

AIFMD

UK FCA update 29 August 2013

DIRECTIVE 2011/61/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 8 June 2011
on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC
and Regulations (EC) No 1060/2009 and (EU) No 1095/2010



FCA update 29th August 2013

The UK Financial Conduct Authority (FCA) is responsible for the implementation of the Alternative Investment Fund Managers Directive (AIFMD). Its general summary of AIFMD is on its website:

<http://www.fca.org.uk/firms/markets/international-markets/aifmd>

The FCA published its latest update on 29th August 2013.

<http://www.fca.org.uk/firms/markets/international-markets/aifmd/latest-news>

The key points covered were:

- The FCA has signed supervisory co-operation agreements with 42 non-EU authorities. These are to allow the exchange of information between regulators, cross-border on-site visits and mutual assistance in law enforcement. These are designed to help EU regulators supervise compliance with the AIFMD requirements when a non-EU entity is involved in the management or marketing of an alternative investment fund (AIF) within the EU. This is important as non-EU managers marketing AIFs within the EU need to meet upfront and ongoing requirements for information to be provided to investors.

- The FCA has shared the opinion of The European Securities and Markets Authority's (ESMA) for late transposition of the AIFMD. This is discussed on page 4.
- The update includes information for managers who are able to benefit from the transitional arrangements that allow them to defer the point at which they have to be authorised to 22 July 2014. The FCA states in the update that managers need to be fully authorised by 22nd July 2014 and that the FCA may take up to 6 months to process applications. The FCA advises firms seeking an authorisation or a variation of permission under AIFMD (including small authorised UK AIFMs and depositaries) to apply no later than 22 January 2014 in case the FCA needs a full six months to determine the application. At the latest firms that need to be authorised as full-scope UK AIFMs or need to be registered, should submit a complete application no later than 22 April 2014. The FCA will normally determine an application for authorisation as a full-scope UK AIFM within three months, as provided for under Regulation 5(5) of the AIFMD UK Regulation. If applications are not submitted by 22 April, the FCA is under no obligation to process them by the 22nd July deadline. Submitting by 22 January provides the chance to re-submit if there is a problem.



FCA update 29th August 2013

- The update includes some brief comments on the ESMA guidelines on remuneration. As required by ESMA, the FCA has confirmed that it will comply with the guidelines. The FCA recognises that AIFMs may be able to rely on the principle of proportionality as set out in the guidelines. This would allow some AIFMs to dis-apply some elements of the guidelines. However, any AIFMs that do this must be able to justify that full application may be disproportionate. The FCA plans to further consult on how several aspects of the guidelines, such as the proportionality regime, will be implemented in the UK later this year. Subject to the feedback received, the FCA will consider whether any additional guidance on remuneration might be necessary. Although the FCA has not yet issued its own guidelines, it expects firms that are authorised AIFMs to make their best efforts to comply with the ESMA guidelines. Firms taking advantage of the transitional provisions between now and 22 July 2014 do not need to do so until they are authorised as full-scope UK AIFMs.
- The update draws attention to a general policy statement issued by the FCA on 28th June 2013. This is discussed on page 5.
- The final point covered in the FCA update is in respect of the uncertainty over the treatment of managers who provide services regulated by the AIFMD and also services regulated by The Markets in Financial Instruments Directive 2004/39/EC (MiFID). The European Commission takes the view that MiFID services cannot be passported by virtue of the AIFM management or marketing passports. It also stated that an AIFM cannot obtain separate authorisation under MiFID, leading to the position that an AIFM may passport its collective portfolio management services to other EU States but cannot provide MiFID services anywhere in the EU other than its Home State. The FCA disagrees. The FCA states, "*We intend to carry out requests from authorised full scope UK AIFMs to notify the supervisory authority of another EEA State that the firm intends to provide services under Article 6(4) in that Host State. However, such firms should be aware of the risk that the Host State authority may refuse the notification, having regard to the Commission's opinion.*"



ESMA opinion 1st August 2013

Practical arrangements for the late transposition of the AIFMD

ESMA has issued an opinion setting out its position on the arrangements that should apply where member states (MS) have failed to transpose the AIFMD into local law by the deadline of 22 July 2013. The full text is available here:

http://www.esma.europa.eu/system/files/2013-1072_opinion_on_practical_arrangements_for_late_transposition_of_aifmd.pdf

The text of the conclusion of the opinion is reproduced on the right. Broadly the conclusion is that managers can take advantage of passporting even into MS that have failed to implement the Directive.

4. Arrangements before implementation of the Directive in all MS

4.1. Notification of marketing of EU AIFs when the host MS of the AIFM has not transposed the Directive (Articles 31 and 32 of the Directive)

13. ESMA believes that, if the Directive has been transposed in the home MS of the AIFM, the competent authority of the host MS of the AIFM (Article 32) or home MS of the AIFM (Article 31) may not refuse a valid notification under the Directive on the ground that the Directive has not yet been transposed in the host MS. This applies irrespective of whether the marketing is done using the freedom to provide services or by means of a branch.

4.2. Management passport (Article 33 of the Directive)

14. ESMA believes that AIFMs established in a MS that has transposed the Directive should be able to manage an EU AIF via the management passport, both using the freedom to provide services or by means of a branch, in a MS where the Directive has not been transposed, irrespective of the provisions currently in place in such jurisdiction since the relevant provisions of the Directive are of a self-executing nature, and provided the AIFM is authorised to manage that type of AIF in accordance with Article 33(1) of the AIFMD. Any local restrictions on AIFMs that are not in accordance with the AIFMD will need to be disapplied.



FCA policy statement 28th June 2013

The full text of the policy statement is available here:

<http://www.fca.org.uk/static/documents/policy-statements/ps13-05.pdf>

The policy statement, which was published before the transposition date for AIFMD of 22 July 2013, sets out the FCA's rules for implementation of AIFMD and sets out the FCA's responses to the two consultations in respect of AIFMD run by the FCA in November 2012 and March 2013.

The policy statement covers the following matters:

- Implementation and scope, in particular the draft FCA Perimeter Guidance (PERG). Much of the guidance is not as helpful as might be hoped;
- Operating requirements for full-scope and sub-threshold AIFMs. This looks at systems and controls and conduct of business rules, as they apply to AIFMs in the full scope of AIFMD and small AIFMs that are not subject to all its requirements. However, the content is technical regarding applying the Senior Management Arrangements, Systems and Controls sourcebook (SYSC) and the Conduct of Business sourcebook (COBS).

- The proposed prudential regime for all types of AIFM, including capital requirements, professional negligence risks, the liquid assets requirement and financial reporting matters; and the consequential rules and proposed prudential regime for small authorised UK AIFMs.;
- The application of the ombudsman service rules and the Financial Services Compensation Scheme (FSCS) to AIFMs and depositaries of AIFs;
- Proposals for depositaries;
- Marketing;
- FCA fees regime for firms within the scope of AIFMD;
- Remuneration rules. The policy statement does little more than recognise that the FCA has yet to produce its remuneration guidance;
- AIFMD contains provisions for AIFMs established outside the EEA to be given passporting rights for the management and marketing of AIFs. that will not become so until 2015 or 2016 at the earliest, The FCA will deal with this in due course;
- Cost benefit analysis.



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