

FRIENDLIER NORWEGIAN HEDGE FUNDS REGULATIONS IN FORCE

July 2010 sees friendlier Norwegian hedge funds regulations entering into force – at last. New regulations lift the previous general marketing ban, implying that marketing licences shall now be obtainable.

Long day's journey into night

While market players have urged for a liberalisation of Norway's particularly stringent marketing regime applicable to hedge funds for close to a decade, Norwegian regulators have been dragging their feet. A particularly long-lasting and half-hearted legislative process ended with the entry into force of new regulations 1 July 2010.

Norwegian and foreign "special funds"

The new regulations allow the establishment and marketing of Norwegian "special funds", defined as open-ended collective investment vehicles of a non-UCITS type which mainly invest their assets in financial instruments and cash deposits and which are named "special funds" in the funds' articles. Norwegian "special funds" will see few regulatory restrictions imposed on their investment strategies and policies, but such funds must be open for redemptions at least once yearly. A corresponding right is ensured for foreign non-UCITS funds of the typical hedge fund style to be marketed into Norway. However, a license from the Norwegian regulator (the "NFSA") must be obtained in advance of any marketing.

Institutional investors only

Contrary to the wording of the legislative text adopted by the Norwegian Parliament, the Norwegian Ministry of Finance has in regulations limited the scope of permitted investors in "special funds". Hence, "special funds" may at present only be offered to institutional investors defined as professional investors by the EU "MiFID" Directive, including financial institutions, large undertakings meeting specific size and capital requirements as well as institutional investors whose main activity is to invest in financial instruments.

Satisfactory supervision and cooperation

Foreign "special funds" will need to demonstrate that both the fund and the fund manager are subject to satisfactory home state regulatory supervision in order to qualify for a marketing license. Also, it is a prerequisite for being granted a marketing licence that satisfactory cooperation exists between the NFSA and the regulator of the fund manager. Such cooperation is at present in place with regulators within the European Economic Area (the "EEA") and the USA. Hedge funds managed by non-EEA or non-USA domiciled fund managers will therefore still be banned from offering their funds in the Norwegian market.

"Equivalent investor protection" test

Foreign "special funds" must in addition evidence that they provide the investors with a level of protection equivalent to the investor protection offered to investors in Norwegian "special funds". No guidance has yet been provided as to the exact expectations of the NFSA when it comes to their assessment of foreign "special funds" in this respect.

Hence, future NFSA licensing practice related to Norwegian "special funds" is likely to set the standard for the investor protection threshold, which must be met by foreign "special funds" in order to receive a Norwegian marketing license.

The "investor's first approach" exemption

Passive sales of hedge funds based on the investor's first approach were generally accepted as not infringing the previously applicable marketing ban. This regime has now been altered as regards non-professional investors. The new regulations impose a ban both on the marketing and sale of "special funds" to non-professional investors carried out by investment firms or funds managers in Norway. This ban applies irrespective of whether sales are based on prior marketing of the fund or rather on the investor's first approach. Note nevertheless that the NFSA recognizes that it falls outside their powers to limit passive sales based on the investor's first approach which take place outside Norwegian jurisdiction.

Insurance companies and pension funds investing in "special funds"

Pursuant to recently adopted regulations, Norwegian insurance companies and pensions funds will not be allowed to invest more than one per cent of their technical reserves in one single licensed "special fund". "Special funds" will in the future still be regarded as an alternative investment. Investment companies and pension funds are not allowed to allocate more than a total of seven per cent of their reserves in alternative investments.

A number of questions have deliberately been left unanswered in the new regulations, leaving room for manoeuvring to the NFSA. Hence, administrative practice and precedents of the NFSA will decide to what extent the new licensing regime will be perceived as hedge funds friendly in practice. No marketing licenses have yet been granted under the new regime.

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