

Guernsey Funds and the AIFMD

Briefing Summary: Guernsey vis-à-vis the European Union

Service Area: Investment Funds

Location: Guernsey

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Guernsey is a Crown Dependency. The Bailiwick of Guernsey (Guernsey, together with Herm, Sark, Alderney and the surrounding islets) is part of the British Isles but independent of the UK. It is neither a member nor an associate member of the European Union (the "EU") and as such is classified as a third-country. Guernsey is therefore not required to comply with EU directives such as the Alternative Investment Fund Managers Directive (the "AIFMD"). Guernsey has, however, passed equivalent legislation in certain areas to facilitate access to EU markets.

The impact of Brexit

The United Kingdom's 2016 departure from the EU did materially impact Guernsey's relationship with the EU: Guernsey was not a Member State of the EU prior to Brexit. However, Guernsey's former "Protocol 3" relationship (whereby Guernsey fell within the common customs area, the common external tariff and within the EU for most of the purposes of the free movement of goods) was replaced with new arrangements under the Trade and Cooperation Agreement.

Guernsey and the AIFMD

All Guernsey funds are eligible to be marketed into the European Union and European Economic Area ("EEA") in accordance with the provisions of the AIFMD through both:

- national private placement regimes; and
- (once available) the third-country passporting regime.

Guernsey funds with a Guernsey manager which are not actively marketed into the EU/EEA fall outside the scope of AIFMD.

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National Private Placement Regimes

Guernsey funds with a Guernsey manager can be marketed in one or more countries of the EU/EEA through individual national private placement regimes ("NPPR") by complying with the requirements of AIFMD Article 42 (which requires that the manager produce annual reports, pre-investment disclosure and regulatory reporting on liquidity, risk management arrangements and leverage) and the provisions of the applicable national regimes.

This reduces costs as the full panoply of AIFMD requirements do not apply, including that no depositary is needed (although a small number of EU/EEA countries require a depositary in order to permit marketing under the NPPR route).

Under AIFMD Article 36 EU alternative investment fund managers are permitted to market non-EU funds into the EU.

The GFSC has issued AIFMD Marketing Rules to help ensure compliance by Guernsey investment funds and their managers with the AIFMD's NPPR requirements.

NPPRs have proved highly effective in facilitating marketing in many EU/EEA countries. Guernsey funds continue to be marketed in those countries, thereby avoiding the more onerous and costly AIFMD requirements. In particular, Guernsey enjoys easy access to the major UK investor market, which continues unaffected following the UK's departure from the EU.

AIFMD third-country passporting

A Guernsey manager can opt to comply with Guernsey's equivalent AIFMD regime to be ready for the extension of the AIFMD passporting regime to third countries.

In July 2015 The European Securities and Markets Authority ("ESMA") issued its advice to the European Commission, Parliament and Council on the extension of the AIFMD passporting regime to non-EU managers and funds. Guernsey was one of only six jurisdictions to even be considered by ESMA, and one of only two to be approved for the third-country passporting regime without condition.

In July 2016, the "unqualified and positive assessment" for Guernsey was reiterated, with further jurisdictions approved for the extension of the third-country passporting regime.

Notwithstanding the requirement to do so following such positive assessments, the EU Commission is yet to specify the date by which the third-country passport should be extended to those jurisdictions.

We continue to hope for greater clarity following the UK's departure from the EU, although we cannot be sure of how long this might take.

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AIFMD II

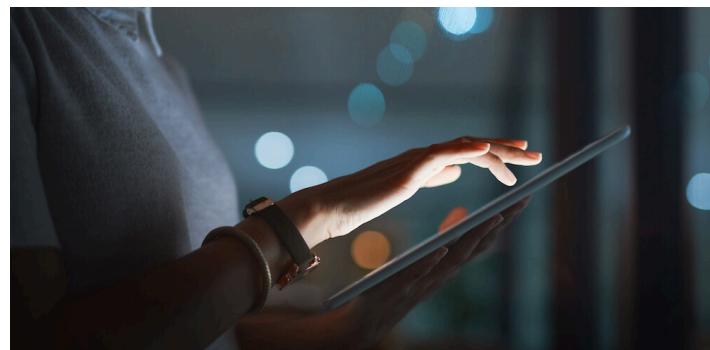
The EU Commission has been reviewing the AIFMD and in November 2021 published a proposal for AIFMD II in the form of a draft Directive. In May 2022 the European Parliament issued its draft report on the proposals and in June 2022, the Council of the European Union published its compromise text. The Council, European Parliament and Commission have yet to agree on the final version of AIFMD II. The compromise text included five requirements in respect of the areas of delegation, loan origination, liquidity management tools, depositaries and alternative investment fund manager activities. In summary:

1. delegation reporting is expected to be included in regular supervisory reporting requirements;
2. an introduction of common minimal rules for loan – originating funds is expected;
3. it is expected that an AIFM will be required to disclose at least one liquidity management tool from the list to be set out in New Annex V of the AIFMD, including, by way of example, suspension of redemptions and subscriptions and swing pricing;
4. there may be exceptional case by case approval of depositary passports;
5. certain permitted ancillary activities by an AIFM are expected to be specified.

Such requirements would likely need to be implemented into the Guernsey AIFMD Rules and Guidance, 2021 but would only affect those managers and depositaries that have opted in to comply with the same.

On current timing, AIFMD II may come into force in 2025 or later yet. In the meantime though, the timing for the adoption of rules extending the availability of third country passports to jurisdictions who have been favourably assessed, such as Guernsey, has not yet been clarified by the EU Commission.

Please note that this briefing is intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such. © Carey Olsen (Guernsey) LLP 2026



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