

the FAQ states: *'and/or have to be covered by the law of that country'*, such double protection cannot be required by FINMA. It should be sufficient if either an equivalent local depositor protection scheme exists, or the law of that country requires sufficient coverage and such protection can be evidenced by the applicant.

IV. Further Changes

By revising the FAQ, FINMA also ***took the opportunity to make some further changes.***

For example, when answering how the payment obligation for depositor protection must be booked and backed by capital, the old FAQ stated that the payment obligation has to be booked as an irrevocable commitment under the off-balance sheet transactions and that they must be backed by 'equity capital'. FINMA took the opportunity to clarify that the payment obligations for depositor protection must be backed by 'regulatory capital' rather than equity capital, which allows for some flexibility.

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EU Draft Directive on Alternative Investment Fund Managers

Reference: CapLaw-2009-44

On 29 April 2009, the European Commission published its draft Directive on Alternative Investment Fund Managers. The draft directive proposes to regulate all managers of alternative funds established in the EU. Such managers will need to be authorized in their home country to carry out their activity. The holders of such authorization will then be enabled to provide services and distribute the shares of alternative investment funds to professional investors in the entire EU.

By Stephanie Comtesse

1) Background

As a result of the financial crisis, the European Commission published a proposal to introduce harmonized regulation of alternative investment fund managers (AIFM) on 29 April 2009.

2) Scope

The draft Directive on Alternative Investment Fund Managers (Draft Directive) will apply to all AIFM established in the EU. For the purpose of the Draft Directive, alternative investment funds (AIF) are defined as all collective investment undertakings that are not subject to authorization pursuant to the UCITS Directive. Accordingly, not only managers of hedge

funds and private equity funds are concerned but also, for example, managers of real estate funds and commodity funds.

The following AIFM will, however, not be subject to the Draft Directive:

- AIFM whose assets under management, including those acquired by use of leverage, do not exceed 100 million Euro;
- AIFM whose assets under management are not leveraged and do not exceed 500 million Euro, under the condition that the relevant AIF cannot be redeemed for a period of five years following its constitution.

The Draft Directive applies regardless of whether the relevant AIFs are established within or outside of the EU.

3) Authorization

All AIFM subject to the Draft Directive will be required to obtain an authorization from the competent authorities of their home country in order to provide management services to AIF.

The operating conditions to be fulfilled by the applicant for an AIFM authorization include:

- ***Conduct of business rules***

These rules pertain to, in particular, the avoidance of conflicts of interest and efficient internal risk management systems.

- ***Capital requirements***

An initial capital of at least 125,000 Euro, increased by 2% of the amount by which the portfolios managed by the AIFM exceed 250 million Euro, is required.

- ***Organizational requirements***

An independent valuator must be appointed to evaluate the assets and the shares of the AIF.

The depositary must be a credit institution established in the EU. The liability of the depositary towards the AIFM and the investors has been specifically addressed in the Draft Directive.

– *Delegation*

The delegation of tasks incumbent upon the AIFM must be authorized by the competent authority of the home country.

The third party to whom functions are delegated must be creditworthy and experienced.

A delegation of the portfolio management or the risk management can only be approved if these tasks are entrusted to third parties authorized as an AIFM. This implies, in particular, that no delegation to asset managers outside of the EU is possible.

The tasks of the valuator and the depositary may not be delegated.

4) Transparency and Reporting

The Draft Directive is intended to increase the transparency level regarding the AIF by foreseeing harmonized disclosure duties:

The AIFM must issue an audited annual report for each managed AIF and make it available to both, the investors and the competent authorities, within four months of the end of the financial year.

Investors must be provided with various information pertaining to the investment strategy and to the objectives of the AIF prior to an investment. Such disclosures include the assets in which the AIF may invest, the techniques it may implement, the use and limitation of leverage as well as related risks.

The Draft Directive further foresees periodic reporting obligations regarding, in particular, the markets and instruments in which the AIF is engaged. Information regarding liquidity, the risk profile and asset categories of the AIF is also required, as are disclosures on the use of short selling.

Additional reporting and disclosure obligations are imposed upon AIFM which manage leveraged AIF and which acquire controlling influence in companies.

5) Provision of Services by AIFM

a) Marketing of AIF in the Home Country and in Other EU Countries

An authorized AIFM will need to notify the competent authority in its home country of its intention to market shares of AIF to professional investors (as defined in MiFID). Such authority must inform the AIFM within ten days following receipt of the notification whether it may proceed with marketing activities.

The Draft Directive foresees that the EU member states may allow AIF to be marketed to retail investors on their territory. To this effect, further requirements may be imposed upon the AIFM.

In order to market the AIF in another EU country, the AIFM must notify the competent authority of its home country. The notification must include, in particular, the indication of the host countries in which it intends to become active. Within ten working days, the notification will be conveyed to the competent authority in the relevant host country along with a confirmation that the AIFM is authorized. As soon as the competent authority of the home country has transmitted the information to the host country, it shall notify the AIFM. The AIFM may then immediately proceed with marketing in the host country.

b) Management Services

Authorized AIFM will be enabled to provide management services to AIF in all EU countries either directly or through a branch. A notification procedure similar to the one described above regarding marketing services has to take place if the AIFM wishes to provide management services to AIF in a host country.

6) Countries Outside of the EU (Third Countries)

a) Marketing in the EU of AIF Domiciled in Third Countries

The same notification procedure as for EU domiciled AIF applies with respect to the marketing of AIF established outside of the EU to professional investors in the EU by AIFM. Furthermore, an agreement must have been entered into between the third country and the EU member state regarding the exchange of tax information according to the OECD Model Tax Convention.

The provisions of the Draft Directive pertaining to third countries will only enter into force three years after its implementation. In the meantime, AIF domiciled in third countries may still be marketed in the EU pursuant to the relevant national legislation.

b) Marketing of AIF by AIFM Established in a Third Country

EU member countries are enabled by the Draft Directive to authorize AIFM established outside of the EU to market shares of AIF to professional investors in accordance with the Draft Directive under, in particular, the following restrictions:

- The legislation of the relevant third country regarding prudential regulation and ongoing supervision of AIFM is deemed equivalent to the Draft Directive.
- The relevant third country grants EU AIFM effective market access at least comparable to that granted by the EU to AIFM from that country.

- A cooperation agreement is entered into between the competent authority of the EU member country and the regulator of the AIFM ensuring the exchange of information to monitor the implications of the activity of the AIFM with regard to systemic risks and the orderly functioning of the relevant EU country's financial markets.
- The relevant third country has entered into an agreement with the EU member country concerning the exchange of tax information according to the OECD Model Tax Convention. Regardless of the above, AIFM established in third countries will not be allowed to market shares of AIF in the EU for a period of three years following the implementation of the Draft Directive.

7) Implementation

It is currently foreseen that the finalized directive could come into force in 2011.

8) Conclusion and Outlook

Within the EU, the Draft Directive is highly controversial. AIFM appear to be concerned that the implementation will be linked with substantial costs and administrative burdens. Critics complain that managers of all Non-UCITS funds are subject to the Draft Directive. For instance, private equity fund managers question why they should be treated identically to hedge fund managers although their activity does not entail systemic risks. Contrarily, supporters of higher levels of regulation criticize the fact that only the AIFM, but not the AIF themselves, would be regulated. They are opposed to the de minimis exemptions and call for higher capital requirements.

Outside of the EU—and in particular in Switzerland—the Draft Directive raises concerns relating to future access to the EU market. The current version of the Draft Directive does appear to limit the possibility for AIF domiciled or managed outside of the EU to be marketed to professional investors in the EU. Furthermore, at this stage, prospects of AIFM outside of the EU to provide services (in particular asset management services) to AIF in the EU appear to be compromised.

In view of the controversies described above, numerous changes to the Draft Directive are to be expected in the course of the upcoming debates of the European Parliament and Council. Regardless of the outcome, it is already clear that the finalized directive will have a substantial impact on the fund management industry in and outside of the EU.

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