

***AIFMD may restrict
EU investors' access
to private equity***

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AIFMD may restrict EU investors' access to private equity

An industry that traditionally operated outside regulatory constraints will now have to consider the consequences of raising institutional capital in Europe.



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The leading global private equity managers, in terms of funds raised and diversification of assets, are predominantly based outside the EU, either in North America or elsewhere. Indeed, the private equity managers that are most attractive to investors today are often located within emerging markets. But how will such third-country managers access European institutional capital following implementation of the Alternative Investment Fund Managers directive (AIFMD)? Indeed, given the challenges created by the AIFMD will they want to?

Traditionally, private equity managers have raised funds through a combination of private placement and passive marketing. Passive marketing is a process whereby the institutional investor makes a direct approach to the private equity manager. Passive marketing is not regulated by the AIFMD.

But the AIFMD places additional burden on third country private equity managers accessing EU institutional investors through private placement regimes – where the directive requires managers to meet transparency obligations and to operate within a set of rules in relation to EU portfolio companies.

Third-country private equity managers, having understood the consequences of the AIFMD, need to develop strategies detailing how they will continue to access European institutional capital.

The private placement regime

A non-EU alternative investment fund manager (AIFM) managing an EU alternative investment fund (AIF), or marketing a fund into the EU, must comply with all the directive's provisions, unless the non-EU AIFM can demonstrate that doing so would be incompatible with its home country regulatory regime (which must offer an equivalent level of protection to investors). Additionally, the non-EU AIFM must appoint a legal representative in the EU to act as a contact point, and to perform the compliance function for management and marketing activities performed in the EU.

Non-EU private equity managers can continue to access institutional investors in the EU through the private placement regime provided they comply with transparency requirements as set out in Chapter IV of the AIFMD. These include:

- Filing annual reports for all AIFs, including disclosure of fixed and variable remuneration paid to AIFM staff members.
- Disclosing aggregate remuneration paid to senior management and AIFM members of staff, whose actions have a material impact on the risk profile of the AIF.
- Onerous portfolio company transparency obligations that exceed criteria for small and medium enterprises; in addition certain there are reporting obligations for employee representatives.
- Disclosing the strategic intentions regarding portfolio companies that are controlled, including employment plans.

Additionally, there are asset-stripping provisions that prevent an AIF distributing portfolio company reserves for two years after an acquisition.

Non-EU private equity managers continuing to market to EU institutional investors should understand the regulatory consequences and operational constraints placed upon them by the directive. Mapping compliance with the AIFMD will be critical.



In order to obtain approval for marketing an AIF under the private placement regime, there must be a cooperation arrangement between the non-EU AIFM's domicile and the member state where the fund is being promoted. Furthermore, the non EU AIFM's domicile, and where applicable that of the fund, should not be listed as a non-cooperative country and territory by the Financial Action Task Force on anti-money laundering and terrorist financing.

The passport

From 2018, the private placement regime is likely to be replaced by a passporting regime, which will additionally require that a tax information sharing arrangement is in place between the third country and each EU member state.

The AIFMD is likely to enter into force with a transposition period of two years, during which detailed rules supporting the primary legislation will be drawn up. In the case of a closed-end fund that does not intend to make any additional investments after January 2013, the AIFM will not require authorisation.

Thinking ahead

Non-EU private equity managers continuing to market to EU institutional investors should understand the regulatory consequences and operational constraints placed upon them by the directive. Mapping compliance with the AIFMD will be critical.

Given the onerous provisions above, certain non-EU managers may decide against promoting their funds directly to EU institutional investors. Passive marketing can, of course, continue.

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