



## The Alternative Investment Fund Managers Directive: Update for Non-EU Managers of Non-EU Funds

This *Commentary* sets out the key features of the European Directive on Alternative Investment Fund Managers (“AIFMD”) as they apply to non-EU fund managers (“AIFMs”) managing non-EU alternative investment funds (“AIFs”). It is a supplement to our [January 2014 White Paper](#) and reflects on recent developments that impact non-EU AIFMs.

The United Kingdom voted by way of referendum on 23 June 2016 to leave the European Union. A formal separation would require a whole-scale review of UK legislation, including in relation to financial regulation. As of now and during the period of negotiation, the AIFMD as implemented in the United Kingdom will remain in full effect. We will update this *Commentary* to take into account any changes to the regime which result from Brexit separation proceedings.

### 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

regulates funds as well as managers). Subject to certain exemptions,<sup>1</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).

<sup>1</sup> There is 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.

**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.

## Marketing Under the AIFMD

Scope. “Marketing” is defined in the AIFMD as any direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares in an AIF it manages to investors in the European Union. Marketing is understood to cover capital raising and thus does not include “secondary sales” unless such activities include additional capital raising. Furthermore, the AIFMD does not apply to passive marketing or reverse solicitation (although attempts to rely on such exemptions must be approached with caution and be supported by a robust fact pattern).

As there is no EU-wide guidance on the scope of “marketing”, its interpretation differs across Member States. In the United Kingdom, the FCA has published guidance on what constitutes “marketing” in its Perimeter Guidance Manual, part of the FCA Handbook. By way of example, circulating to potential investors draft documents (such as draft presentations, prospectuses or subscription documents) does not qualify as “marketing” for the purposes of the United Kingdom’s implementing legislation. Other Member States have been less forthcoming with clear guidance, and it is advisable for AIFMs to seek local advice before approaching EU markets.

**AIFMD Passport.** An EU manager of EU AIFs may conduct its marketing and management activities across the European Union, subject to certain conditions being met. This is known as the “AIFMD passport”, or “passporting”.

Although the AIFMD envisaged the extension of the passporting regime to include all full-scope AIFMs, passporting is not currently available to EU AIFMs of non-EU AIFs, or to non-EU AIFMs of any AIF (hereafter referred to collectively as “Non-Passporting AIFMs”). As a consequence, non-EU AIFMs may only market into EU Member States in accordance with the relevant national private placement regime.

**National Private Placement.** The AIFMD permits individual Member States to allow the active marketing of AIFs by Non-Passporting AIFMs in that Member State’s discretion, subject to the fulfilment of certain generally applicable criteria (which we shall refer to as the “Baseline Requirements”). This is referred to as “national private placement”.

The Baseline Requirements for the Member States choosing to permit private placement are:

- The Non-Passporting AIFM must comply with the AIFMD’s disclosure and transparency provisions in respect of the AIFs that it markets (and it is marketing, rather than a sale, that is the appropriate trigger);
- The Non-Passporting AIFM must comply with anti-asset stripping provisions in respect of private equity funds;
- The supervisory authority of each of (i) the non-EU AIFM’s home jurisdiction (if applicable); and (ii) the AIF’s home jurisdiction (if it is a non-EU AIF) must have entered into cooperation arrangements with regulators in each EU Member State in which the AIF will be marketed; and
- The jurisdiction in which a non-EU AIFM is established (and the jurisdiction in which a non-EU AIF is established, if different) must not be listed as non-cooperative by the Financial Action Task Force.

As a consequence of implementing the AIFMD, certain Member States have prohibited private placement regimes outright, whilst others allow the practice subject to specific local law conditions (e.g. requiring the appointment of a depositary or implementing a lengthy approval process)—this process of exceeding an EU directive’s requirements so as to interfere with the regulatory intention is known as “gold-plating”.

## Future Developments

Work to extend rights to Non-Passporting AIFMs continues. In its advice to the European Parliament, the Council and the Commission on the application of the AIFMD passport to non-EU AIFMs and AIFs published on 19 July 2016, ESMA concluded that there were no significant obstacles impeding the application of the AIFMD passport to managers in Canada, Guernsey, Japan, Jersey and Switzerland. ESMA was more equivocal about the extension of the passport to AIFMs and AIFs in other jurisdictions, including the United States. The Parliament, the Council and the Commission are now considering ESMA's advice.

Until a concluded view is reached, Non-Passporting AIFMs must continue to rely on national private placement to actively market to EU investors.

## 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/contactus/](http://www.jonesday.com/contactus/).

### **John Ahern**

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

### **Michael Butowsky**

New York  
+1.212.326.8375  
[mrbutowsky@jonesday.com](mailto:mrbutowsky@jonesday.com)

### **Christopher Dearie**

London  
+44.20.7039.5920  
[cdearie@jonesday.com](mailto:cdearie@jonesday.com)

### **Kristen DiLemmo**

London  
+44.20.7039.5725  
[kdilemmon@jonesday.com](mailto:kdilemmon@jonesday.com)