Jersey Managers and Funds Marketing into Europe
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1. AIFMD

The Alternative Investment Fund Managers Directive 2011/61/EU (AIFMD) was implemented in July 2013 and prescribed new rules with respect to the authorisation, operation and transparency of managers of alternative investment funds (AIFs) which are marketed to professional investors in the EU/EEA. It has been described as the most fundamental piece of international regulation to ever impact the funds industry and has had a profound effect on how managers of funds located in or marketing into the EU operate their business.

The fundamental changes introduced by AIFMD include those relating to the authorisation of managers of alternative investment funds (AIFMs), organizational requirements and restrictions on such AIFMs (with respect to matters including governance, capital requirements, delegation of duties, depository functions and management of liquidity, risks and conflicts). In addition AIFMD prescribes for continuing obligations, such as reporting and disclosure. It also provides for a marketing passport which can be used by AIFMs to market funds across the EU through a regulator-to-regulator prior notification procedure. Currently only EU domiciled AIFMs marketing EU AIFs may utilise the marketing passport. The timing of the proposed extension of the marketing passport to non-EU AIFMs and AIFs (Third Countries) continues to be unclear.

This update looks, from a Jersey perspective, at the two methods for marketing to professional investors based in Europe under the AIFMD, which, depending on the jurisdiction of the AIFM and AIF, are:

1. the EU Member States’ national private placement regimes; and
2. the EU marketing passport (when available).

2. National Private Placement Regimes (NPPRs)

Under AIFMD, unless both the AIF and AIFM are based within the EU, AIFMs are currently required to continue to market AIFs to professional investors in EU Member States by complying with existing NPPRs applicable to such Member States, with the addition of AIFMD disclosure and reporting requirements and certain other conditions.

For Jersey, these conditions have been satisfied through:

1. a co-operation agreement between the JFSC and the regulators of the Member States, coordinated by the European Securities and Markets Authority (ESMA);
2. Jersey remaining off the Financial Action Task Force blacklist; and
3. the AIFM complying with certain transparency, reporting and disclosure requirements as set out in the AIFMD and provided for by the JFSC’s AIF Codes of Practice (AIF Codes).

Furthermore, Jersey was the first ‘third country’ to implement, through domestic legislation, the full scope of the AIFMD and Level 2 regulations issued by the EU Commission on an “opt-in” basis. As a result, all Jersey AIFs and Jersey AIFMs to which the AIFMD applies require prior approval, or must comply with exemption conditions, before marketing into Europe. It is not
considered that these additional requirements impose a significantly greater burden on Jersey AIFMs or AIFs than would apply by virtue of the European requirements resulting from the marketing into Europe itself.

It is expected that the private placement route will be available until at least 2018, at which time it will be reviewed by ESMA.

3. Sub-threshold AIFMs

Should an AIFM wish to market its fund into the EU, the AIFM will first need to determine whether it is a ‘sub-threshold’ manager, in which case lighter touch provisions from a Jersey legal perspective (and also under the AIFMD) will apply. Managers who either manage leveraged assets valued at less than €100m or who manage unleveraged and closed-ended assets valued at less than €500m are only subject to a simple JFSC registration process under the Jersey AIF Order (if the relevant AIF is a Very Private, COBO only or Private Placement Fund) and are for these purposes “Sub-Thresold AIFMs”. In these cases lighter touch reporting and disclosure requirements apply under the AIFMD and Jersey AIF Codes (subject to the requirements of the relevant states’ NPPRs).

4. Marketing Passporting

The marketing passporting system is currently only available for EU managers of EU funds. The result is a more onerous regulatory regime but in exchange EU managers have the right to passport their fund throughout Europe without further authorisation and to passport their services throughout Europe without additional Member State approvals.

As mentioned above, Jersey was the first ‘third country’ to offer AIFMs a fully compliant AIFMD option, meaning that Jersey has an ‘opt-in regime’ for managers wishing to comply fully with AIFMD requirements when marketing to European investors. Jersey has not only achieved the capability to operate NPPRs under the AIFMD, but has also already implemented ahead of time the necessary mechanics to support an EU-wide AIFMD marketing passport. Following its assessment by ESMA, on 30 July 2015 ESMA recommended that Jersey (and Guernsey) be included in the first wave of ‘third countries’ whose managers can seek authorization for the marketing passport; provided they comply with all of the requirements of the AIFMD. Subject to approval by the EU Commission, Parliament and Council, this should therefore enable Jersey AIFMs to market their Jersey AIFs freely throughout the EU.

5. Regulatory Options

Where there is to be marketing into the EU pursuant to the AIFMD then the impact of the AIFMD on Jersey AIFMs and AIFs is as follows:

- Very Private / COBO Only / Private Placement Funds (PPFs)

These funds must apply to the JFSC for an AIF Certificate under Jersey’s Alternative Investment Funds (Jersey) Regulations (the AIF Regulations) and adhere to the applicable sections of the AIF Codes (being in relation to disclosure, reporting and asset stripping together with notification to the JFSC in advance of marketing). Jersey-based AIFMs of these funds will need to comply with the relevant sections of the AIF Codes, and either be licensed by the JFSC under the Financial Services (Jersey) Law 1998 (FSJ Law) as providers of AIF Services Business, or if the AIFM is “sub-threshold” (as defined in the Directive and AIF Codes), it will need to be approved as a “sub-threshold AIFM service provider” under the Jersey AIF Order.

There are less onerous requirements for sub-threshold AIFMs from a Jersey perspective and under the Directive, however certain Member States have enhanced requirements under their
NPPRs and the same level of disclosure (for example) may be required whether the AIFM is sub-threshold or not.

- **Expert / Listed / Eligible Investor / Unclassified / Recognised Funds**

These funds are already required to be regulated under the Collective Investment Funds (Jersey) Law 1988 and their service providers are required to be regulated under the FSJ Law. The only additional regulatory requirements pursuant to the Jersey AIF Regulations are compliance with applicable sections of the AIF Codes and notification to the JFSC in advance of marketing into the EU/EEA.

- **Unregulated Funds**

These funds must be converted to another form of fund (such as an Eligible Investor, Listed or Expert Fund) before they may be marketed into the EU/EEA.

6. **Conclusion**

Once the marketing passport becomes available, Jersey will be able to offer a broad range of marketing and organisational options to managers, whether they are targeting European or global investors.

In the meantime, Jersey AIFMs can and are successfully able to market their Jersey AIFs utilising NPPRs. With ESMAs positive assessment of Jersey, Jersey now benefits from an increased level of certainty and the ability to market in the EU in the longer term.

The future looks bright for the Jersey investment funds industry, which will have the ability to offer fund promoters the best of both worlds.

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