

AIFMD update – January 2014

Service area / [Corporate](#)

Location / [Guernsey](#)

Date / [January 2014](#)

The deadline for implementation of the Alternative Investment Fund Managers Directive (the “Directive”) passed on 22 July 2013. By that date European Economic Area (“EEA”) Member States were required to have implemented all necessary laws and regulations to comply with the provisions of the Directive. However, many EEA Member States have not yet done so and have implemented transitional provisions as permitted by Article 61 of the Directive. Those provisions generally permit managers who were active prior to 22 July 2013 to continue to so act until 22 July 2014 without complying with the Directive provided they notify their local regulator of their marketing activities.

Although not part of the EEA, Guernsey has implemented its own AIFMD equivalent regime, the AIFMD (Marketing Rules) 2013 and the AIFMD Rules 2013.

AIFMD (Marketing Rules) 2013

The Marketing Rules apply to Guernsey alternative investment fund managers (“Guernsey AIFMs”) who wish to market alternative investment funds (“AIFs”) after 22 July 2013 in the EEA through private placement under Articles 42 and 43 of the Directive.

The Marketing Rules require all Guernsey registered or authorised AIFs (“Guernsey AIFs”) and Guernsey AIFMs to notify the Guernsey Financial Services Commission (“GFSC”) of their marketing activities in the EEA. However, the Marketing Rules contain a transitional provision such that Guernsey AIFMs who prior to 22 July 2013 managed and propose to market Guernsey AIFs or other alternative investment funds after 22 July 2013 do not need to notify the GFSC of their activities until 21 July 2014 at the latest.

The Marketing Rules also require Guernsey AIFs and Guernsey AIFMs to comply with all applicable EEA laws in respect of their marketing activities in the EEA. Since applicable EEA laws would require any such activities to be conducted in accordance with EEA Laws, it is debatable whether this additional requirement serves any purpose. However, the notification requirements will give the GFSC greater visibility over the marketing activities of Guernsey AIFs and AIFMs and it is submitted that this is the primary purpose behind their implementation.

AIFMD Rules 2013

The AIFMD Rules enact the relevant provisions of the Directive into Guernsey law. They apply to Guernsey AIFMs who wish to opt to comply with them in respect of those AIFs which they manage and propose to market in the EEA. Notably the AIFMD Rules are not compulsory but create an opt-in regime for those AIFMs which wish to be governed by a regime in Guernsey which is of equivalent effect to the Directive.

It is not necessary for Guernsey AIFMs to opt into the AIFMD Rules regime in order to continue to market in the EEA after 22 July 2013. Guernsey AIFs and Guernsey and non-Guernsey AIFs which are managed by Guernsey AIFMs may continue to be marketed in the EU provided the provisions of Article 42 of the Directive are complied with i.e.:

- Co-operation agreements are in place between the competent authorities of the EEA States where the AIFs are to be marketed and the GFSC. The GFSC has cooperation agreements with 27 of the 31 EEA States. The GFSC does not yet have agreements in place with Spain, Italy, Slovenia and Croatia.

OFFSHORE LAW SPECIALISTS

- Guernsey is not listed as a non-co-operative country and territory by FATF. This is correct.
- Where a Guernsey AIFM is conducting marketing, certain disclosure and transparency requirements contained in the Directive are adhered to by it. Guernsey AIFMs are already updating their documents and engaging with their advisers in relation to AIFMs where compliance with these provisions is necessary.

Further, it will also not be necessary for Guernsey AIFMs to opt into the AIFMD Rules following the Directive passporting regime being opened up to Guernsey and other non-EEA AIFMs during or after 2015. Guernsey AIFMs who wish to obtain such a passport must apply to their Member State of Reference (essentially the EEA member state with which a non-EEA AIFM has its closest connection). Therefore, a Guernsey AIFM can currently market under the existing private placement regimes and will be able to obtain an EEA passport once the regime is opened up to third countries without complying with Guernsey's AIFMD Rules. Nonetheless, Guernsey AIFMs might elect to opt into the AIFMD Rules for the following reasons:

- Although the intention behind the Directive is that existing national private placement regimes will continue in their present form, in practice, many EEA States have taken this opportunity to "gold plate" their existing regimes, with the effect in many instances of making it more difficult for non-EEA managers to access those regimes. The GFSC anticipates that, in future, some EEA States may require AIFMs to be regulated in a similar manner to EEA AIFMs under the Directive in order to utilise their private placement regime. A Guernsey AIFM which opts into the AIFMD Rules will be able to demonstrate that they are so regulated.
- Once the passport becomes available to non-EEA AIFMs, Guernsey AIFMs who have opted to be regulated under the AIFMD Rules will be able to demonstrate to their Member State of Reference that they are already licensed to a standard equivalent to the Directive. It is anticipated that this may assist the passport application to the Member State of Reference.

Conclusion

Guernsey AIFs, and Guernsey and non-Guernsey AIFs which are managed by Guernsey AIFMs, which are marketed within the EEA under the national private placement regimes will only have to comply with certain disclosure and transparency requirements contained in the Directive (that is to say eight of the 71 articles of the Directive). Notably these do not include the remuneration, valuation and depositary provisions. In addition, the AIFMD Rules permit Guernsey AIFMs to decide, based on their individual marketing strategy, whether it is in their best interests to remain outside of Guernsey's AIFMD equivalent regime or whether to take advantage of it. It is hoped that this approach will promote both regulatory certainty and commercial flexibility for Guernsey's clients.



FIND US

PO Box 98
Carey House
Les Banques
St Peter Port
Guernsey GY1 4BZ
Channel Islands

T +44 (0)1481 727272

F +44 (0)1481 711052

E guernsey@careyolsen.com



FOLLOW US

Visit our corporate team at
careyolsen.com

Please note that this briefing is only 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 2017