

Foreign Private Equity and Hedge Funds marketed in Spain/Need to obtain authorisation for the GP

A bill (hereinafter, the "**Bill**") is currently being passed through the Spanish Parliament to transpose Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers.

Although the Bill is yet to be approved by the Spanish Parliament, few changes are expected to be made to the text (on which this note is based) that has been referred to the *Consejo de Estado* (supreme advisory body to the Government). The Bill is expected to be passed into law in June.

The Bill regulates, for the first time, the requirements that must be met in order to market shares or units in foreign private equity funds or other foreign closely-held collective investment schemes in Spain.

The Bill provides a broad definition of closely-held collective investment schemes ("**CIS**"), which are understood to be those that raise capital from a number of investors, by way of marketing activities, in order to invest it in all types of financial or non-financial assets in accordance with a defined investment policy. Therefore - in addition to private equity funds- hedge funds, debt funds or real estate investment funds also fall under this category.

The Bill provides for different situations, depending on the nationality of the scheme and/or its general partner ("**GP**") or manager, with different rules for each situation.

1. CIS based in another EU Member State and managed by a Member State-authorized GP/manager

This type of fund may be freely marketed, although the GP/manager must previously notify the Spanish Securities Market Authority ("**CNMV**", its Spanish acronym), providing the following information:

- a) Identification of the entities it intends to market, as well as the place where they are based.
- b) The provisions and methods for marketing the shares or units in Spain and, as the case may be, information on classes of the latter or series of the former.
- c) The fund regulation or the partnership's incorporation documents.
- d) The entity's prospectus as well as its latest annual report.
- e) Identification of the investment entity's depository.
- f) A description of the investment entity or any information on the entity that may be available to investors.
- g) Information on the place where the master investment entity is based if the entity to be marketed is a feeder.

- h) When appropriate, information on any measures taken to avoid the marketing of shares/units in the investment entity to retail investors.

This notification must be filed together with a certificate issued by the competent authorities in the manager's home Member State, evidencing that it is authorised under Directive 2011/61/EU.

The notification may be made in English.

2. CIS incorporated in a non-EU country but managed by an EU Member State-authorized GP/manager.

In this case, it is necessary to obtain the CNMV's prior authorisation of the CIS, as well as to register the CIS and its GP/manager with the CNMV register.

When applying for authorisation and registration, evidence of the following must be submitted to the CNMV:

- a) That there is a cooperation agreement in place between the competent authorities of the GP/manager's home state and the supervisory authorities of the Member State where the CIS is based, in order to guarantee an efficient exchange of information.
- b) That the CIS' home state does not appear on the International Financial Action Task Force on Money Laundering's list of non-cooperative countries.

The GP/manager must also file at the CNMV the notification containing the information described in point 1 above, together with documents evidencing that the CIS, as well as the shares or units that make up its capital or assets, are indeed subject to their applicable legal regime.

The CNMV may deny the authorisation and registration for prudential reasons, when compliance with Spanish legislation on securities markets, investor protection or the conditions for competition with entities authorised in Spain cannot be assured.

The Bill provides for the possibility of establishing additional conditions by way of subsequent regulations.

3. CIS managed by a non-EU GP/manager

These CIS will also require prior authorisation, as well as registration of both the CIS and its GP/manager with the CNMV register.

When applying for authorisation, evidence of the following must be submitted to the CNMV:

- a) That there is a cooperation agreement in place between the CNMV and the competent authorities of the CIS' and the GP/manager's home states, in order to guarantee an efficient exchange of information.
- b) That the CIS' and the GP/manager's non-EU Member States do not appear on the International Financial Action Task Force on Money Laundering's list of non-cooperative countries.

Once evidence of a) and b) above has been submitted, the GP/manager must file the notification as well as the information described in point 2 above at the CNMV.

The authorisation may be denied on the same grounds as those referred to in point 2 above, and further regulations with additional conditions for the marketing of these CIS may also be issued.

CIS must in all cases respect applicable legislation on marketing and advertising in Spain and, in the case of GPs/managers from a non-EU state, the transparency requirements contained in the Bill for GPs/managers authorised in Spain.

The above-described regime applies to the marketing of CIS aimed at professional investors, and not marketing aimed at non-professional investors, which is subject to a different regime with greater information and transparency requirements.

The notification, authorisation and registration obligations described in this paper must be fulfilled prior to carrying out any marketing activities in

Spain. Nevertheless, the Bill provides a transitional period for any marketing activities being carried out at the time the Act enters into force. Although

this date may change if the passage of the Act is delayed, the Bill sets 22 July 2014 as the deadline for fulfilment of the obligations set out therein.

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