

ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE: NEW JERSEY REGULATIONS AND THE IMPACT ON EXISTING JERSEY STRUCTURES

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This briefing provides an overview of the regulatory authorisations which Jersey AIFs, Jersey AIFMs and other Jersey service providers require in order to continue their EU activities. The regulatory regime for Jersey funds has always distinguished between the number and type of potential investors to which the fund is offered. The authorisation requirements following the Implementation Date will differ, depending on the regulatory classification of the Jersey AIF, as set out in this summary.

The Alternative Investment Fund Managers Directive (the "Directive") came into force on 22 July 2013 (the "Implementation Date"). As provided in our previous briefings, the Directive impacts alternative investment fund managers ("AIFMs") operating from Jersey, to the extent that they are either: (i) managing an alternative investment fund ("AIF") which is established in the EU; or (ii) marketing an EU or non-EU AIF in the EU, after the Implementation Date. Iceland, Liechtenstein and Norway (the non-EU EEA States) have also implemented the Directive. References to "EU" in this briefing should be read accordingly.

It should further be noted that, in addition to making any necessary applications and notifications to the Jersey Financial Services Commission ("JFSC"), the transparency and disclosure requirements set out in the Directive must be complied with by AIFs marketed in the EU and it is recommended that advice should be sought in connection with those requirements.

Key Jersey legislation

The main Jersey legislation relevant to collective investment schemes, and which is referred to below, is as follows:

- Collective Investment Funds (Jersey) Law 1988, as amended (the "CIF Law")
- Alternative Investment Funds (Jersey) Regulations 2012 (the "AIF Regulations")
- Control of Borrowing (Jersey) Order 1958, as amended (the "COBO Order")
- Financial Services (Jersey) Law 1998, as amended (including the Financial Services (Amendment of Law) (No. 4) (Jersey) Regulations 2012) (the "FS Law")

The new AIF Regulations

AIFs (as defined in the Directive) which are established in Jersey and marketed to professional investors in the EU may be required to apply to the JFSC for a certificate under the AIF Regulations (an "AIF Certificate"). All categories of Jersey funds potentially fall within the definition of an AIF and could be subject to the AIF Regulations, depending on the scoping provisions of the Directive and any exemptions to the AIF Regulations as may be adopted from time to time.

Jersey AIFMs are required to register in respect of "AIF Services Business", a new category of financial services business under the FS Law. New codes of practice attach to this new licensing category (the "AIF Codes") and Jersey AIFMs have the option of either: (i) adopting the entirety of the AIF Codes, which reflect the full passporting requirements of the Directive; or (ii) adopting only those parts of the AIF Codes which set out the minimum requirements of the Directive for the purposes of marketing AIFs during the period from the Implementation Date until at least 2018 (the "private placement period"), i.e. the period when non-EU AIFMs may market AIFs in EU Member States subject to the requirements of each such Member State's national private placement rules.

Jersey entities providing depositary services to AIFs ("AIF Depositaries"), and which are not already registered to conduct fund services business as trustees, custodians or depositaries under the FS Law, are now required to apply to the JFSC to act as depositary to an AIF under the AIF Regulations. The FSB Codes (as defined below) apply to AIF Depositaries (see "Funds which are regulated under the CIF Law" below).

Funds which are subject to the COBO Order

AIFs which are authorised under the COBO Order ("COBO Funds") fall into three main categories: very private funds (those funds which are offered to fewer than 15 potential investors), Jersey Private Placement Funds (those funds offered to fewer than 50 professional or sophisticated investors) and COBO-only funds (those funds offered to fewer than 50 investors of any type). COBO Funds which are marketed in the EU, from the Implementation Date, are subject to the AIF Regulations and require an AIF Certificate.

It should be noted that, from the Implementation Date, Jersey AIFMs of COBO Funds require an AIF Services Business licence. This includes where a service provider which will be regarded as the AIFM of a COBO Fund is currently relying on an exemption from the requirement to be registered under the FS Law. The historic exemption from regulation therefore no longer applies. Jersey depositaries of COBO Funds are required to register to provide services as AIF Depositaries unless they are already registered as a trustee, custodian or depositary under the FS Law, as described above.

Funds which are regulated under the CIF Law

AIFs which are offered to more than 50 potential investors are regulated as "collective investment funds" ("CIFs") and must hold a certificate ("CIF Certificate") under the CIF Law. Such funds are exempt from the requirement to apply for an AIF Certificate and do not require any further authorisations to be marketed in the EU following the Implementation Date. Funds in this category include (i) public collective investment funds (funds offered to investors of any type); (ii) Jersey Expert Funds (funds offered to expert investors in accordance with the Jersey Expert Fund Guide issued by the JFSC); (iii) Jersey Eligible Investor Funds (funds offered to high value or highly sophisticated investors in accordance with the Jersey Eligible Investor Fund Guide); and (iv) Jersey Listed Funds (funds which are listed on a recognised stock exchange in accordance with the Jersey Listed Fund Guide). However, in order for the JFSC to maintain a register of those AIFs which are being marketed in the EU, a written notification to that effect is required to be submitted to the JFSC on behalf of the AIF (the "AIF Notice"). From the Implementation Date, CIFs are subject to revised codes of practice (the "CIF Codes"), which reflect the requirements of the Directive.

Jersey AIFMs of CIFs must be registered to carry on fund services business under the FS Law. Whilst these entities are exempt from the requirement to obtain an AIF Services Business licence, they are subject to revised codes of practice which reflect the requirements of the Directive (the "FSB Codes"). They are able to elect to adopt the entirety of the FSB Codes, which will reflect the EU-wide passporting requirements of the Directive, or only those parts of the FSB Codes which, for the purposes of the Directive, are required during the private placement period. Jersey depositaries of CIFs must apply for a licence to act as a fund services business depositary or custodian under the FS Law (a "FSB Depositary Licence"). The applicable FSB Codes have been revised so as to reflect the differing Directive requirements for depositaries of financial instruments, depositaries of other assets which are not normally held in custody, and depositary "lite" services.

Jersey Unregulated Funds

There are two types of unregulated funds: unregulated eligible investor funds (those funds which are offered to an unlimited number of eligible investors) ("Unregulated EIFs") and unregulated exchange-traded funds (those funds which are offered to an unlimited number of investors and are listed on one of the prescribed stock exchanges) ("Unregulated ETFs"). These funds are not subject to authorisation and supervision by the JFSC. For this reason, from the Implementation Date, it will not be possible to market an unregulated fund in the EU. In order to continue EU marketing activities, the following action can be taken in relation to these funds.

Unregulated ETFs: subject to the relevant application process and the eligibility criteria set out in the Jersey Listed Fund Guide, it may be possible for Unregulated ETFs to be converted into Jersey Listed Funds or, alternatively, public collective investment funds (that is, to become regulated as CIFs) and submit an AIF Notice to the JFSC. It would also be necessary for the Jersey service providers to Unregulated ETFs to apply for the relevant licences under the FS Law. From the Implementation Date, the provisions in relation to Jersey AIFMs and depositaries outlined above (under "Funds which are regulated under the CIF Law") apply.

Unregulated EIFs: recognising that investors in these funds are highly sophisticated, the JFSC has introduced a guide enabling the conversion of an Unregulated EIF into a Jersey eligible investor fund (a "Jersey EIF"), subject to the relevant application process and the eligibility criteria. Jersey EIFs are issued with a CIF Certificate and regulated under the CIF Law. However, the general licensing and authorisation regime applicable to CIFs has been relaxed in certain areas. A self-certification regime applies, which enables a 72-hour fast-track authorisation process in relation to the issue of CIF Certificates and a 10-day fast-track authorisation process in relation to the issue of any requisite fund services business licences under the FS Law. From the Implementation Date, the provisions in relation to Jersey AIFMs and depositaries (outlined above under "Funds which are regulated under the CIF Law") apply.

It should be noted that general partner and trustee service providers to Unregulated ETFs and Unregulated EIFs, which previously benefitted from a specific exemption to the requirement to be licensed under the FS Law, will from the Implementation Date require a fund services business licence under the FS Law to act as service providers to Jersey Listed Funds, public collective investment funds or Jersey EIFs.

Sub-threshold AIFMs

Jersey AIFMs which fall within one of the exemptions set out in the Directive (i.e. they manage portfolios of AIFs whose assets under management are less than €100 million, or €500 million when the portfolios of AIFs are closed ended and unleveraged), are not required to register for AIF Services Business. In order to benefit from this exemption, sub-threshold AIFMs are required to apply to the JFSC for approval to be treated as such.

Conclusion

The Implementation Date has now passed and it is necessary for AIFMs to establish what the impact of Jersey's proposed new Directive-compliant regulatory regime will be on the AIFs they manage and on their own position. It is also necessary for those wishing to provide depositary services to ensure that they are registered for the appropriate classes of fund services business under the FS Law. It is recommended that advice be sought on the implications as a matter of urgency, in order to avoid having to cease EU marketing activities, or delay the provision of the AIFM or depositary services, following the Implementation Date.

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