

AIFMD PASSPORT

AIFMD PASSPORT From 22 July 2013 managers of alternative investment funds (“AIF”) obtaining authorization under the Alternative Investment Fund Managers Directive (“AIFMD”), will be permitted to avail of a new passport system to market AIF to professional investors across the EU and to manage AIF domiciled in other member states.

AIFMD Passport Pre-2015

EU AIFM. The EU passport will be available automatically to EU AIFM managing EU AIFs. In Ireland, guidelines are already available which allow the submission of applications for approval as an AIFM from as early as end of Q1 2013, ensuring that authorized promoters can avail of the benefits of the passport immediately on transposition.

Non-EU AIFM. Different rules apply to non-EU AIFM and non-EU AIF which currently cannot avail of the passport and therefore will only be able to use national private placement rules (“NPPRs”) after July 2013 if they wish to manage or market AIF in the EU. The AIFMD imposes a number of additional requirements which will apply to those managers seeking to rely on NPPRs (see over).

AIFMD Passport Post-2015 July 2015. It is possible that non-EU AIFMs may be able to apply for authorization to market AIFs under the passport system from 2015 onwards. However, please note that the availability of the passport is subject to a positive decision to extend the passport to non-EU AIFM by the European Securities and Markets Authority (“ESMA”) (which is not certain at this time).

Non-EU AIFM seeking an EU passport post-2015

Additional conditions will apply for a non-EU AIFM:

- The non-EU AIFM must comply with all of the provisions of the AIFMD.
- The non-EU AIFM must seek authorization as an AIFM from its member state of reference (“MSR”) which is the EU member state where the AIFM intends to “develop effective marketing” for most of its AIFs. It must also have a “legal representative” established in its MSR which is to be the official point of contact for the MSR regulator and will be responsible for “the compliance function relating to the management and marketing activities performed by the AIFM under the Directive together with the AIFM”.
- Appropriate cooperation arrangements must be in place between the competent authorities of the MSR and the competent authorities of the countries where each of the non-EU AIF and the non-EU AIFM are established.
- Neither the country where the non-EU AIFM nor the non-EU AIF are established must be listed as a Non-Cooperative Country and Territory by the Financial Action Task Force.

The countries where the non-EU AIFM and the non-EU AIF are established must each have signed a tax information sharing agreement with the MSR which complies with the OECD Model Tax Convention.

PRIVATE PLACEMENT

National private placement rules (“NPPRs”) must be used for Non-EU AIF and non-EU AIFM that cannot avail of the European passport in order to market non-EU domiciled AIF. However, individual member states may move to abolish or restrict the use of NPPRs, once the AIFMD is in force.

Conditions for the use of NPPRs. The use of NPPRs requires adherence to the following conditions:

- the US manager must comply with the provisions of the AIFMD relating to the annual report and disclosure to investors (including disclosure as to aggregate remuneration);
- the US manager must comply with detailed reporting requirements under the AIFMD to national regulators in each of the member states in which they intend to privately place their AIFs. Such reporting must be done either quarterly, semi-annually or yearly depending on the value of the assets under management of the AIFM and includes reporting on the principal markets on which an AIFM trades, instruments traded, principal exposures, important concentrations, illiquid assets, special arrangements, risk profiles, risk management systems, stress testing results, list of all AIFs managed, leverage in the AIFs and sources of leverage. Individual Member States may impose stricter reporting rules;
- if the US manager manages an AIF which acquires control of a non-listed company, the provisions of the AIFMD relating to major holdings and control must be complied with;
- appropriate cooperation arrangements must be in place between the competent authorities of the member state where the AIF is marketed and the competent authorities of the USA;
- appropriate cooperation arrangements must be in place between the competent authorities of the member state where the AIF is marketed and the country where the non-EU AIF is established; and
- the USA must not be listed as a Non-Cooperative Country and Territory by the Financial Action Task Force. The USA is not currently on this list and is not likely to be so.

Termination of NPPRs. Between 2015 and 2018, NPPRs and the European passport could co-exist. However, in 2018 ESMA will decide whether to terminate NPPRs, in which case authorisation under the AIFMD will be the only option for marketing non-EU domiciled AIF to EU investors.

THE SELF-MANAGED ALTERNATIVE

The AIFMD provides that an AIFM may be either externally or internally managed. It will therefore be possible to establish a self-managed qualifying investor AIF (“QIAIF”) in Ireland which may itself be the authorized AIFM. The QIAIF may then delegate some of its management functions to either an EU or a non-EU investment manager. This investment manager would not be the AIFM and therefore would not be required to comply with the AIFMD.