

# Sweden

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This article outlines the relevant rules and regulations with respect to the marketing in Sweden by foreign alternative investment fund managers (“AIFMs”) or other entities of alternative investment funds<sup>1</sup> (“AIFs”) to investors in Sweden.

The Alternative Investment Fund Managers Directive (2011/61/EU) (the “AIFMD”) was implemented in Sweden on 22 July 2013 by the Swedish Alternative Investment Fund Managers Act (the “AIFMA”).

This article will not elaborate on the definition of an AIF and the scope of the AIFMA. However, it can be noted that in case an entity does not qualify as an AIF, or if an exemption applies, general Swedish securities laws apply in relation to any marketing to prospective investors in Sweden. That means that if the fund units offered are deemed “transferable securities” and where an offer is made to the public, the offering may trigger a requirement to prepare and publish a prospectus. Further, if the fund units are deemed “financial instruments” under Swedish securities laws, entities conducting marketing activities in Sweden may be subject to a notification/licensing requirement under Swedish securities laws. General Swedish securities laws may also apply in relation to AIFs, as further described below.

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<sup>1</sup> An AIF is a fund which falls within the scope of the Alternative Investment Fund Managers Directive (2011/61/EU), that is a fund which is not a UCITS fund and which satisfies the criteria of being “a collective investment undertaking” which “raises capital from a number of investors” for the purpose of “investing the capital pursuant to a defined investment policy”.

## Marketing

The concept of “marketing” under the AIFMA is broad. It covers direct or indirect offerings or placements at the initiative of the AIFM, or on behalf of the AIFM, of units or shares of an AIF it manages to investors domiciled or with a registered office within the EEA. Marketing includes any sale promoting actions such as advertising, telemarketing, brochures, flyers, mail, e-mail, internet and investor events. Websites in Swedish or websites otherwise directed to Swedish investors may also be considered as marketing. Further, the preparatory works to the AIFMA state that the provisions of investment advice as to the investment in a specific AIF, shall be considered as marketing for the purpose of the AIFMA.

Notably, the preparatory works to the AIFMA express the view that marketing in the meaning of the AIFMD is not possible until the AIF actually exists, which must be determined on a case by case basis. Activities conducted before the fund vehicle meets the criteria of an AIF should therefore not be considered as marketing for the purposes of the AIFMA. In relation to launching a private equity fund, it is argued that the fund vehicle would meet the definition of an AIF at the earliest by “first closing” since there is typically nothing to be classified as an AIF nor any assets to be managed before a “first closing”. Investor contacts or similar activities before a “first closing” should therefore typically not be viewed as “marketing.” However, a marketing licence should be in place by “first closing” at the latest.

### 1.1 Reverse solicitation

With reference to recital 70 of the AIFMD, the preparatory works to the AIFMA state that reverse solicitation should not be considered as marketing and should therefore fall outside the scope of the AIFMA. While there are no clear rules as to what would be considered as reverse solicitation, the preparatory works exemplify a few situations that typically would not constitute marketing, e.g. if an investor on its own initiative contacts the AIFM to subscribe for units (e.g. on the company’s website, provided that the website is not specifically directed to Swedish investors), or if an investor contacts an investment firm to execute or transmit an order of units or shares of an AIF which are not part of any offer from the investment firm. In order for the activities to be deemed taken at the investor’s own initiative, neither the AIFM nor any other party (e.g. an investment firm) may initiate any contacts with the Swedish investor.

## Licensing requirements for AIFMs marketing AIFs in Sweden

### 1.2 General

In order for any AIF to be marketed in Sweden, the AIFM must be duly authorised irrespective of whether the actual marketing is conducted by any third party (please see section 3 below). As outlined below, the licensing and notification requirements to market AIFs in Sweden differ depending on the domicile of the AIF and the AIFM and if the AIF is to be marketed to professional investors<sup>2</sup> only or (also) to non-professional investors<sup>3</sup>.

### 1.3 Marketing of AIFs to professional investors in Sweden

#### 1.3.1 Marketing AIFs by EEA based AIFMs

An EEA based AIFM duly licensed in its home member state may market its EEA based AIFs to professional investors in Sweden subject only to a passporting/notification procedure. Marketing to professional investors in Sweden by an EEA based AIFM duly licensed in its home member state, of a non-EEA based AIF requires a marketing licence by the Swedish Financial Supervisory Authority (the “SFSA”).

*In order for the EEA-based AIFM to obtain a licence, it would need to satisfy certain conditions corresponding to the provisions in art. 36 of the AIFMD. These conditions include, in brief, that:*

- (iv) it can be expected that the AIFM will comply with all the applicable rules under the AIFMD;
- (v) appropriate cooperation arrangements are in place between the SFSA and the supervisory authority of the third country where the non-EEA based AIF is established; and
- (vi) the third country where the non-EEA based AIF is established has taken adequate measures to prevent money laundering and terrorist financing (in practice, the country in question must not be on FATF’s list of non-cooperative countries and territories).

#### 1.6.1 Marketing of AIFs by non-EEA based AIFMs

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<sup>2</sup> The AIFMA (and AIFMD) definition of “professional investors” corresponds to the definition of “professional clients” in Annex II of the MiFID (2004/39/EC).

<sup>3</sup> Non-professional investors are investors who are not professional investors.

Marketing by a non-EEA AIFM of an AIF (including a non-EEA based AIF) managed by the AIFM to professional investors in Sweden requires a marketing licence by the SFSA.

In order for the non-EEA based AIFM to obtain a licence, it would need to satisfy certain conditions corresponding to the provisions in art. 42 of the AIFMD, that is:

- (i) the planned activities must be conducted in a manner consistent with the transparency and disclosure requirements in art. 22-24, and art. 26-30 if applicable, of the AIFMD;
- (vii) appropriate cooperation arrangements must be in place between the SFSA and (a) the supervisory authority of the third country where the non-EEA AIFM is established and (b) the supervisory authority of the third country where any concerned non-EEA AIF is established or the competent authority where any concerned EEA AIF is established; and
- (viii) the third country where the non-EEA AIFM or any non-EEA AIF is established has taken adequate measures to prevent money laundering and terrorist financing (in practice, the country in question must not be on FATF's list of non-cooperative countries and territories).

We have understood from our contacts with the SFSA that the turnaround time for SFSA to process an application (both for marketing of non-EEA AIFs by EEA-based AIFMs and marketing of AIFs by non-EEA based AIFMs) will be 60 days. The application fee payable is SEK 16,000.

#### 1.9 Marketing of AIFs to non-professional investors in Sweden

Sweden imposes stricter requirements on marketing directed to non-professional investors. Subject to an authorisation by the SFSA, an AIFM may market certain AIFs to non-professional investors in Sweden. Such AIFs must in addition to the requirements set out in section 2.2.1 or 2.2.2 above, fulfil the following conditions;

the AIF is equivalent to a Swedish special fund<sup>4</sup> and (i) the

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<sup>4</sup> I.e. the fund must satisfy the following requirements; (i) the AIF's sole purpose is to invest in liquid financial assets only (in principle eligible assets as defined under the UCITS Directive (2009/65/EC) although the SFSA may grant exemptions from the UCITS requirements), (ii) the AIF applies the principle of risk diversification, and (iii) the fund units are repurchased or redeemed with the fund's assets at the unit holder's request.

AIFM has taken the necessary measures to enable redemption of shares/units in the AIF in Sweden and to make payments to investors in Sweden, as well as to disclose the information required under the AIFMA, (ii) the AIFM is conducting similar activities and is subject to satisfactory supervision in the country where the AIFM is established, and (iii) a "Key Investor Information Document" containing key information about the AIF has been prepared; or

the AIF is admitted to trading on a regulated market and a "Key Investor Information Document" containing key information about the AIF has been prepared.

#### 1.9.1 Marketing of private equity funds to certain non-professional investors

An exemption from the requirements set out above is available for certain closed-ended funds, which under certain circumstances may be marketed to non-professional investors subject to the requirements applicable to marketing directed to professional investors. Under this exemption, an authorisation by the SFSA to market AIFs to certain "semi-professional investors"<sup>5</sup> ("Semi-Professional Investors") may be granted provided that (i) there is no right of redemption for at least five years from the initial investment, and (ii) the AIF (under its investment policy) generally invests in listed or non-listed companies, in each case in order to acquire control according to the provisions corresponding to art. 26-30 of the AIFMD.

#### Licensing and notification requirements for other entities conducting marketing activities

In addition to the licensing and notification requirements outlined in section 2 above applicable to AIFMs, other entities conducting marketing activities of AIFs in Sweden may be subject to a licensing or notification requirement under the Swedish Securities Market Act (the "SMA"), implementing the inter alia the Market in Financial Instruments Directive (2004/39/EC)(the "MiFID"). This may be relevant if, for example, an AIFM engages a third party to conduct marketing activities in relation to an AIF on behalf of the AIFM. Under the SMA units or shares of an AIF may only be

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<sup>5</sup> A Semi-Professional Investor is defined as an investor that (i) commits to invest an amount equal to at least EUR 100,000; and (ii) confirms in writing in a separate document that he or she is aware of the risks associated with the investment in question.

offered to or placed with investors by an investment firm (and presumably also by other third parties) to the extent the units or shares may be marketed to the investors (art. 6.8 of the AIFMD). Important to note is therefore that in order for any marketing of units or shares of an AIF to be permitted in Sweden, whether the marketing is carried out by the AIFM itself or by a third party, the AIFM must always be licensed by (or, for EEA managers marketing EEA AIFs, notified to) the SFSA, as described in section 2 above.

### **Reporting obligations**

Sweden has adopted a largely “copy-out approach”, with no significant gold plating. The disclosure requirements set out in art 23 of the AIFMD, i.e. information that needs to be furnished to investors prior to their investment in the AIF, shall in Sweden be presented in an “information brochure” which also needs to be included in the application for authorisation. In terms of regulatory reporting, there are no additional requirements in Sweden. The SFSA has confirmed that they will apply the ESMA guidelines.

In accordance with art. 22 of the AIFMD, the AIFM must, within six months from the end of every financial year, prepare an annual report for each AIF marketed by the AIFM in Sweden.

Upon request, the annual report must be provided to the fund's investors. The annual report should also be made available to the SFSA and, provided that Sweden is not the fund's home state, to the competent authority in the fund's home state.

In terms of EEA-based AIFs marketed by the AIFM, the AIFM should also, as set out in art. 24 of the AIFMD, continuously report to the SFSA on (i) the proportion of non-liquid assets in the fund, (ii) changes to the fund's liquidity management and (iii) the fund's current risk profile and applicable risk management systems.



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