

MARKETING IN THE EU? IMPLICATIONS FOR NON-EU MANAGERS OF CAYMAN FUNDS UNDER AIFMD

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As is well documented, the Directive on Alternative Investment Fund Managers (Directive 2011/ 61/EU the "Directive" or "AIFMD") aims to provide for an internal market for Alternative Investment Fund Managers ("AIFMs") within the EU. Unless a complete or partial exemption is available however, the reach of the Directive extends not only to EU funds, but also, to a lesser extent, to Non- EU funds managed by Non-EU Managers, marketing to EU investors¹.

Non-EU AIFMs of Cayman funds marketing to EU investors will need to be aware therefore that, effective 22 July 2013, the following provisions of the Directive will apply to them:

- Financial reporting requirements including remuneration disclosure requirements;
- Disclosure requirements to investors around the fund and fund manager; and
- Disclosure requirements to EU Regulators around the fund and fund manager.

ARE YOU MARKETING TO EU INVESTORS?

As defined in the Directive, the activity of "marketing" is any direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM, of units or shares in a fund it manages to or with investors domiciled in the EU. The definition of marketing does not include reverse solicitation which should be considered to be outside of the scope of the Directive.

Where Cayman funds are being marketed within the EU in line with the above, and subject to the individual rules of each Member State, non-EU AIFMs will be permitted to continue to market such Cayman funds to Professional Investors² on a private placement basis in that Member State under the Member State's own private placement rules until at least 2018 provided that reporting requirements are met and co-operation agreements between the relevant countries are in place³.

WHAT ARE THE REPORTING REQUIREMENTS?

The Directive imposes reporting requirements in respect of Annual Reports, Disclosure to Investors, and Reporting to Competent Authorities.

ANNUAL REPORTS AND REMUNERATION DISCLOSURE

An AIFM is required to produce, for each of the funds it markets in the EU, annual reports which must contain:

- balance sheet/statement of assets and liabilities;
- income and expenditure account for the financial year;
- report on activities of the financial year;
- any material changes during the financial year;
- total amount of remuneration paid to AIFM staff for the financial year (fixed and variable) number of beneficiaries, and any carried interest; and
- the aggregate remuneration broken down by senior management and staff of the AIFM whose actions have a material impact on risk profile of the AIF.

The information concerning remuneration as contained in the annual report must contain information on the total amount of remuneration for the financial year specifying:

- the total remuneration of the entire staff of the AIFM, with an indication of number of beneficiaries;
- the total remuneration of those staff of the AIFM who in part or in full are involved in the activities of the Cayman Fund with an indication of the number of beneficiaries; or
- the proportion of the total remuneration of the staff of the AIFM attributable to the Cayman Fund and an indication of the number of beneficiaries; and
- the carried interest paid by the Cayman Fund, where relevant.

AIFMs must provide general information relating to the financial and non-financial criteria of the remuneration policies and practices for relevant categories of staff to enable investors to assess the incentives created. AIFMs



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must disclose at least the information necessary to provide an understanding of the risk profile of the fund and the measures it adopts to avoid or manage conflicts of interest.

WHAT MUST BE MADE AVAILABLE TO INVESTORS?

The minimum level of information to be made available to investors must include, inter alia:

- the investment strategy and objectives of the fund including how these can be changed, use of leverage and collateral and asset reuse arrangements;
- the identity of AIFM, and the fund's depository, auditor and other service providers including prime broker and a description of their duties;
- any delegated investment management function and any delegation of safekeeping function;
- valuation procedures;
- the fund's liquidity risk management;
- fees, charges and expenses;
- how fair treatment of investors is ensured by the AIFM, details of any preferential treatment, the type of investors who obtain such preferential treatment and their legal or economic links with the fund or AIFM;
- latest annual report;
- the historical performance of the fund; and
- how information required regarding special arrangements or leverage is disclosed.

AIFMs are also required to periodically disclose to investors the percentage of fund assets which are subject to special arrangements due to their illiquid nature, total leverage employed and any right of use of collateral under such leveraging arrangement, arrangements for managing liquidity and any changes to the maximum leverage that the AIFM may employ on behalf of the fund.

WHAT MUST BE REPORTED TO REGULATORS?

AIFMs are required to provide certain information on a regular basis to the supervisors of the Member State in which each Cayman Fund is marketed⁴ including:

- the principal markets and instruments traded by it on behalf of the Cayman fund;
- the percentage of fund assets subject to special arrangements arising from their illiquid nature, arrangements for managing liquidity, the risk management systems employed, the current risk profile of the fund, the main categories of assets invested in, and the results of stress tests performed in line with the Directive.
- an annual report of the Cayman fund and for end of each quarter, on request, a list of all funds managed by the AIFM.
- Where substantial leverage is employed, information on the overall level of leverage employed.

WHAT SHOULD NON-EU AIFMS OF CAYMAN FUNDS DO NOW?

The AIFMD states that Member States may impose stricter rules than those set out in the Directive on non-EU AIFMs in respect of the marketing of funds in their territories. Whilst there is no evidence of Member States gold-plating the AIFMD requirements in advance of the July implementation date, AIFMs will need to be prepared for the certainties that will apply on July 22.

AIFMs within scope of the AIFMD will therefore need to ensure that systems are in place to allow them to comply with reporting requirements in their home jurisdiction, in the Cayman Islands, and in the EU Member State in which the fund is marketed. ■

Notes

¹ The impact of the AIFMD on EU Managers of Cayman Funds is outside the scope of this article.

² A "Professional Investor" is an investor which is considered a professional client, in accordance with Annex II of Directive 2004/39/EC (the "MiFID Directive").

³ We understand that CIMA is at an advanced state of negotiation with ESMA in this regard.

⁴ Annex IV of the EU Commission's Regulation implementing the AIFMD contains templates for the filing of such information.

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