

Regulatory Round-Up: Did Anything Happen While I Was Away?

There have been important new developments in several key regulatory initiatives over the course of the summer.

It is the beginning of September, and that ‘back to school’ feeling is in the air. Regulatory briefings do not make the best holiday reading, so this note sets forth a quick overview of how key regulatory initiatives have progressed over the summer and where things now stand.

AIFM Directive

Formal negotiations were suspended during the European Parliament’s summer recess, but work on the Alternative Investment Fund Managers Directive (AIFMD) has continued behind the scenes. At the end of last week, the Belgian Presidency released a further Council compromise text for discussion at a new series of trilogue meetings, the first of which took place on Monday 30 August.

The most notable point on the Belgian compromise text is that the two issues most relevant to private equity firms—the ‘third country’ provisions relating to the treatment of non-EU funds and fund managers, and the transparency and disclosure provisions relating to portfolio companies (which the European Parliament proposes to extend to include ‘anti-asset stripping’ provisions)—have been set aside for separate discussion. The intention is to reach agreement at a conceptual level before proposing revised legislative text. This suggests that there is still significant political disagreement on these key issues, making it difficult to predict the final position.

It is also worth noting that the Council has not adopted the European Parliament’s proposal to exempt private equity from the provisions relating to regulatory capital, depositaries or periodic valuation (see previous [EUPEN](#)), preferring its original approach (an assets under management (AUM) threshold that would exempt smaller firms, with the provisions of AIFMD being applied on a ‘proportionate’ basis to those firms that are above the threshold and so within the scope of the Directive).

The AIFMD is scheduled for a full vote of the European Parliament (the final step in the process) on Tuesday 21 September 2010, but this may well be postponed if agreement is not reached quickly in the current round of trilogues.

FSA Remuneration Code

Amendments to the EU Capital Requirements Directive (CRD3), passed at EU level in early July, require the FSA to regulate remuneration structures not only for banks but also for a wide range of financial institutions, including some private equity firms. A revised Remuneration Code, which will form part of the FSA Handbook, was published for consultation at the end of July.

Despite the publicity, only a relatively small number of private equity firms will be covered by the new rules, as they apply only to investment firms subject to the CRD. Exempt-MiFID (manager/operator) firms and exempt-CAD (adviser/arranger) firms are outside the scope of the new rules. However, a firm with wider permissions, such as firms authorised to provide discretionary investment management services outside the context of fund management, will be subject to the CRD and consequently will need to apply the new rules.

The proposed rules have been designed with banks and similar institutions in mind, and it is not yet clear what level of compliance the FSA will require from those private equity firms within scope. There is a degree of flexibility, in that the Code is to be applied ‘proportionately’ to a firm’s business. The BVCA Regulatory Committee is engaging with the FSA on some of the key issues, including whether or not carried interest will be treated as remuneration subject to the Code, and the FSA’s position with respect to private equity firms is expected to become clearer in the coming weeks.

FSA Online Notifications and Applications (ONA)

The FSA's new online system (ONA) has been launched, and it will be mandatory for firms to use it beginning 4 October 2010. To register for ONA, go to the [ONA page](#) of the FSA website.

ONA covers the following notifications and applications: approved persons, appointed representative, variation or cancellation of permission, passporting, waivers and standing data. It is not yet possible to use ONA for initial authorisation applications, or for change of controllers applications or notifications.

The existing Firms Online system will be switched off at the beginning of 2011. Once the old system is switched off, there will no longer be online access to applications made using that system, so the FSA is instructing firms to print and retain paper copies of any old applications.

Solvency II

Solvency II is an EU initiative under which EU-based insurance companies will become subject to a regulatory capital regime similar to the Basel II regime for banks. Solvency II will come into effect across the EU at the end of 2012, but many insurers will, in practice, be aiming for Solvency II compliance by the end of 2011.

The issue for private equity firms is that Solvency II will potentially increase the regulatory capital 'cost' to insurers of holding an interest in a private equity fund, possibly reducing the willingness of some EU insurers to invest. At the end of August, the fifth Solvency II quantitative impact study (QIS5) began, the results of which will be used to determine more precisely what the regulatory capital 'cost' of different assets will be, and how much more 'expensive' an indirect investment in unlisted securities will be than, say, an investment in listed securities or government bonds. The study will run until November 2010.

UK Carbon Reduction Commitment

The deadline for registering or making an information

disclosure for the first phase of the CRC Energy Efficiency Scheme (see previous [EU PEN](#)) is fast approaching. If either your firm or any fund needs to register as a full participant, you should submit the registration application by mid-September to ensure that your registration is processed and complete by the final deadline of 30 September 2010.

If you registered by the 30 June 2010 (extended to 31 July 2010) deadline for disaggregation, you need to mark the relevant significant group undertakings (SGUs) for disaggregation on your primary registration, and each SGU must complete its own registration process by 30 September 2010 in order to participate separately from the wider group.

The Environment Agency has produced a useful '[walk-through](#)' guide to the online registration system, which is available on the [Environment Agency website](#). If you need help with your application, the Environment Agency's CRC Helpdesk can now be contacted by telephone on 08708 506 506, as well as by email at CRCHelp@environment-agency.gov.uk.

SEC Registration for Private Fund Managers

The U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act was signed into law on 21 July 2010. The Act requires managers of private (non-regulated) funds, including non-U.S. fund managers with U.S. investors, to register with the U.S. Securities and Exchange Commission (SEC) as investment advisers. There are exemptions that may benefit some non-U.S. firms, but these are limited in scope, and a large number of firms with U.S. investors will need to be registered with the SEC by July 2011.

On Tuesday 28 and Wednesday 29 September 2010, partners from Kirkland's U.S. practice, in conjunction with Augentius Fund Administration, will be hosting London breakfast seminars for clients to explain the SEC registration process and answer questions. The seminar is CPD-accredited. To register, please visit www.kirkland.com/pfmaar (please note that registration is essential for building security reasons).

Should you have any questions about the matters addressed in this *KirklandPEN*, please contact the following Kirkland author or your regular Kirkland contact.

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