

Impact of New European AIFMD Regulation on SBICs

Written by Catherine M. Anderson

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The recent adoption of the European Alternative Investment Fund Managers Directive (AIFMD), effective July 2013 (and with transitional provisions in some countries through 2014), has imposed complex new regulations on most managers of hedge funds, private equity funds and SBICs which “market” their funds in Europe to potential investors. **SBIC managers who intend to offer their existing or new funds to European investors should review their activities and fund structures to ensure that they are in compliance with the AIFMD, and make any required filings, notifications, registrations and/or disclosures before they commence their European marketing initiatives.**

In particular, SBIC managers should note the following:

- As a threshold matter, the main provisions of the AIFMD only apply to managers that, in aggregate, have EUR100 million (about USD 112 million at today’s exchange rates) or more of assets under management in all of their funds.
- AIFMD applies to both European and non-European based managers, and to funds which are “marketing” to European investors. Europe includes the 27 EU countries plus the additional European Economic Areas of Norway, Iceland and Liechtenstein.
- The definition of “marketing” varies country-by-country, adding to the complexity of interpretation of AIFMD. It broadly includes any manager’s “direct or indirect offering or placement ...of units or shares...of an AIF it manages”. Some countries have determined that marketing hasn’t commenced and the fund is “pre-marketing” when it hasn’t been formed, subscription documents are not yet available and there is no private placement memorandum circulating.
- In certain circumstances, “reverse solicitation” by unsolicited European investors requesting fund information, may result in the fund/manager being exempted from AIFMD; but many countries have adopted very narrow interpretations of “reverse solicitation”, and the analysis is very fact dependent on the particular country, investor and other circumstances.
- SBIC funds which were closed to new investors before the AIFMD came into effect in 2013 and have existing European investors generally are not affected by AIFMD.
- SBIC managers deemed to be “marketing” a fund in Europe may be required to provide, *inter alia*:
 - ▶ Disclosures to investors in offering documents which may be in addition to customary domestic disclosures.
 - ▶ Reporting to country regulators similar to reporting required for SEC Form PF.
 - ▶ Annual reporting with financial details and manager remuneration disclosure to country regulators and investors.
- Since the implementation of AIFMD varies by country, funds and/or managers may have to register with multiple regulators, whose regimes vary widely. Eg, the UK requires only an online form with limited information and no regulatory approval; but Germany requires multiple forms, extensive disclosures, a designated custodian, and formal regulatory approval.
- Non-EU fund managers cannot yet use the “passport” which is available for EU fund managers. Once they obtain initial registration from a country regulator, the passport qualifies the managers to market in all other EU countries which recognize the passport. The passport may be available in late 2015 to non-EU fund managers.
- The impact of AIFMD is an evolving landscape, as different countries implement and apply its principles. SBIC managers should, as a first practical step, identify the EU countries in which they intend to market their funds, and obtain in-country advice on the steps required for AIFMD compliance before they commence any marketing activities in Europe for any existing or new funds.

- Finally, SBICs whose employees live and work in EU countries must also be careful not to run afoul of the AIFMD. Citizenship and residence within a EU country does not confer upon a manager any special exemption from AIFMD to market in Europe a non-EU fund, such as an SBIC.

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