

Jersey Managers and Funds Marketing into the European Union under the AIFMD

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1. AIFMD

The Alternative Investment Fund Managers Directive 2011/61/EU (**AIFMD**) was implemented in July 2013 and prescribed new rules with respect to the authorisation, operation and transparency of managers of alternative investment funds (**AIFs**) which are marketed to professional investors in the EU/EEA. It has been described as the most fundamental piece of international regulation to ever impact the funds industry and has had a profound effect on how managers of funds located in or marketing into the EU operate their business.

The fundamental changes introduced by the AIFMD include those relating to the authorisation of managers of alternative investment funds (**AIFMs**), organizational requirements and restrictions on such AIFMs (with respect to matters including governance, capital requirements, delegation of duties, depository functions and management of liquidity, risks and conflicts). In addition, the AIFMD provides for continuing obligations, such as reporting and disclosure. It also provides for a marketing passport which can be used by AIFMs to market funds across the EU/EEA through a regulator-to-regulator prior notification procedure. Currently only EU/EEA domiciled AIFMs marketing EU/EEA AIFs may utilise the marketing passport. The timing of the proposed extension of the marketing passport to non-EU (**Third Country**) AIFMs and AIFs continues to be unclear.

There are two methods for marketing to professional investors based in the EU/EEA under the AIFMD, which, depending on the jurisdiction of the AIFM and AIF, are:

1. the EU/EEA Member States' national private placement regimes; and
2. the EU/EEA marketing passport (when available).

2. National Private Placement Regimes (NPPRs)

Under the AIFMD, unless both the AIF and AIFM are based within the EU/EEA, AIFMs are currently

required to continue to market AIFs to professional investors in EU/EEA Member States by complying with existing NPPRs applicable to such Member States, with the addition of AIFMD transparency, disclosure and reporting requirements and certain other conditions.

For Jersey, these conditions have been satisfied through:

1. a co-operation agreement between the Jersey Financial Services Commission (the **JFSC**) and the regulators of the Member States, coordinated by the European Securities and Markets Authority (**ESMA**);
2. Jersey remaining off the Financial Action Task Force blacklist; and
3. the AIFM complying with certain transparency, reporting and disclosure requirements as set out in the AIFMD and provided for by the JFSC's Code of Practice for AIF Services Business (**AIF Code**).

Furthermore, Jersey was the first 'Third Country' to implement, through domestic legislation, the full scope of the AIFMD and the Level 2 Regulation issued by the EU Commission on an "opt-in" basis. As a result, all Jersey AIFs and AIFMs to which the AIFMD applies require prior approval, or must comply with exemption conditions, before marketing to investors in the EU/EEA.

3. Sub-threshold AIFMs

Certain AIFMs are exempt from the majority of the requirements of the AIFMD and the Jersey AIF Code on the basis that the values of the assets they manage fall below certain prescribed thresholds, namely: (i) leveraged funds valued at less than €100 million; or (ii) unleveraged closed-ended funds valued at less than €500 million. Such AIFMs and the AIFs they manage are subject to a simplified regime as described below.

4. Marketing Passport

The marketing passport system is currently only available to EU/EEA managers of EU/EEA funds. The result is a more onerous regulatory regime but in exchange EU managers have the right to passport their funds throughout the EU/EEA without further authorisation and to passport their services throughout the EU/EEA without additional Member State approvals.

Following its assessment by ESMA, on 30 July 2015 ESMA recommended that Jersey (and Guernsey) be included in the first wave of 'Third Countries' whose managers can seek authorization for the marketing passport provided they comply with all of the requirements of the AIFMD. ESMA further recommended the deferral of the extension of the EU marketing passport to non-EU AIFMs and AIFs until a large number of jurisdictions had been assessed by ESMA. Subject to approval by the EU Commission, Parliament and Council, this should therefore enable Jersey AIFMs to market their Jersey AIFs freely throughout the EU/EEA.

As mentioned above, Jersey was the first 'Third Country' to offer AIFMs a fully compliant AIFMD option, meaning that Jersey has an 'opt-in regime' for managers wishing to comply fully with AIFMD requirements when marketing to investors in the EU/EEA. Jersey has not only achieved the capability to operate NPPRs under the AIFMD, but has also already implemented the necessary mechanics to support an EU-wide AIFMD marketing passport once this is made available to Third Country AIFMs.

5. Regulatory Options

Where there is to be marketing to investors in the EU/EEA the impact of the AIFMD on Jersey AIFMs and AIFs is as follows:

- **Jersey Private / Very Private / COBO Only / Private Placement Funds**

These funds must apply to the JFSC for an AIF Certificate under Jersey's Alternative Investment Funds (Jersey) Regulations 2012 (the **AIF Regulations**) and comply with the applicable sections of the AIF Code.

Jersey-based AIFMs of these funds will need to comply with the relevant sections of the AIF Code, namely in relation to transparency, disclosure, reporting and asset stripping, and either be licensed by the JFSC pursuant to the Financial Services (Jersey) Law 1998 (**FSJ Law**) as providers of AIF Services Business, or if the AIFM meets the criteria for exemption as a "sub-threshold" AIFM (see paragraph 3 above), it will need to be approved as a "sub-threshold AIFM service provider" under the Alternative Investment Funds (Jersey) Order 2013 (the **Jersey AIF Order**).

There are less onerous requirements for sub-threshold AIFMs from a Jersey perspective and under the AIFMD, however certain Member States have enhanced requirements under their NPPRs, so advice should be taken in each EU Member State in which it is proposed to conduct marketing activities.

- **Expert / Listed / Eligible Investor / Unclassified / Recognised Funds**

These funds are already required to be regulated under the Collective Investment Funds (Jersey) Law 1988 and their service providers are required to be regulated under the FSJ Law. Accordingly, the only additional regulatory requirement pursuant to the Jersey AIF Regulations is to comply with applicable sections of the AIF Code and notification to the JFSC in advance of marketing into the EU/EEA.

- **Unregulated Funds**

These funds must be converted to another form of fund (such as an Eligible Investor, Listed or Expert Fund) before they may be marketed into the EU/EEA.

6. Conclusion

Jersey AIFMs can and are successfully able to market Jersey and EU AIFs utilising NPPRs. With ESMA's positive assessment of Jersey, Jersey now benefits from an increased level of certainty and the ability to market in the EU/EEA in the longer term. Once the marketing passport becomes available, Jersey will be able to offer an even broader range of marketing and organisational options to managers, whether they are targeting European or global investors.

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Meet the Author



Niamh Lalor

Partner

Jersey

E: niamh.lalor@ogier.com

T: [+44 1534 514210](tel:+441534514210)

Key Contacts



Emily Haithwaite

Group Partner, Ogier Legal L.P.

Jersey

E: emily.haithwaite@ogier.com

T: [+44 1534 514072](tel:+441534514072)



Sophie Reguengo

Partner

Jersey

E: sophie.reguengo@ogier.com

T: [+44 1534 514122](tel:+441534514122)



Alexandra O'Grady

Managing Associate

Jersey

E: alexandra.o'grady@ogier.com

T: [+44 1534 514081](tel:+441534514081)



Joanna Christensen

Counsel

Jersey

E: joanna.christensen@ogier.com

T: [+44 1534 514127](tel:+441534514127)



Brooke Lewis

Associate

Jersey

E: brooke.lewis@ogier.com

T: +44 1534 514074

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