

AIFMD Factsheet for Non-EU Managers Marketing a Non-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 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 legislation extending the AIFMD passport to non-EU AIFMs and non-EU AIFs. 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 non-EU AIFs 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 AIFs domiciled outside 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 competent authorities of the member state where the AIF is marketed and the competent authorities of the non-EU manager;
- appropriate cooperation arrangements must be in place between the competent authorities of the member state where the AIF is marketed and the country where the non-EU AIF is established; 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**”). No further requirements have been imposed.

What rules will apply after the passport is extended?

ESMA was required under the AIFMD to give an opinion as to whether the passport system should be extended to non-EU AIFMs and non-EU AIFs by July 2015. ESMA has decided to assess third country regimes on a country-by-country basis and, in July 2015, issued a positive opinion 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.

If legislation is adopted extending the passport, a non-EU manager may choose to:

- (a) continue to market a non-EU AIF in the EU under NPPRs, provided that the additional conditions set out above are met; or
- (b) apply for authorisation to market the non-EU AIF under the passport system.

In order to avail of the EU passport, the following conditions must be met:

- The non-EU manager must seek authorisation as an AIFM from its member state of reference (“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**. It is likely that full compliance will prove extremely difficult in the context of marketing non-EU AIFs. For example, full compliance with the depositary requirements will prove difficult for AIFs domiciled in jurisdictions which do not currently have an established custody network, such as the Cayman Islands.
- 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 the MSR.
- Appropriate cooperation arrangements must be in place between the competent authorities of the country where the non-EU AIF is established and the competent authorities of the MSR.
- Neither the non-EU manager’s home country nor the country where the non-EU AIF is established must be listed as a Non-Cooperative Country and Territory by 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.
- The country where the non-EU AIF is established must have signed a tax information sharing agreement with the MSR which complies with the OECD Model Tax Convention.

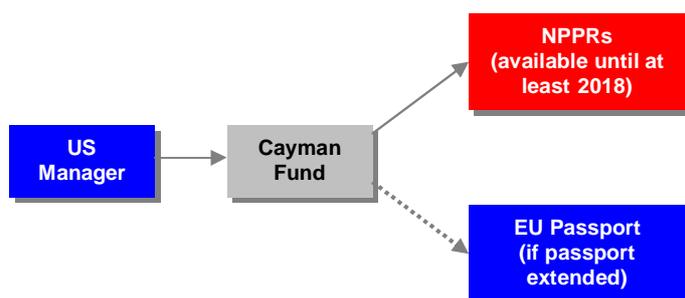
What rules may apply after 2018?

In 2018, ESMA is required to provide a recommendation as to the desirability of terminating the NPPRs. If the NPPRs are withdrawn, non-EU managers will only be able to market a non-EU AIF to EU investors if they are duly authorised under the AIFMD, provided that the passport is extended.

What is the difference between marketing a non-EU AIF and an EU AIF?

In practical terms, a non-EU manager marketing a Cayman fund, for example, as opposed to an EU AIF will find it extremely difficult to comply in full with the provisions of the AIFMD. In particular, there may be practical challenges to be overcome in relation to the appointment of a depositary which meets the requirements of the AIFMD. In strict legal terms, the difference between marketing a non-EU AIF and marketing an EU AIF is that in the case of marketing a non-EU AIF, the non-EU AIF’s jurisdiction must also satisfy the relevant conditions in respect of cooperation agreements, tax information sharing agreements and non-listing by FATF. However, the reality is that full compliance with the AIFMD when marketing non-EU AIFs will prove problematic. It should also be noted that, if legislation is adopted extending the passport to non-EU AIFMs, non-EU AIFMs of EU AIFs will have no option but to apply for authorisation, whereas non-EU AIFMs of non-EU AIFs could possibly choose between NPPRs and the passport up until 2018.

Example – US Manager Marketing a Cayman Fund in the EU



- Comply with annual report, reporting to investors and reporting obligations provisions of AIFMD
- Cooperation arrangements to be put in place between US manager's regulator (eg, SEC) and the EU member state where the Cayman fund will be marketed
- Cooperation arrangements to be put in place between the Cayman fund's regulator (eg CIMA) and the EU member state where the Cayman fund will be marketed
- Neither USA nor Cayman listed as a Non-Cooperative country by FATF

Subject to positive advice from ESMA to extend the EU passport

- Apply to MSR for authorisation to market Cayman fund in EU
- **Comply with all provisions of AIFMD**
- Must have legal representative in MSR
- Cooperation arrangements to be put in place between US manager's regulator (eg, SEC) and the MSR
- Cooperation arrangements to be put in place between the Cayman fund's regulator (eg CIMA) and the MSR
- Neither USA nor Cayman to be listed as non-cooperative country by FATF
- Tax information sharing agreement required between USA and MSR
- Tax information sharing agreement required between Cayman 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.

Contacts



Tara Doyle

PARTNER

D +353 1 232 2221

E tara.doyle@matheson.com



Michael Jackson

MANAGING PARTNER

D +353 1 232 2000

E michael.jackson@matheson.com



Dualta Counihan

PARTNER

D +353 1 232 2451

E dualta.counihan@matheson.com



Joe Beashel

PARTNER

D +353 1 232 2101

E joe.beashel@matheson.com



Anne-Marie Bohan

PARTNER

D +353 1 232 2212

E anne-marie.bohan@matheson.com



Shay Lydon

PARTNER

D +353 1 232 2735

E shay.lydon@matheson.com



Liam Collins

PARTNER

T +353 1 232 2195

E liam.collins@matheson.com



Philip Lovegrove

PARTNER

D +353 1 232 2538

E philip.lovegrove@matheson.com



Elizabeth Grace

PARTNER

D +353 1 232 2104

E elizabeth.grace@matheson.com



Oisín McClenaghan

PARTNER

T +353 1 232 2227

E oisinmcclenaghan@matheson.com



Michelle Ridge

PARTNER

T +353 1 232 2758

E michelle.ridge@matheson.com



Barry O'Connor

PARTNER

T +353 1 232 2488

E barry.oconnor@matheson.com

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