KIRKLAND & ELLIS

KIRKLANDPEN
Private Equity Newsletter

July 13, 2011

EU Alternative Investment Fund Managers Directive: Countdown to Implementation

PENpoints

The countdown to implementation of the EU Alternative Investment Fund Managers Directive has begun, with the European Union confirming that each EU country must amend its national law to implement the AIFMD by July 2013.

After repeated delays, the two-year countdown to the implementation of the EU Alternative Investment Fund Managers Directive ("AIFMD") has finally begun. The European Union has confirmed that each individual EU country must amend its national law to implement the AIFMD by July 22, 2013.

The implementation timeline for an EU-based fund manager differs from the timeline for a non-EU-based fund manager, as follows:

EU-Based Fund Manager

- An EU-based fund manager managing funds as of July 22, 2013, must apply for authorization between July 22, 2013, and July 21, 2014, and, once authorized, must comply with the AIFMD in full.
- An EU-based fund manager established on or after July 22, 2013, must become authorized before commencing fund management activities.
- Once authorized, an EU-based fund manager will be able to market fund interests to "professional" (i.e., institutional) investors across the EU in accordance with the AIFMD "passporting" regime (discussed in our earlier *KirklandPEN*). Marketing to "retail" (i.e., non-institutional) investors may be subject to additional restrictions (or wholly prohibited) under applicable national law.
- Marketing of a non-EU fund by an authorized EU-based fund manager will be subject to additional restrictions, with the marketing "passport" unavailable for such funds until at least July 2015 (contingent upon extension of the passporting regime by the European Commission).

Non-EU-Based Fund Manager

- A non-EU-based fund manager will not be affected by the AIFMD until it first markets fund interests to EU-based investors after July 22, 2013. A fund in the market from and after that date must comply with the new regime.
- A non-EU-based fund manager, including one whose funds are managed in an "offshore" jurisdiction (e.g., the Channel Islands or Cayman Islands), will not be required (or be able) to become authorized until at least July 2015 (contingent upon extension of the authorization regime by the European Commission).
- Until authorization becomes possible, a non-EU-based fund manager may continue to market EU and non-EU fund interests to EU investors under each individual country's private placement regime, but must also comply with certain AIFMD transparency and disclosure requirements for any fund marketed to EU-based investors from July 22, 2013, including:
  - Fund-related requirements: The non-EU-based fund manager must prepare an annual report in a prescribed format for each post-July 22, 2013, fund marketed to EU investors, and must also provide certain disclosures to investors. The non-EU-based fund manager will also be subject to regulatory reporting requirements aimed at monitoring systemic risk.
  - Portfolio company requirements: If a post-July 22, 2013, fund acquires or disposes of shares in an unlisted EU company, the non-EU based fund manager must make certain regulatory filings and, if such a fund acquires control of an unlisted EU company, must also provide certain

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disclosures about the fund and the fund manager to the company, the other shareholders and regulators, as well as use its best efforts to ensure that the company passes this information to employee representatives. There are also specific "anti-asset stripping" provisions restricting shareholder distributions for a period of 24 months after acquisition of a listed or unlisted EU company, primarily aimed at preventing dividend recapitalizations.

- Ultimately the European Commission intends that a non-EU-based fund manager marketing to EU investors will be subject to the same regulatory regime as an EU-based fund manager, but this will not be mandatory until at least July 2018 (contingent upon the termination of national private placement regimes by the European Commission).

Attention will now turn to the proposals for technical measures that will supplement the AIFMD. The European Securities and Markets Authority will seek public comment during the summer of 2011, with the results likely published in November 2011. The UK Financial Services Authority is expected to seek public comment on the UK implementation of the AIFMD in late 2011 or early 2012.

In a related development, on June 15, 2011, the European Commission formally requested comments on possible new EU rules for venture capital funds, reflecting concerns that the AIFMD framework is not generally suitable for venture capital activities. It is possible that a special "light-touch" regime could be created, and the Commission has indicated that it intends to put forward a legislative proposal by the end of the year.

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

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FTC/DOJ Announce Changes to HSR Rules and Notification Form

PENpoints

New changes to the Hart-Scott-Rodino Act premerger notification rules and form will increase the time and expense to complete the form and require the production of additional documents and information.

The Federal Trade Commission, with the concurrence of the Antitrust Division of the Department of Justice, recently announced substantial changes to the Hart-Scott-Rodino (HSR) Act premerger notification rules and form. The HSR Act requires premerger notification and clearance for most large mergers and acquisitions of assets, voting securities and/or non-corporate interests. The changes will be effective thirty days after publication in the Federal Register.

While many of the form changes remove obsolete and no-longer-useful requirements, other changes will increase the time and expense to complete the form and require the production of additional documents and information. Set forth below is a summary of certain changes impacting private equity funds.

Additional Documents

While the current rules require parties to a reportable transaction to produce certain documents relating to the transaction that is the subject of the HSR filing, the new rules require parties to produce additional documents and information, including:

Confidential Information Memoranda. Parties will be required to produce each Confidential Information Memorandum (CIM) prepared at any time during the one-year period prior to the HSR filing that "specifically relates" to the sale of the target entity or assets, even if the CIM was not prepared in connection with the transaction in question and does not discuss traditional HSR topics, such as markets, market shares, competition, competitors or the potential for product or

geographic expansion. If no CIM exists, the parties must produce materials provided to the buyer "*specifically to serve the purpose*" of a CIM. While it appears that the FTC did not intend to require production of ordinary-course documents and/or due diligence materials, it likely would require production of a presentation or other overview of the target entity or assets given to the buyer, even if not labeled a CIM.

Outside Consultant/Advisor Documents. Parties will be required to produce each document prepared during the one-year period prior to the HSR filing by "investment bankers, consultants or other third party advisors" that (1) "specifically relates" to the sale of the target entity or assets, and (2) discusses traditional HSR topics (markets, market shares, etc.), regardless of whether such document was prepared in connection with the transaction in question.

Synergy/Efficiency Analyses. Parties will be required to produce each document prepared by or for officers or directors of the reporting persons or their controlled entities that evaluates or analyzes synergies and/or efficiencies in connection with the transaction at issue, whenever prepared, and even if it does not discuss competition-related topics.

Expanded Reporting for "Associate" Entities

The current HSR form requires a filing party to report information based on its ultimate parent entity (UPE) and all entities that the UPE "controls" from an HSR perspective. The new rules expand the scope of the HSR filing by requiring an acquiring party to provide certain information with respect to "associated" entities that are under common investment or operational management with the acquiring party. In particular, a private equity fund acquirer now will be required to provide information regarding minority (5% or greater, but less than 50%) and controlling investments of its "associates,"[1] where the portfolio investments have an overlapping line of business or report revenues in overlapping the North American Industry Classification System (NAICS) codes with the target entity or assets.

Identifying a private equity fund's "associates" will require a complex and rigorous analysis, and tracking information about these entities will increase greatly the recordkeeping and data collection required for preparing an HSR filing. Depending on the facts, a fund's general partner, management company and possibly related funds may be considered to be "associates," thus possibly triggering expanded disclosure for all affiliated funds.

Products Manufactured Outside of the U.S.

The current HSR form requires each filing party to identify its revenues from operations conducted in the U.S. by NAICS code. The new form expands this requirement to include revenues for products the filing party manufactured outside of the U.S. and then sold in or into the U.S. in the most recent year. In addition, parties must report manufacturing revenues at the more detailed 10-digit product code level, as opposed to the 7-digit product class level.

Compiling and updating the additional information required by the HSR form changes likely will be very time-consuming. Reporting parties should expect to spend additional time preparing HSR filings and should adjust their transaction timelines accordingly.

1 "Associate" is defined as follows: "[A]n associate of an acquiring person shall be an entity that is not an affiliate of such person but: (A) has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a "managing entity"); or (B) has its operations or investment decisions, directly or indirectly, managed by the acquiring person; or (C) directly or indirectly controls, is controlled by, or is under common control with a managing entity; or (D) directly or indirectly manages, is managed by, or is under common operational or investment management with a managing entity."

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PENbriefs

Circuits Split Over Credit Bidding in Sales Under Chapter 11 Plans

A recent decision by the U.S. Court of Appeals for the Seventh Circuit (binding on bankruptcy courts in Chicago, among other places) upholding a secured creditor's right to "credit bid" at an auction for a debtor's assets conducted as part of a Chapter 11 plan, declined to follow a decision reaching the opposite result by the U.S. Court of Appeals for the Third Circuit (binding on bankruptcy courts in Delaware, among other places). The Seventh Circuit case creates a clear split with the Third Circuit regarding a secured creditor's right to credit bid under a Chapter 11 plan, which may need to be resolved by the U.S. Supreme Court. To learn more, see our recent *Kirkland Alert*.

PENnotes

Destination Brazil: Evaluating and Sourcing the Hottest M&A Deals
New York, New York
July 14, 2011

This webcast, hosted by *The Deal*, will feature a panel discussion on M&A opportunities in Brazil. Topics to be discussed will include: competition for targets between private equity firms and strategics; the potential consequences of over-inflation; target valuations in Brazil compared to other emerging countries, and how companies source deals. Kirkland partner Karyn Koiffman will participate in the discussion. For more information, please visit: www.thedeal.com/knowledge/merrill-datasite/destination-brazil-evaluating-and-sourcing-the-hottest-ma-deals.php.

Practising Law Institute's "Mergers & Acquisitions 2011: What You Need to Know Now"
Chicago, Illinois
New York - September 8, 2011
Chicago - September 22-23, 2011

At this two-day program, top deal lawyers, general counsel, regulators and investment bankers will discuss trends and techniques in tender offers and private equity transactions, dramatic developments in Delaware law and shareholder litigation, continuing vitality of the poison pill and insight into the antitrust regulatory landscape. Kirkland partner R. Scott Falk, P.C., is a co-chair of this event. For more information, or to register for this event, please visit: www.pli.edu.

Brazil Investment Summit 2011
New York, New York
October 25-27, 2011

Kirkland is a sponsor of Terrapinn's Brazil Investment Summit 2011, an investment strategy conference for funds, traders and investors focused on Brazilian opportunities. This three-day conference will uncover opportunities across hedge funds, quantitative strategies, private equity, infrastructure, real estate, commodities and more. Kirkland partner Frederick Tanne will participate in a panel discussion on "Private Equity Opportunities." For more information, please visit: www.terrapinn.com/2011/brazil-investment-summit-usa/index.stm.

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Private Equity Practice at Kirkland & Ellis

Kirkland & Ellis LLP's nearly 400 private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 200 private equity firms around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named Best M&A Firm in the United States at World Finance's 2011 Legal Awards and was honored as the "Private Equity Team of the Year" at the 2011 IFLR Americas Awards. Kirkland was also recognized as "Law Firm of the Year" in *Buyouts* magazine's "2010 Deal of the Year Yearbook." Kirkland was ranked in the first tier among law firms for both Private Equity Buyouts and Private Equity Funds by *The Legal 500 U.S. 2010*. Additionally, *Pitchbook* named Kirkland as one of the most active law firms representing private equity firms in its 2010 "Private Equity Breakdown."

The Lawyer magazine recognized Kirkland as one of the "The Transatlantic Elite" in 2008, 2009 and 2010, noting that the firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

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