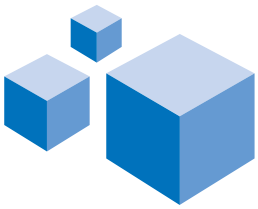

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Fishing Across the Pond:

What Do US Managers Need to Know About Marketing into the UK?

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Introduction

The Alternative Investment Fund Managers Directive (AIFMD) came into force on 22 July 2013 with the result that all alternative investment fund managers (AIFMs) must, subject to limited exemptions, be appropriately authorised to manage alternative investment funds (AIFs) which are established or marketed in the EU.

The AIFMD has introduced a European passport under which full-scope AIFMs can manage and market AIFs throughout the EU. However, the EU Passport is not yet available for non-EU managers marketing a non-EU fund and will not be available until 2015 at the earliest. This is subject to the European Securities and Markets Authority (ESMA) recommending that the passport is made available to them and the European Commission activating the passport provisions by adopting a delegated act. If the EU Passport regime is activated, all non-EU AIFMs managing or marketing AIFs in the EU will need to apply for authorisation, choose a "regulator of reference" within an appropriate EU jurisdiction (depending on various criteria) and comply fully with the AIFMD.

Until such time as the EU Passport is available, US managers are required to market their funds in the UK in accordance with the national private placement regime (NPPR).

Private placement regime in the UK

A manager (either EU or non-EU) managing an AIF in the UK immediately before 22 July 2013 may benefit from transitional relief, in which case it will not need to comply with the AIFMD requirements until 22 July 2014.

If the transitional relief is not applicable, the manager will need to comply with the UK's private placement regime, as amended by the AIFMD. The UK has determined to leave its own private placement regime unchanged save for one exception, namely notification to the FCA (see below).

The following conditions have to be met to market in the UK under the AIFMD rules:

(i) a co-operation agreement has to be in place between the jurisdiction in which the fund is based and the UK – to date, the UK has entered into at least 43 MoUs with various jurisdictions;

(ii) the manager has to notify the FCA that it will be marketing the fund in the UK and provide certain information about the fund to the FCA;

(iii) the manager will have to provide certain pre-investment transparency information, which is usually set out in the offering memorandum;

(iv) the manager will have to report at least on an annual basis to the FCA and investors and this will include disclosures on the aggregate pay of the staff of the manager; and

(v) if applicable, the manager will need to comply with the rules on asset-stripping and transparency on acquisition of controlling stakes.

Notification to the FCA

The two registers relevant to a US manager are:

(1) Article 42 Register – for non-EU AIFMs that are not small AIFMs managing AIFs; and

(2) Small third country AIFM Register – for non-EU AIFMs that are small AIFMs managing AIFs.

These forms can be found under Forms in the AIFMD NPPR section of the FCA website at: www.fca.org.uk/firms/markets/international-markets/aifmd/nppr

The FCA has further confirmed that a non-EU AIFM marketing its AIFs in the EU under Article 42 will not be deemed by the FCA to be a financial counterparty for the purposes of EMIR (the EU regulation on derivatives, central counterparties and trade repositories). This means that the AIFM will not be subject to the EMIR reporting obligations, which came into effect on 12 February 2014.

Further details regarding the FCA's private placement regime can be found in the FUND sourcebook of the FCA Handbook at FUND 10.5: http://fshandbook.info/FS/html/FCA/FUND/10/5

Reverse solicitation

A manager may be able to rely on reverse solicitation or passive marketing. The most important point to note is that there is little firm guidance as to what constitutes reverse solicitation.

Marketing for AIFMD purposes means any offering or placement of shares/units in an AIF at the initiative of the AIFM or on behalf of the AIFM to or with EU investors.

Thus, the above definition does indicate that reverse solicitation i.e. where an investor approaches the AIFM for the purposes of investing without prior solicitation, is not considered 'marketing' under the AIFMD. The AIFMD itself and the Level 2 Regulations specify that the AIFMD requirements that would otherwise apply to the manager of a fund being marketed in the EEA do not apply to an offering or placement of units/shares of a fund where the marketing activity takes place in the EEA at the initiative of the EEA investor.

According to FCA guidance (FCA Handbook PERG 8.37.11), if the AIFM can show evidence of confirmation from the investor that the offering or placement was made at the investor's initiative, this should normally be sufficient to demonstrate that this is the case, provided that the confirmation is obtained before the offer or placement takes place. However, please note that this confirmation can not be relied upon if it was obtained in order to circumvent the AIFMD.

The FCA has said that in supervising this area, it will take account of any evidence suggesting that marketing activity has been going on.

Please note that the words '...or on behalf of...' in the definition of 'marketing' under the AIFMD mean that if an AIFM utilises distribution or placement agents to market its AIFs, that AIFM would still be regarded as carrying on the "marketing" and thus be subject to the marketing provisions of the Directive (to the extent applicable). An AIFM cannot therefore rely on reverse solicitation simply because the AIFM did not approach the investor directly. For those managers utilising a third party marketer, the third party marketer will more than likely be performing indirect marketing under AIFMD.

On the basis of the above, if a manager wishes to rely on reverse solicitation, it will need to ensure that it has confirmation from the prospective UK investor that the investor is approaching the fund entirely at its own initiative. This confirmation should be sought prior to any marketing materials being sent or any offer or placement taking place.

It is important to be able to demonstrate that the manager did not approach the investor to market the fund but, as mentioned above, there is no firm guidance on reverse solicitation or any indication as yet as to how strictly the FCA will construe the legislation. Thus, any reliance would have to be made at the determination of the manager taking into account all the particular circumstances.

Financial promotion

It is important to note, however, that in addition to the above, the manager marketing the fund will be subject to the FCA financial promotion rules, namely that the fund can only be offered to certain types of investors, such as investment professionals and high net worth and sophisticated investors.

Regulated activity – advising and arranging

In addition to the restriction on financial promotion, a manager will not be permitted to carry out any regulated activity in the UK without authorisation. As regards marketing, the relevant regulated activities are usually advising and arranging. If the manager is arranging deals in the UK, it will either need to be authorised or fall within an exemption. Dealing with an application by an investor in the fund would usually amount to arranging for FCA purposes. Only regulated activities carried on in the UK will fall within the scope of FSMA and while it is often clear where an activity is being carried on, activities with a cross border element usually require further analysis. Although FSMA and the FCA rules do not specify where particular regulated activities are regarded as carried on, it is commonly considered that investment advice is given where it is received and arrangements relating to investments are normally carried on at the place where the arranger is when the arrangements are made.

Thus, if it is the case that all arrangements for raising funds from the UK investor take place outside of the UK, then the activity could be deemed to fall outside the territorial scope of FSMA. If this is not clear cut, however, and an element (or elements) of the activity are carried on within the UK, then a manager will need to consider whether any exemption applies, either generally or specifically, to the act of arranging. Similarly in the case of advising. As regards general exclusions, the overseas person exclusion under Article 72 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO") may be applicable.

Article 72 RAO will apply to an overseas person which carries on certain regulated activities (including advising and arranging) but which does not do so, or offer to do so, from a permanent place of business in the UK, subject to the following condition, namely that the arranging is carried on as a result of a 'legitimate approach'. This means that the approach made by the overseas person does not breach the financial promotion rules (as mentioned above).

Next Steps

Should you wish to discuss any of the points raised in the above or any other AIFMD issues in more detail, please contact Claire at claire.cummings@cummingslaw.com

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