

Financial Services and Markets

Countdown to AIFMD – Second Treasury consultation

On 14 March 2013, HM Treasury published the second of its two consultation papers on its proposals as to how the Alternative Investment Fund Managers Directive ("**AIFMD**" or "**the Directive**") will be transposed into UK law on 22 July 2013. The paper addresses a number of matters postponed from the earlier consultation and closes in just over three weeks, on **5 April 2013**. It does not address issues raised in responses to its first consultation. A copy of the paper is available [here](#).

Outline

The consultation paper addresses:

- the marketing of non-UCITS retail funds;
- the application of the approved persons regime to investment companies;
- the application of the Financial Services Compensation Scheme to EEA AIFMs;
- the application of AIFMD to managers and trustees of Common Investment Funds and Common Deposit Funds;
- the impact of the European Venture Capital Funds Regulation and the European Social Entrepreneurship Funds Regulation; and
- the fact that there is disagreement in Europe as to whether non-UK EEA AIFMs would be able to passport discretionary portfolio management services and other non-core services.

Marketing of non-UCITS retail funds

The first Treasury consultation paper set out the Government's complex proposals regarding the marketing of AIFs and the inter-relationship between the AIFMD regime and the existing UK financial promotion regime (see our [briefing note](#) for further details). These included the requirement that marketing of non-UCITS retail schemes (NURS) and qualifying investor schemes (QIS) should be subject to FCA approval. However, the Treasury had postponed discussion of the marketing of other (non-UK) non-UCITS retail schemes in the UK.

In the second consultation paper the Treasury now proposes amending the existing "recognised schemes" marketing regime in sections 270 and 272 of FSMA. This would involve:

- a revocation of section 270 (and 271) FSMA (funds managed and authorised in designated territories (i.e. the Isle of Man, Guernsey and Jersey)); and
- a reform of section 272 FSMA (individually recognised overseas schemes) to apply to all non-UK schemes (including those managed and authorised in the current designated territories) and to impose more stringent requirements over and above the existing section 272 recognition process so that:
 - while the regulator is already required, in deciding whether constitutional and management arrangements are adequate and that the powers and duties of the operator (and if relevant) trustee or depositary are adequate, to have regard to any rule of law and any matters which are, or could be, the subject of rules applicable in relation to non-UK "comparable authorised schemes" (i.e. comparable to UK retail funds), it will also have to have regard to the extent to which the home state regulator of the AIF and its AIFM had already implemented AIFMD requirements;

- under a new section 277A FSMA, the operator of a recognised overseas scheme would be required to provide a written statement to the FCA either confirming that the scheme complies with the rules/requirements comparable to the current UK regulatory requirements for retail funds (see point immediately above) or identify where there is divergence and confirming compliance in all other respects – such a statement would have to be provided once a year;
- in an amendment to section 277 FSMA, the same confirmation would be required to be included in the notice required in the event of any proposed alteration to the scheme or to the operation of the scheme which would affect its ability to satisfy the requirements comparable to the rules/requirements comparable to the current UK regulatory requirements for retail funds (see above).

Under a transitional provision, all existing Isle of Man, Jersey and Guernsey schemes recognised under section 270 would be automatically treated as recognised under the revised section 272 as from 22 July 2013 and *as if they had* each provided the written statement of compliance under section 277A (see above) as of that date. Any such scheme which failed to provide an actual confirmation of compliance before 22 July 2014 (the end of the transitional period) would cease to be recognised on that date.

Application of the approved persons regime to Investment Companies

The approved persons regime will apply to external managers of investment companies, regardless of whether they are above or below the AIFMD's *de minimis* threshold.

However, the approved persons regime will not be applied to internally managed investment companies – regardless of whether they are above or below the threshold. An amendment to section 59 FSMA will make this express.

Application of the Financial Services Compensation Scheme to EEA AIFMs

The Government's preferred option is to restrict FSCS coverage so that only incoming non-UK EEA AIFMs of UK authorised unit trusts or open-ended investment companies would be compulsorily subject to the FSCS and required to pay levies. The FSA's second consultation paper will be addressing this preferred option as to scope.

Application of AIFMD to Common Investment Funds and Common Deposit Funds

Common Investment Funds (CIFs) and Common Deposit Funds (CDFs) are established under UK charities legislation, benefit from charitable tax reliefs and exemptions and are regulated by the Charity Commission, while the managers and corporate trustees of the funds are managed by the FSA. They fall within the definition of AIFs under the AIFMD (although certain church-specific funds which are similar to CIFs and CDFs will not on the basis that, according to the Treasury's analysis, they do not raise external capital and are not managed as a regular business).

It follows that managers and corporate trustees of CIFs and CDFs (other than church funds) will be subject to AIFMD, subject to transitional arrangements. Where relevant, the sub-threshold AIF regime as proposed in the first Treasury consultation paper, will apply: the AIFM will be required to register as a small authorised UK AIFM and will be subject to the existing requirements applying to collective investment scheme operators. No additional AIFMD requirements will be imposed.

The Treasury notes that the Charity Commission may require fund managers wishing to set up new CIFs or CDFs in the future to be authorised as full-scope AIFMs; the Commission will be providing an updated model scheme on its website shortly in order to facilitate the transition to AIFMD.

The draft Alternative Investment Fund Managers Regulations 2013 include amendments to charities legislation (the Charities Act 2011 and the Charities Act (Northern Ireland) 1964 so that any charity within the meaning of Schedule 6 of the Finance Act 2010, from any EU Member State, will be able to invest in CIFs and CDFs and can therefore be marketed to by authorised AIFMs (as professional investors).

Impact of the European Venture Capital Funds Regulation and the European Social Entrepreneurship Funds Regulation

The first consultation paper suggested that the second consultation paper would discuss the impact of these Regulations. As it happens, the second consultation paper does not actually contain any specific proposals in this regard. It is likely that both the European Venture Capital Funds Regulation and the European Social Entrepreneurship Funds Regulation will be agreed by the European Parliament and Council prior to the AIFMD implementation date of 22 July 2013. The European Parliament adopted legislative resolutions containing revised versions of the Regulations earlier this week. In a press release welcoming this, the European Commission said that the Council is expected to adopt the Regulations on 21 March 2013 and that they are estimated to be in force "before the summer".

Both Regulations will be directly applicable in the UK, without the requirement for any implementing legislation, but technical amendments to the FCA's powers under the Financial Services and Markets Act 2000 ("**FSMA**") may be necessary, together with possible changes to the UK regulations implementing the AIFMD and other directly applicable EU Regulations.

Any such UK amending legislation will appear in draft on the Treasury website "in due course".

Passporting

The Treasury's proposals are predicated on the assumption that non-UK EEA AIFMs would be able to passport their discretionary, client-by-client portfolio management services and other "non-core" activities (investment advice, safe-keeping and administration and reception and transmission of orders) under Article 6(4) AIFMD. The UK's view that this is permitted is not shared by all EU supervisors and "the FSA is working with its counterparts in Europe in an effort to address this issue".

The Alternative Investment Fund Regulations 2013

A set of draft Regulations is attached to the second consultation paper. These Regulations are intended to be combined with the draft Regulations appended to the first consultation – i.e. following the consultation and feedback process there will be a single set of final Alternative Investment Fund Managers Regulations 2013 consolidating the provisions set out in both consultation papers.

The draft Regulations attached to the second consultation paper therefore only address those new matters subject to consultation and do not address issues of concern that we identified in the first set of Regulations and which we have drawn to the Treasury's attention. It is to be hoped that these issues will be addressed in the final Regulations.

Our other recent briefing notes on the countdown to AIFMD

[The countdown to AIFMD – \[the first\] Treasury consultation](#)

[The countdown to AIFMD implementation: FSA consultation](#)

[Countdown to AIFMD – Level 2 Regulation](#)

[Countdown to AIFMD – two ESMA papers on scope](#)

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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