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German Ministry of Finance Publishes Second Draft for Implementation of AIFMD

Germany is currently busy implementing the Alternative Investment Fund Managers Directive 2011/61/EU ("AIFMD") into German domestic law. In July 2012, the German legislator published an initial discussion draft of the legislation implementing the AIFMD into domestic law, the German Investment Code (Kapitalanlagegesetzbuch, or "KAGB"). This initial discussion draft of the German Investment Code went further than required by the AIFMD (see our client information dated August 6, 2012), particularly with regard to the application of the German Investment Code to non-EU alternative investment funds (AIF) and non-EU alternative investment fund managers (AIFM). This overreach was subject to intense criticism from the fund industry.

In response to the intense criticism, the German Ministry of Finance revised the initial discussion draft to include various comments from the fund industry. The Ministry of Finance has yet to officially distribute this revised second draft of the German Investment Code to the public. However, we have had the opportunity to review this revised draft, particularly the provisions applying to non-EU AIFs and non-EU AIFMs. Please find below a brief summary of the main revisions under the latest draft of the German Investment Code applicable to non-EU AIFs managed by non-EU AIFMs and marketed to professional investors in Germany from 2013 to 2015 under the German domestic regime. Please note that non-EU AIFs managed by non-EU AIFMs and marketed to investors in Germany will presumably be subject to the so-called passport regime as of 2015.

1. Cross-border managed funds

To everyone's surprise, the initial discussion draft of the German Investment Code completely prohibited any and all marketing of so-called cross-border managed funds in Germany between 2013 and 2015. Cross-border managed funds are fund structures in which the AIF and the AIFM are domiciled in different jurisdictions. The German government's reasoning behind this sweeping prohibition was that it wanted to wait and observe how other EU Member States would deal with such cross-border managed funds.

Fortunately, the German government seems to have listened to reason as well as the fund industry's comments and has deleted the prohibition against cross-border managed AIFs in the latest draft of the German Investment Code. In the latest draft, cross-border managed AIFs may apply for authorization for marketing in Germany under the German Investment Code until 2015; after 2015, such AIFs will most likely have to apply for marketing authorization under the passport regime as it is expected that Germany will extend the passport regime to non-EU AIFs and non-EU AIFMs as of 2015.

2. Transitional provisions

According to the initial discussion draft of the German Investment Code, a AIF could not be marketed after the German Investment Code had entered into effect (on 22 July 2013) and before the authorization for marketing the AIF units was issued by the German supervisory authority. This prohibition also applied to AIFs that were already marketed before 22 July 2013 and the subscription period of which will not end by 22 July 2013.

In the event the AIF could be marketed in Germany under the previous regime before 22 July 2013 and its subscription period had not ended before 22 July 2013, the revised draft of the German Investment Code now allows AIFMs to continue to market AIFs under the previous German regime until the end of the authorization procedure. However, in any event, the right to market under the previous regime will end at the latest on 21 July 2014. In other words, a non-EU AIF may be marketed under the previously existing German regime for a maximum of one year after the German Investment Code enters into effect on 22 July 2013.

3. Depositary

As required in the AIFMD, the initial discussion draft of the German Investment Code also demanded the appointment of a depositary for an AIF. However, unlike the AIFMD, the initial discussion draft unnecessarily limited the appointment of the depositary only to financial service providers. The revised draft of the German Investment Code now follows the AIFMD more closely and also allows the appointment as depositary „an entity which carries out depositary functions as part of its professional or business activities in respect of which such entity is subject to mandatory professional registration recognized by law or to legal or regulatory provisions or rules of professional conduct and which can provide sufficient financial and professional guarantees to enable it to perform effectively the relevant depositary functions and meet the commitments inherent in those functions.“ In other words, the revised draft also allows trustees, notaries, registrars and lawyers to act as depositary.

4. German translation

The initial discussion draft of the German Investment Code required that all documents, which need to be submitted by the AIF/AIFM to the German supervisory authority when applying for authorization for marketing in Germany, be translated into German. The revised draft now allows said documents to be submitted either in German or in English. This will reduce administrative time and costs significantly for non-EU funds.

5. German representative

In its initial discussion draft of the German Investment Code, the German supervisory authority required that a so-called German representative be appointed for the AIF. This German representative, who acted as a contact for all correspondence with the German supervisory authority, needed to be a professionally qualified representative with its registered seat or residence in Germany.

The latest draft does not seem to require the appointment of a German representative for AIFs marketed to professional investors.

6. Restriction on financial investments

According to the initial discussion draft of the German Investment Code, a maximum of 49 % of a closed-ended AIF's assets could be invested in financial instruments, such as transferable securities, money-market instruments, units in collective investment undertakings and certain derivative contracts/instruments. The revised draft of the German Investment Code has dropped this restriction. However, the AIFM may still invest only in assets the market value of which can be determined/appraised.

7. Deadlines for the German supervisory authority's response

Under the initial discussion draft, the non-EU AIF was to be informed no later than six months following submission of the required documentation to the German supervisory authority whether said authority would grant the authorization to commence marketing the AIF units without a passport to professional investors in Germany. The 6-month period would begin to run anew if the German supervisory authority requested amended or additional documentation.

This deadline has been shortened in the revised draft of the German Investment Code for certain fund structures. If the AIF is not a feeder AIF, then the German supervisory authority must respond within two months. If the AIF is a feeder AIF and its master AIF is not managed by a non-EU AIFM, then the response must be sent within three months. Finally, if the AIF is a feeder AIF and its master AIF is managed by a non-EU AIFM, then the German supervisory authority must inform the AIF within four months. However, as in the previous draft, the time period will begin to run anew if the German supervisory authority requests any additional or amended documentation.

8. Consent for transfers

The initial discussion draft of the German Investment Code required that a transfer of units in so-called “special AIFs” by the investors could be made only with the consent of the AIFM. “Special AIFs” are AIFs that may be marketed only to professional and semi-professional investors. The revised draft of the German Investment Code no longer includes this requirement.

Issues	Initial Discussion Draft	Second Draft
Cross-border managed funds	Prohibited	Permitted
Transitional provisions (application of previous regime)	None (all marketing had to cease until authorization granted)	Applicable until 21 July 2014 Limited to financial service providers
Depositary	Limited to financial service providers	Follows the AIFMD
German translation	Required	Optional; documents may be submitted in English
German representative	Required	Not required
Restriction on financial investments	Max. 49 % of assets for closed-ended funds	No restrictions
Deadline for German supervisory authority's response	6 months	Depends on fund structure, but no longer than 4 months
Consent for transfers	Required	Not required

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

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