

AIFMD II will further enhance benefits of using Jersey as a fund domicile

Briefing Summary: The Alternative Investment Fund Managers Directive (“**AIFMD I**”) was adopted over a decade ago and, to allow Jersey managers and funds access to UK and European investors, Jersey transposed AIFMD I into its domestic law.

Service Area: Investment Funds, Fund Regulation and Compliance

Sector: Investment and Wealth Management

Location: Jersey

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Executive summary

The changes to AIFMD I contemplated by AIFMD II will have a much less significant impact on Jersey alternative investment fund managers (“**AIFMs**”) of Jersey alternative investment funds (“**AIFs**”) vis-à-vis EU AIFMs of EU AIFs. The key changes to be brought by AIFMD II and differences in treatment can be summarised as follows:

AIFMD II changes	EU AIFM & EU AIF	Jersey AIFM & Jersey AIF
Requirement for two full time EU resident employees or individuals committed to the conduct of the AIFM’s business	Requirement for authorisation as AIFM	Not applicable
Amended delegation framework	Applicable	Not applicable
Mandatory liquidity management provisions for open-ended AIF	Must comply in respect of open-ended AIFs	Not applicable

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AIFMD II changes	EU AIFM & EU AIF	Jersey AIFM & Jersey AIF
New regime and restrictions on loan originating AIFs	Must comply in respect of loan originating AIFs	Not applicable
Further investor disclosure and regulatory reporting	Applicable	Applicable
Enhanced conflict of interests' provisions for third party AIFMs	Applicable	Not applicable
Appointment of depositaries outside home jurisdiction	Applicable	Not applicable

Jersey fund managers will mainly be impacted by the additional reporting obligations which will apply to Jersey funds marketed into member states of the EU/EEA.

Jersey has implemented the necessary regulations for Jersey managers to comply with AIFMD I to the extent necessary for Jersey funds to be marketed into the EU/EEA. A Jersey fund can be "marketed" into the EU/EEA through national private placement regimes by complying with only the requirements of Article 42 of AIFMD I (annual reports, pre-investment disclosure and regulatory reporting on liquidity, risk management arrangements and leverage). This results in a significant costs-saving for Jersey funds as other AIFMD I requirements do not apply, including that no depositary is needed (save for a small number of EU/EEA countries which require a depositary before permitting marketing). Costs charged to investors are under an increasing spotlight and European Securities and Markets Authority ("**ESMA**") will be required to submit a report within 18 months of AIFMD II being finalised assessing costs charged by AIFMs and explaining the reasons and differences for the level of costs.

National private placement regimes have proved effective in many EU/EEA countries and Jersey funds continue to be marketed in those countries, thereby avoiding the more onerous and costly AIFMD I requirements. Jersey and the UK are both "third countries" for the purposes of AIFMD I and II and there will be no impact on Jersey fund managers' access to the UK investor market.

Introduction

Recently, the EU Parliament and the Council of the EU have agreed on specific amendments to the text of AIFMD I (as amended “**AIFMD II**”). Once AIFMD II is finalised, member states will have to incorporate the changes within two years of publication of the European Directive and, to the extent any changes are applicable to Jersey’s AIFMD regime, Jersey is expected to do the same. Accordingly, the AIFMD II proposals are anticipated to come into effect in 2026.

AIFMD II does not constitute a total overhaul of AIFMD I. Nonetheless, there are certain amendments which will impact Jersey funds.

Summary of the current impact of AIFMD I on Jersey funds

Before considering the impact of AIFMD II from a Jersey perspective, it is worth a quick recap on the key points of AIFMD I vis-à-vis Jersey managers and Jersey funds.

Overview

- Jersey is not, and never has been, a member state of the EU/EEA.
- Jersey funds are classified as “non-EU AIFs” (alternative investment funds).
- Jersey fund managers are classified as “non-EU AIFMs” (alternative investment fund managers).
- Jersey funds can be marketed to professional investors in the EU using individual member states’ national private placement regimes (“**NPPR**”).
- Article 42 is the key Article of AIFMD I for Jersey funds with a Jersey manager (i.e. non-EU AIF, non-EU AIFM).

What are the key changes made by AIFMD II?

In summary, AIFMD II introduces the following (most of which will not be applicable to a Jersey AIFM):

- the requirement for an EU AIFM to have two natural persons domiciled in the EU who are either full-time employees or executive members of the governing body of the EU AIFM who are committed full time to conduct the business of that EU AIFM;
- an amended delegation framework providing for more detail to be provided in respect of delegates, including a detailed description of the human and technical resources employed by the EU AIFM for (i) performing day-to-day portfolio or risk management tasks within the EU AIFM; and (ii) monitoring the delegated activity;
- a new regime for “loan originating AIFs” (i.e. EU AIFs originating loans), including a prohibition on allowing EU AIFMs to pursue an originate-to-distribute investment strategy, a 5% retention requirement, 20% limit on loans to a single borrower meeting certain conditions and a requirement that such funds are closed-ended, unless the EU AIFM can demonstrate that its liquidity risk management can satisfy the liquidity terms whilst still complying with its investment strategy;

- for EU AIFMs managing open-ended AIFs, a requirement to (i) select liquidity management tools from the list provided; (ii) adopt detailed policies and procedures for their use; and (iii) notify the home regulator when such tools are activated or deactivated;
- a requirement for third-party EU AIFMs to submit detailed explanations and evidence of its compliance with the existing conflicts of interest provisions in AIFMD I; and
- provisions allowing the appointment of depositaries outside the home jurisdiction of an EU AIFM; and
- additional reporting requirements (as described below).

What are the key points of AIFMD II for Jersey funds and Jersey managers?

Amendments to Article 42 (Conditions for the marketing in Member States without a passport of AIFs managed by a non-EU AIFM)

Currently Article 42 of AIFMD I only permits NPPR-based marketing if the third country where the non-EU AIFM or the non-EU AIF is established (i.e. Jersey) is not listed as a Non-Cooperative Country and Territory by FATF (the “**FATF Requirement**”). AIFMD II replaces this FATF Requirement and provides that access via NPPRs will only be available where the non-EU AIFM or the non-EU AIF is established is not identified as a “high-risk third” country pursuant to the EU’s 4th Anti-Money Laundering Directive.

Jersey has never been listed as a “high-risk third country” by the EU (and is not expected to) and therefore this change should not have any effect on Jersey funds or Jersey fund managers.

Furthermore, a condition has been added requiring the third country where the non-EU AIF or non-EU AIFM is established to have signed an agreement with the EU/EEA member state in which the units or shares of the non-EU AIF are intended to be marketed, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements, and that third country is not mentioned in Annex I to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes.

This requirement is not expected to impact Jersey as Jersey is already party to a number of tax information exchange agreements which are in line with international standards. A full list is available here: [Tax Information Exchange Agreements with other countries \(gov.je\)](https://www.gov.je/TaxInformationExchangeAgreements).

Amendments to the reporting requirements

From a practical perspective, the main changes for Jersey managers and Jersey funds (i.e. a non-EU AIFM of a non-EU AIF) will be in respect of the additional reporting requirements required by AIFMD II. We have summarised the existing AIFMD I requirements for Jersey AIFMs below, and highlighted the changes which will be brought by AIFMD II once it comes into force.

A Jersey AIFM of a Jersey AIF must comply with the following limited requirements of AIFMD I:	Impact on a Jersey AIFM of a Jersey AIF if changes proposed under AIFMD II are implemented:
Article 22 – which requires an annual report containing specified information in respect of the fund	No changes.

<p>A Jersey AIFM of a Jersey AIF must comply with the following limited requirements of AIFMD I:</p>	<p>Impact on a Jersey AIFM of a Jersey AIF if changes proposed under AIFMD II are implemented:</p>
	<p>Amendments to reporting to the JFSC:</p> <ul style="list-style-type: none"> • An AIFM shall regularly report to the competent authorities of its home Member State on the principal markets and instruments in which it trades on behalf of the AIFs it manages. • It shall, <i>in respect of each AIF it manages</i>, provide information on the main instruments in which it is trading, on markets of which it is a member or where it actively trades, and on the principal exposures and <i>assets most important concentrations</i> of each of the AIFs it manages. <i>That information shall include the identifiers that are necessary to connect the data provided on assets, AIFs and AIFMs to other supervisory or publicly available data sources.</i> <p>In addition, the following amendments and additions have been made to information to be provided to the JFSC:</p> <ul style="list-style-type: none"> • the current risk profile of the AIF and the risk management systems employed by the AIFM to manage, including the market risk, liquidity risk, counterparty risk and, other risks including operational risk <i>and the total amount of leverage employed by the AIF</i> • information on the main categories of assets in which the AIF invested, and regarding delegation arrangements concerning portfolio management or risk management functions as follows: <ul style="list-style-type: none"> ◦ i information on the delegates, specifying the delegates' name and domicile, whether they have any close links with the AIFM, whether they are authorised or regulated entities for the purpose of asset management and where relevant, their supervisory authority, including the identifiers of the delegates that are necessary to connect the information provided to other

Accordingly, the principal impact on Jersey AIFMs and AIFs will be in respect of the reporting requirements highlighted above and managers of Jersey funds should familiarise themselves with these additional reporting requirements as they apply to their funds in advance of AIFMD II coming into effect.

No amendments to the Passport Extension

AIFMD II makes no changes to Article 67 and therefore we must assume that the current impasse as regards the extension of the passporting regime to Jersey fund managers and funds will remain indefinitely.

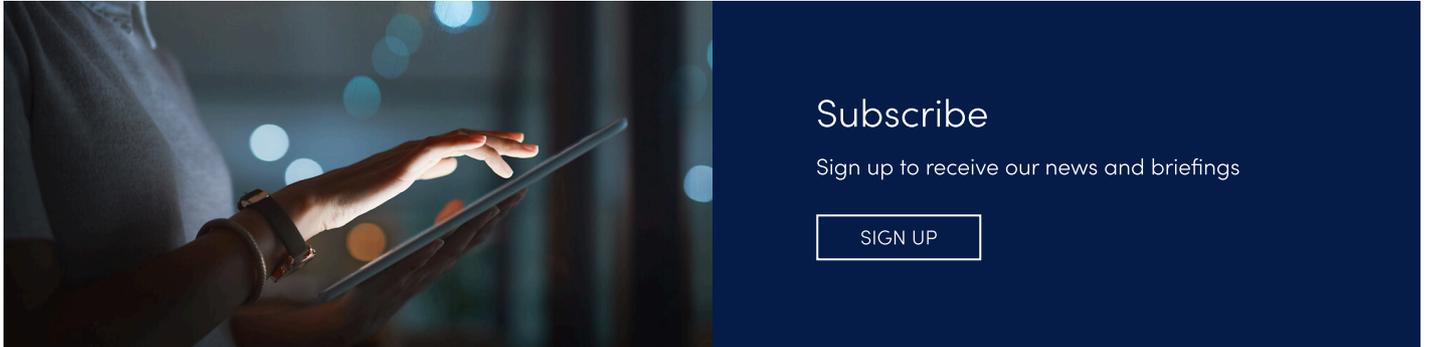
However, NPPRs have proved highly effective in facilitating marketing in many EU/EEA countries. Jersey funds continue to be marketed in those countries, thereby avoiding the more onerous and costly requirements of complying in full with AIFMD I requirements (such requirements only added to further by AIFMD II).

Separately, Jersey continues to enjoy easy access to the major UK investor market, which continues unaffected following the UK's departure from the EU and which will not, of course, be subject to AIFMD II. There is no suggestion that the UK will implement similar changes to the UK's regime. However, the FCA has suggested that there will be a consultation on simplifying the existing UK AIFMD during 2024.

<p>A Jersey AIFM of a Jersey AIF must comply with the following limited requirements of AIFMD I:</p>	<p>Impact on a Jersey AIFM of a Jersey AIF if changes proposed under AIFMD II are implemented:</p>
<p>Article 22 – which requires an annual report containing specified information in respect of the fund</p>	<p>Additional disclosures to be made to investors before investing:</p> <ul style="list-style-type: none"> • <i>the name of the AIF;</i> • <i>the possibility and conditions for using liquidity management tools selected in accordance with Article 16(2b)</i> • <i>a list of fees, charges and expenses that are borne by the AIFM in connection with the operation of the AIF and that will be directly or indirectly allocated to the AIF</i> <p>Additional ongoing disclosure to investors:</p> <ul style="list-style-type: none"> • <i>the composition of the originated loan portfolio;</i> • <i>on an annual basis, all fees, charges and expenses that were directly or indirectly borne by investors;</i> • <i>on an annual basis, any parent company, subsidiary or special purpose entity utilised in relation to the AIF’s investments by or on behalf of the AIFM.</i> <p>ESMA shall develop guidelines to specify the circumstances where the name of an AIF is unfair, unclear, or misleading.</p>

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