AIFMD Factsheet: Private Placement Post-AIFMD

What is the AIFMD?

The Alternative Investment Fund Managers Directive ("AIFMD") introduces a new passport system for the marketing of alternative investment funds ("AIFs") in the European Union ("EU"). The marketing passport is automatically available to authorised EU alternative investment fund managers ("AIFMs") managing EU AIFs. However, the AIFMD introduces different rules for non-EU AIFMs and non-EU AIFs which mean that the passport will not be available for non-EU AIFMs and non-EU AIFs until legislation is adopted extended the passport. This factsheet discusses the conditions which apply to the private placement of funds in the EU following implementation of the AIFMD.

Is Private Placement still Possible after 22 July 2013?

Who May Use Private Placement?

Subject to the national private placement regimes ("NPPRs") in place in each EU member state, private placement may be available to the following managers following AIFMD transposition:

- EU AIFMs marketing non-EU AIFs; and
- Non-EU AIFMs marketing AIFs, whether EU or non-EU AIFs.

The above AIFMs may be able to continue to make use of NPPRs until at least 2018, subject to a number of mandatory conditions which will apply over and above the private placement rules operating from jurisdiction to jurisdiction. Unless and until the passport is extended, NPPRs will be the sole regime available to non-EU AIFs and non-EU AIFMs wishing to market in the EU (ie, non-EU AIFs and non-EU AIFMs will not be able to avail of the marketing passport offered by the AIFMD). By 22 July 2015, the European Securities and Markets Authority ("ESMA") was required to deliver an opinion to the European Commission (the "Commission") and European Parliament on whether the marketing passport ought to be extended to non-EU AIFMs / non-EU AIFs. ESMA issued an opinion in late July 2015 recommending that the passport be extended to Guernsey, Jersey and Switzerland but no legislation has been adopted extending the passport as yet.

Private Placement May Not be Available

The availability of private placement after 22 July 2013 depends on NPPRs applicable in each member state. In the negotiations preceding the introduction of the AIFMD, the ability of non-EU AIFMs and non-EU AIFs to market in Europe was one of the more controversial issues, giving rise to the possibility that member states who were not happy with the outcome of the negotiations would move unilaterally to impose stricter private placement requirements or simply not permit private placement at all. In this regard, it is noted that Germany’s pre-existing private placement regime was abolished following the end of the grandfathering period on 22 July 2014 and it has been replaced by a new pre-notification regime. The Netherlands has also stated that following AIFMD implementation, the Dutch private placement regime is only available to managers under the thresholds set out in the AIFMD.

Requirements Applicable to EU AIFMs Marketing Non-EU AIFs

EU AIFMs seeking to privately place non-EU AIFs are required to comply in full with the AIFMD, excluding the depositary provisions. The AIFM must, however, ensure that one or more entities are appointed to carry out the depositary duties set out in the AIFMD, including cash flow monitoring, custody of financial instruments capable of being held in custody and record-keeping of financial instruments not capable of being held in custody. The AIFM is required to provide its supervisory authority with information about the identity of the entities responsible for carrying out the depositary duties.

The disapplication of the balance of the AIFMD depositary provisions means that the AIFMD liability regime for depositaries, including the strict liability standard for loss of instruments held in custody, does not apply to the entities carrying out the depositary functions in these circumstances. This is sometimes referred to as the “depositary-lite” regime.
**Additional Requirements**

- There must be cooperation arrangements in place between the regulator of the AIFM and the regulator of the non-EU AIF to ensure efficient exchange of information.

- The third country where the non-EU AIF is established must not be listed as a “non-cooperative country” by the Financial Action Task Force (“FATF”).

**Requirements Applicable to Non-EU AIFMs Marketing AIFs**

Non-EU AIFMs seeking to privately place non-EU or EU AIFs are subject to AIFMD requirements to include annual reporting, mandatory investor disclosure obligations and regular reporting to the relevant member state authorities with respect to a list of prescribed matters.

**Reporting Requirements**

**Who does the non-EU AIFM report to?**

Non-EU AIFMs must report to the regulatory authorities in each of the member states into which they intend to privately place their AIFs.

**What does the non-EU AIFM have to report?**

The detailed reporting requirements set out in the AIFMD include the following:

- The non-EU AIFM must make available an annual report for each AIF it markets in the EU to the regulatory authorities in the home member state of each EU AIF or the regulatory authorities in the member states where each non-EU AIF is privately placed. The annual report must include the following information:
  - a balance sheet or statement of assets and liabilities;
  - an income and expenditure account;
  - a report on activities;
  - any material changes in the information provided to investors before they invested in the AIF;
  - the total amount of remuneration, split into fixed and variable remuneration, paid by the AIFM to its staff and the number of beneficiaries; and
  - the aggregate amount of remuneration broken down by senior management and members of staff of the AIFM whose actions have a material impact on the risk profile of the AIF.

- The non-EU AIFM must regularly report to the regulatory authorities in each member state where it markets its AIFs on the principal markets and instruments in which it trades on behalf of the AIFs it manages. ESMA has clarified that this requirement will only apply to AIFs marketed in member states and not all the AIFs managed by the AIFM (with the exception of master AIFs of EU feeder AIFs and master AIFs of feeder AIFs marketed in member states).

- The non-EU AIFM must provide the following information to the regulatory authorities in each of the member states where it markets its AIFs, in relation to each EU AIF it manages and each AIF it markets in the EU:
  - the percentage of the AIF’s assets which are subject to special arrangements arising from their illiquid nature;
  - any new arrangements for managing the liquidity of the AIF;
  - the current risk profile of the AIF and the risk management systems employed by the AIFM to manage the market risk, liquidity risk, counterparty risk and other risks including operational risk;
information on the main categories of assets in which the AIF invested; and

the results of the stress tests required to be performed under the AIFMD relating to risk management and liquidity management.

The Non-EU AIFM must, on request, provide a detailed list of all AIFs which the AIFM manages for the end of each quarter.

A non-EU AIFM employing leverage on a substantial basis must provide information about the overall level of leverage employed by each EU AIF it manages and each AIF it markets in the EU, a break-down between leverage arising from borrowing of cash or securities and leverage embedded in financial derivative instruments and the extent to which the AIF’s assets have been reused under leveraging arrangements. Leverage shall be considered to be employed on a substantial basis when the exposure of an AIF, as calculated according to the commitment method, exceeds three times its net asset value.

The Commission published a delegated act in December 2012 (the “Level 2 Regulation”) which provides further detail as to the reporting requirements under the AIFMD and also provides a pro-forma reporting template.

How often must the non-EU AIFM report?

The Level 2 Regulation sets out the frequency at which the specified information must be reported to regulatory authorities.

- AIFMs that manage assets exceeding the threshold of €100 million (leveraged) or €500 million (unleveraged) but less than €1 billion must report semi-annually.
- AIFMs with more than €1 billion under management must report on a quarterly basis.
- Where an AIFM having total assets under management exceeding the AIFMD thresholds but less than €1 billion manages individual AIFs with assets under management exceeding €500 million, reporting in respect of those AIFs must be on a quarterly basis.

Member states may impose stricter rules requiring all or part of the specified information to be reported on a more frequent basis.

Additional Requirements

Cooperation arrangements must be in place between the regulatory authorities in the member states where the AIFs are marketed, the regulators in the countries where the AIFs are established and the regulatory authority in the home country of the AIFM. The relevant non-EU jurisdictions concerned must not be listed as a “non-cooperative country” by FATF.

The AIFMD confers a discretion on member states to impose stricter rules on non-EU AIFM marketing under NPPRs. As mentioned above, it is possible that some member states may take steps to restrict their existing NPPRs or simply not permit non-EU AIFM to privately place at all.

Private Placement by Sub-threshold EU AIFMs

EU AIFMs managing assets below the thresholds specified in the AIFMD (where the AIFM manages assets under €100 million or under €500 million where the AIFs do not use leverage and have a five year lock-in period) may only market in the EU subject to the NPPRs in place in each jurisdiction. Such AIFMs must register with the regulatory authorities in their home member state and comply with minimum reporting requirements. Sub-threshold EU AIFMs have the option to opt in under the AIFMD and thereby avail of the marketing passport.

A Note on Passive Marketing / Reverse Solicitation

The AIFMD defines marketing as “any direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares in an AIF it manages to or with investors domiciled in the Union.” The words “at the initiative of the AIFM” mean that reverse enquiries by investors will not be caught under the definition; thus “passive” marketing by AIFMs would not be considered to be “marketing” under the AIFMD. The words “direct or indirect” and “or on behalf of the AIFM” indicate that the AIFM would be considered to be “marketing” even if all actual marketing activity was carried out in the EU solely by a marketing or distribution agent.
The first draft of the AIFMD proposed a prohibition on reverse solicitation. While this prohibition was ultimately removed from the final AIFMD, it is indicative that many member states will focus closely on claims that investors invested in AIFs through reverse solicitation. It is important for AIFMs to maintain records which clearly prove that the investment was a reverse solicitation and to take advice if any doubt exists as to whether it is possible to categorise an approach as a reverse solicitation.

**The End of Private Placement?**

As noted above, until the AIFMD passport is extended, marketing under NPPRs will be the only regime available to non-EU AIFs and non-EU AIFMs wishing to market in the EU, subject to the NPPRs, if any, in each member state. Between the date of the extension of the passport (if the passport is in fact extended) and 2018, NPPRs and the European passport could co-exist. In 2018, ESMA is required to provide a recommendation as to the desirability of terminating the NPPRs. If it does so, the Commission will have to pass secondary legislation phasing out NPPRs.

**Private Placement in Ireland**

Private placement is available in Ireland post-implementation of the AIFMD, subject to the AIFMD conditions and written notification of intention to market being made to the Central Bank of Ireland (the “Central Bank”).

**The Self-managed AIF – A Passporting Alternative**

As a practical matter, this means that an EU AIFM which markets an EU AIF, or a self-managed EU AIFM, will have an advantage over any EU or non-EU AIF which markets a non-EU AIF, as that EU AIFM will have the full benefit of the passporting regime from the date of authorisation. The AIFMD envisions that where the legal form of the AIF permits internal management and the AIF chooses not to appoint an external AIFM, the AIF may itself be authorised as an AIFM. In Ireland, the self-managed investment company is a self-managed fund structure permitted for UCITS and non-UCITS which was already firmly embedded within the Irish regulatory framework prior to AIFMD implementation. Non-EU managers can therefore avail of the marketing passport by designating the EU AIF it intends to market as the authorised AIFM, which in turn could delegate investment management functions to the non-EU manager.

**Summary of Private Placement Costs**

<table>
<thead>
<tr>
<th>Private Placement Fee</th>
<th>UK</th>
<th>France</th>
<th>Luxembourg</th>
<th>Ireland</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supervisory Fee Per Annum</td>
<td>£500 stg</td>
<td>€2,000</td>
<td>€500</td>
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<tr>
<td>Notification Fee Per AIF: Full scope AIFM</td>
<td>£250 stg</td>
<td>€2,000</td>
<td>€2,650</td>
<td>No Fee</td>
</tr>
<tr>
<td>Notification Fee Per AIF: Sub-threshold AIFM</td>
<td>£125 stg</td>
<td>€2,000</td>
<td>€2,650</td>
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</tr>
<tr>
<td>Notification Fee Per Umbrella AIF: Full scope AIFM</td>
<td>£250 stg</td>
<td>€2,000</td>
<td>€5,000</td>
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<tr>
<td>Notification Fee Per Umbrella AIF: Sub-threshold AIFM</td>
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<td>€2,000</td>
<td>€5,000</td>
<td>No Fee</td>
</tr>
<tr>
<td>Notification Fee Per Sub Fund: Full scope AIFM</td>
<td>£250 stg</td>
<td>€2,000</td>
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<td>Notification Fee Per Sub Fund: Sub-threshold AIFM</td>
<td>£125 stg</td>
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<td>N/A</td>
<td>No Fee</td>
</tr>
</tbody>
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Source: HFM Week September 2014

Full details of the Asset Management and Investment Funds Group, together with further updates, articles and briefing notes written by members of the Asset Management and Investment Funds team can be accessed at www.matheson.com.

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