced that they have signed the ESMA approved cooperation agreements with all 34 non-EEA authorities.

AIFMD Transparency Requirements

Following full implementation of the AIFMD in the U.K. (on 22 July 2014), non-EEA AIFMs wishing to market AIFs in the U.K. will be required to comply with the following transparency requirements, which apply in relation to each AIF marketed in the EEA:

- (1) **Audited Annual Report:** This report must be provided, within six months of the year end, to investors “on request,” and “made available” to regulators in the home member state of the AIFM (and the EEA fund where applicable). There are detailed rules governing how a non-EEA AIFM determines its home member state, but for marketing purposes it effectively means each state in which the AIFM markets. There are a number of prescribed items that need to be included in the annual report. These include information on fixed and variable remuneration (including carried interest) paid to staff and aggregate remuneration broken down by senior management and staff members who have a material impact on the AIF’s risk profile.
- (2) **Investor Disclosures:** Detailed information about the AIF needs to be provided to investors before they invest and must be updated for material changes. Information is required on investment strategy, valuation procedures, liquidity risk management, fees and charges, (including maxima) and details of any preferential treatment of investors.
- (3) **Reporting to Authorities:** The AIFM must report to its home member state regulator (*i.e.* the regulator in each state in which it markets) about the principal markets and instruments in which it trades. In addition, it must provide details on percentage of illiquid assets held, new arrangements with respect to managing liquidity, current risk profile of the AIF, information on the AIF’s assets and the results of stress tests. The type and range of reporting is similar to the U.S.’s Form PF reporting process.
- (4) **Private equity provisions:** Managers of private equity AIFs also are required to comply with the private equity transparency requirements and “asset stripping” provisions.

The 12-Month Grace Period

The AIFMD already provides U.K.-based AIFMs with a transitional period of one year in which to obtain authorisation from the U.K. FCA and comply with AIFMD requirements. However, the position of non-EEA AIFMs wishing to market their AIFs to EEA professional investors was uncertain.

The principal problem some non-EEA AIFMs faced was that it was not clear whether the relevant regulator cooperation agreements were going to be in place with all major non-EEA fund jurisdictions by 22 July 2013.

The absence of a cooperation agreement would mean that non-EEA AIFMs would not be able actively to market funds to U.K. professional investors. Instead, they would have to rely on more difficult, passive, reverse solicitation routes.

The U.K. government has helped deal with these issues by announcing that the U.K. will extend the one year transitional relief to non-EEA AIFMs. Therefore non-EEA AIFMs marketing AIFs in an EEA state before 22 July 2013 can market AIFs in the U.K. up to 22 July 2014 without the need for a regulatory cooperation agreement and without having to comply with AIFMD transparency provisions.

Taking Advantage of the 12-Month Grace Period

As noted above, only non-EEA AIFMs who are marketing AIFs prior to 22 July 2013 are able to take advantage of the 12-month grace period. Marketing is defined under AIFMD as:

“a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the Union.”

Accordingly, passive marketing or reverse solicitation would not be considered marketing under the AIFMD. The FCA guidance provides that communications in response to an approach from a potential investor with prior knowledge of the AIF and no previous involvement with the AIFM could be at the initiative of the investor and, therefore, would not constitute marketing.

The FCA guidance provides that the following would be considered to be marketing under the AIFMD:

- communications that are sent to investors as part of an organised marketing campaign or documentation which is available on a publically accessible website; and
- communications distributed through a chain of intermediaries, for example where units/shares of an AIF are purchased by a third party, such as an underwriter or placement agent, with the objective of distributing them to a wider investor base.

However, in the FCA’s view, communications in draft documentation (*i.e.* a draft offering memorandum) do not fall within the meaning of an offer or placement for the purposes of AIFMD and therefore are not considered marketing for AIFMD purposes.

For non-EEA AIFMS seeking to take advantage of the 12-month extension, care should therefore be taken to be able to demonstrate that marketing has occurred prior to 22 July 2013. It appears that the marketing should form part of a current marketing campaign.

Finally, pre-marketing communications are still subject to U.K. private placement laws. Therefore, non-EEA AIFMs will need to ensure that they continue to make promotional communications to exempt categories of investor set out in the U.K.’s Financial Promotion Order.