FINANCIAL SERVICES

AIFMD: Update on transposition requirements and delegation strategies

What is the AIFMD?

In the aftermath of the global financial crisis, the European Commission drafted one of the most ambitious and complex regulatory reform agendas ever introduced into the asset management industry in the form of the Alternative Investment Fund Managers Directive (AIFMD). The Directive will have profound, wide-reaching and long-term implications for in-scope alternative investment fund managers (AIFMs), who are required to comply by July 2013.

AIFMs grappling with questions around transposition requirements

The deadline for EU Member States to transpose the AIFMD into national law is 22 July 2013. Since the requirements with which AIFMs will need to comply will depend to a great extent on their activities, as well as where their funds and investors are located, many firms continue to struggle with questions around the transposition requirements and the associated implications for their individual firms. The following are just a few of the issues and questions AIFMs will need to resolve for themselves as they prepare for the transposition of the Directive:

Marketing

- Until transposition takes place in a particular EU Member State, non-EU AIFMs should be able to market their non-EU alternative investment funds to investors in that Member State by use of the existing private placement regime. It is important to note, however, that some Member States are contemplating the elimination of the private placement regimes at such time as the AIFMD is transposed into law. Therefore, it will be incumbent upon non-EU AIFMs to conduct their proper due diligence with respect to their marketing initiatives.
- After the date of transposition, a non-EU AIFM will need to comply with a number of conditions (including new reporting and disclosure requirements) in order to continue to take advantage of the private placement regime in a given EU Member State.
- Existing AIFMs who have their funds, management functions and investors all located in the same country will have an additional year-long transposition period.
- If an AIFM has either funds, managers or investors in countries other than its own, it will need to review and adapt its marketing strategy based on the rules in those respective countries.
- AIFMs should also be cognizant that, in some cases, for new business after 22 July 2013, the EU Member States may require new authorization.

Taxation

Some of the most complex questions AIFMs will need to answer with respect to the transposition of the AIFMD revolve around the whole issue of taxation. One of the key issues causing consternation for many AIFMs relates to location of effective management and control. For example, if a provider based in Jersey or Guernsey was to appoint a European AIFM, would that

EU Member States are required to 'transpose' or adopt the AIFMD legislation by inserting it into the relevant section of their local law by 22 July 2013.

An existing AIFM with an existing authorization may be granted a transitional year, during which they can apply for the new authorization and become compliant with the Directive.

necessarily mean that for tax purposes, the effective management and control of the fund have been shifted to that European country? And if this is, indeed, the case, what are the associated tax implications?

This continues to represent a significant tension point in the lead up to the Directive, with AIFMs eager to identify and prevent unforeseen and potentially-costly tax consequences. In a worst-case scenario, AIFMs could find themselves being double-taxed – once in the country or origin and once where effective management and control is seen to reside.

Another key consideration under the heading of taxation relates to value added taxes (VAT). AIFMs will need to be able to understand and assess the associated implications, so as not to incur VATs that are cost prohibitive to their operations.

Issues around delegation

From the outset, the topic of delegation and the extent to which AIFMs can delegate certain functions (e.g. fund administration, portfolio management, risk management) has been one of the most contentious issues surrounding the AIFMD.

One of the critical questions revolves around the 'substance' of the functions being delegated. Under the new rules, AIFMs will not be allowed to delegate a significantly larger percentage of these functions than they will be performing themselves. In order to meet these new requirements, many AIFMs will need to undertake reorganizations of various functions such as risk or portfolio management.

Another issue generating a significant deal of controversy centers around the proposed rules around remuneration and, in particular, how they relate to parties to whom certain activities have been delegated. It appears, given the way the requirements are being interpreted by many, that the sub-advisors of AIFMS, to whom certain risk management and/or portfolio management activities have been delegated, may also be caught up by the AIFMD's remuneration guidelines, despite the fact that they, themselves, are not AIFMs.

These are just a few of the questions around delegation continue to cause consternation for many AIFMs, who are uncertain about how these new rules will be interpreted by regulators, who remain unclear about what the thresholds for substance will look like going forward and who may not know how they rank in relation to their peers. One of the worries shared by many AIFM is that, in the eyes of regulators, at least, there may be a fine line between the act of simply acquiring additional assistance and outsourcing the primary substance of a given task.

How KPMG can help

With the compliance deadline quickly approaching, AIFMs are struggling to answer questions around transposition requirements, delegation and a host of other pressing AIFMD-related issues. KPMG member firms have extensive expertise in helping some of the world's largest and most prominent AIFMs prepare for this complex new regulatory regime.

KPMG's global network of firms has helped a number of AIFMs identify and address gaps and blind spots in their marketing strategies as they relate to the Directive. And given our global network of firms' extensive experience working with AIFMs in the lead-up to the introduction of the Directive over the past 4 years, we're able to add significant value with respect to questions around delegation, helping member firms' clients position themselves for compliance and long-term profitability under the new rules.

Common AIFMD-related acronyms

AIF	Alternative Investment Fund
AIFM	Alternative Investment Fund Manager
AIFMD	Alternative Investment Fund Managers Directive
ESMA	European Securities and Markets Authority
EU	European Union
FATF	Financial Action Task Force
MiFID	Markets in Financial Instruments Directive
MS	Member State of the European Union
MSR	Member State of Reference for a non-EU AIFM
UCITS	Undertakings for Collective Investment in Transferable Securities

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