

Guernsey funds and the AIFMD 2

Service area / [Investment Funds](#)

Legal jurisdiction / [Guernsey](#)

Date / [January 2024](#)

Executive Summary

AIFMD 2 will bring significant changes to certain aspects of AIFMD 1. The implications for Guernsey fund managers relate primarily to reporting obligations in respect of Guernsey funds marketed into the EU.

We consider that Guernsey remains an ideal jurisdiction from which to access EU investors (perhaps even more so following AIFMD 2). Being outside the EU, Guernsey managers are not subject to the full regulatory burden of the Directive but will continue to be able to access key EU markets through the national private placement regimes. AIFMD 2 will also not affect access by Guernsey fund managers to the UK investor market.

Introduction

More than 10 years after the first Alternative Investment Fund Managers Directive (“AIFMD 1”) was adopted, the EU Parliament and the Council of the EU have agreed on specific amendments to the text of AIFMD 1 (as amended “AIFMD 2”). The proposals are currently expected to come into effect in 2026.

AIFMD 2 does not constitute a total overhaul of AIFMD 1. Nonetheless, there are certain amendments which will impact Guernsey funds.

Summary of the current impact of AIFMD 1 on Guernsey funds

Before considering the impact of AIFMD 2 from a Guernsey perspective, it is worth a quick recap on the key points AIFMD 1 vis-à-vis Guernsey and Guernsey funds.

Overview

- Guernsey is not, and never has been, a Member State of the EU.
- Guernsey funds are classified as “non-EU AIFs” (alternative investment funds).
- Guernsey fund managers are classified as “non-EU AIFMs” (alternative investment fund managers).
- Guernsey funds can be marketed to professional investors in the EU using individual Member States’ national private placement regimes (“NPPRs”).

The “Reporting Requirements”

- Article 42 is the key Article of AIFMD 1 for Guernsey funds with a Guernsey manager (i.e. non-EU AIF, non-EU AIFM).
- Article 42 only permits NPPR-based marketing if the third country where the non-EU AIFM or the non-EU AIF is established (i.e. Guernsey) is not listed as a Non-Cooperative Country and Territory by FATF (the “**FATF Requirement**”).
- A non-EU AIFM of a non-EU AIF must comply with:
 - a. any specific requirements of the relevant Member State’s NPPR;
 - b. Article 22 – which requires an annual report containing specified information in respect of the fund;
 - c. Article 23 – which requires the disclosure of certain information in respect of the fund to investors both before investing and on an ongoing basis; and
 - d. Article 24 – which requires the reporting of certain information in respect of the fund to the designated Home Member State of the non-EU AIF,

OFFSHORE LAW SPECIALISTS

and, broadly, if the non-EU AIF¹ controls larger, non-listed companies: (i.e. the AIF is a buyout fund):

- e. Article 27 – which requires certain notifications in respect of the acquisition and disposal of major holdings and control of non-listed companies;
- f. Article 28 – which requires certain notifications in respect of the acquisition of control of non-listed companies and issuers;
- g. Article 29 – which requires annual reports to contain certain information in respect of the non-listed company controlled by the fund; and
- h. Article 30 – which precludes certain “asset-stripping” activities in respect of non-listed companies or issuers controlled by the fund.

The “Passport Extension”

Article 67 of AIFMD 1 introduced the potential for the “passport” (permitting access to all 27 EU Member States) to be extended to Guernsey. Back in 2016, Guernsey received an “unqualified and positive assessment” and was approved for the extension of the third-country passporting regime. There have been no further developments on this since the Brexit vote was passed.

What are the key changes made by AIFMD 2?

AIFMD 2 introduces:

- a new regime for “loan origination funds” (i.e. AIFs originating loans), most notably the requirement that such funds are closed-ended unless the manager can demonstrate that its liquidity risk management can satisfy the liquidity terms whilst still complying with its investment strategy;
- additional reporting requirements;
- amended delegation and substance requirements;
- new provisions relating to the fair treatment of investors and undue costs; and
- new provisions relating to conflicts of interest.

What are the key points of AIFMD 2 for Guernsey funds and Guernsey managers?

Replacement of the FATF Requirement

AIFMD 2 replaces the FATF Requirement; access via NPPRs will only be available where the third country 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 fourth Anti-Money Laundering Directive.

This should not have any effect on Guernsey funds or Guernsey fund managers.

Amendments to the Reporting Requirements

Significant changes have been made to the Reporting Requirements, with additional, more detailed reporting and disclosure now required in relation to:

- the possibility and conditions under which the liquidity management tools might be used;
- fees, charges and expenses borne by the AIFM in connection with the operation of the AIF that will be borne by the AIF;
- the composition of the originated loan portfolio;
- the current risk profile of the fund, including the market risk, liquidity risk, counterparty risk, other risks including operational risk and the total amount of leverage employed by the fund;
- delegation arrangements; and
- the Member States in which the fund is marketed.

Managers of Guernsey funds should familiarise themselves with these additional reporting requirements as they apply to their funds in advance of AIFMD 2 coming into effect.

A table setting out these changes is available overleaf.

Amendments to the Passport Extension

AIFMD 2 makes no changes to Article 67 and therefore we must assume that the current impasse as regards the extension of the passporting regime to Guernsey fund managers and funds will remain indefinitely.

However, 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 requirements of complying in full with AIFMD requirements (such requirements only added to further by AIFMD 2).

Separately, Guernsey 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 2. 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.

¹ Per Article 26(1). Note that some of the provisions of Articles 27-30 apply more widely.

Continued

Table of AIFMD 2 amendments to AIFMD 1 for non-EU AIFMs and non-AIFMs

Article 23 Disclosure to investors

Paragraph 1(h) is amended as follows:

AIFMD 1	Amendments	AIFMD 2
<i>'(h) a description of the AIF's liquidity risk management, including the redemption rights both in normal and in exceptional circumstances, and the existing redemption arrangements with investors.'</i>	<i>'(h) a description of the AIF's liquidity risk management, including the redemption rights both in normal and in exceptional circumstances, disclosing the possibility and conditions for using liquidity management tools selected in accordance with Article 16(2b), and the existing redemption arrangements with investors.'</i>	<i>'(h) a description of the AIF's liquidity risk management, including the redemption rights both in normal and in exceptional circumstances, disclosing the possibility and conditions for using liquidity management tools selected in accordance with Article 16(2b), and the existing redemption arrangements with investors.'</i>

Paragraph 1(ia) is inserted:

AIFMD 1	Amendments	AIFMD 2
<i>'(i) a description of all fees, charges and expenses and of the maximum amounts thereof which are directly or indirectly borne by investors;'</i>	<i>'(ia) a list of fees and charges that will be applied in connection with the operation of the AIF and that will be borne by the AIFM or its affiliates.'</i>	<i>'(i) a description of all fees, charges and expenses and of the maximum amounts thereof which are directly or indirectly borne by investors; (ia) a list of fees and charges that will be applied in connection with the operation of the AIF and that will be borne by the AIFM or its affiliates.'</i>

Paragraph 4(d), (e) and (f) are added:

AIFMD 1	Amendments	AIFMD 2
<i>'4. AIFMs shall, for each of the EU AIFs that they manage and for each of the AIFs that they market in the Union, periodically disclose to investors.'</i>	<i>'(d) originated loan portfolio; (e) on a quarterly basis, all direct and indirect fees and charges that were directly or indirectly charged or allocated to the AIF or to any of its investments; (f) on a quarterly basis, any parent company, subsidiary or special purpose entity established in relation to the AIF's investments by the AIFM, the staff of the AIFM or the AIFM's direct or indirect affiliates.'</i>	<i>'(d) originated loan portfolio; (e) on a quarterly basis, all direct and indirect fees and charges that were directly or indirectly charged or allocated to the AIF or to any of its investments; (f) on a quarterly basis, any parent company, subsidiary or special purpose entity established in relation to the AIF's investments by the AIFM, the staff of the AIFM or the AIFM's direct or indirect affiliates.'</i>

Article 24 Reporting obligations to competent authorities

The amendments to paragraph 1 have broadened the AIFM's required reporting obligations to all markets and instruments in which it trades.

AIFM's must now provide information on any exposure of each of the AIFs it manages.

Continued

AIFMD 1	Amendments	AIFMD 2
<i>'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.</i>	<i>'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.</i>	<i>'An AIFM shall regularly report to the competent authorities of its home Member State on the markets and instruments in which it trades on behalf of the AIFs it manages.</i>
<i>It shall 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 most important concentrations of each of the AIFs it manages.'</i>	<i>It shall 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 most important concentrations of each of the AIFs it manages.'</i>	<i>It shall provide information on the instruments in which it is trading, on markets of which it is a member or where it actively trades, and on the exposures of each of the AIFs it manages.'</i>

Paragraph 2(d) is deleted:

AIFMD 1	Amendments	AIFMD 2
<i>'2. An AIFM shall, for each of the EU AIFs it manages and for each of the AIFs it markets in the Union, provide the following to the competent authorities of its home Member State: ...</i>	<i>'(d) information on the main categories of assets in which the AIF invested'</i>	
<i>(d) information on the main categories of assets in which the AIF invested'</i>		

Paragraph 6 is replaced by the following:

AIFMD 1	Amendments	AIFMD 2
<i>'6. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying:</i>	<i>'6. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying:</i>	<i>'6. ESMA shall develop draft regulatory technical standards specifying the details to be reported according to paragraphs 1 and 2. ESMA shall take into account other reporting requirements to which the AIFMs are subject and the report issued in accordance with paragraph 2 of Article 69b.</i>
<i>(a) when leverage is to be considered to be employed on a substantial basis for the purposes of paragraph 4; and</i>	<i>(a) when leverage is to be considered to be employed on a substantial basis for the purposes of paragraph 4; and</i>	
<i>(b) the obligations to report and provide information provided for in this Article.</i>	<i>(b) the obligations to report and provide information provided for in this Article.</i>	
<i>Those measures shall take into account the need to avoid an excessive administrative burden on competent authorities.</i>	<i>Those measures shall take into account the need to avoid an excessive administrative burden on competent authorities.</i>	<i>ESMA shall submit those draft regulatory technical standards to the Commission by [•].</i>
	<i>'6. ESMA shall develop draft regulatory technical standards specifying the details to be reported according to paragraphs 1 and 2. ESMA shall take into account other reporting requirements to which the AIFMs are subject and the report issued in accordance with paragraph 2 of Article 69b.</i>	<i>Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.'</i>
	<i>ESMA shall submit those draft regulatory technical standards to the Commission by [•].²</i>	
	<i>Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.'</i>	

2.36 months after the entry into force of AIFMD 2

Continued

Paragraph 7 is added:

AIFMD 1	Amendments	AIFMD 2
	<p>'7. ESMA shall develop draft implementing technical standards specifying:</p> <p>(a) the format and data standards for the reports referred to in paragraphs 1 and 2;</p> <p>(b) the reporting frequency and timing. ESMA shall submit those draft implementing technical standards to the Commission by [•].³ Power is delegated to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.'</p>	<p>'7. ESMA shall develop draft implementing technical standards specifying:</p> <p>(a) the format and data standards for the reports referred to in paragraphs 1 and 2;</p> <p>(b) the reporting frequency and timing. ESMA shall submit those draft implementing technical standards to the Commission by [•]. Power is delegated to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.'</p>

Article 42

Conditions for the marketing in member states without a passport of AIFs managed by a non-EU AIFM

Paragraph 1(c) is amended as follows:

AIFMD 1	Amendments	AIFMD 2
<p>'(c) the third country where the non-EU AIFM or the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF.'</p>	<p>'(c) the third country where the non-EU AIFM or the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF identified as a high-risk third country pursuant to Article 9(2) of the Directive (EU) 2015/849.'</p>	<p>'(c) the third country where the non-EU AIFM or no the non-EU AIF is established is not identified as a high-risk third country pursuant to Article 9(2) of the Directive (EU) 2015/849.'</p>

Paragraph 1(d) is added:

AIFMD 1	Amendments	AIFMD 2
	<p>'(d) the third country where the non-EU AIF or non-EU AIFM is established has signed an agreement with the 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 of 2020 on the revised EU list on non-cooperative jurisdictions for tax purposes.'</p>	<p>'(d) the third country where the non-EU AIF or non-EU AIFM is established has signed an agreement with the 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 of 2020 on the revised EU list on non-cooperative jurisdictions for tax purposes.'</p>

3 36 months after the entry into force of AIFMD 2

Continued



FIND US

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

T +44 (0)1481 727272

E guernsey@careyolsen.com



FOLLOW US

Visit our investment funds team
at careyolsen.com



PLEASE NOTE

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 (Guernsey) LLP 2024.