



October 2010

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## AIFM Directive Update

On 30 April 2009 the European Commission released a draft of a Directive on Alternative Investment Fund Managers (AIFM Directive) to the European Parliament (Parliament) and the Council (Council) to regulate managers of Alternative Investment Funds (AIFM) as part of a legislative package to fight the global financial crisis. Since the AIFM Directive was officially published, the proposed regulations have been discussed widely and are considered by some to be very controversial in Europe.

In order to be adopted, the text of the proposed directive needs to be approved by the Parliament and the Council. In May 2010 the Parliament and the Council approved their own revised versions of the AIFM Directive. Since then, the AIFM Directive has remained a work in progress and is the subject of intense lobbying efforts and political discussions. One of the main issues discussed in detail is provisions relating to non-EU funds and the treatment of non-EU managers that market non-EU funds to EU investors, including provisions regarding the related disclosure requirements, as well as limitations on leverage and on employee compensation and other operational matters.

The most-recent versions of the drafts adopted by the Parliament and the Council have stated different approaches regarding the application of the AIFM Directive to non-EU managers. The Parliament's draft would permit third-country funds to benefit from a marketing "passport" if the fund's home country meets certain criteria and the other conditions of the AIFM

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Directive are satisfied. In contrast, the Council's version would maintain the approach of the current national legal regimes, under which non-EU funds must be marketed within the EU under separate, national private placement rules.

As a consequence, some non-EU fund managers have established Undertakings for Collective Investment in Transferable Securities (UCITS) funds in the EU in order to avoid the uncertainty and potential complexity of complying with the envisaged directive with respect to their non-EU funds. Alternatively, some non-EU managers have considered whether to abandon marketing efforts in the EU as a result of the cost and heightened regulatory burden.

On 19 October 2010 EU economic affairs and finance ministers at their meeting in Luxembourg reached an agreement to support the latest compromise proposal by Belgium issued on 15 October for the AIFM Directive, which has raised the prospect that the legislation could be finalized by a vote in the Parliament in November.

After intense discussions, the EU ministers found a compromise that will permit non-EU managers and funds to obtain the same pan-European marketing passport as their Europe-based managers two years after the AIFM Directive comes into force, which is likely to be in 2013. Further, national private placement marketing regimes will remain applicable for at least five years after the AIFM Directive comes into force, but might eventually be abolished once the passport system has been implemented satisfactorily.

The concerns of France's ministers about the ability of non-EU-domiciled funds to enter the European market through Member States with less-stringent regulatory regimes were assuaged by the two-year delay and a role for the future European Securities and Markets Authority (ESMA) in protecting the integrity of EU financial markets.

Further, the UK, another Member State, was successful in ensuring that non-EU managers who meet the terms of the AIFM Directive will eventually enjoy the same ability to market their funds throughout Europe as those within the EU. However, the UK was not in line with France's efforts to give ESMA wider powers to oversee the EU-passport system.

The revised text will now go before a so-called triologue meeting of representatives of EU Member States, the Parliament and the Commission. If, as expected, it is approved, the legislation will go before a full session of

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the Parliament for approval at the first reading in early November 2010.

For further information relating to the AIFM Directive and its ramifications for investors, please contact your principal Squire Sanders lawyer or any of the lawyers listed in this Alert.



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2010

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