

## **XI. *Alternative Investment Fund Managers Directive Impact on Non-EU Managers***

### **A. Introduction**

The European Commission promulgated the Directive for Alternative Investment Fund Managers (“AIFMD”) in 2010 as one of the many measures adopted worldwide to quell fears of financial instability and systemic risk.<sup>1</sup> The AIFMD seeks to achieve these goals through “enhance[d] supervisory practices” and “pre-emptive action to prevent market instability and the build-up of systemic risk in the European financial system.”<sup>2</sup> Accordingly, the AIFMD constructs a complex regulatory framework for alternative investment fund managers (“AIFMs”) operating within European Union (“EU”) Member States, including “hedge funds, private equity funds, real estate funds and infrastructure funds . . . .”<sup>3</sup>

However, the AIFMD has far-reaching effects that reach non-EU investment funds marketing and operating within the EU.<sup>4</sup> Although the EU implemented the AIFMD in 2011, EU managers benefited from a transition period through July 22, 2014, and non-EU managers have a “phased compliance obligation for registration which must be met, in full, no later than July 2018.”<sup>5</sup> With deadlines fast approaching, regulators and managers are facing numerous challenges with implementation and compliance, and the EU may subsequently lose a significant number of investment companies as non-EU investment managers choose to avoid compliance either through private placement,<sup>6</sup> reverse solicitation,<sup>7</sup> or abandoning the EU altogether for alternative investment economies.<sup>8</sup>

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<sup>1</sup> *AIFMD Reshaping the Future*, KPMG 2 (Nov. 25, 2014), <http://www.kpmg.com/LU/en/IssuesAndInsights/Articlespublications/Documents/AIFMD-Reshaping-for-the-future-sixth-edition.pdf>, archived at <http://perma.cc/5PTA-LGQZ>.

<sup>2</sup> *Alternative Investment Fund Managers Directive (AIFMD)*, FIN. CONDUCT AUTH. (Jan. 28, 2015), <http://www.fca.org.uk/firms/markets/international-markets/aifmd>, archived at <http://perma.cc/M6EC-MQFD>.

<sup>3</sup> KPMG, *supra* note 1.

<sup>4</sup> *See id.* at 6.

<sup>5</sup> *AIFMD*, HSBC, <http://www.hsbcnet.com/gbm/about-us/financial-regulation/aifmd> (last updated June 4, 2014), archived at <http://perma.cc/2KSE-GYDU>.

<sup>6</sup> *See infra* notes 10-11 and accompanying text (explaining the inconvenience and complexities involved in national private placement regimes, which

This Article examines the repercussions the new AIFMD regulatory regime has had upon non-EU AIFMs, and the possible courses that non-EU managers are now choosing amongst. Part B examines the challenges the new reporting schemes impose on investment funds, while Part C discusses the variation in regulatory requirements in different EU Member States. Next, Part D discusses “passports” for AIFMs, while Part E considers reverse solicitation as an option for AIFMs. Finally, Part F discusses other alternatives to the AIFMD.

### **B. Annex IV Reporting Presents New Challenges**

Currently, non-EU AIFMs may only access the EU market through national private placement regimes (“NPPRs”), which permit non-EU AIFMs to sell directly to investors in individual Member States by reporting to each Member State’s “national financial security regulator.”<sup>9</sup> Such AIFMs can utilize the NPPR so long as the managers comply with various idiosyncratic reporting and disclosure regimes.<sup>10</sup> However, not only does this route “replace the AIFMD’s compliance yoke with the burden of reporting to as many as 27 different regulators,” this option also is only available until 2018.<sup>11</sup> Thus, the Annex IV reporting requirements make NPPRs a particularly onerous route to the EU financial markets.<sup>12</sup> The deadlines for Annex IV are fast approaching, and, although the submission deadline is January 30,

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constrain non-EU AIFMs by requiring individual compliance with each national regulatory agency).

<sup>7</sup> See *infra* notes 39-50 and accompanying text (explaining the difficulties and risk of using the reverse solicitation route, which disallows conventional “marketing” techniques and requires the investor herself to reach out to the fund).

<sup>8</sup> See *infra* notes 51-53 and accompanying text (discussing the possibility of non-EU AIFMs leaving the EU marketplace entirely rather than comply with the new directive).

<sup>9</sup> *An American in AIFMD land*, ERNST & YOUNG 8 (2014), [http://www.ey.com/Publication/vwLUAssets/EY\\_-\\_An\\_American\\_in\\_AIFMD\\_land/\\$FILE/ey-American-in-AFMID-land.pdf](http://www.ey.com/Publication/vwLUAssets/EY_-_An_American_in_AIFMD_land/$FILE/ey-American-in-AFMID-land.pdf), archived at <http://perma.cc/6NFL-YB72>.

<sup>10</sup> *Id.* NPPRs are the only access point for funds within the AIFMD regime, but there remains the reverse solicitation option, discussed *infra* Part E; *National Private Placement Regime*, FIN. CONDUCT AUTH., <http://www.fca.org.uk/firms/markets/international-markets/aifmd/nppr> (last visited Jan. 31 2015), archived at <http://perma.cc/NYG5-2ZYS>.

<sup>11</sup> ERNST & YOUNG, *supra* note 9, at 8.

<sup>12</sup> *Id.*

2015, as of January 2015, “only half of AIFMs are fully aware of the Annex IV reporting requirements applicable to them and the timetable for submission, with a further 42% being somewhat aware but unsure of the information required.”<sup>13</sup>

The confusion and hesitation appear to stem from of the sheer enormity of Annex IV’s reporting burden.<sup>14</sup> Annex IV reports are highly detailed reports to regulators, including “41 highly forensic questions, requir[ing] managers [to] provide information on instruments traded, exposures, Assets under Management (AuM), liquidity profiles, a breakdown of investments by type, geography and currency, concentrations, risk profile covering counterparty, market and liquidity risk, borrowing and exposure risk, stress test results and leverage.”<sup>15</sup> In addition, Annex IV requires AIFMs to painstakingly report information about each fund’s asset class and risk profile, as well as investor-specific disclosures.<sup>16</sup> Firms are unsurprisingly overwhelmed and underprepared for reporting, “which has resulted in them coming under regulatory scrutiny potentially for the very first time.”<sup>17</sup>

In response, many firms are expected to abandon their attempts at handling Annex IV reporting in-house and seek assistance from their “fund administrators,” which already possess much of the data needed for reporting and disclosure.<sup>18</sup> The costs associated with

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<sup>13</sup> *Fund Managers Look to Outsourcing to Overcome Annex IV Reporting Challenges*, MOORE STEPHENS (Jan. 7, 2015), <http://blog.moorestephens.co.uk/category/financial-services/fund-managers-outsourcing-overcome-annex-iv-reporting-challenges/>, archived at <http://perma.cc/2Y8M-BK55>.

<sup>14</sup> *The AIFMD Reporting Challenge*, BNP PARIBAS SEC. SERV. 7 (Sept. 30, 2014), <http://securities.bnpparibas.com/files/live/sites/quintessence/files/Regulation/Files/AIFMD-reporting-transparency-Annex-IV-4.pdf>, archived at <http://perma.cc/3HUR-EW9E> (“The AIFMD Annex IV transparency reporting requirements represent a major challenge for fund managers.”).

<sup>15</sup> *How Ready Are AIFMs for Annex IV Reporting Under AIFMD?*, COCONNECT (July 7, 2014), <http://cooconnect.com/webinar-review/how-ready-are-aifms-for-annex-iv-reporting-under-aifmd>, archived at <http://perma.cc/7U87-WTMW>.

<sup>16</sup> BNP PARIBAS SEC. SERV., *supra* note 14, at 10.

<sup>17</sup> Joe Parsons, *Have Europe’s Managers Prepared for Annex IV Reporting?*, GLOBAL CUSTODIAN, Winter 2014, at 12-13, available at [http://www.globalcustodian-digital.com/globalcustodian/winter\\_2014?pg=14#pg14](http://www.globalcustodian-digital.com/globalcustodian/winter_2014?pg=14#pg14), archived at <http://perma.cc/XVY4-STDL>.

<sup>18</sup> *Id.* at 13 (explaining how fund administrators collect data from their clients, organize and format the information and send to the regulators, and that Annex

regulatory burdens such as the reporting system in place are onerous; in July 2014 “38% of those [AIFMs] surveyed indicated that the costs of complying could force managers to either merge their funds with other firms or close them entirely.”<sup>19</sup>

### C. Variations in Member State Regulatory Regimes

For EU AIFMs, these reports may be onerous, but because they may apply for a passport through a “single local regulatory body,” EU-based AIFMs only have to comply with the reporting scheme of the Financial Conduct Authority (“FCA”) or other National Competent Authority (“NCA”).<sup>20</sup> The passport grants them uniform access to all Member States, thus allowing EU AIFMs to bypass the complex NPPR reporting schemes required by each individual Member State.<sup>21</sup> However, passports are not currently available to non-EU AIFMs, resulting in individual reporting to the NCAs of all Member States in which the AIFM’s investment products are offered.<sup>22</sup> As discussed *supra* Part B, the biggest difficulty in reporting is part of an overarching problem with the AIFMD structure—each EU Member State differs in its regulatory implementation.<sup>23</sup> While the AIFMD regulates the entire EU, “each country is allowed to interpret the directive in its own

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IV has created a new avenue of business for banks to launch their own reporting services).

<sup>19</sup> *Id.*

<sup>20</sup> Chris Kentouris, *AIFMD Annex IV Reporting: Risk Scrutiny on Deadline*, FINOPS REPORT (Dec. 17, 2014), <http://finops.co/technology/analytics/aifmd-annex-iv-reporting-risk-scrutiny-on-deadline/>, archived at <http://perma.cc/U5H4-J4HX>.

<sup>21</sup> *Id.* (detailing an example of how onerous the reporting may be to qualify for a passport, the author notes that Annex IV requires “at least three hundred points of reference data and other risk metrics . . . .”)

<sup>22</sup> Adam Hodgkins, *Annex IV Solution*, CORDIUM (last visited Feb. 1, 2015), <http://www.cordium.com/uk-services/aifmd/annex-iv-solution/>, archived at <http://perma.cc/TF9Q-JQYG>; Shay Lydon, *Marketing in Europe: Life after the AIFMD for Non-EU Managers*, OFFSHORE INVESTMENT (Jan. 2014), available at [http://www.matheson.com/images/uploads/publications/Marketing\\_in\\_Europe\\_Life\\_After\\_AIFMD\\_for\\_Non-EU\\_Managers\\_Offshore\\_Investment\\_Magazine\\_January\\_2014.PDF](http://www.matheson.com/images/uploads/publications/Marketing_in_Europe_Life_After_AIFMD_for_Non-EU_Managers_Offshore_Investment_Magazine_January_2014.PDF), archived at <http://perma.cc/T54Q-L3F3>.

<sup>23</sup> See *supra* Part B (discussing the reporting costs of Annex IV).

way.”<sup>24</sup> Thus, “[i]n addition to the level of disclosure required under the AIFMD, one of the biggest concerns for non-EU investment managers is the level of uncertainty stemming from variance in the implementing rules from country to country.”<sup>25</sup>

This problem extends past mere reporting requirements.<sup>26</sup> Although many Member States have transposed the AIFMD into their own regulatory requirements, implementation has been complicated by Member States that have included additional requirements, thereby “gold-plating” their regulatory requirements.<sup>27</sup> These “gold-plated” regimes may vary significantly among Member States.<sup>28</sup> For example, Germany’s regime calls on non-EU AIFMs to select a non-affiliate specifically responsible for “the so called ‘depository-lite’ duties of cash monitoring, safekeeping of assets and oversight and verification . . . .”<sup>29</sup> Even without such gold-plating, most EU states vary in their regulatory requirements in some way which makes compliance difficult, adding to the time and cost it takes for AIFMs to participate in the EU economy.<sup>30</sup> For example, “seven countries intend to allow AIFMs to appoint a depository in a different EU location to an EU AIF during the transition period,” and an additional “[n]ine Member States will require AIFMs marketing non-[European Economic Area

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<sup>24</sup> Chelsea Naso, *US Fund Managers: Are You Cleared to Access EU Investors?*, LAW360 (July 10, 2014, 6:58 PM), <http://www.law360.com/articles/556319/us-fund-managers-are-you-cleared-to-access-eu-investors>.

<sup>25</sup> Peter Rawlings, *EU Fund Reg Variance Challenges U.S. CCOs*, COMPLIANCE REPORTER (Sept. 23, 2013), <http://compliancereporter.com/eu-fund-reg-variance-challenges-u-s-ccos>; see Naso, *supra* note 24.

<sup>26</sup> See Parsons, *supra* note 17.

<sup>27</sup> Press Release, Alt. Inv. Mgmt. Ass’n, Some Key EU Markets ‘Gold-Plating’ AIFMD - AIMA EY Survey (Oct. 11, 2013), available at <http://www.aima.org/en/media/press-releases.cfm/id/EBA50564-74B7-48CF-80893ACF56625320>, archived at <http://perma.cc/B9H2-YVG6>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See Alt. Inv. Mgmt. Ass’n & Ernst & Young, *AIFMD: The Road to Implementation*, EY 2-7 (Sept. 2013), [http://www.ey.com/Publication/vwLUAssets/EY\\_AIFMD:\\_the\\_road\\_to\\_implementation/\\$FILE/EY-AIMA-Survey-September-2013-AIFMD-the-road-to-implementation.pdf](http://www.ey.com/Publication/vwLUAssets/EY_AIFMD:_the_road_to_implementation/$FILE/EY-AIMA-Survey-September-2013-AIFMD-the-road-to-implementation.pdf), archived at <http://perma.cc/2X5L-C5E6>.

(“EEA”)] AIFs in their jurisdiction to engage a qualified auditor to perform statutory audits . . . .”<sup>31</sup>

#### **D. Passport Availability for Non-EU AIFMs**

As discussed *supra* Part C, the root of this problem for non-EU AIFMs is the unavailability of passports.<sup>32</sup> For EU AIFMs that are fully authorized in an EU Member State that has incorporated the AIFMD into its own statutes, the manager can obtain a passport that enables her to market funds throughout the EU.<sup>33</sup> However, passports are currently unavailable for non-EU AIFMs, leaving non-EU AIFMs confined to marketing through alternative routes, including reverse solicitation and NPPRs.<sup>34</sup> Passports might be available for non-EU AIFMs in 2015, when the European Securities Markets Authority (“ESMA”) decides whether to open up the passporting regime to currently excluded AIFMs.<sup>35</sup> In the event passports become available for non-EU AIFMs, the manager “will have to apply for authorisation to its member state of reference (“MSR”).”<sup>36</sup> Additionally, “the non-EU AIFM must indicate the member states where distributors are going to promote units or shares of AIFs, the number of target investors in each member state, the official languages into which promotional documents have been translated and the distribution of marketing activities across member states where the non-EU AIFM intends to market its AIFs.”<sup>37</sup>

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<sup>31</sup> *Id.* at 7 (listing “Cyprus, Czech Republic, Denmark, Finland, Malta, Sweden and UK” as the EU Member States that “allow[] depositary flexibility,” while “Austria, Croatia, Denmark, Estonia, France, Italy, Latvia, Luxembourg, Netherlands, and Romania” will require certified audits).

<sup>32</sup> See Lydon, *supra* note 22, at 1.

<sup>33</sup> *Navigating Through AIFMD*, KPMG 5 (2014), <http://www.kpmg.com/IE/en/IssuesAndInsights/ArticlesPublications/Documents/navigate-through-aifmd-july-2014.pdf>, archived at <http://perma.cc/ST3W-ZG69>.

<sup>34</sup> *AIFMD Factsheet for Non-EU Managers Marketing EU AIF*, MATHESON (Oct. 23, 2013), [http://www.matheson.com/images/uploads/publications/AIFMD\\_Factsheet\\_for\\_Non-EU\\_Managers\\_Marketing\\_EU\\_AIF.pdf](http://www.matheson.com/images/uploads/publications/AIFMD_Factsheet_for_Non-EU_Managers_Marketing_EU_AIF.pdf), archived at <http://perma.cc/ELY6-3BZ9>.

<sup>35</sup> *Id.*

<sup>36</sup> *Alternative Investment Fund Managers Directive: Overview*, MATHESON, (Oct. 15, 2013), [http://www.matheson.com/images/uploads/publications/AIFMD\\_Factsheet\\_Overview.pdf](http://www.matheson.com/images/uploads/publications/AIFMD_Factsheet_Overview.pdf), archived at <http://perma.cc/V4WK-9979>.

<sup>37</sup> *Id.*

Currently, ESMA is “calling for evidence,” which entails ESMA soliciting EU and non-EU fund managers, investors, and non-EU securities supervisors to respond to and comment on the current passporting regime; ESMA must subsequently “issue advice on whether the passporting regime should be extended to the management and/or marketing of AIFs by non-EU AIFMs and its marketing of non-EU AIFs by EU AIFMs.”<sup>38</sup> After ESMA receives all responses, it will review the comments, draft an opinion, and advise various European regulatory bodies in July 2015.<sup>39</sup> Thus, the passporting regime may be around the corner for non-EU AIFMs, depending upon the outcome of the ESMA review.<sup>40</sup> Until July 2015, however, non-EU AIFMs are confined to NPPRs if they choose to stay within the confines, complexities and costs of the AIFMD; alternatively, these non-EU AIFMs must seek alternatives to complying with the AIFMD regulatory regime.<sup>41</sup>

### E. Reverse Solicitation

The first alternative for non-EU AIFMs is reverse solicitation.<sup>42</sup> According to a study by research and consulting firm Preqin, the lion’s share of non-EU AIFMs are selecting reverse solicitation as their

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<sup>38</sup> *ESMA consults on AIFMD Passport and Third Country AIFMs*, EUROPEAN SEC. MARKETS AUTH. (Aug. 11, 2014), <http://www.esma.europa.eu/news/ESMA-consults-AIFMD-passport-and-third-country-AIFMs>, archived at <http://perma.cc/7NSY-AV9N>.

<sup>39</sup> Justin Cornelius, Matthew Baker & Chris Ormond, *ESMAGathers Data for Proposed Extension of AIFMD Passport*, BERWIN LEIGHTON PAISNER (Nov. 12, 2014), <http://www.blplaw.com/expert-legal-insights/articles/aifmd-passport-extension/>, archived at <http://perma.cc/ET9L-HC3F>.

<sup>40</sup> *Id.*

<sup>41</sup> The AIFMD is still merely another straw on the regulatory camel for AIFMs, as there are a number of other compliance regimes they must also consider, furthering the costs associated with the funds. For a listing of various worldwide reporting regimes, see Gary Kaminsky, *Reverse Solicitation – AIFMD Solution or Regulatory Minefield?*, INDOS FIN. (Aug. 6, 2014), <http://www.indosgroup.com/2014/08/reverse-solicitation-aifmd-solution-or-regulatory-minefield/>, archived at <http://perma.cc/Q74N-CPNR>.

<sup>42</sup> *AIFMD Marketing Chart: Navigating the Passport and Private Placement Regimes*, DECHERT (Apr. 2013), [http://www.dechert.com/files/Uploads/Documents/AIFMD\\_Marketing\\_Passport\\_and\\_Private\\_Placement\\_Regimes\\_-\\_Dechert\\_2013.pdf](http://www.dechert.com/files/Uploads/Documents/AIFMD_Marketing_Passport_and_Private_Placement_Regimes_-_Dechert_2013.pdf), archived at <http://perma.cc/DAS7-GRK9>.

preferred strategy for “complying” with the AIFMD.<sup>43</sup> However, this strategy is dangerous and has infinite pitfalls, primarily because “[r]everse solicitation is not a strategy. By definition, one can’t ‘do’ reverse solicitation—it is a passive activity reactive to third-party inquiries of interest in the AIFM.”<sup>44</sup> The concern regarding reverse solicitation is that the term “marketing” is broad and vague, which is a trap for the unwary.<sup>45</sup> In the 2011 incarnation of the AIFMD, the European Parliament defined “marketing” as “a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an alternative investment fund (“AIF”) it manages to or with investors domiciled or with a registered office in the [EU].”<sup>46</sup>

Not only will each Member State likely promulgate different additional gold-plated rules or include additional regulations on top of the AIFMD, but Member States may define words in different ways.<sup>47</sup> Thus, the definition of “marketing” may vary throughout the EU, leaving AIFMs utilizing reverse solicitation as their key strategy in the EU markets in a very precarious situation.<sup>48</sup> The problem for fund managers is that reverse solicitation is largely out of the AIFMs’ control, and the contact they have with investors may be “marketing” in one Member State and not another.<sup>49</sup> Reverse solicitation is out of the control of the AIFM for the following reason:

[Reverse solicitation] is meant to allow for the specific and narrow situation where an investor actively seeks out the manager without having been solicited (directly or indirectly) in any manner. In today’s multimedia environment with numerous means for information to

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<sup>43</sup> Peter Rawlings, *Reverse Solicitation Most Popular AIFMD Solution*, COMPLIANCE REPORTER (July 23, 2014), <http://compliancereporter.com/reverse-solicitation-most-popular-aifmd-solution>.

<sup>44</sup> Kaminsky, *supra* note 41.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (quoting Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers, 2011 O.J. L 174/18).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; see also *AIFMD 2014 Update – Action Points for Non-EU Managers in 2014*, SIDLEY AUSTIN LLP 2 (Jan. 24, 2014), [http://www.sidley.com/files/News/6fca2aae-c6ae-43cc-914a-473f4e8da6bf/Presentation/NewsAttachment/21e3060f-3ba5-49e0-bcdf-ab452003b71d/Investment%20Funds%20Update\\_2014.01.24.pdf](http://www.sidley.com/files/News/6fca2aae-c6ae-43cc-914a-473f4e8da6bf/Presentation/NewsAttachment/21e3060f-3ba5-49e0-bcdf-ab452003b71d/Investment%20Funds%20Update_2014.01.24.pdf), archived at <http://perma.cc/GDK8-8PXS>.

<sup>49</sup> See Kaminsky, *supra* note 41.



be disseminated and numerous parties willing to make introductions that is a difficult threshold to maintain.<sup>50</sup>

Ensuring that a fund's contact with investors is confined and controlled so that it avoids breaching regulations is difficult.<sup>51</sup> Not only is it difficult to control reverse solicitation generally, but fund manager-friendly regimes might permit certain types of contact that their stricter Member States forbid.<sup>52</sup> Thus, the landscape for reverse solicitation presents numerous land mines and trapdoors, making it an unrealistic option for managers attempting to make consistent use of the EU as an investment economy.<sup>53</sup>

#### F. Other Alternatives for Non-EU AIFMs

Of course, reverse solicitation is not the only option for U.S. AIFMs—over a quarter recently reported they would completely avoid fundraising activities in the EU, while another 20% reported they would target the EU through a “managed account platform.”<sup>54</sup> Finally, less than 10% of managers will target individual Member States through the NPPRs, and a very small number of U.S. AIFMs stated that they would appoint a “registered manager.”<sup>55</sup> The registered manager approach is likely the most expensive and time-consuming option but would, in turn, “provide greater flexibility in raising capital.”<sup>56</sup> Despite the fund's ability to market throughout the EU, it comes at the cost of substantial corporate reorganization.<sup>57</sup> Thus, these bleak options have resulted in gun-shy non-EU managers; for example, “[s]ome 61% of London AIFMs feel the AIFMD has opened up new opportunities in

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Data Providers and Consultants Warned on Breaching Reverse Solicitation Rules*, COOCONNECT (Nov. 12, 2014), <http://cooconnect.com/news/data-providers-and-consultants-warned-on-breaching-reverse-solicitation-rules>, archived at <http://perma.cc/FAW6-4N5K>.

<sup>53</sup> See Kaminsky, *supra* note 41.

<sup>54</sup> Rawlings, *supra* note 43.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See SIDLEY AUSTIN LLP, *supra* note 48, at 7.

Europe . . . [while] only 35% of New York AIFMs agree with their European counterparts.”<sup>58</sup>

### G. Conclusion

Non-EU managers have to rethink their strategy if they want to continue to seek out investors within the European markets, at least until passports become available for non-EU AIFMs.<sup>59</sup> Non-EU managers are facing the difficult task of deciding whether targeting investors in individual Members States is worthwhile, as they no longer have the opportunity to blanket the entire EU because of the regulatory prerequisites to even offering their funds.<sup>60</sup> This is an expensive process, and risky, considering the sanctions funds face if they toe the line around “marketing.”<sup>61</sup> While AIFMs may still use private placements, funds still have to reach these investors and assess their interest using only broad, vague information.<sup>62</sup> And finally, for those funds that instead choose the risk-averse option of re-incorporating in the EU or utilizing an “authorized manager,” which would make the passporting regime available to them, the additional expenses are likely to be innumerable.<sup>63</sup> Regardless of the route chosen by a non-EU manager, the final word of advice appears to be to seek local counsel’s advice.<sup>64</sup>

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<sup>58</sup> Leah Cunningham, *UK Gets the AIFMD Vision, US, Not So Much, Says Survey*, HEDGEWEEK (Jan. 26, 2015, 15:30), <http://www.hedgeweek.com/2015/01/26/217284/uk-gets-aifmd-vision-us-not-so-much-says-survey>, archived at <http://perma.cc/7BNP-RHKP>.

<sup>59</sup> See Lydon, *supra* note 22, at 1.

<sup>60</sup> Richard Small, Neil Robson & Hilger von Livonius, *Advice for Non-EU Fund Managers on AIFMD Compliance*, RISK & COMPLIANCE, July-Sept. 2014, at 7, available at <http://riskandcompliancemagazine.com/advice-for-non-eu-fund-managers-on-aifmd-compliance/>, archived at <http://perma.cc/3LTG-FR78>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 10 (warning of potential agency costs as well as the additional regulatory costs likely present in those gold-plated Member States, including portfolio management and compensation compliance).

<sup>64</sup> *Id.* at 9-11.

<sup>65</sup> Student, Boston University School of Law (J.D. 2016).