



JONES DAY  
**COMMENTARY**

# THE ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE: UPDATE FOR NON-EU MANAGERS OF NON-EU FUNDS

The Alternative Investment Fund Managers Directive (the “AIFMD”) is a European Union (“EU”) Directive that came into force on 22 July 2013 and aims to implement a coordinated regulatory framework for alternative investment fund managers (“AIFMs”) of alternative investment funds (“AIFs”).

Given that the AIFMD is an EU Directive (a legislative act of the EU which requires member states of the EU to implement the desired result without actually dictating the means by which this must be achieved), non-EU AIFMs (especially of non-EU AIFs) could be forgiven for questioning how and why it could apply to them. However, the AIFMD’s application is relatively wide and does have an impact on such managers.

This brief *Commentary* is intended to provide non-EU AIFMs managing non-EU AIFs with an introduction to the key concepts under the AIFMD and a summary of the aspects of the AIFMD which are most relevant to them.<sup>1</sup>

## BACKGROUND: APPLICATION AND KEY CONCEPTS

Generally speaking, the AIFMD applies to and regulates AIFMs rather than AIFs themselves (in contrast to the Directive on Undertakings for Collective Investment in Transferable Securities (“UCITS”), which

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<sup>1</sup> To the extent that a more detailed analysis of the AIFMD is required, Jones Day has published a full *Commentary* on the AIFMD, which can be found on our website: [http://www.jonesday.com/alternative\\_investment\\_fund\\_managers\\_directive/](http://www.jonesday.com/alternative_investment_fund_managers_directive/).

regulates funds as well as managers). Subject to certain exemptions,<sup>2</sup> the AIFMD applies to:

- All EU AIFMs managing EU AIFs or non-EU AIFs (irrespective of where they are marketed);
- Non-EU AIFMs managing EU AIFs (irrespective of whether they are marketed in the EU); and
- **Non-EU AIFMs marketing AIFs (whether EU AIFs or non-EU AIFs) to EU investors.**

It is the last of these three categories upon which this *Commentary* focuses.

**What is an AIFM?** An AIFM is any legal person whose regular business is managing one or more AIFs. “Managing” for these purposes is broadly defined as providing investment management services (being portfolio management and/or risk management).

**What is an AIF?** An AIF is any collective investment undertaking which raises capital from a number of investors with a view to investing it for the benefit of those investors according to a defined investment policy. Broadly, all funds which are not covered by the UCITS Directive may be caught by the AIFMD, save for those structures specifically carved out or exempted from its scope.

The long-term aim of the AIFMD is that all firms within its scope will eventually be authorised and regulated by an EU financial services regulator. However, the AIFMD provides for a transitional period, and the majority of the provisions will not apply to non-EU AIFMs of non-EU AIFs for a considerable period of time.

The transitional period under the AIFMD is a one-year grace period for AIFMs that were managing AIFs or, in the case of non-EU AIFMs, that were marketing AIFs to EU investors before 22 July 2013. To the extent that the transitional period is available to non-EU AIFMs marketing non-EU AIFs, they can continue to market as previously in accordance with the relevant national private placement regimes. If a non-EU AIFM cannot make use of the transitional provisions, it will

have to abide by the applicable requirements of the AIFMD, primarily the marketing regime.

## MARKETING UNDER THE AIFMD

“Marketing” is defined in the AIFMD as any direct or indirect offering or placement to investors in the EU at the initiative of the AIFM or on behalf of the AIFM of units or shares in an AIF it manages. Marketing is understood to cover capital raising and thus does not include “secondary markets” unless such activities include additional capital raising. Furthermore, the AIFMD does not apply to passive marketing or reverse solicitation.

As ever, caution should be exercised when seeking to rely on a reverse solicitation carve-out. Recent guidance from the UK’s Financial Conduct Authority (the “FCA”) provides significant assistance to AIFMs in this respect insofar as reverse solicitation is to be interpreted in the UK. The FCA’s guidance states that: “a confirmation from the investor that the offering or placement of units [or] shares of the AIF was made at its initiative, should normally be sufficient to demonstrate that this is the case, provided this is obtained before the offer or placement takes place. However, AIFMs and investment firms should not be able to rely upon such confirmation if this has been obtained to circumvent the requirements of AIFMD”. It is important to note that this guidance is only in respect of the UK and it will be interesting to see whether the authorities in other member states follow this approach; however, it should help AIFMs seeking to utilise reverse solicitation to update their marketing and subscription agreements accordingly.

Under the AIFMD, an EU passport is being introduced to allow AIFMs to market AIFs to professional investors across the EU. With the exception of EU AIFs managed by EU AIFMs (for which the EU passport will be the sole means of marketing), the EU passport will become available in 2015 (at the earliest) and will run in parallel with national private placement regimes until at least 2018.

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<sup>2</sup> There are exemptions from the AIFMD for AIFMs that solely manage closed-ended AIFs which either (i) do not make further investments after 22 July 2013 or (ii) have a lifespan which will expire by 22 July 2016 and which closed their subscription period before 22 July 2011. There is also a partial exemption for small AIFs, and the following structures are also carved out from the AIFMD’s scope: joint ventures, family offices, holding company structures, pension funds, employee participation or saving schemes, securitisation, special purpose vehicles, national central banks or national, regional or local governments.

Non-EU AIFMs managing non-EU AIFs may be able to market using the EU passport from, at the earliest, the second half of 2015 provided that they are authorised under the AIFMD in the relevant member state of reference, comply with the AIFMD in full and satisfy certain cooperation agreement requirements.<sup>3</sup>

Non-EU AIFMs managing non-EU AIFs may market using national private placement notes until 2018 (at the earliest) without being authorised, provided that the AIFM complies with the following:

- The non-EU AIFM must comply with certain provisions of the AIFMD relating primarily to transparency requirements, disclosure to investors, reporting obligations to regulators, control of unlisted companies and “asset stripping”.
- Appropriate co-operation arrangements in respect of “systemic risk oversight” must be in place between the member states where the AIF is to be marketed and the jurisdiction of establishment of the AIFM so as to ensure exchange of information, as required by the AIFMD.
- The jurisdictions where the AIFM and AIF are established must not be on the FATF Blacklist.

The use of the national private placement regime may be phased out by the European Commission following reports on the same from ESMA by 2018/2019 but, until such time as that occurs, it is expected the majority of non-EU AIFMs marketing non-EU AIFs will continue to use this route which will run alongside the EU passport regime.

Having said that, such AIFMs will need to be wary of complying with the relevant aspects of the AIFMD and ensuring that their marketing activities are up to date with any changes which may be made to national private placement

regimes in member states. For example, the UK has stated that its national private placement regime will remain largely unaltered but that the FCA will require that AIFMs notify them if they intend to market AIFs in the UK. The FCA has a dedicated web page where details of the notification forms can be found ([www.fca.org.uk/firms/markets/international-markets/aifmd/nppr](http://www.fca.org.uk/firms/markets/international-markets/aifmd/nppr)).

In summary, non-EU AIFMs seeking to market non-EU AIFs to investors in the EU need to be aware of the requirements of the AIFMD in respect of marketing, even when using existing national private placement regimes and especially if the transitional period is not available. Legal advice should be sought as to the applicability of transitional provisions and the requirements of national private placement regimes in individual member states.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

### John Ahern

London  
+44.20.7039.5176  
[jahern@jonesday.com](mailto:jahern@jonesday.com)

### Neil Seaton

London  
+44.20.7039.5175  
[nseaton@jonesday.com](mailto:nseaton@jonesday.com)

### Adam Skinner

London  
+44.20.7039.5123  
Singapore  
+ 65.6233.5520  
[askinner@jonesday.com](mailto:askinner@jonesday.com)

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<sup>3</sup> A supervisory cooperation agreement must be in place between the competent authority of the member state of reference and the jurisdiction where the AIFM is established; the jurisdiction of establishment for the AIFM and the AIF must not be on the FATF Blacklist; and taxation agreements must exist between the jurisdictions of establishment for the AIFM and the AIF and each member state where the AIF will be marketed and the member state of reference.