



Bermuda and the European Union (EU) Alternative Investment Fund Managers Directive (AIFMD)

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AIFMD

With the introduction of the AIFMD¹, the aim of the EU was to impose much greater regulation on EU alternative investment fund managers (**AIFMs**) (being persons who are managing alternative investment funds (**AIFs**)) and in return to grant AIFMs a harmonised passport for the purposes of marketing EU AIFs to professional investors throughout the EU. However the experience to date is that the position is in practice far from harmonious and accessing the EU passport is neither simple nor cost-effective in various Member States of the EU.

On 30 July 2015 the European Securities and Markets Authority (**ESMA**) issued to the European Commission (i) its opinion on the functioning of the passport for EU AIFMs; (ii) its views on the functioning of the national private placement regimes under the AIFMD; and (iii) its advice regarding extension of the EU passport to the first wave of non-EU jurisdictions assessed pursuant to the terms of the AIFMD.

Non-EU Passport

ESMA identified 22 countries² to assess in the light of the AIFMD requirements. If, following such assessments, ESMA ascertains that there are no significant obstacles regarding investor protection, market disruption, competition and the monitoring of systemic risk that would impede the extension of the passport to non-EU AIFMs then it is required to issue "*positive advice*". The issuance of such positive advice then triggers a legislative process that would ultimately lead to the passport being extended (subject to political agreement). ESMA has adopted a country by country approach to its advice.

The *first wave* of advice from ESMA covered 6 countries but only Guernsey, Jersey and (following the passing of certain legislation) Switzerland were given unqualified positive appraisals. Concerns were raised over the other three countries considered, namely the USA, HK and Singapore, principally in relation to a lack of reciprocal access for EU funds and EU managers in those countries but also, in the case of Singapore and Hong Kong, due to the lack of information available to ESMA meaning that there may be scope for positive advice to be issued in future. Scant detail of ESMA's concerns is given, making it difficult to assess its conclusions. The provision of positive advice does not necessarily mean that the AIFMD passport will be extended imminently, and ESMA leaves it to the European Commission and its co-legislators to determine whether to wait until ESMA has delivered positive advice in relation to a significant number of jurisdictions.

In late September 2015, ESMA confirmed the non-EU countries to be included in the *second wave* of its assessment relating to the extension of the AIFMD passport and this list³ included Bermuda. ESMA has indicated that it expects the second wave assessment process to be completed, and its advice in relation to

¹ 2011/61/EU

² Australia, Bahamas, Bermuda, Brazil, BVI, Canada, Cayman Islands, Curacao, Guernsey, Hong Kong, Isle of Man, Japan, Jersey, Mexico, Mauritius, Singapore, South Africa, South Korea, Switzerland, Thailand, USA and the US Virgin Islands. Another seven countries (Malaysia, Egypt, Chile, Peru, India, China and Taiwan) have been identified on the basis that they are markets which are relatively accessible to UCITS and AIFs, but these have not been assessed as there are currently no supervisory memoranda of understanding in place between the regulators and ESMA and activity in the EU is currently low

³ The full list of countries is: Australia, Bermuda, Canada, Cayman Islands, Isle of Man and Japan.

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Bermuda to be issued, by the end of Q1 2016.

Bermuda and AIFMD Passport

Bermuda has currently entered into Memoranda of Understanding with 27 Member States of the European Economic Area⁴ (EEA), enabling Bermuda based AIFMs and AIFs to participate in those 27 EEA States' private placement regimes for the purposes of complying with the current AIFMD requirements.

Bermuda is also developing a new opt-in regime for fund managers, which is intended to mirror the AIFMD. If Bermuda is approved for the purpose of regulating AIFMD business, then managers wishing to obtain the EU marketing passport could authorise with, and be regulated by, the Bermuda Monetary Authority (**BMA**)

Amendments to Bermuda's Investment Business Act 2003 (**IBA**) to provide for an AIFMD-compliant, opt-in regime have been approved by the Bermuda Parliament and are now waiting for the assent to be given before becoming law. However the provisions of this opt-in regime will only come into operation when the Minister issues a Notice published in the Royal Gazette in Bermuda confirming the operative date. Much of the detail of the Bermuda AIFM regime will be covered by AIFMD Rules which have been drafted and are being further developed but are not yet ready to be issued as at the date of this article.

The Bermuda AIFM opt-in regime will enable a person whose ordinary business is the carrying on of managing one or more AIFs (which for Bermuda law purposes will cover any form of investment fund vehicle that raises capital from a number of investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors and it may be open or close ended). It is key that "*managing an AIF*" means performing at least risk management or portfolio management for the AIF and not delegating out both functions. Further, to be eligible to be licensed as an AIFMD in Bermuda the AIFMD must have some form of physical base in Bermuda.

The Bermuda AIFM op-in regime will be structured whereby the qualifying AIFM will be subject to prudential supervision and regulation by the BMA which will transpose the requirements, terms and conditions set out under the AIFMD framework into Bermuda law. The detail of this framework will be set forth in the Bermuda AIFM Rules which will address, amongst other things, the requirements relating to remuneration policies and procedures; management of conflicts of interest and risk management techniques; prescribed valuation policies and procedures; limitations on delegation; depositary requirements; disclosure and transparency requirements and prescribed information for offering documents.

Advantages of Bermuda as the AIFM regulator

EU Member State Regulator (MSR)	BMA as Regulator
Technically no choice of MSR (there are criteria to determine this, although in practice managers will make an assertion)	Certainty of regulator
Unclear how an EU regulator will exercise oversight remotely. Will it cost more?	Local oversight
Will non-EU managers (particularly 'offshore') receive equal treatment from the regulator? Will the regulator set a higher bar?	Consistent level of regulation
Does the regulator have the necessary expertise in asset class, e.g. ILS? Will the manager have to educate them?	BMA has the credentials to regulate AIFMs and AIFs (including ILS). Bermuda has also been granted full equivalence by the European Commission to comply with the EU Solvency II supervisory regime.

⁴ There are 28 member states of the EEA



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