

AIFMD Factsheet for non-EU Managers Marketing an EU AIF

What is the AIFMD?

The Alternative Investment Fund Managers Directive (“**AIFMD**”) introduced a new passport system for the marketing of alternative investment funds (“**AIFs**”) in the European Union (“**EU**”). The marketing passport is automatically available to authorised EU alternative investment fund managers (“**AIFMs**”) managing EU AIFs. However, the AIFMD introduced different rules for non-EU AIFMs and non-EU AIFs which mean that the passport will not be available for non-EU AIFMs and non-EU AIFs until the European Commission (the “**Commission**”) adopts the necessary legislation extending the passport. The decision to adopt the necessary legislation extending the passport is dependent upon positive advice issuing from the European Securities and Markets Authority (“**ESMA**”) recommending that the passport be extended and the Commission adopting rules extending the passport to those third countries which have received a positive assessment from ESMA.

Can non-EU managers still market EU AIF in the EU following the introduction of the AIFMD?

Until a decision on the extension of the marketing passport to non-EU AIFMs / non-EU AIFs is made, non-EU managers may continue to market EU-domiciled AIFs in the EU subject to national private placement rules (“**NPPRs**”). However, in order to do so, the following conditions must also be met:

- the non-EU manager must comply with the provisions of the AIFMD relating to the annual report, disclosure to investors and reporting obligations to national regulators;
- if the non-EU manager manages an AIF which acquires control of a non-listed company, the provisions of the AIFMD relating to major holdings and control must be complied with;
- appropriate cooperation arrangements must be in place between the non-EU manager’s competent authorities and the competent authorities of the EU AIF;
- appropriate cooperation arrangements must be in place between the non-EU manager’s competent authorities and the competent authorities of the member states where the AIFs are marketed; and
- the non-EU manager’s home country must not be listed as a Non-Cooperative Country and Territory by the Financial Action Task Force (“**FATF**”).

The ability to market under NPPRs is dependent on the marketing rules applicable in each EU member state. Private placement is available in Ireland, subject to the above conditions and written notification of intention to market being made to the Central Bank of Ireland (the “**Central Bank**”).

What rules will apply if the passport is extended?

ESMA was required under the AIFMD to give advice as to whether the passport system should be extended to non-EU AIFMs and non-EU AIFs by July 2015. ESMA has indicated that it will carry out a country-by-country assessment of whether the passport ought to be extended. In July 2015, ESMA issued its initial advice recommending that the passport be extended to Guernsey, Jersey and Switzerland. In July 2016, ESMA published its second set of advice indicating that the passporting regime under AIFMD should be extended to Canada and Japan, as well as Guernsey, Jersey and Switzerland. In regards to Hong Kong, Singapore and Australia, ESMA concluded that these countries had met the relevant assessment criteria, albeit with relatively minor obstacles remaining to market access. In relation to the US, ESMA noted concerns regarding reciprocal market access and a disparity of treatment which could result from extending the AIFMD passport to that jurisdiction. As such, ESMA has suggested that the AIFMD passport be extended to a restricted category of US funds. Due to the pending implementation of AIFMD-like regimes in Bermuda and the Cayman Islands, ESMA was unable to finalise its assessment of those jurisdictions. Likewise, it could also not reach a definitive assessment on the status of the Isle of Man at the time.

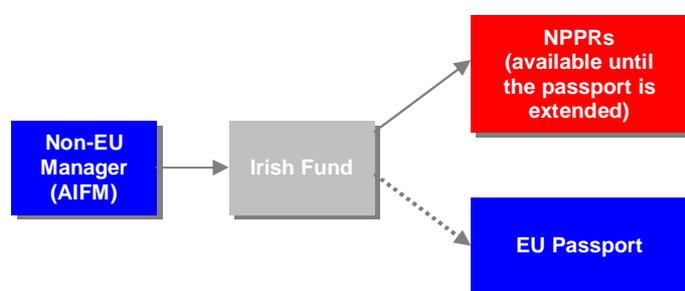
The Commission was due to give its final decision on extending the AIFMD passport to third countries in mid-October 2016, three months after ESMA issued its second set of advice. However, the Commission has not yet passed the necessary legislation to extend the AIFMD passport to third countries and currently there is no clear timescale for its implementation.

Where ESMA issues a positive opinion in relation to a relevant non-EU country and the Commission subsequently adopts the necessary legislation extending the passport, a non-EU manager managing an EU AIF will be required to apply to its member state of reference (“**MSR**”) for authorisation as an AIFM. An alternative would be to designate the EU AIF as a self-managed AIF and therefore the authorised AIFM as defined in the AIFMD. The EU AIFM could then delegate the portfolio management and risk management functions to the non-EU manager. Please see our [AIFMD Factsheet for EU AIF appointing a non-EU Manager](#).

In order to be authorised as an AIFM, the following conditions must be met:

- The non-EU manager must seek authorisation as an AIFM from its MSR. The AIFMD provides that the MSR is the EU member state where the AIFM intends to “develop effective marketing” for most of its AIFs.
- The non-EU manager must comply with all of the provisions of the AIFMD.
- The non-EU manager must have a legal representative established in its MSR. The “legal representative” is to be the official point of contact for the MSR regulator and will be responsible for “*the compliance function relating to the management and marketing activities performed by the AIFM under the Directive together with the AIFM*”. The legal representative may therefore be a service provider appointed in the MSR.
- Appropriate cooperation arrangements must be in place between the non-EU manager’s competent authorities and the competent authorities of MSR.
- Appropriate cooperation arrangements must be in place between the non-EU manager’s competent authorities and the competent authorities of the EU AIFs.
- The non-EU manager’s home country must not be listed as a Non-Cooperative Country and Territory by the FATF.
- The non-EU manager’s home country must have signed a tax information sharing agreement with the MSR which complies with the Organisation for Economic Cooperation and Development (“**OECD**”) Model Tax Convention.

Example – Non-EU Manager Marketing an Irish Fund in the EU



- Comply with annual report, reporting to investors and reporting obligations provisions of AIFMD
- Cooperation arrangements in place between non-EU manager’s regulator and the Irish fund’s regulator (the Central Bank)
- Cooperation arrangements in place between the non-EU manager’s regulator and the EU member state where the Irish fund will be marketed
- Non-EU manager’s home country not listed as Non-Cooperative Country by FATF

Subject to positive advice from ESMA to extend the EU passport

- Apply to MSR for authorisation to market Irish fund in EU
- **Comply with all provisions of AIFMD**
- Must have legal representative in MSR
- Cooperation arrangements in place between non-EU manager’s regulator and the Irish fund’s regulator (the Central Bank)
- Cooperation arrangements in place between non-EU manager’s regulator and the MSR
- Non-EU manager’s home country not listed as non-cooperative country by FATF
- Tax information sharing agreement between non-EU manager’s home country and MSR

Full details of the Asset Management and Investment Funds Group, together with further updates, articles and briefing notes written by members of the Asset Management and Investment Funds team can be accessed at www.matheson.com.

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