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AIFMD - New RTS distinguishes open and closed ended AIFs

On 17 December 2013 the European Commission adopted regulatory technical standards (“RTS”) related to determining types of alternative investment fund managers (“AIFM”) by way of a Delegated Regulation, supplementing the Alternative Investment Fund Managers Directive (Directive 2011/61/EU) (“**AIFMD**”).

The RTS provides guidance to AIFMs to help them determine whether they are AIFMs of open-ended AIF(s) and/or closed-ended AIF(s).

Open-ended AIFs defined

An AIF is open-ended if its units or shares may, at the request of any of its investors, be repurchased or redeemed prior to the commencement of its liquidation phase or wind-down, directly or indirectly, out of the assets of the AIF in accordance with the procedures and frequency set out in its constitutive and/or offering documents.

The following are not considered repurchases or redemptions at the request of any of its investors:

- ▣ distributions/decreases in the capital of the AIF in accordance with the AIF’s constitutive and/or offering documents;
- ▣ distributions/decreases in the capital of the AIF authorised by a resolution of the AIF’s investors; and
- ▣ trading of the AIF’s shares or units on a secondary market

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Closed-ended AIFs defined

An AIF is closed-ended if it is not open-ended.

Why does this RTS matter?

It is important that AIFMs throughout the EU have a clear understanding of whether they are AIFMs of open-ended or of closed-AIFs to give effect to AIFMD in a harmonized way, in particular because:

- ▣ AIFMs must make decisions about the appropriateness of the frequency of valuations for open-ended AIFs which they do not have to make for closed-ended AIFs (closed-ended AIFs are required to value when there is an increase or decrease in the capital by the relevant AIF);
- ▣ AIFMs are required to align the investment strategy, liquidity profile and redemption policy of their open-ended AIFs so that investors have the ability to redeem their investments in a manner consistent with the fair treatment of all AIF investors and in accordance with the AIF's redemption policy and its obligations;
- ▣ a change of redemption policy can result in an AIF changing from closed-ended to open ended, with a corresponding change on the obligations imposed on the AIFM.

This is an important development because, to date, there has not been a harmonised understanding of what constitutes a closed-ended AIF. This reality was recognized in AIFMD which permits managers of unleveraged closed-ended AIFs with AUM of up to Euro 500 million to avail of the lighter "registered" AIFMD regime even though the AIFs that they manage had redemption rights which were exercisable prior to the commencement of their liquidation phase or wind-down.

Article 3(2)(b) of AIFMD describes a closed-ended AIF as a an AIF that does not have exercisable redemption rights for a period of five years following the date of initial investment in the relevant AIF.

No effect on transitional provisions of AIFMD

The RTS re-affirms the Article 3(2)(b) description of closed-ended AIFs for the purposes of the transitional provisions set out in Article 61(3) and (4) of AIFMD which relate to closed-ended AIFs established before 22 July 2013 which are closed to subscription and either will not make any additional investments or are constituted for a period of time set to expire three years after 22 July, 2013.

Prospectus Directive

The RTS definition of closed-ended AIF should be distinguished from a closed-ended fund pursuant to the Prospectus Directive (2003/71/EC) (the "PD"), which considers a closed-ended fund to be a fund that does not provide any redemption facility (at the request of the investor) during the life of the fund. The PD does not apply to closed-ended AIFs which provide an opportunity for redemption at the request of investors during its liquidation phase or wind-down.

Effective Date

The RTS shall enter into force on the twentieth day following that of its publication in *the Official Journal of the European Union*. We expect publication early in 2014.

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