BREXIT AND ALTERNATIVE ASSET MANAGERS

MANAGING THE IMPACT IN THE EEA

July 2018

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1 / EXECUTIVE SUMMARY

In 2016, AIMA[1] published "Brexit and Beyond",[2] a thought-leadership paper that set out our vision for a Brexit deal between the EU and UK that would recognise the needs of the European alternative asset management industry and the investors it serves.

We welcome the progress that has since been made in respect of the legal text underpinning the UK's withdrawal and, specifically, the commitment to a 21-month transition period. This provides more certainty to market participants regarding the timeframe associated with Brexit.[3] We also welcome the statements from HM Treasury, the FCA and Bank of England regarding the establishment of a temporary permissions regime for EEA firms that currently passport their services into the UK. This helps to mitigate the risk of a cliff edge effect for EEA firms that currently provide investment management services into the UK using existing cross-border provisions in EU law.[4]

However, the temporary nature of this framework means that a more permanent and comprehensive solution will still be needed to protect the ability of EEA investment managers to provide their services in the UK. Similarly, the position of EEA investors who use the services of UK-based investment managers has not at this point been fully addressed. The goal of this paper is to offer a bottom-up assessment of what will need to be addressed by the EU and its institutions during that transition period to ensure that EEA managers can continue to provide services in the UK and to ensure that EEA investors continue to have access to services provided by UK investment managers.

The analysis recognises that the UK is likely to leave the EU's single market and that many existing cross-border provisions will cease to apply for UK firms with respect to their business in the EEA and for EEA firms with respect to their business in the UK.

We therefore suggest the steps that can be taken to smooth the path to the new regime and prevent disruption to the alternative asset management industry and the investors it serves.

The purpose of this paper is not to speculate about the final shape of a Brexit settlement between the EU and UK when it comes to financial services, but instead to set out technical points that should be addressed – be that as part of an all-encompassing agreement or on a more individual basis.

In what follows, we make the following points:

- **Prioritise cooperation agreements in case of a "no deal" scenario**. In any future relationship, cooperation arrangements between supervisory authorities will be required and are often a pre-requisite for market access for non-EEA entities. The European Securities and Markets Authority (ESMA) should therefore be tasked with ensuring that EEA member states put in place bilateral cooperation arrangements with the UK on standard terms. This will ensure that investors can continue to have access to privately placed funds and will ensure that existing delegation arrangements under the AIFMD and UCITS Directive are not needlessly disrupted. However, the timing of these agreements is essential. To avoid cliffedge effects, we believe that at least basic cooperation agreements need to be in place prior to the March 2019 withdrawal date, in case the transition period does not happen.

- **Use of transition period**: Assuming that Brexit entails the UK's withdrawal from the single market, the UK will become a "third country" under various EEA rules. This will require UK alternative asset managers to change the way they do business with EEA investors and clients.

1 The Alternative Investment Management Association (AIMA) is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry.
2 AIMA and MFA: 'Developing Alternative Investment Management in the UK - Brexit and Beyond', December 2016.
3 See https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf.
4 See https://www.fca.org.uk/news/statements/fca-statement-eu-withdrawal.

We therefore believe that it would be sensible to deal with the following matters during that transition period in order to protect the interests of those investors and clients:

- Equivalence: Various pieces of EU financial services legislation incorporate "equivalence" or similar frameworks which allow third-country firms or clearing or trading infrastructure to provide services to EEA clients on the condition that the rules of their home jurisdiction have been deemed equivalent to those of the EU.[5] The European Commission should during the transition period adopt an equivalence determination in respect of UK rules to ensure that EEA investors and firms continue to have access to the investment management services that they currently use.

- Change of status issues: Depending on the nature of the future relationship with the EU, many UK firms are likely to undergo a change of status under EU law. EU financial services legislation does not contain provisions which regulate the change of a status of an undertaking from an EEA entity to a non-EEA entity. If, for example, UK managers market their non-EEA funds under a private placement regime, they will need to change status for purposes of that regime, which will likely require de-notification under one regime and registration under another and, depending on the answers to the questions in the Annex, may adversely affect EEA investors in EEA AIFs and UCITS managed by those transitioning UK managers (e.g., if mandatory redemptions are required as a particular EU investor is not permitted to invest in non-EEA AIFs or non-UCITS products and a period to affect these redemptions in an orderly way is not provided). Such changes of status should be possible during the transition period in order to avoid disruption.

- **Grandfathering:** The EU and UK should adopt an approach that ensures that EEA investors' relationships with UK firms that existed prior to Brexit can continue uninterrupted after Brexit by virtue of "grandfathering" provisions.

- **Central coordination of work:** In order to deal effectively with the points addressed above and the more technical matters identified in the remainder of this paper, it will be essential that Brexit-related work, particularly in respect of cooperation agreements, is driven by the European Commission and ESMA, rather than through a series of bilateral projects between the UK and individual EEA member states. This reflects the fact that a series of bilateral discussions would be less likely to ensure the timely adoption of cooperation agreements and would increase the likelihood of divergences in the approaches adopted by individual member states and their competent authorities. We believe that ESMA is well placed to provide a focus for discussions related to cooperation agreements, given its extensive past work and experience in this space, as well as the effective working relationships that it has already established with member state authorities.

We believe that covering these points would minimise disruption for the alternative asset management industry and the investors it serves.

The remainder of this paper explores some of the pieces of legislation that are relevant from the perspective of cross-border activity in the European alternative asset management industry, including the AIFMD, UCITS, MiFID2 and EMIR. We identify the key cross-border provisions in these rules that will be impacted by Brexit and explain why a combination of the policy conditions outlined above would help ensure that firms can move from the existing framework to a new one with minimal disruption to the services they provide to investors. The Annex to the paper sets out a number of technical questions that will need to be addressed assuming the UK leaves the single market. We have addressed a nearly identical set of questions to the UK government and the UK Financial Conduct Authority (FCA) as the issues covered in the Annex will affect EEA firms accessing the UK market as third-country firms as well.[6]

5 In this paper we use "equivalence" as an umbrella term for any legal assessment of the rules or requirements of a third-country jurisdiction, noting that EU legislation uses a variety of terms and procedures to codify such assessments.

6 See https://www.aima.org/resource/brexit-and-alternative-asset-managers-managing-the-impact.html.

2 / MANAGING THE IMPACT OF BREXIT

2.1 / AIFMD

Cross-border provision of management services by UK alternative investment managers

Current state of play

The AIFMD contains multiple provisions that govern the management and marketing of alternative investment funds (AIFs) in the EEA. Different provisions apply depending on where the alternative investment fund manager (AIFM) has been established and where the AIF to be marketed has been established.

Article 32 of the AIFMD enables authorised EEA-based alternative investment fund managers (EEA AIFMs) to market across the EEA any AIFs they manage, provided those AIFs were established in the EEA, following a notice to their home member state of their intention to do so (the 'EEA marketing passport').

Article 33 of the AIFMD enables authorised EEA AIFMs to manage AIFs established in other member states either directly or via a branch following a notice to its home member state of its intention to do so (the 'EEA management passport'). Article 6(4) of the AIFMD allows member states to authorise EEA AIFMs to manage segregated client portfolios without the need for a separate MiFID authorisation. This service can be offered on a cross-border basis by virtue of the EEA management passport.

Article 36 of the AIFMD enables authorised EEA AIFMs to market non-EEA AIFs (and certain EEA feeder AIFs) they manage to professional investors subject to certain conditions, including the existence of required cooperation agreements between the supervisory authorities of the home member state of the AIFM and the supervisory authorities where the non-EEA AIF was established, and subject to the EEA member state where the marketing is to take place having implemented an Article 36 private placement regime (which not all EEA member states have done).

Under this provision, supervision of all requirements related to authorisation, systemic risk and other reporting required by Article 24 of the AIFMD remain with the home member state.

Impact of Brexit on cross-border marketing and managing activities

Assuming Brexit entails the withdrawal of the UK from the single market, EEA AIFMs may not be able to market to investors in the UK via the marketing passport or provide services in the UK via the management passport. The UK FCA has announced a temporary permissions regime which will maintain the status quo for a period while the UK government and the FCA establish the details of how firms should go about transitioning to a revised status in the UK. AIMA has asked for clarification from the UK government and the FCA about how EEA AIFMs should go about transitioning from using the management passport under Article 33 and marketing their AIFs to UK investors under Articles 32 and 36 in parallel to this request that member states and member state competent authorities consider the corresponding transition details in relation to UK AIFMs.

In relation to the EEA member states' AIFMD regimes, UK AIFMs will no longer qualify for the management and marketing rights under Articles 32, 33 and 36 described above and UK AIFMs will most likely be treated as third-country AIFMs (or non-EEA AIFMs in common parlance). Because of the change in status from EEA AIFM to non-EEA AIFM, UK AIFMs will no longer be eligible to manage EEA AIFs pursuant to the EEA management passport or market their AIFs under Articles 32 and 36. The AIFMD does not contain any provisions dealing with the orderly withdrawal of notices and registrations filed under Articles 32, 33 and 36 in circumstances such as those brought about by Brexit and, in the absence of any agreement or clarity on a proposed approach, uncertainty will prevail over existing relationships which have developed under these arrangements.

The AIFMD does include provisions relating to non-EEA AIFMs enabling them to manage EEA AIFs and/or to market AIFs under certain conditions. Currently, the right of non-EEA AIFMs to manage EEA AIFs is subject to the national law of each EEA member state and the right of non-EEA AIFMs to market in the EEA any AIFs they manage is subject to (i) the requirements of Article 42 and (ii) the conditions set out in the Article 42 private placement regime of the EEA member state where the marketing is to take place, if the EEA member state has one.

Although the minimum requirements of Article 42 do not require compliance with the full scope of requirements of the AIFMD that apply to EEA AIFMs, Article 42 does require, among other things, that appropriate cooperation agreements are in place between the supervisory authorities of the EEA member state where the marketing is to occur and the supervisory authorities of the third country where the non-EEA AIFM is established. With respect to the marketing of an EEA AIF by a non-EEA AIFM, a cooperation agreement between the supervisory authorities of the home member state of the EEA AIF and the supervisory authorities of the third country where the non-EEA AIFM has been established is also required. In addition, unlike Article 36, Article 42 leaves supervision of systemic risk and other reporting required by Article 24 of the AIFMD with each separate EEA member state where marketing takes place.

For UK AIFMs that would want to use any available Article 42 private placement regimes following Brexit, there will be a timing issue which would need to be resolved in order to allow for a seamless transition upon Brexit. UK AIFMs will not technically be non-EEA AIFMs until after the UK leaves the single market and neither the AIFMD nor EEA current member state private placement regimes under Article 42 currently make provision for an entity that is not a non-EEA AIFM to file the necessary registration paperwork, which can take a minimum of 20 days from filing to process and much longer in some circumstances, e.g., Sweden – 60 days.

Impact of Brexit on cross-border delegations

Brexit may also affect delegations from authorised EEA AIFMs to UK-based asset managers. Article 20 of the AIFMD requires that, where the delegation concerns portfolio management or risk management and is conferred on a third-country entity, a cooperation agreement between the competent authority of the EEA AIFM and the supervisory authority of the delegate is in place.

AIFMD third-country passport

The AIFMD contains provisions in Articles 35 and 37 to 41 that could allow non-EEA AIFMs to access marketing and management rights similar to the EEA marketing passport, provided that ESMA has made a positive assessment regarding the third country where the AIFMs (and, where applicable, AIFs) were established and provided that relevant cooperation agreements are in place. AIMA fully supports the finalisation of the process of activating the third-country marketing passport, as well as the third-country management passport.

Cooperation agreements

Since the UK is currently in the EEA, no cooperation agreements of the type required for the various provisions of the AIFMD discussed above have been signed with other EEA member states. If no such agreements are signed before the formal withdrawal of the UK from the EU at the end of any transition period, it is likely that any then-existing UK AIFMs will have to immediately cease:

- marketing their AIFs in the EEA;
- directly managing any EEA AIFs until they have re-registered with the competent authority of the member state of the EEA AIF under the applicable national law; and
- any communications with their existing EEA investors outside of information specifically related to the AIF(s) these investors are invested in.

UK entities will also have to cease providing portfolio management or risk management to any AIF via a delegation arrangement from an EEA AIFM in such circumstances.

Although similar issues would naturally arise for EEA AIFMs with UK activities, the FCA's announced temporary permissions regime will defer these matters for a period, but eventually cooperation agreements are likely to be necessary to facilitate access by EEA AIFMs to UK clients and investors.

Policy solutions

ESMA should be tasked with ensuring that EEA member states sign **cooperation agreements** with the UK ahead of March 2019 to become effective by the end of the transition period at the very latest. As noted above, these agreements are at the foundation of many of the third-country provisions in the AIFMD and underpin the existing delegation framework.

The European Commission adopted a Delegated Regulation to facilitate the establishment of cooperation arrangements with third countries, as per various articles of the AIFMD, in accordance with Article 56 and subject to Articles 57 and 58 of the AIFMD. ESMA was also directed to develop guidelines to determine the conditions of the application of European measures adopted by the Commission regarding the cooperation arrangements. Further to these obligations, ESMA published its "Guidelines on the model MoU concerning consultation, cooperation and the exchange of information related to the supervision of AIFMD entities", which included the text of a model MoU that EEA member states could use with third countries. In practice, that model MoU was the actual text used for the cooperation agreements put in place with many third countries. In the interests of existing investors in AIFs, ESMA should be tasked with ensuring that the EEA member states and the UK government enter into bilateral cooperation agreements for AIFMD purposes on the agreed ESMA model MoU terms with effect from the moment of Brexit in order to avoid cliff edge effects.

The EU and UK should put in place a **grandfathering provision** that would allow UK AIFMs to communicate freely with existing, pre-Brexit EEA investors in AIFs they manage and which were marketed in the EEA prior to Brexit and to allow those EEA investors to retain their investments in those AIFs and add to them without such activities constituting ongoing marketing of those AIFs in the EEA.

The UK should be able to use the **transition period** to enable UK AIFMs to continue to market their AIFs (regardless of whether these are EEA or non-EEA domiciled) to existing and new EEA-based investors as well as to manage existing or new EEA AIFs on the basis of their pre-Brexit authorisation status in the UK. This would give UK AIFMs time to decide whether to establish new operations in the EEA and seek and obtain the necessary authorisation(s) within the relevant EEA jurisdictions or to redeem EEA investors that are not permitted to invest in non-EU AIFs or non-UCITS products in an orderly manner, depending on the circumstances. It would also avoid unnecessary disruptions which would be detrimental for the UK AIFMs but also for the end EEA investors whose returns on assets might suffer from such a potential disruption.

During this transition period, UK AIFMs should also be able to apply to withdraw their current notices/registrations under Articles 32, 33 and 36 of the AIFMD and concurrently file the necessary third-country notices/registrations under Article 42 where applicable, which could become effective before the end of the transition period. EEA firms could use this same transition period to change the way they do business with UK investors once the contours of the post-Brexit regulatory regime for marketing in the UK by EEA firms have been determined.

2.2 / UCITS

Paralleling the situation under AIFMD, Brexit might affect delegations from EEA authorised UCITS management companies to UK-based asset managers. Article 13 of the UCITS Directive requires that, where the delegation concerns investment management and is conferred on a third-country entity, a cooperation agreement between the competent authority of the EEA UCITS management company and the supervisory authority of the delegate is in place.

Policy solutions

In the interests of existing investors in UCITS, ESMA should be tasked with ensuring that EEA member states and the UK government enter into bilateral cooperation agreements for UCITS purposes on model MoU terms with effect from the moment of Brexit in order to avoid cliff edge effects.

2.3 / MiFID2 / MiFIR

MiFID2, like the prior MiFID framework, enables authorised investment firms to provide investment services across the EU, subject to making a notification under Article 34 of MiFID2. Many EEA investors rely on this provision to be able to use the portfolio management services of UK investment managers, just as many EEA-based investment managers use this framework to passport services into the UK.

Assuming Brexit entails the withdrawal of the UK from the single market, this intra-EEA passporting right will be lost. While the implications of this are not entirely clear

from the point of view of relationships with EEA clients that pre-date Brexit, it is likely that UK investment firms would, in the absence of a specific agreement addressing this point, have to cease providing services to those clients or establish an authorised MiFID investment firm within the EEA in order to provide services to those clients. A similar difficulty will ultimately arise for EEA firms when the UK's temporary permissions regime expires. Whether firms would choose to establish new entities would depend on the feasibility and cost of establishing a new legal entity in the EEA and the ease, or lack of it, of obtaining local authorisation.

Policy solutions

The EU and UK should put in place a **grandfathering provision** that enables UK investment firms to continue to provide services to any EEA clients with whom they had a relationship prior to Brexit. This would mean that alternative asset managers that do not expect to establish new EEA client relationships would be able to avoid establishing a new entity in the EEA.

As part of the agreed **transition period**, we assume that UK firms will be able to continue to provide services to existing and new EEA clients on the basis of their pre-Brexit authorisation status in the UK. This would give firms time to decide whether to establish new operations in the EEA and seek and obtain the necessary authorisation within the relevant EEA jurisdiction.

According to Article 46 of MiFIR, a third-country firm may provide investment services to per se professional clients and eligible counterparties without the establishment of a branch, subject to registration with ESMA, which itself is contingent on the existence of a positive equivalence determination in respect of the third-country jurisdiction. In the absence of a positive equivalence determination, existing national regimes remain unchanged.

The adoption of an equivalence determination triggers the transitional provision of Article 54 of MiFIR according to which firms may continue to provide cross-border services under a national regime without seeking registration with ESMA for a period of three years.

In advance of Brexit, **during the transition period**, the European Commission should adopt an **equivalence determination** in respect of UK rules that derive from the existing MiFID2 framework, enabling UK alternative asset managers to benefit from the third-country registration regime of Article 46 of MiFIR and maximising the access of EEA clients to the services provided by UK investment managers. The European Commission should ensure that the UK adopts a reciprocal determination in respect of EEA rules to ensure that EEA investment managers can provide their services to UK investors after the expiry of the UK's temporary permissions regime.

2.4 / EMIR

Practical implications of Brexit

Equivalence: scope of entities

In its paper 'The Impact of a No-Deal Brexit on the Cleared Derivatives Industry'[7], the FIA helpfully highlights the important role of equivalence and recognition in the context of the status of UK clearing infrastructure for EEA firms.

Similarly, Article 13 of EMIR provides a mechanism to avoid duplicative or conflicting rules, whereby counterparties entering into a transaction subject to EMIR shall be deemed to have fulfilled their EMIR obligations where at least one of the counterparties is established in an equivalent third country.

We have previously highlighted the fact that the application of this provision is not clear in a fund management context. Take, for example, the common example of an offshore (i.e. non-EU/EEA) fund with a UK investment manager.

After Brexit, the investment manager will presumably be subject to UK rules replicating EMIR. However, given that EMIR's definitions of financial and non-financial counterparty attach to the investment fund, rather than to the investment manager, it is not clear that the offshore fund managed by the UK manager would be able to benefit from an equivalence determination in

7 https://fia.org/sites/default/files/FIA_WP_Brexit_NoDeal.pdf

respect of UK rules, given that it is not "established" there (following the wording of Article 13 of EMIR).

In the extreme, this could lead to a situation where UK rules have been deemed equivalent by the European Commission, but UK investment managers are nonetheless unable to enter into OTC derivatives transactions with EEA brokers on behalf of the funds they manage without those funds being subjected to competing EEA and UK rules. This reflects the fact that the funds themselves might not be established in the UK.

Equivalence: Future alignment of product scope

Assuming the UK incorporates into UK law the delegated regulations that define which contracts are subject to the EMIR clearing obligation of Article 4 and MiFIR derivatives trading obligation of Article 28, the UK and EU will have a consistent approach to which products must be cleared and, where applicable, traded on a trading venue after the UK's withdrawal from the EU. However, divergence could arise over time in respect of the contracts that are subject to the mandatory clearing and trading obligations, potentially leading to dislocation of liquidity in certain products.

Policy solutions

The European Commission should adopt an **equivalence determination** in respect of UK rules that parallel EMIR, whilst also ensuring that the benefits of such an equivalence determination extend to entities "established in or subject to the rules of" the UK. This should occur during the **transition period**. The European Commission should ensure that the UK adopts a reciprocal determination in respect of EEA rules.

The EU and UK should develop a process to ensure that future decisions on equivalence or the scope of substantive requirements of EMIR and MiFIR (including the clearing and trading obligation) are adopted in a synchronised manner to avoid market dislocations.

ANNEX / TECHNICAL QUESTIONS ARISING FROM THE UK'S DEPARTURE FROM THE SINGLE MARKET

In the absence of an agreement for the UK to remain part of the single market, the UK is likely to become a third country for the purposes of the AIFMD either immediately upon Brexit or following an agreed period of transition. This will have a direct impact on UK AIFMs marketing in the EEA under current passporting and NPPR arrangements and on EEA investors already invested in these products. We have set out a non-exhaustive selection of technical questions that will arise in relation to UK AIFMs needing to transition from one status to another and it would be helpful to have clarification on these matters well in advance of Brexit to avoid confusion and additional costs or undesirable impacts for EEA investors.

Since the AIFMD does not contemplate the situation where a country transitions from being a member state to not being a member state, our preference would be that the European Securities and Markets Authority (ESMA) coordinate a uniform set of responses to these questions posed in the discussion below which will apply in all member states, rather than each member state responding separately. However, in the event that is not possible, we ask that ESMA coordinate a centralised public database of member state responses to these questions in English so that all stakeholders are able to easily access this information and implementation of changes is streamlined as far as possible.

Status of Current Article 32 Passporting Notifications from UK AIFMs for EEA AIFs

A UK AIFM that today utilises the process under Article 32 of the AIFMD, as transposed into the relevant national law, to market EEA AIFs it manages in one or more EEA host member states via the AIFMD passport, will no longer be eligible to do so upon Brexit. Assuming the UK AIFM becomes a non-EEA AIFM, and assuming the third country passport does not become a live option before Brexit, the only avenue that might be available to the UK AIFM for continuing to market those EEA AIFs in an EEA host member state is via the method set out in Article 42 of the AIFMD assuming the EEA host member state has transposed Article 42 to allow for a national private placement regime ('NPPR') process meeting at least the minimum requirements of Article 42 of the AIFMD. Not all member states that have transposed Article 32 have transposed Article 42.

As a result, if a UK AIFM is currently marketing an EEA AIF in one or more EEA host member states pursuant to the marketing passport regime set out in Article 32 of the AIFMD, there will be a number of questions for the relevant EEA host member states regarding the situation for the UK AIFM, the EEA AIF and the EEA investors in the EEA AIF at the time of Brexit and thereafter. These questions are set out below.

Deregistration from the relevant Article 32 regime for UK AIFMs

1. Will a formal deregistration notification be required for EEA AIFs no longer eligible to be marketed under the Article 32 regime due to Brexit?
2. Assuming a formal deregistration notification is required:
   - 2.1. Is advance notice required?
   - 2.2. In what format should the deregistration notification be presented?
   - 2.3. What information should the deregistration notification contain?
   - 2.4. Should the deregistration notification be submitted via the UK FCA or directly to the host member state competent authority?
   - 2.5. When is the deadline for submission of the deregistration notification?
   - 2.6. What happens if a UK AIFM with a registration under the Article 32 regime does not file a deregistration notification?
3. Will a deregistration fee be payable?
   - 3.1. If a deregistration fee is payable, how much will it be?
   - 3.2. Where and by when must it be paid?
   - 3.3. What happens if the fee is not paid on time?
4. When will deregistration become effective?
5. If a UK AIFM has paid an annual fee for the year of the deregistration, will it receive a pro rata refund? If so, will the refund be automatic or must a refund be applied for? If the latter, how should such application be made?

6. Does a local agent need to be appointed for a specific period post-deregistration?
   - 6.1. How long would such an agent need to be appointed for?
   - 6.2. What functions would the agent need to perform or stand ready to perform?
   - 6.3. Does the agreement with such an agent need to be submitted to the host member state competent authority?
7. Will a final financial report and/or audited financial statements need to be filed with the host member state competent authority?
   - 7.1. If so, by when and covering what period?
   - 7.2. Where and how should these be submitted?
   - 7.3. Do the answers differ if:
     - 7.3.1. No investors from the host member state ever invested in the AIF;
     - 7.3.2. Investors from the host member state did invest in the AIF but all such investments were either (i) made pre-11 July 2013 or (ii) genuine reverse solicitations; or
     - 7.3.3. No investments by investors from the host member state were made following marketing in the host member state after 11 July 2013?
8. Will any financial regulatory and/or systemic risk reports need to be filed with the host member state competent authority?
   - 8.1. If so, by when and covering what period?
   - 8.2. Where and how should these be submitted?
   - 8.3. Do the answers differ if:
     - 8.3.1. No investors from the host member state ever invested in the AIF;
     - 8.3.2. Investors from the host member state did invest in the AIF but all such investments were either (i) made pre-11 July 2013 or (ii) genuine reverse solicitations; or
     - 8.3.3. No investments by investors from the host member state were made following marketing in the host member state after 11 July 2013?
9. What records must be kept and for how long?
10. Do the answers to any of the questions above differ if:
    - 10.1. The UK AIFM concurrently registers under an available Article 42 NPPR process;
    - 10.2. The UK AIFM chooses not to register under an available Article 42 NPPR process; or
    - 10.3. There is no available Article 42 NPPR process due to a failure to have cooperation agreements in place?

Concurrent registration under an available Article 42 NPPR process

The questions in this section all assume that the host member state has adopted an NPPR process consistent with Article 42 of the AIFMD.

11. If the UK AIFM previously had a notification under the Article 32 regime in place, is a formal registration required as part of the Article 42 NPPR process?
12. Assuming a formal registration will be required as part of the host member state's Article 42 NPPR process:
    - 12.1. Will there be any items from the host member registration process that UK firms will not need to fulfil if they were previously passporting under the Article 32 regime in that host member state?
    - 12.2. What is the deadline for NPPR registration for UK firms transitioning from the host member state's Article 32 regime?
    - 12.3. Will it be possible for a registration application to be submitted in advance of the effective date of the deregistration from the Article 32 regime becoming effective if the only deficiency in the application is that the cooperation agreements between the FCA and the host member state competent authority and the competent authority of the member state of the EEA AIF, respectively, are not yet in place?

12.4. Will the usual time periods for consideration of applications under the host member state's NPPR process apply with respect to UK AIFMs and EEA AIFs previously notified under the host member state's Article 32 regime?

12.5. Will NPPR registrations be allowed to be approved subject to the cooperation agreements between the FCA and the host member state competent authority and the competent authority of the member state of the EEA AIF, respectively, coming into effect?

12.6. Will an NPPR registration fee be payable? If so, will transitioning firms have the benefit of any annual fees paid previously under the host member state's Article 32 regime which are not being refunded to them following deregistration from the host member state's Article 32 regime?

13. In respect of financial, regulatory and systemic risk reporting which would have been submitted via the FCA under the Article 32 regime, where reports cover a period that straddles the Article 32 regime and the host member state's NPPR process, where and how should such reports be submitted?

14. Please confirm that a UK AIFM transitioning from Article 32 passporting to Article 42 registration for an EEA AIF will be permitted to terminate its depositary service, subject to any contractual restrictions from doing so.

No registration under an Article 42 NPPR process

The questions in this section all assume that the host member state has **not** adopted an NPPR process consistent with Article 42 of the AIFMD.

15. If an NPPR registration is not possible for UK AIFMs as an alternative to the Article 32 regime (due to lack of cooperation agreements or otherwise) for a limited period of time or at all, what is the position of investors from the host member state in the EEA AIF who invested as a result of marketing by the UK AIFM during the period when the UK AIFM was relying on the Article 32 passporting regime?

15.1. Can such investors from the host member state remain in the EEA AIF?

15.2. If they can remain in the EEA AIF, can they make "top up" investments without that being considered marketing by the UK AIFM?

15.3. In such circumstances would financial, regulatory and systemic risk reporting obligations continue?

15.3.1. Which reports would have to be filed?

15.3.2. For how long?

15.3.3. Where should such reports be submitted?

16. What records must be kept and for how long?

17. Would the answers to the above be different if the UK AIFM instead chose not to register under the host member state's Article 42 NPPR process because it does not intend to market in that host member state following Brexit even though registration is technically possible? If so, in what ways?

Status of Current Article 36 National Private Placement Regime Notifications from UK AIFMs regarding Non-EEA AIFs and Certain EEA Feeder AIFs

A UK AIFM that today utilises the process under Article 36 of the AIFMD, as transposed into the relevant national law in the form of a national private placement regime ('Article 36 NPPR regime'), to market (i) non-EEA AIFs and (ii) EEA feeder AIFs with non-EEA master funds that it manages in one or more host member states will no longer be eligible to do so upon Brexit. Assuming the UK AIFM becomes a non-EEA AIFM, and assuming the third country passport does not become a live option before Brexit, the only avenue that might be available to the UK AIFM for continuing to market those non-EEA AIFs/EEA feeder AIFs in a host member state is via the method set out in Article 42 of AIFMD described above assuming the EEA host member state has transposed Article 42 to allow for a national private placement regime meeting at least the minimum requirements of Article 42 of the AIFMD. Not all member states that have transposed Article 36 have transposed Article 42.

As a result, if a UK AIFM is currently marketing a non-EEA AIF/EEA feeder AIF in one or more host member states pursuant to a host member state's Article 36 NPPR regime, there will be a number of questions for the relevant EEA host member states regarding the situation for the UK AIFM, the non-EEA AIF/EEA feeder AIF and the EEA investors in the non-EEA AIF/EEA feeder AIF at the time of Brexit and thereafter. These are set out below.

Deregistration from the relevant Article 36 NPPR

18. Will a formal deregistration notification be required for firms no longer eligible under the host member state's Article 36 NPPR regime due to Brexit?
19. Assuming a formal deregistration notification is required:
    - 19.1. Is advance notice required?
    - 19.2. In what format should the deregistration notification be presented?
    - 19.3. What information should the deregistration notification contain?
    - 19.4. Where should the deregistration notice be submitted?
    - 19.5. When is the deadline for submissions of the deregistration notifications?
    - 19.6. What happens if a UK AIFM with a registration under the host member state's Article 36 NPPR regime does not file a deregistration notification?
20. Will a deregistration fee be payable?
    - 20.1. If a deregistration fee is payable, how much will it be?
    - 20.2. Where and by when must it be paid?
    - 20.3. What happens if the fee is not paid on time?
21. When will deregistration become effective?
22. If a UK AIFM has paid an annual fee for the year of the deregistration, will it receive a pro rata refund? If so, will the refund be automatic or must it be applied for? If the latter, how should such application be made?
23. Does a local agent need to be appointed for a specific period post-deregistration?
    - 23.1. How long would such an agent need to be appointed for?
    - 23.2. What functions would the agent need to perform or stand ready to perform?
    - 23.3. Does the agreement with such an agent need to be submitted to the host member state competent authority?
24. Will a final financial report and/or audited financial statements need to be filed with the host member state competent authority?
    - 24.1. If so, by when and covering what period?
    - 24.2. Where and how should these be submitted?
    - 24.3. Do the answers differ if:
      - 24.3.1. No investors from the host member state ever invested in the AIF;
      - 24.3.2. Investors from the host member state did invest in the AIF but all such investments were either (i) made pre-11 July 2013 or (ii) genuine reverse solicitations; or
      - 24.3.3. No investments by investors from the host member state were made following marketing in the host member state after 11 July 2013?
25. Will any financial regulatory and/or systemic risk reports need to be filed with the host member state's competent authority?
    - 25.1. If so, by when and covering what period?
    - 25.2. Where and how should these be submitted?
    - 25.3. Do the answers differ if:
      - 25.3.1. No investors from the host member state ever invested in the AIF;
      - 25.3.2. Investors from the host member state did invest in the AIF but all such investments were either (i) made pre-11 July 2013 or (ii) genuine reverse solicitations; or

25.3.3. No investments by investors from the host member state were made following marketing in the host member state after 11 July 2013?

26. What records must be kept and for how long?

27. Do the answers to any of the questions above differ if:

27.1. The UK AIFM concurrently registers under an available Article 42 process;

27.2. The UK AIFM chooses not to register under an available Article 42 process; or

27.3. There is no available Article 42 process due to a failure to have cooperation agreements in place?

Concurrent registration under an available Article 42 NPPR process

The questions in this section all assume that the host member state has adopted an NPPR process consistent with Article 42 of the AIFMD.

28. If the UK AIFM previously had a notification under the host member state's Article 36 NPPR regime in place, is a formal Article 42 NPPR registration required?

29. Assuming a formal Article 42 NPPR registration is required:

29.1. Will there be any items from the host member state's Article 42 NPPR registration process that UK firms will not need to do if they were previously registered under the host member state's Article 36 NPPR regime?

29.2. What is the deadline for registration under the host member state's Article 42 NPPR process for firms transitioning from the host member state's Article 36 NPPR regime?

29.3. Will it be possible for a registration application to be submitted in advance of the effective date of the deregistration from the host member state' s Article 36 NPPR regime becoming effective if the only deficiency in the application is that the cooperation agreements between the FCA and the host member state competent authority and the competent authority of the member state of the EEA AIF, respectively, are not yet in place?

29.4. Will the usual time periods for consideration of applications apply with respect to UK AIFMs and non-EEA AIFs/EEA feeder AIFs previously registered under the host member state's Article 36 NPPR regime?

29.5. Will registrations under the host member state's Article 42 NPPR process be allowed to be approved subject to the cooperation agreements between the FCA and the host member state competent authority and the competent authority of the member state of the EEA AIF, respectively, coming into effect?

29.6. Will a registration fee under the host member state's Article 42 NPPR process be payable? If so, will transitioning firms have the benefit of any annual fees paid previously under the host member state's Article 36 NPPR regime which are not being refunded to them following such deregistrations?

30. In respect of financial, regulatory and systemic risk reporting that would have been submitted via the FCA under the host member state's Article 36 NPPR regime, where reports cover a period that straddles the host member state's Article 36 NPPR regime and the host member state's Article 42 NPPR process, where and how should such reports be submitted?

31. Please confirm that a UK AIFM transitioning from a host member state's Article 36 NPPR regime to the host member state's Article 42 NPPR regime for a non-EEA AIF/EEA feeder AIF will be permitted to terminate its depositary lite service, subject to any contractual restrictions from doing so.

No registration under an Article 42 NPPR

32. If registration under a host member state's Article 42 NPPR process is not possible (due to lack of cooperation agreements or otherwise) for a limited period of time or at all, what happens if there were investors from the host member state in the non-EEA AIF/EEA feeder AIF during the period when the UK AIFM was relying on the host member state's Article 36 NPPR regime?

    32.1. Can such investors from the host member state remain in the non-EEA AIF/EEA feeder AIF?

    32.2. If they can remain in the fund, can they make "top up" investments without that being considered marketing by the UK AIFM?

    32.3. In such circumstances would financial, regulatory and systemic risk reporting obligations continue?

        32.3.1. Which reports would have to be filed?

        32.3.2. For how long?

        32.3.3. Where should such reports be submitted?

33. What records must be kept and for how long?

34. Would the answers to the above be different if the UK AIFM instead chose not to register under the host member state's Article 42 NPPR process because it does not intend to market in that host member state following Brexit even though registration is technically possible? If so, in what ways?

Status of Current Article 33 Registrations from UK AIFMs and their Branches

A UK AIFM that today utilises the process under Article 33 of the AIFMD, as transposed into the relevant national law, to manage an EEA AIF established in a host member state either directly or by establishing a branch in the host member state (the "management passport") will no longer be eligible to do so upon Brexit. Assuming the UK AIFM becomes a non-EEA AIFM, and assuming the third country passport does not become a live option before Brexit, the only avenue that might be available to the UK AIFM (or its relevant host member state branch, where applicable) for continuing to manage EEA AIFs established in that host member state is via a national law regime specific to that host member state to allow non-EEA AIFMs to manage EEA AIFs established in that host member state until Articles 35 and 37-39 of the AIFMD come into effect. Not all EEA member states have adopted such a regime however.

As a result, if a UK AIFM (or its relevant host member state branch, where applicable) is currently relying on a management passport notification under Article 33 to allow it to manage an EEA AIF established in a host member state, there will be a number of additional questions for the relevant EEA host member states regarding the situation for the UK AIFM (or its relevant host member state branch, where applicable) and the applicable EEA AIF at the time of Brexit and thereafter. These are set out below.

Deregistration from the relevant Article 33 regime

35. Article 33(6) of the AIFMD provides: "In the event of a change to any of the information communicated in accordance with paragraph 2, and, where relevant, paragraph 3, an AIFM shall give written notice of that change to the competent authorities of its home member state at least 1 month before implementing planned changes, or immediately after an unplanned change has occurred." Since all UK AIFMs that have given the notification in accordance with paragraph 2 or paragraph 3 will be affected by Brexit in the same way, is the notice under paragraph 6 still expected and, if it is, what is the deadline for such a notification to be made?

36. Is a formal deregistration notification required for a UK AIFM (or its relevant host member state branch, where applicable) no longer eligible for the host member state's Article 33 management passport regime?
37. Assuming a formal deregistration notification is required:
    37.1. Is advance notice required?
    37.2. In what format should the deregistration notification be presented?
    37.3. What information does the deregistration notification need to contain?
    37.4. Where should the deregistration notice be submitted?
    37.5. When is deadline for submissions of deregistration notifications?
    37.6. What happens if a UK AIFM with an Article 33 registration does not file a deregistration notification?
38. Will a deregistration fee be payable?
    38.1. If a deregistration fee is payable, how much will it be?
    38.2. Where and by when must it be submitted?
    38.3. What happens if the fee is not paid timely?
39. When will deregistration become effective?
40. If a UK AIFM (or its relevant host member state branch, where applicable) has paid an annual fee for the year of the deregistration, will it receive a pro rata refund? If so, will the refund be automatic or must it be applied for? If the latter, how should such application be made?
41. What records must be kept and for how long?

Registration of UK AIFM under the host member state's national regime, if any, for non-EU AIFMs managing EU AIFs established in that host member state

42. Assuming non-EU AIFMs are permitted to manage AIFs established in the host member state:
    42.1. What conditions apply?
    42.2. What is the deadline for registration for UK AIFMs transitioning from the host member state's Article 33 regime to the regime for non-EU AIFMs?
    42.3. Will it be possible for a registration application to be submitted in advance of the effective date of the Article 33 deregistration (assuming one is needed) becoming effective?
    42.4. Will the usual time periods for consideration of applications apply with respect to UK AIFMs previously registered under the host member state's Article 33 regime?
    42.5. Will a registration fee be payable? If so, will transitioning firms have the benefit of any annual fees paid previously under the Article 33 regime which are not being refunded to them following Article 33 deregistrations?
43. Would the answers to any of the above questions be different if they were applied to a branch of a UK AIFM in the host member state?

Effects on delegations from EEA AIFMs to UK firms

44. Will any outbound delegation arrangements a host member state AIFM currently has in place with UK entities be allowed to survive Brexit if the applicable cooperation agreements are not in place at time of Brexit and:
    44.1. It will be just a matter of time before new cooperation agreements are in place; or
    44.2. Cooperation agreements are not put in place?

Effects for EEA AIFs where the UK AIFM or branch is not permitted to carry on managing the EU AIF post-Brexit

45. Assuming UK AIFMs (and their host member state branches) will not be permitted to manage AIFs established in the host member state as a result of Brexit, in what ways will the process around changing AIFMs differ from similar types of changes made on a voluntary basis?

Other Matters

46. Will the status of UK firms and EEA firms as either Financial Counterparties or Non-Financial Counterparties and similar scope classifications which would arise under EMIR and SFTR continue to depend on the status of an AIFM and/or an AIF as either an EEA or non-EEA AIFM and/or AIF?

47. Will the Multilateral Memorandum of Understanding (ESMA/2104/608) between the UK FCA and the other EEA competent authorities (the 'MMOU') automatically fall away upon Brexit? Article 12 contains a termination provision but there is no express provision about the MMOU terminating when a member state leaves the EU.