

Financial Services and Markets

Countdown to AIFMD – UK Treasury's revised implementing Regulations

The UK Treasury today published its responses to its January and March consultation papers on implementation of the Alternative Investment Fund Managers Directive ("**AIFMD**" or "**the Directive**"). An amended version of the Alternative Investment Fund Managers Regulations 2013 ("**the UK Regulations**") has also been published.

Copies of the Treasury responses are available [here](#) and [here](#).

A copy of the amended UK Regulations is [here](#).

Summary

In this note we focus on some of the main points of importance to our clients which emerge from the response to the January consultation and the revised draft UK Regulations. These are summarised below.

Transitional arrangements

- **Availability of the "one year" AIFM transitional:** as heralded in the Treasury's recent Q&As, the Government's position is that the one year's transitional provision for AIFMs is available to (a) UK and EEA AIFMs who are managing AIFs and (b) to non-EEA AIFMs who are marketing an AIF in the EEA, in either case "immediately before" 22 July 2013. It is clear that this transitional provision will also allow an EEA AIFM which qualifies for the transitional to launch and market new AIFs during the transitional period. It also appears to allow a non-EEA AIFM marketing an AIF in the EEA immediately before 22 July 2013 to market other AIFs during the transitional period. However, non-EEA AIFMs will need to consider carefully whether they are "marketing" in the UK "immediately" before 22 July 2013, taking into account the definition of marketing and the relevant FCA guidance.

This approach means that the AIFMD marketing requirements will not apply until the earlier of 22 July 2014 or the date on which the AIFM's application for authorisation has been determined or, in the case of a third country AIFM, the date on which the AIFM notifies the FCA that it intends to market in the UK under Article 42 of the Directive. This is good news for firms, meaning that marketing in the UK may continue as before until summer 2014 at the latest. However, as we noted in our previous briefing, while this is helpful for inward marketing into the UK, it does not assist with wider European marketing and it may still be necessary to prepare AIFMD-compliant offering documents in order to market in at least some other EEA jurisdictions from 22 July 2013.

- **Trustees/Depositaries get their own "one year" transitional:** following feedback, the Government has decided to extend the same one year transitional relief that is available for AIFMs to depositaries – i.e. so that they have up until 22 July 2014 in which to become authorised with the new specified activity of acting as a trustee or depositary of an AIF. This means they can act as an AIFM depositary before they have the specific depositary authorisation. However, there are limitations to this transitional relief:
 - the depositary/trustee will, during the transitional period, have to comply with all the other applicable AIFMD implementing provisions as if it had Part 4A permission – i.e. it is only relieved from having to get the new permission;
 - the transitional provision is only available to firms that are already authorised persons. Where authorised AIFs are involved the firm must have an existing Part 4A permission to act as the trustee of an authorised unit trust scheme, the depositary of an authorised contractual scheme or the depositary of an open-ended investment company. The transitional provision does not assist a would-be depositary (or its clients) if it is not currently authorised. This may be relevant in particular to some firms looking to provide their services as an "alternative

depository", some of which may not already be authorised. As currently drafted, there seems to be no alternative but for such firms to ensure that they have the appropriate Part 4A permission before they can be appointed as a depository.

- **UK AIFMs managing funds in run-off or with limited life:** an AIFM will not need to apply AIFMD compliance to AIFs which fall within the exemptions concerning run-off (i.e. no further investments from 22 July 2013), and limited life (i.e. fully raised/subscription period closed before 22 July 2011 and scheduled to end their life before 22 July 2016). This grandfathering provision no longer requires the AIFM to be exclusively managing such AIFs – i.e. it can manage other "live" AIFs, without losing the grandfathering relief in relation to run-off/limited life funds.

"Managing an AIF"

- No change has been made to the core definition of "managing an AIF" – it means performing at least risk management or portfolio management for the AIF (as those terms are defined in the Directive). There is therefore no express requirement on the face of the UK Regulations for both functions to be carried on in order to be "managing an AIF", although the practical reality is that, in order to obtain FCA permission as an AIFM, a firm will need to be responsible for both. However, firms which carry out either the risk management or the portfolio management function as delegates will not need permission to manage an AIF (unless the delegator is a "letterbox").
- As proposed in the consultation draft, the ancillary activities listed in paragraph 2 of Annex I of AIFMD (administration, marketing and any other activities carried out "with or for the purposes of" the management of the AIF) are included as part of the regulated activity of managing an AIF.

Marketing

- Definition of "marketing" – the consultation draft did not fully reflect the Directive definition. The revised UK Regulations now copy out the Directive text. As a result marketing (within the meaning of the UK Regulations) is defined as being at the initiative of, or on behalf of, the AIFM.
- The effect of the change is that:
 - anything that is not "marketing" under the AIFMD as defined (such as marketing that is not by or on behalf of or at the initiative of the AIFM), will be subject to the financial promotion regime and the promotion of collective investment schemes regime;
 - the "routes" by which non-UK firms may market to retail investors are:
 - an EEA AIFM may exercise its marketing passport (to market to professional investors), and then market to retail investors in accordance with the UK financial promotion regime;
 - an EEA AIFM need not exercise its passport right if it only wants to market to retail investors, in such a case it can apply to the FCA for specific consent to market to retail investors (Regulation 54);
 - a non-EEA AIFM may market under Article 42 of the Directive (Regulation 59 of the revised UK Regulations) – this will require notification to the FCA and a self-certification as to compliance with certain conditions (including as to the existence of cooperation arrangements and "clean" NCCT status) and (insofar as is relevant) ongoing compliance with the transparency provisions of the Directive and the 'private equity' provisions (acquisition of control of non-listed companies/issuers and asset stripping).

Sub-threshold schemes

- **Sub-threshold NURS and QIS:** In the light of responses, the Government has reversed the original proposal to make managers of "authorised AIFs" – i.e. Non-UCITS Retail Schemes (NURS) and Qualified Investor Schemes (QIS) - subject to the full requirements of the Directive. Now, no new AIFMD requirements will be applied in relation to such schemes.
- **Sub-threshold internally-managed UK investment trusts and VCTs:** there is no change to the *de minimis* registration regime (with some minimal disclosure obligations) proposed in the consultation draft. The existing requirements under UK company law and the Prospectus and Transparency Directives will continue to apply.
- **Sub-threshold externally-managed investment companies:** the government will maintain the *status quo* for external managers of sub-threshold investment companies.

Our other recent briefing notes on the countdown to AIFMD

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

[The countdown to AIFMD - Second Treasury consultation](#)

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

[The countdown to AIFMD – Second FSA consultation](#)

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

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

[Countdown to AIFMD – UK Treasury's implementation Q&As](#)

For detailed advice on the proposed implementation provisions or any other aspect of AIFMD, please contact any of the financial services partners named below.

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