



October 23, 2013

CAVEAT FUND MANAGER

The JOBS Act has lifted the ban on fund managers from public advertising. At the same time, fund managers now engaging in general solicitation may find themselves running afoul of a EU directive, the Alternative Investment Fund Managers Directive (the "AIFMD"). Fund managers are well advised to tread carefully and to take active steps now in order to avoid triggering the AIFMD and its transparency, reporting and disclosure obligations vis-à-vis EU regulators.

On 22 September 2013, a fund manager was prohibited from soliciting capital from investors under the Securities Act of 1933. As of 23 September 2013, a fund manager can now advertise, solicit, email, create an internet presence, give media interviews, speak at conferences, tweet, and generally knock on doors in order to raise monies from investors, provided these investors are "accredited investors"¹. While the rules on general solicitation have been loosened in the US, the rules on solicitation have just been tightened on the European continent with the AIFMD.

The AIFMD is a EU directive that entered into force as of 22 July 2013. Its goal is to harmonize the supervision of fund managers. The AIFMD not only applies to all fund managers located in the European Union ("EU"), but also to all non-EU fund managers who market their alternative investment funds to EU investors. Please note that the AIFMD is already triggered by the act of marketing, long before a EU investor makes any investment in a fund.

What is "marketing" under the AIFMD?

The AIFMD applies a broad definition of "marketing" and means a direct or indirect offering or placement at the initiative of the fund manager or on behalf of the fund manager of units or shares of an alternative investment fund it manages to or with investors domiciled or with a registered office in the European Union. The question is when does this broad definition of marketing apply to a non-EU fund manager's ac-

¹ As defined in Rule 501(a) of Regulation D under the Securities Act of 1933 (17 C.F.R. §230.501(a)).

tivities? When do marketing activities, which are now permissible in the US, reach out to EU investors across the pond and violate the AIFMD? Unfortunately, the European regulators have been slow in publishing any clarification or guidelines on this issue.

As a general rule, introducing and advertising the fund house itself, such as describing past performance and experience, should not fall within the definition of marketing. However, on the other hand, introducing and describing a specific fund of the fund house to an EU investor should qualify as a marketing activity and therefore require the prior authorization for marketing of the fund manager under the AIFMD.

Both the UK regulator (Financial Conduct Authority, or "FCA") and the German regulator (Bundesanstalt für Finanzdienstleistungsaufsicht, or "BaFin") have stated that communications in relation to and the provision of draft documentation, which still requires some negotiating on material issues between the fund manager and the investor, does not constitute "an offer or placement"².

Two of the ways that a non-EU fund manager may inadvertently market its fund to EU investors is through a website or networking at industry events, such as at a conference. While on the one hand it is clear that directly addressing a EU investor is a marketing activity under the AIFMD, it is not clear on the other hand how to deal with indirect marketing where it may turn out that the fund manager reached a EU investor as part of a worldwide marketing strategy.

Closed shop is (not really) an option

How can a fund manager ensure that only non-EU investors are allowed to enter a fund's site? One possibility of controlling this could be via a button on the site confirming that the investor entering the website is in fact not domiciled and located in the EU. The law cannot ask for more since it is not within the duty of the fund manager to verify such statements of potential investors.

² Häufige Fragen zum Vertrieb und Erwerb von Investmentvermögen nach dem KAGB (GZ WA 41-Wp 2137-2013/0293); FCA's Policy Statement PS13/5.



Networking

Another scenario to be scrutinized is the attendance by a fund manager as a speaker at conferences, even if those conferences are located outside the EU. Fund managers may unknowingly find themselves addressing EU investors at these conferences. Does advertising a fund at a conference in New York to EU investors constitute marketing in the European Union? Does the domicile of a EU investor travel with the investor? While it may seem farfetched, this is exactly what the UK regulator initially tried to argue. Following growing protests, the FCA is now leaning towards the interpretation that the domicile does not travel with a UK investor. The latest interpretation of the definition of “marketing in the UK” by the FCA is to limit the scope of marketing to the territory of the UK, i.e. the UK investor must be domiciled (within the EU meaning) in the UK and the marketing activity must take place in the UK.

Other EU regulators have yet to issue much guidance on this issue. However, it is arguable that the German regulator, the BaFin, will apply by analogy the same approach to conferences as it does to licensing requirements pursuant to the German Banking Act for conducting cross-border banking business and/or providing cross-border financial services³. According to the BaFin, it is assumed that an entity requires a license to offer banking or financial services if there are indications that the aim is to specifically target German investors in light of all facts and circumstances (i.e. on a case-by-case basis).

³ Notes regarding the licensing requirements pursuant to section 32 (1) of the German Banking Act (Kreditwesengesetz – KWG) in conjunction with section 1 (1) and (1a) of the KWG for conducting cross-border banking business and/or providing cross-border financial services dated 5 April 2005.

In such case, by analogy, the nature and intent of the conference would be decisive, i.e. are the presentations at the conference of a general nature or are they tailored to German investors. Indications thereof would be the presentation of an analysis of German tax treatment and structuring of funds to meet German regulatory requirements. Until the BaFin issues some guidance as to the definition of marketing under the AIFMD (or, to be specific, the German Investment Code (Kapitalanlagegesetzbuch) that transposed the AIFMD into German domestic law), we suggest applying the guidelines previously provided by the BaFin in connection with banking and financial services activities to a fund manager’s future marketing activities and avoiding the above-mentioned indications.

Reverse solicitation

While a fund manager may not approach directly or indirectly a EU investor to market its funds, a EU investor may approach a fund manager to request information and documents about a fund at its own initiative. This is called reverse solicitation and does not trigger any requirements under the AIFMD.

Unfortunately, neither the AIFMD nor the EU regulators have issued any clear definition as to what constitutes reverse solicitation. The differentiation between marketing and reverse solicitation will have to be undertaken on a case-by-case basis taking all circumstances into account and will be largely dependent on the individual EU regulators’ interpretation thereof in the future.

Please note that it will be up to the fund manager to prove that reverse solicitation took place. It is therefore extremely important that the fund manager obtains written confirmation from the EU investor stating that the investor took the initiative to initially solicit the fund manager.



be in touch: If you have any questions, please do not hesitate to contact us!



Dr. Carsten Bödecker

Partner . Steuerberater . Rechtsanwalt

Tel. +49 (0) 211 946847-51

Fax +49 (0) 211 946847-01

carsten.boedecker@bepartners.pro



Carsten Ernst

Partner . Steuerberater

Tel. +49 (0) 211 946847-52

Fax +49 (0) 211 946847-01

carsten.ernst@bepartners.pro



Alexander Skowronek

Steuerberater . Rechtsanwalt

Tel. +49 (0) 211 946847-62

Fax +49 (0) 211 946847-01

alexander.skowronek@bepartners.pro



Nathalie Grenewitz

US-Attorney at Law

Tel. +49 (0) 211 946847-57

Fax +49 (0) 211 946847-01

nathalie.grenewitz@bepartners.pro