

Assessing the options under the AIFM Directive

By Susan Lock

The Alternative Investment Fund Managers Directive (“AIFMD”) is extremely broad in scope. It applies to entities performing risk or portfolio management from within the European Economic Area (“EEA”) for both non-EEA or EEA Alternative Investment Funds (“AIFs”), entities performing risk or portfolio management for EEA AIFs from outside of the EEA and/or entities that actively market an AIF to EEA investors.

With around 85% of the world’s offshore hedge funds, the Cayman Islands has many domiciled entities (and managers of alternative investment funds (“AIFMs”) that manage Cayman entities) that are within scope of the directive.

Cayman has stepped up to the plate in terms of being ready for the AIFMD. The key has been the jurisdiction’s speed of reaction, the strength of professional services available and Cayman’s cooperation with overseas regulators. The Government and regulator of the Cayman Islands have entered into necessary cooperation agreements with regulators of EEA states and done all they can to maintain the country’s FATF ‘white’ status.

These actions mean the jurisdiction has done everything within its capability to ensure both the AIFs / AIFMs domiciled in, and those AIFMs utilising the jurisdiction, can continue to actively capital raise in the EEA for the time being.

The AIFMD is merely a framework and provisions, particularly those relating to non-EEA AIFMs, are being implemented in phases. We have some way to go to see the whole picture both in each member state and how the European Securities and Markets Authority (“ESMA”) will make its assessments but even though we are still at the Level 2 stage, I think we can say that Cayman will emerge with a positive reputation on its reaction to the legislation.

With respect to managers who become



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AIFMs, they have to consider the structure of their activities and operations and identify, where necessary, the single AIFM in their operation and where their business may fall within scope of the AIFMD or utilise a particular exemption, neither of which are always straightforward as there are complications of which to be mindful. Campbells continues to advise with regards to this and introduce clients to relevant legal counsel in the EEA in order that they may avoid any pitfalls.

Non-AIFMs need to consider the scope of their capital raising and decide how, if at all, they wish to approach and actively market to EEA investors. There is a range of options available to non-EEA AIFMs based in Cayman or managing AIFs in Cayman. They could ‘passport’ in to the EEA and take advantage immediately of the AIFMD by setting up an AIFMD-compliant fund structure in an EU member state. Alternatively, they may be able to continue actively marketing their fund(s) under national private placement rules until at least 2018. However, they need to comply with additional reporting and disclosure obligations in addition to being mindful of the national laws of the particular EEA state in which they are marketing. Further, many clients will choose to rely on the safe harbour of ‘reverse solicitation’; but this is a grey area as the AIFMD leaves each member state to interpret the scope of what activities constitutes ‘active’ and ‘passive’ marketing.

There is a risk to European investors that the AIFMD will present too large a challenge to some non-EEA AIFMs and they will simply avoid Europe altogether, preferring to examine their business models and cherry pick markets. However, on a more positive note, there is also evidence that the AIFMD will open up certain EEA markets which have hitherto been closed to any non-UCITS hedge funds and so create opportunities for managers and jurisdictions. ■