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## Non-EU Managers and the Alternative Investment Fund Managers Directive

by **Rory Gallaher (rory.gallaher@deacons.com.hk)**

A compromise text of the new EU Directive on Alternative Investment Fund Managers (AIFMs) has finally been agreed after more than a year and a half of intensive negotiations. As with all political compromises, it will leave all parties feeling some-what aggrieved.

The directive paints an outline of the landscape for AIFMs in Europe, but the detailed picture will only become clear once a plethora of subsidiary rules have been formulated and adopted.

What is clear is that for non-EU AIFMs no passport to market to professional investors in the EU will be available until 2015, but the current national private placement regimes within the EU can be maintained until at least 2018. This will come as some relief to non-EU AIFMs, but there seems to be no good reason why the existing national private placement regimes should not continue indefinitely.

It is also clear that if a non-EU AIFM wishes to obtain a passport, it will be subject to the same restrictions and obligations as an authorised EU AIFM.

The directive is expected to come into force in January 2011, and EU Member States will have two years to adopt the directive into national legislation.

The "Third Country Rules" permit EU AIFMs to manage non-EU alternative funds and to market non-EU alternative funds within the EU, and permit non-EU AIFMs to manage EU funds and to market EU or non-EU funds within the EU.

The Third Country Rules seek to establish a level playing field for these different combinations of managers and funds.

If management of an EU fund is delegated to a non-EU AIFM, that non-EU AIFM will need to be authorised by the home regulator of the relevant EU fund. Once authorised, the non-EU AIFM will be required to comply in substance with all the requirements of the directive.

A non-EU AIFM wishing to market a non-EU fund to EU professional investors may do so without a passport under national private placement rules of the Member States in which marketing is to be conducted until at least 2018, subject to compliance with certain provisions of the directive including:

- the requirement to produce annual reports for each fund;
- the requirements for disclosure of information to investors; and
- the reporting obligations to competent authorities.

A co-operation agreement will need to be in place between the relevant Member State regulator and the non-EU AIFM's home regulator.

The passporting regime for non-EU AIFMs will not be implemented unless the European Securities and Markets Authority (ESMA) so recommends. If ESMA does not make such recommendation, the national private placement regimes can continue. If the passporting regime is implemented, the national private placement regimes will continue until ESMA recommends that they be terminated.

## The Collection and Use of Personal Data in Hong Kong

by Pauline Woo ([pauline.woo@deacons.com.hk](mailto:pauline.woo@deacons.com.hk))

The recent report on the investigation into the handling of personal data under the Octopus Rewards Program, and an appeal by Wing Lung Bank against an enforcement action by the Privacy Commissioner for Personal Data (PCPD), provide much food for thought for financial institutions and licensed corporations on how they can strengthen their personal data protection policies. The focus has been largely on the collection and use of personal data relating to direct marketing, and in this connection, the PCPD issued a new guidance note on 18 October 2010.

With the above in mind, we set out timely considerations in relation to complying with the Personal Data (Privacy) Ordinance (PDPO) in conducting direct marketing:

### Collection of personal data

- An easy to understand Personal Information Collection Statement (PICS) should be used, taking into account the level of understanding that would be generally expected of the type of data subject.
- The PICS should be easy and clear to read in terms of font size and prominence.
- The bundling of data collection for provision of the data user's service with data collection for marketing purposes should therefore be avoided.
- The class of transferees of the personal data should be specifically defined. Vague terms such as "business partners" or "other third parties" should be avoided.

### Use of personal data

- The data subject should be informed of the right to opt-out of direct marketing. Where the marketing approach is done by mail or fax, a "tick" box and a return address should be provided for the data subject to exercise the opt-out right.
- A data user should only use personal data for marketing products or services which are directly related to the original purpose of collection of the data. A bank using personal data of its customers for marketing financial and insurance products is considered to be directly related to the bank's products and services.

- A data subject's personal data may be transferred by the data user only in limited circumstances, e.g. to a contractor or agent promoting the data user's products and services directly related to its pre-existing relationship with the data subject. The data user should be prudent in its selection of an agent or contractor and it will remain liable for its agent's or contractor's breach of the requirements under the PDPO. In addition, care should be taken to avoid third parties conducting marketing activities in the name of the data user.

On 18 October 2010, the Government published the Consultation Report on the Review of the PDPO. According to the Report, the majority of the proposals made by the PCPD, as well as the proposal to introduce legislation to make unauthorised sales of personal data by data user an offence, will be pursued. However in relation to direct marketing, subject to further public discussion, the following proposals will not be further pursued: (i) the requirement to obtain explicit consent of the data subject (i.e. the "opt-in" proposal); (ii) the setting up of a territory-wide do-not-call register against direct marketing activities; and (iii) the right for a data subject to request disclosure by direct marketers their source for his personal data. The public may continue to submit their views and comments on the legislative review until 31 December 2010.

## Up-to-date with News from the SFC?

by **Rebecca Yip** ([rebecca.yip@deacons.com.hk](mailto:rebecca.yip@deacons.com.hk))

Hong Kong's SFC usually communicates with licensees (companies and individuals) by posting circulars, enforcement news items and other information on its website. As an alternative to checking the SFC's website for the latest information, it is possible to subscribe to the SFC's "Update Alert" service, which emails subscribers with news of updates to the sections of the SFC website which the subscriber has selected.

Licensed corporations also automatically receive email alerts from the SFC via FinNet e-mail accounts. The SFC creates a FinNet account for each licensed corporation when it is first licensed. An invitation letter to use the FinNet e-Circular service is typically sent along with the SFC's approval letter when a licensed corporation first obtains its licence.

Most SFC circulars are sent to licensed corporations' FinNet email accounts at the same time as they are posted on the SFC's website, so it is important that a licensed corporation arranges for someone to subscribe to the SFC email alert service or check the FinNet inbox on a regular basis. Recent experience has shown that if a licensed corporation does not check the FinNet account, it may not realise that a circular on the website is of relevance to its business. In order to capture all relevant circulars, including SFC questionnaires, licensed corporations are encouraged to establish and regularly monitor their FinNet accounts.

## International Investment Fund Managers Face Registration Requirements in Canada

by **Lynn M. McGrade and H. Scott McEvoy of Borden Ladner Gervais LLP**

On 15 October 2010 the Canadian Securities Administrators (CSA) released a notice of and request for comment on proposed amendments to National Instrument 31 103 Registration Requirements and Exemptions (NI 31 103) that would require registration of international investment fund managers if the investment fund they manage, regardless of whether the fund is situate in Canada or not, has investors in a province or territory of Canada and the manager or the fund has actively solicited those Canadian investors.

NI 31 103, which came into effect on 28 September 2009, provided a comprehensive and largely harmonized registration regime in Canada, including the creation of a new registration category for investment fund managers. Under NI 31 103 a temporary exemption for a period of two years was provided to non resident investment fund managers pending the publication by the CSA of the circumstances in which an international investment fund manager would be

required to register, as well as the circumstances in which a domestic investment fund manager with a head office in Canada would be required to register in more than one province or territory in Canada.

Under the proposals, which are expected to be effective when the temporary exemption expires, an international investment fund manager that carries out investment fund management activities from a location outside of Canada would be required to register in the province or territory where the fund it manages has investors, and the manager or the fund has actively solicited these investors. "Active solicitation" refers to intentional actions taken by the manager or the fund to encourage purchase of the fund's securities, such as direct communications, advertising in Canadian publications, or media (including through the internet) and purchase recommendations made by a paid third party such as a distributor to Canadian residents.

An exemption from the registration requirement has been proposed where:

1. the international investment fund manager does not have a physical place of business in Canada;
2. the investment fund is incorporated, formed or created under the laws of a foreign jurisdiction, and all the securities of the fund have been distributed in Canada pursuant to a prospectus exemption to a person or company that is a permitted client (primarily institutions and very high net worth individuals);
3. the fair value of the assets of the fund attributable to

Canadian investors of any investment fund for which the international investment fund manager acts as investment fund manager is not more than 10% of the fair value of all of the assets of the fund as at the end of the investment fund manager's most recently completed financial year;

4. the fair value of the assets of all funds managed by the investment fund manager that are attributable to Canadian investors is not more than CDN\$50 million as at the end of the investment fund manager's most recently completed financial year; and
5. the international investment fund manager provides certain mandated disclosures to Canadian clients and makes certain annual filings to the relevant Canadian regulator.

A grandfathering exemption has also been proposed for international investment fund managers where neither the investment fund manager or the fund has actively solicited Canadian investors after 28 September 2011 (except where the trade is pursuant to a reinvestment plan in certain circumstances). In its current form the grandfathering exemption is not subject to the fair value threshold limitations (as noted above).

The CSA proposals present challenges to international investment fund managers that market their funds to Canadian investors. As temporary exemptions are set to expire on 28 September 2011, firms currently soliciting investors in Canada will need to plan carefully as the proposals are finalised.

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