

The Banking Law Journal

Established 1889

AN A.S. PRATT & SONS PUBLICATION

MARCH 2014

HEADNOTE: VOLCKER, CONTINUED

Steven A. Meyerowitz

THE FINAL VOLCKER RULE: THE COVERED FUND PROVISIONS

Satish M. Kini, Paul L. Lee, and Gregory J. Lyons

SECTION 1111(B) OF THE BANKRUPTCY CODE: AN EFFECTIVE WEAPON FOR UNDERSECURED CREDITORS OPPOSING CONFIRMATION OF CRAM CHAPTER 11 PLANS

Patrick E. Mears and John T. Gregg

BANKRUPTCY POISON PILLS: NEW ATTEMPTS TO AVOID ABSOLUTE PRIORITY

Michael A. Nardella

FIVE KEY ISSUES IMPACTING EMPLOYERS IN THE FINANCIAL SERVICES INDUSTRY

John F. Fullerton III and Jason Kaufman

EU RISK RETENTION REQUIREMENT: WHO CAN NOW RETAIN IN A MANAGED CLO?

Nick Shiren and Robert Cannon

U.S. SWAP REGULATION: CROSS-BORDER DEBATE AMONG ISSUES TO WATCH

Mark D. Young, Maureen A. Donley, Rachel Kaplan Reicher, and Elizabeth A. Doyle

EMIR REGULATIONS CONTINUE TO IMPACT DERIVATIVES MARKETS IN 2014

Patrick Brandt

THE EU BANKING UNION: WILL THE NEW REGULATORY FRAMEWORK RESTORE CONFIDENCE IN EUROPEAN BANKING?

Sven G. Mickisch and Patrick Brandt

THE FUTURE OF MARKETING NON-EU ALTERNATIVE INVESTMENT FUNDS IN EUROPE

Stephen G. Sims, Patrick Brandt, and Daniel F. Faundez

BANKING BRIEFS

Terence G. Banich

EDITOR-IN-CHIEF

Steven A. Meyerowitz
President, Meyerowitz Communications Inc.

BOARD OF EDITORS

Paul Barron
*Professor of Law
Tulane Univ. School of Law*

George Brandon
*Partner, Squire, Sanders &
Dempsey LLP*

Barkley Clark
*Partner, Stinson Morrison Hecker
LLP*

John F. Dolan
*Professor of Law
Wayne State Univ. Law School*

Thomas J. Hall
*Partner, Chadbourne & Parke
LLP*

Jeremy W. Hochberg
*Counsel, Wilmer Cutler Pickering
Hale and Dorr LLP*

Kirk D. Jensen
Partner, BuckleySandler LLP

Satish M. Kini
*Partner, Debevoise & Plimpton
LLP*

Douglas Landy
*Partner, Milbank, Tweed, Hadley
& McCloy LLP*

Paul L. Lee
*Of Counsel, Debevoise &
Plimpton LLP*

Jonathan R. Macey
*Professor of Law
Yale Law School*

Martin Mayer
The Brookings Institution

Stephen J. Newman
*Partner, Stroock & Stroock &
Lavan LLP*

Sarah L. Reid
*Partner, Kelley Drye & Warren
LLP*

Heath P. Tarbert
Partner, Allen & Overy LLP

Stephen B. Weissman
Partner, Rivkin Radler LLP

Elizabeth C. Yen
Partner, Hudson Cook, LLP

Bankruptcy for Bankers
Howard Seife
*Partner, Chadbourne & Parke
LLP*

Regional Banking Outlook
James F. Bauerle
*Keevican Weiss Bauerle & Hirsch
LLC*

Recapitalizations
Christopher J. Zinski
Partner, Schiff Hardin LLP

Banking Briefs
Terence G. Banich
*Member, Shaw Fishman Glantz
& Towbin LLC*

Intellectual Property
Stephen T. Schreiner
Partner, Goodwin Procter LLP

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2014 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form — by microfilm, xerography, or otherwise — or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., PO Box 7080, Miller Place, NY 11764, smeyerow@optonline.net, 631.331.3908 (phone) / 631.331.3664 (fax). Material for publication is welcomed — articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL LexisNexis Matthew Bender, 121 Chanlon Road, North Building, New Providence, NJ 07974.

THE FUTURE OF MARKETING NON-EU ALTERNATIVE INVESTMENT FUNDS IN EUROPE

STEPHEN G. SIMS, PATRICK BRANDT, AND DANIEL F. FAUNDEZ

The authors explore the Alternative Investment Fund Managers Directive, which regulates alternative investment fund managers in the European Union.

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”) managers¹ in the EU.

MARKETING PASSPORT RESTRICTIONS

Under the Directive, EU managers can market EU AIFs to EU investors² 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.

Stephen G. Sims, a partner of Skadden, Arps, Slate, Meagher & Flom LLP, is the practice leader of the firm’s European Investment Management Group. Patrick Brandt is a counsel in the firm’s corporate group. Daniel F. Faundez is an associate with the firm. Resident in the firm’s office in London, the authors can be reached at stephen.sims@skadden.com, patrick.brandt@skadden.com, and daniel.faundez@skadden.com, respectively.

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 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 be 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.

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.

CONCLUSION

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.

NOTES

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.

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>.