

## *Financial Services and Markets*

### *The countdown to AIFMD implementation: FSA consultation*

On 14 November 2012 the FSA published the first of two consultations on the new Financial Conduct Authority ("FCA") rules implementing the Alternative Investment Fund Managers Directive ("AIFMD"). The FSA hopes to publish its second consultation in February, followed by a single policy statement covering all the new rules in June 2013. A Treasury consultation paper, dealing with amendments to the UK regulated activities regime and powers for the FCA is expected shortly. The FSA paper will be of significant interest to any prospective UK AIFM or depositary. It also proposes changes for UCITS firms, whether or not they manage AIFs. While there are still some gaps, caused principally by the continued delay in the publication of the European implementing Regulation (known as the "Level 2 Regulation"), there is enough information in the paper for these firms to significantly advance their AIFMD planning. Implementation is now just over 7 months away.

The consultation is open until **1 February 2013**. A copy of the paper can be accessed [here](#).

Some key issues covered in the paper include:

- **Transitionals and Authorisation**

AIFMs already managing AIFs before 22 July 2013 will be permitted to continue managing AIFs for up to one year under the then applicable FCA handbook provisions. Firms which currently carry on business as an AIFM without requiring authorisation (e.g. internally managed investment companies) may continue to do so on this basis during the same transitional period. All such firms will have to submit an application for AIFM authorisation or variation of permission by 22 July 2014 at the latest and comply with the new rules from that date.

Any firm which has not managed AIFs before 22 July 2013 (apparently even if it was marketing before that date) will have to apply for authorisation as an AIFM, without any transitional relief.

The CP indicates that the FCA does not expect to begin accepting applications for authorisation (or variation of permission) from prospective AIFMs before 23 July 2013. The FSA does not indicate how this will affect marketing of EU AIFs by UK AIFMs, either within the UK or elsewhere in the EEA, where this marketing occurs in the period between 22 July 2013 and authorisation (or variation of permission) being granted - the AIFMD marketing regime is generally predicated upon the manager being *authorised as an AIFM*. This is a significant issue which introduces unwelcome uncertainty for firms.

The FSA has not yet decided whether it will offer a "grandfathering" mechanism for firms currently authorised to operate collective investment schemes, whereby an "automatic" variation of permission would be applied to their existing permissions. If it were to do so this might serve to reduce or eliminate the "marketing gap" outlined in the previous paragraph for such firms.

- **Passporting of MiFID services**

The FSA provides some helpful comments with regards to whether an AIFM that carries out certain MiFID services will be able to passport those services into other EU member states – its view is that such a firm will have this right.

- **Letterbox test**

The AIFMD prohibits an EU AIFM from delegating functions to such extent that it becomes a "letter-box" entity. The Commission's Level 2 Regulation will set out circumstances where an entity is deemed to be a "letter-box". Subject to that, the paper sets out useful guidance on how the FSA proposes to assess this test.

- **New Investment Funds sourcebook (FUND)**

This will set out many of the key rules for AIFMs and depositaries. It will also replace the current COLL sourcebook for UCITS managers and UCITS funds.

- **Regulatory capital**

The paper sets out the FSA's detailed proposals for regulatory capital for AIFMs and UCITS managers. We have been advising firms extensively on these requirements. The FCA will group managers into three categories: (i) Collective Portfolio Management Firms (i.e. external AIFMs and/or UCITS firms who do not provide MiFID services), (ii) internally managed AIFs and (iii) Collective Portfolio Management Investment Firms (i.e. external AIFMs and/or UCITS firms providing limited MiFID services).

UCITS firms who do not manage AIFs will be surprised to learn that the FSA proposes to impose the AIFMD liquid assets requirement on them. This is not required by either the AIFMD or UCITS Directive.

The paper includes new template GABRIEL returns.

- **Depositaries**

The paper contains a number of key depositary provisions. Where the AIF is not an authorised fund, the FSA is minded to allow an AIFM to appoint an affiliate as its depositary provided sufficient independence is ensured and conflicts can be managed, although the FSA questions whether this proviso can be met when title to the AIF's assets is held by the affiliated depositary (i.e. rather than the AIF itself or an independent third party).

The paper sets out the FSA's proposed approach to approving private equity/real estate fund administrators as depositaries. It refers to these as "PE AIF depositaries". The paper contemplates they must have a minimum capital requirement of €125,000, but indicates that this is based on an assumption that they will not provide safekeeping duties in relation to any AIF financial instruments that can be held in custody (such as some transferable securities) and are therefore only required to verify the ownership of other types assets belonging to the AIF. This assumption is likely to be ill-founded in the context of the majority of private equity funds – note that the FSA seeks views on whether to set a higher capital requirement (for instance by way of a higher own funds requirement or the application of an expenditure-based requirement) where the PE AIF depositary also holds relevant financial instruments in custody.

- **Remuneration**

The paper includes a draft AIFM Remuneration Code. This will be separate from the FSA's existing Remuneration Code, but follows much of its structure. The draft included in the paper omits any guidance on proportionality. The FSA has indicated that it will publish this guidance following publication of the final ESMA guidelines on remuneration. Without this the current draft is of limited value.

The FSA does, however, provide a useful indication of its preferred approach to firms which will be subject to both the current Remuneration Code and the new AIFM Remuneration Code. It is minded to regard compliance with the AIFM Remuneration Code as satisfying the requirements of the current Code.

We will be offering workshops on the implementation of the Directive once the Level 2 Regulation has been published.

For detailed advice in relation to the consultation paper or any aspect of AIFMD, please contact any of the financial services partners named below.

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