

Briefing notes on the implementation of AIFMD **By AVCA Legal & Regulatory Committee**

Introduction

In advance of the European Union (“EU”) Alternative Investment Fund Managers Directive 2011/61/EU (“AIFMD” or “the Directive”) and the supplementary level 2 Regulation (EU) No 231/2013) (the “Regulation”) coming into force on 22 July 2013, the AVCA Legal and Regulatory Committee provides this brief explaining the impact of the Directive on alternative investment fund managers (“AIFMs”) based outside of the European Economic Area (“EEA”). Because the implementing legislation has not yet been passed in each EEA member state and the final rules in each jurisdiction may vary, this summary is offered in draft form and is not intended to offer definitive guidance or legal advice. AIFMs’ precise regulatory obligations to European member states will be defined by each state’s implementing legislation.

Background

In the past, private offerings of alternative investment funds (“AIFs”) in the EEA have not required the burdensome regulations that accompany public offerings. The implementation of the Directive will substantially change the regulatory considerations underlying previous private placements in the EEA.

Although the Directive is intended to harmonize the regulatory framework for AIFMs and for the placement of AIFs throughout the European Union and further member states of the European Economic Area, there will still be variation in the regulatory environment because:

- ✓ The Directive will only take effect through the local implementing legislation in each EU member state, which will be applied and interpreted by national regulatory bodies and courts of each EU member state respectively;
- ✓ There are various provisions in the Directive that allow member states to impose stricter rules than proscribed in the Directive; and
- ✓ The scope of the Directive is limited, allowing member states to implement varying regulation of areas not covered by the Directive. For example, the Directive only addresses the placement of funds to “professional investors,” but states may also choose to apply the Directive’s requirements to the placement of funds to other investor classes.

Scope of Directive

The Directive covers both AIFs and AIFMs. An AIF is defined as a collective investment undertaking that raises capital from investors with a view to investing it in accordance with a defined investment policy. Specifically, any collective investment undertaking, including its investment compartments that (i) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors, and (ii) does not require authorisation as an undertaking for collective investment in transferable securities (“UCITS”) will be considered an AIF. Holding companies, commercial companies and joint ventures will typically fall outside of the scope of the Directive. An AIFM is defined as any legal person whose regular business is managing one or more AIFs and therefore performs portfolio management and/or risk management activities in relation to an AIF.

Rather than requiring each member state independently regulate AIFMs that market within their jurisdiction, the Directive provides for a pan-European marketing passport whereby AIFMs are regulated only by the member state in which they are domiciled (either directly or by reference) and such AIFMs are permitted to market throughout Europe. EU-AIFMs marketing EU-AIFs will benefit from such passporting as of July 22, 2013 and non-EU AIFMs will be eligible for passporting two years later, as of July 22, 2015 (at the earliest), if such non-EU AIFMs are compliant with AIFMD.

Duties of non-EEA AIFMs

The Directive provides that non-EEA AIFMs should be subject to the same obligations, and benefit from the same rights, as EEA AIFMs such that a “level playing field” exists between them. Accordingly, non-EEA AIFMs will be required to comply with the Directive in the event that they seek to manage one or more EEA AIFs or market one or more AIFs managed by them to professional investors in the EEA, irrespective of the domicile of such AIFs. As pan-European passporting is not available for non-EEA AIFMs until at least July 22, 2015, a non-EEA AIFM must comply with the local rules in each European jurisdiction into which it markets until it is eligible for and has acquired a passport.

Management of EEA AIFs Before 22 July 2015

Between 22 July 2013 and 22 July 2015, non-EEA AIFMs will be entitled to manage EEA AIFs in the territory of a member state in accordance with its national law. They will not be required to obtain authorisation under the Directive or comply with any of its other provisions. However, they will not be entitled to benefit from the Directive’s passporting regime in relation to cross-border fund management.

Marketing AIFs in the EEA Before 22 July 2015

Under the Directive, marketing means 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 EEA. Between 22 July 2013 and 22 July 2018, a non-EEA AIFM that intends to market an AIF managed by it to professional investors in the EEA will, for so long as it exists, be able to rely upon national private placement regimes. In order to rely upon a national private placement regime, where available, the following minimum conditions (set out in the Directive) must be satisfied.

The non-EEA AIFM must (i) disclose detailed information to investors and file certain information with the competent authorities in each country and (ii) satisfy additional notification, disclosure and anti-asset stripping obligations (to the extent that an AIF it manages acquires control over an EU non-listed company).

In addition, appropriate cooperation agreements must also be in place between (i) the member states in which the AIFs will be marketed (and, where applicable, the competent authorities of any EEA AIFs concerned) and (ii) the third country in which the non-EEA AIFM (and, where applicable, the non-EEA AIF) is established. Such third country must not be listed as a Non-Cooperative Country and Territory by the Financial Action Task Force.

Some member states have adopted transitional arrangements for non-EEA AIFMs. For example, the UK is providing a one-year transitional period for non-EEA AIFMs that existed and marketed one or more AIFs to investors in any EEA state (not just in the UK) immediately before 22 July 2013. Such AIFMs may market to professional investors in the UK under its national private placement regime until 22 July 2014 without complying with the minimum requirements under the Directive. The scope (and existence) of any transitional provisions varies from one EEA state to another, and as such, AIFMs are encouraged to seek advice from local legal counsel for each relevant member state.

Managing an EEA AIF After 22 July 2015

After 22 July 2015, any non-EEA AIFM managing an EEA AIF will be required to obtain authorisation and comply with the Directive’s requirements concerning, among other things, initial capital, remuneration, conflicts of interest, risk and liquidity management and depositaries.

In planning their regulatory compliance from this date, managers will in particular have to take into account restrictions on delegation of portfolio and risk management functions to third parties. The Directive stipulates that each AIF must only have a single AIFM which must not delegate its functions such that it is in fact a “letterbox entity.”

From 22 July 2015 non-EEA AIFMs will benefit from the Directive’s passporting regime and therefore be able to centralise operations in one EEA country and manage AIFs in other EEA countries.

Marketing AIFs in the EEA After 22 July 2015

Non-EEA AIFMs will have a choice after 22 July 2015. They may either:

- ✓ seek authorisation under the Directive (and benefit from the pan-European marketing passport it provides); or
- ✓ continue to rely upon those national private placement regimes that continue to exist during the period until July 2018. It is expected that all national private placement regimes in the EEA will be abolished from 2018.

Exemptions and Transitional Reliefs

Currently, there are three exemptions which may be of interest to non-EEA AIFMs:

- ✓ the Directive will not apply to AIFMs in so far as they manage AIFs whose only investors are the AIFM, the parent undertakings of the AIFM, the subsidiaries of the AIFM or other subsidiaries of those parent undertakings, provided that none of those investors is itself an AIF;
- ✓ AIFMs, including non-EEA AIFMs, which manage AIFs whose total assets under management fall below EUR 500m (or EUR 100m in the case of AIFs which use leverage in order to acquire assets), will be entitled to follow a simplified registration procedure with their member state of reference (“MSR”). However, AIFMs which follow this simplified registration process will not benefit from passporting rights under the Directive; to obtain such rights, they must expressly opt-in to the Directive and therefore obtain full authorisation from the competent authorities of their MSR; and
- ✓ a non-EEA AIFM may be exempted from compliance with a provision of the Directive (for the purpose of obtaining authorisation after 22 July 2015) if it can demonstrate that it is incompatible with a mandatory legal requirement to which it is subject and that other requirement has the same regulatory purpose and offers the same level of investor protection as the Directives’ provision.

Further Guidance

Further guidance at the European level is expected in order to assist member states in interpreting their obligations under the Directive. In the event that these EU-level guidelines are not sufficiently prescriptive, member state discretion may creep in to the application of the Directive and further divergences may appear. For this and other reasons, non-EEA AIFMs should obtain legal advice in each relevant member state in which they are seeking to manage EEA AIFs and market AIFs.