Alternative Investment Fund Managers Directive

As in most countries, Sweden has in recent years had a continuously growing debate regarding corporate governance and transparency in the private equity and venture capital industry. Although there are, as of yet, no statutory transparency or particular corporate governance rules for the private equity and venture capital industry, in April 2009 the European Commission put forward a proposal for a Directive on Alternative Investment Fund Managers (AIFM Directive) with the purpose of harmonising requirements for entities engaged in the management and administration of alternative investment funds. The Commission's proposal has been met with criticism both within and outside the EU, and in November 2009, the Swedish Presidency of the EU Council Presidency issued a compromise proposal of the AIFM Directive suggesting certain amendments to the Commission's original proposal.

On the 11 November 2010 the European Parliament voted on and approved the AIFM Directive. The final version of the AIFM Directive is expected to be published in the Official Journal of the European Union during spring 2011 and will enter into force at the EU level on the 20th day following the publication. The AIFM Directive will thereafter be transposed into the EU member state laws within two years after its entry into force. The AIFM Directive is expected to be implemented in Sweden during the first half of 2013. The Commission together with the European Securities and Markets Authority (ESMA) will during the implementation shape and determine the steps for the practical application of the AIFM Directive by further clarifying and defining several of the provisions.

The alternative investment funds (AIF) that will fall under the AIFM Directive are defined as all funds that are not regulated under the UCITS Directive (2009/65/EG) and include hedge funds and private equity funds, as well as real estate funds, commodity funds, infrastructure funds and other types of institutional funds. The AIFM Directive applies to all AIF regardless of where the AIF itself is established, while it only applies to alternative investment fund managers (AIFM) established within the EU. There are, however, two proposed de minimis exemptions: (i) AIFM managing funds with combined assets of less than €100 million are not included; and (ii) AIFM managing funds with asset of less than €500 million that are not leveraged and do not grant investors redemption rights during a five-year period following the date of constitution are also excluded.

The AIFM Directive aims to establish a secure and harmonised EU framework for monitoring and supervising the risks that AIFM pose to their investors, counterparties, other financial market participants and to financial stability while permitting AIFM to provide services and market their funds across the internal market to professional investors. In practice, the AIFM Directive imposes strict requirements on AIFM operating within the EU. For example, all AIFM will be required to obtain authorisation from the competent authority in their home member state to be allowed to operate within the EU. The AIFM Directive also stipulates certain rules regarding risk management, liquidity, minimum level of capital, fair valuation of assets and also, in relation to the competent authority, far-reaching disclosure obligations. From a private equity point of view, the AIFM Directive stipulates certain disclosure requirements to other shareholders and representatives of employees of a portfolio company in which the AIFM has acquired a controlling interest and also annual announcements on investment strategy and fund strategies and objectives including disclosures regarding performance of portfolio companies' post-acquisition.

Although the private equity and venture capital industry supports regulation in general, the Swedish Venture Capital Association (SVCA) is critical to that the AIFM Directive assumes that all different types of alternative investments shall be subject to the same requirements. SVCA is of the view that this is unfortunate since there are many differences between the different types of AIF, especially between private equity funds and hedge funds. The 'one size fits all' approach may also have a disproportionate impact on smaller funds in terms of increased administration which may have negative effects on small and medium sized companies' access to capital.

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