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# Alternative Investment Funds And The BVI: Smooth Sailing Into AIFMD Waters

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The European Union's Alternative Investment Fund Managers Directive (or AIFMD) has been approved by the European Parliament and Council, and is to be transposed into the national law of EU member states by 2013. The AIFMD is designed to provide for clear, streamlined regulation of alternative investment fund managers and therefore, indirectly alternative investment funds, with a view to ensuring that funds actively marketed in Europe (passive marketing not coming within the scope of the AIFMD) are managed in a transparent and secure manner. This article focuses on how the AIFMD will affect the ability of BVI fund managers and other managers of BVI funds to actively market in the EU.

## AIFMD and marketing BVI domiciled funds in the EU

The AIFMD predominantly deals with fund managers whose funds target professional investors in the EU. The AIFMD facilitates the continuation of individual private placement regimes within EU member states, however, from 2013 fund managers will need to comply with certain provisions in the AIFMD before being able to conduct a private placement.

The AIFMD sets out a series of requirements for fund managers, rather than directly regulating funds. The key requirements for fund managers are: (i) a general requirement to adhere to wide-ranging principles, including that the manager must act in the best interests of the fund it manages and the investors of the fund; (ii) to take all reasonable steps to identify and manage conflicts of interest; (iii) to introduce a risk management policy; (iv) transparency requirements, including the release of an annual report (to include information on, e.g., remuneration paid by the fund manager and fund) to competent authorities and investors upon request within six months of the end of the financial year; (v) prohibition on 'asset stripping', in that fund managers managing a fund must not (within a 24 month period following the acquisition of 50 percent or more of the voting rights of a non-listed company by the fund) engage in any distribution, share redemption, capital reduction or acquisition of own shares by that company; and (vi) appoint a depository for each fund that it manages.

Private placement. Once the AIFMD is implemented into the national law of EU member states, which is expected by January 2013, private placements in EU member states can continue, though fund managers will need to be mindful of the AIFMD.

An EU fund manager will continue to be able to market non-EU funds to professional investors if authorised to do so by the relevant member state. In order to be approved, the fund manager will need to demonstrate that: (i) the manager complies with the AIFMD, except for the depository requirements (though the fund manager will need to ensure an entity is in place to perform the duties of a depository); (ii) there is a cooperation agreement concerning exchange of information in place between the EU fund manager's regulator and the non-EU fund's regulator; and (iii) the non-EU fund must not be domiciled in a jurisdiction designated by the Financial Action Taskforce (FATF) as non-cooperative on money laundering and terrorist financing matters. For non-EU fund managers, in addition to cooperation agreements and FATF requirements, the manager must comply with, inter alia, the transparency requirements and asset stripping requirements in the AIFMD.

The BVI is on the right track to ensure that managers of BVI funds will be able to satisfy the above requirements, and therefore privately place fund products in the EU once the AIFMD takes effect.

The BVI is not designated as a non-cooperative jurisdiction by FATF, and already has relevant cooperation agreements with most EU member states (including the UK, France and Germany) in the form of the International Organisation of Securities Commissions' Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, to which the BVI is a signatory.

In addition, recent regulatory reforms in the BVI should ensure that BVI-licensed fund managers will already have in place policies and procedures to comply with AIFMD requirements.

Key requirements imposed by the BVI's Regulatory Code 2009, which apply to fund managers licensed under the Securities and Investment Business Act 2010 (SIBA) from 31 March 2011, include: (i) a requirement for managers to act honestly, fairly and with due skill, care and diligence in fulfilling the responsibilities it has undertaken; (ii) to maintain a clearly defined risk management strategy; (iii) to establish, maintain and implement a conflict of interest policy, and to avoid conflicts of interest; and (iv) the safekeeping of customer investments by a suitable custodian.

SIBA also imposes certain requirements on fund managers, including a requirement to prepare an annual report and file the report with the BVI Financial Services Commission within six months of the end of



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the financial year.

Under the AIFMD, the private placement option is to continue until at least 2018. By 2018, there is a possibility that private placements will be phased out and marketing fund products in the EU will require using the passporting regime under AIFMD.

Passport. The AIFMD's European passport regime will allow fund managers to market funds to professional investors throughout the EU once they are authorised to market in one EU member state. From 2013, passporting will initially only be available to EU fund managers marketing EU funds. At present, the passport is scheduled to be available to non-EU fund managers and to EU managers marketing non-EU funds two years after transposition of the Directive (so 2015).

From 2015, if a EU fund manager wants to market a non-EU fund to professional investors using the European passport: (i) the fund manager will need to establish to their home member state that the manager complies with all the provisions of the AIFMD; (ii) there must be a cooperation agreement in place between its home regulator and the relevant non-EU regulator where the fund is domiciled; (iii) the non-EU fund must not be domiciled in a jurisdiction considered non-cooperative by FATF; and (iv) there must be a tax information exchange agreement (TIEA) (in accordance with the requirements of the OECD) in place between the jurisdiction where the fund is domiciled (e.g., BVI), the home member state and the jurisdictions where the fund will be marketed in the EU.

For Non-EU fund managers, there is a deemed 'Member State of Reference' in the EU based on where its funds will primarily be marketed,

otherwise the same requirements as above apply.

As noted above, it can easily be established that the BVI satisfies the requirements for a cooperation agreement (at least in relation to all the major EU jurisdictions), and that it is not a non-cooperative jurisdiction according to FATF. In relation to the last requirement for the fund domicile to have negotiated a TIEA with the relevant EU jurisdiction, again the BVI is already in a favourable position.

At the time of writing, the BVI had signed 20 TIEAs. The BVI has signed TIEAs with some major EU jurisdictions and is presently negotiating a number of others.

#### Conclusion

The BVI has engaged in a number of measures recently which are in line with what the EU, through the AIFMD, is expecting of non-EU jurisdictions seeking to ensure that their fund managers and funds will have access to the European market going forward.

After the implementation of the AIFMD, BVI fund managers and other managers of BVI funds will continue to be able to use the private placement regime in EU member states, and from 2015 it is anticipated that BVI fund managers and other managers of BVI funds will have access to the passport regime.

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