



## Alternative Investment Fund Managers Directive: Text Published in the Official Journal of the European Union

7 July 2011

On Friday, 1 July 2011, the final, official text of the Alternative Investment Fund Managers Directive (2011/61/EU) ("the AIFMD" or "the Directive") was published in the Official Journal ("OJ") of the European Union.

The European Parliament adopted the Directive at its plenary session on 11 November 2010 and the Council of the European Union adopted it on 27 May 2011.

This new EU legislation will regulate managers of hedge, private equity and real estate funds and other alternative investment funds ("AIFs"), a very broad term which covers almost any investment fund (and other collective investment structures) except funds regulated under EU legislation on Undertakings for Collective Investment in Transferable Securities (UCITS). Many of the requirements imposed on managers will have a significant impact on the funds they manage.

The Directive enters into force 20 days after its publication in the OJ. This means that member states ("MSs") will have until 22 July 2013 to transpose the Directive, in other words to make and bring into force the national laws, regulations and administrative provisions necessary to give effect to the AIFMD.

Several dates key off this date, such as (1) the deadline for existing EU alternative investment fund managers ("AIFMs"), except those who qualify for exemption, to obtain authorization under the Directive (22 July 2014), and (2) depending on the opinion and advice to be submitted by the European Securities and Markets Authority ("ESMA"), the earliest potential date for introduction of a passport for non-EU AIFs and AIFMs (October 2015), and the earliest date for termination of national private placement regimes for AIFs (January 2019).

The rest of this client alert focuses on the implementation process, especially the delegated acts ("Level 2 measures") that the European Commission must adopt to give full effect to the Directive. These, too, will be fully effective from 22 July 2013. Since the AIFMD contains only very limited grandfathering and transitional provisions, managers and others involved with AIFs should start to consider how the AIFMD will impact them and how they should adapt their structure and business.

## The Implementation Process

Following political agreement on the terms of the Directive, the Commission initiated the development of the AIFMD Level 2 measures last December. The Commission sent the Committee of European Securities Regulators (“CESR”) (which, from 1 January 2011, was replaced by ESMA), a provisional request for technical advice on Level 2 measures concerning the future Directive – “provisional” because the Directive was not yet formally adopted (see above).

The Level 2 measures will be a mix of regulatory technical standards which clarify or supplement the Directive, and implementing measures which set out uniform conditions and allow little or no scope as to the manner of implementation at national level. More than 50 provisions of the Directive require measures by the Commission. Despite the intense debate that has taken place over the last two years as to the terms of the Directive, the consultations on Level 2 measures (and, to a lesser extent, the future consultations on “Level 3” measures (see below) and MSs' national measures) allow for further active involvement by governments, regulators, trade associations, fund operators, managers, advisors, depositories and other interested parties.

The Commission is seeking technical advice on twenty-six broad issues in four areas:

- General provisions including, for example, authorization (*i.e.* licensing/registration, and exemptions) of AIFMs, operating conditions, liquidity and risk management, and conflicts;
- Depositories, including provisions in such controversial areas as liability, due diligence when delegating, the segregation of assets, and the equivalence of regulation in non-European Economic Area countries such as Switzerland and the US;
- Transparency requirements and leverage; and
- Supervision, including information exchange and other cooperation with third-country regulators, and the procedure to determine which MS should act as the home MS for non-EU AIFMs requiring an EU license/authorization and supervision. The criteria for this determination are set out in the Directive itself.

ESMA has been conducting consultations during 2011 to develop the technical advice which the Commission has requested in respect of implementation measures. ESMA is expected to publish its draft

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship lawyer.

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advice in mid-July, comprising a consultation paper “setting out formal proposals for possible implementing measures”. However, the Commission expressly stated that the technical advice “should not take the form of a legal text”.

The scope of the Directive will be among a number of contentious issues addressed in the draft advice. In particular, ESMA must advise on how to identify the fund portfolios relevant in determining whether managers meet the thresholds for exemption under Article 3.2, how to value assets under management for this purpose, and the treatment of leverage and cross-holdings.

Although the Directive itself sets no deadlines for Level 2 measures, the Commission expects those measures that require transposition by MSs to be transposed within the same timetable as the AIFMD itself. Some measures will be in the form of a Commission regulation, and therefore not require MS transposition. The Commission requires ESMA's final advice by 16 November 2011 and hopes to finalise all Level 2 measures around one year before the transposition deadline, but the opportunity to lobby the Commission on technical measures advised on by ESMA may be limited.

In addition to Level 2 measures described above, some ten provisions of the AIFMD confer powers on ESMA to develop guidelines and recommendations in certain areas – mostly in relation to non-EU AIFs and non-EU AIFMs, even though many issues relating to these matters will be covered by Level 2 Commission directives or regulations. ESMA guidelines and recommendations have more force than CESR equivalents: MSs' national regulators will have less flexibility than they have previously enjoyed in applying and interpreting them. ESMA will consult on these “Level 3” measures in due course.

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