

# Alternative Investment Fund Managers Directive

## Impact on US Managers



The European Union has recently moved forward to finalize the implementation of the *European Alternative Investment Fund Managers Directive* (“AIFMD” or the “Directive”). As a result, asset management firms across the globe are assessing its possible impact on their activities and operations. This FS Regulatory brief is intended to inform US asset managers of its possible consequence, and answer some frequently asked questions.

### *What is AIFMD? What are alternative investment funds?*

The AIFMD is EU legislation aimed to increase investor protection and reduce systemic risk by establishing a harmonized EU framework for regulating alternative investment fund (“AIF”) managers. Subject to a handful of narrow exceptions, “alternative investment funds” are all collective investment schemes that are not UCITS (UCITS is a well-established European regulatory framework for marketing regulated funds across Europe).

### *Will I be subject to any AIFMD requirements?*

There are two ways to be subject to AIFMD:

- **Managing** alternative funds in or from the EU, regardless of fund domicile; or
- **Marketing** alternative funds in or into the EU, regardless of fund domicile.

The impact of the new regulatory obligations on US asset managers will depend on whether you are managing in the EU or simply marketing in the EU. If you are not performing either of these activities, the Directive will not apply to you.

### *Am I managing in the EU?*

Each fund has to have a single manager. The manager is an entity whose “regular business” is managing the fund. “Managing” means performing at least portfolio management and risk management for the fund. The identified manager does not have to perform all portfolio and risk management activities, though the level of activities that a non-EU manager must retain remains to be determined, and we expect individual EU member states to provide guidance on this point.

### *What is the impact if I am managing in the EU?*

If you manage an AIF in the EU, you will be subject to substantially all of the provisions of AIFMD, subject to limited grandfathering and de minimis relief. These provisions include, but are not limited to, risk management requirements, depositary requirements, compensation/remuneration requirements and prudential capital requirements.

The Directive will be effective on July 22, 2013, though existing EU managers subject to the full AIFMD have one year to become authorised and compliant. Note, however, that the manager may not be able to market outside of its EU member state of authorisation during that time.

### *Am I marketing in the EU?*

For managers who are managing in the US, not the EU, certain parts of the Directive will apply if the manager markets AIFs into the EU. “Marketing” is any offering of AIFs “at the initiative of the manager or on behalf of the manager” to EU investors. As such, passive marketing, i.e. marketing at the initiative of an EU investor on a “reverse solicitation” basis is not caught by AIFMD, but using a distribution or placement agent would likely be regarded as marketing. Managers must take care that future activity with such EU investors does not result in active marketing of a fund.

Little guidance exists on passive marketing and although industry groups and asset managers have requested additional guidance, it remains to be seen whether regulators will provide additional specific guidance.

## What is the impact if I am marketing in the EU?

US managers marketing in the EU after July 22, 2013 will have to rely on individual EU member states' existing private placement regimes as their route to market, and must ensure:

- The relevant EU member state has a private placement regime that the US manager may use (existing regimes may not survive because some EU member states are revising their regimes);
- The manager must register to market with the relevant EU member state regulators;
- The manager complies with AIFMD disclosure and transparency provisions;
- The manager complies with AIFMD private equity-specific requirements;
- A cooperation agreement exists between the manager's home country regulator and relevant EU member state regulators, as well as a cooperation agreement between the AIF home country regulator (if not EU) and the relevant EU member state – at this time, ESMA, an independent EU authority, is negotiating the cooperation agreements centrally; and
- The home country of the AIFM and AIF (if non-EU) is not listed as a non-cooperative country by the Financial Action Task Force ("FATF").

US managers should be aware that EU member states may apply additional local requirements and may change their existing private placement regimes.

## What are the AIFMD disclosure, transparency and private equity requirements for US managers marketing in the EU?

The disclosure and transparency requirements can be broken into three categories: disclosure to investors; annual reports; and disclosure to regulators. Each is described below.

*Disclosure to investors:* Most of the investor disclosure requirements are routinely part of a manager's offering

memorandums. These requirements include, but are not limited to, disclosing information about:

- Investment strategies and restrictions;
- Leverage, collateral and prime brokerage arrangements;
- Valuation and liquidity; and
- Fees, expenses, and side letters.

Additionally, the manager must disclose information about side pockets, liquidity arrangements, risk profile and leverage on a periodic basis.

*Annual report:* An annual report must be available to investors and regulators within six months of year end. The Directive details the minimum accounting information necessary, which is consistent with most recognised GAAP disclosures. The manager must also include any changes to the disclosure to investors, described above, and give detailed information concerning its remuneration practices, in addition to a report on the activities of the fund for the year.

*Regulatory reporting:* The new regulatory reporting requirements are similar to US Forms PF and CPO-PQR, though there are a number of differences in the specific reporting requirements and the timing. For instance, assets under management and leverage disclosures are calculated differently and reporting must take place within a month after the period end. Funds of funds are given an additional 15 days.

*Special provisions for private equity funds:* There are specific disclosures required for private equity funds. For instance, when a fund acquires control of a company (defined as 50%, not including small and medium enterprises), the manager must provide information to the acquired company, shareholders of the acquired company and regulators. The manager must also disclose the future development of the acquired company. Also, when acquiring non-listed company ownership, the manager must also disclose its ownership and changes in ownership at based on certain reporting thresholds.

## **US asset managers checklist – What should I do before July 22, 2013?**

- Examine the activities of any EU-based affiliates or delegates or funds to establish whether its activities or functions bring it within scope;
- Review each AIF and determine its marketing activity (passive or active);
- If relying on passive marketing/reverse solicitation, develop policies and procedures to document such activity and demonstrate compliance; and
- If actively marketing, prepare for compliance with national private placement regimes:
  - » Determine relevant EU member states;
  - » Understand each EU member state private placement regime;
  - » Check cooperation agreement status and that relevant countries are not on the FATF list of non-cooperative countries;
  - » Prepare for registration;
  - » Prepare for transparency and disclosure requirements; and
  - » Prepare for private equity requirements.

### Looking ahead

In July 2015, an AIFMD passport may be available to US managers that would allow funds managed by EU managers to market across Europe without using the private placement regime. To obtain the AIFMD passport, managers will have to be compliant with the substantial requirements of AIFMD.

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## **How can PwC help?**

We have been helping a number of fund managers assess the impact of AIFMD. We can:

- Help you identify your alternative investment fund managers and alternative investment funds, and the relevant competent authority under which you'll be supervised, and document your assessment;
- Assist in the registration process;
- Perform a gap analysis of current practices against new investor transparency requirements and assist you in remediating identified gaps; and
- Perform a gap analysis of new regulatory data reporting requirements against current data gathered.

## **Why PwC?**

- We are working on a number of AIFMD assessment and implementation projects.
- We can help you decide what kind of AIFMD reaction works best for your business.
- We can draw on the experiences of our pan-European network and regularly share information from our AIFMD experts. We understand the practical implications of AIFMD.

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