

AIFMD - Passporting

Directive 2011/ 61/EU on Alternative Investment Fund Managers (AIFMD) must be implemented by EU Member States by 22 July 2013. AIFMD is supplemented by a delegated regulation (AIFMD Regulation). AIFMD regulates the activities of Alternative Investment Fund Managers (AIFMs) and their Alternative Investment Funds (AIFs). AIFMD has been implemented in Ireland by the European Union (Alternative Investment Fund Managers) Regulations, 2013.

The AIFMD contemplates two forms of passport, the first is in respect of marketing (which is the incentive to seek authorisation as an AIFM) and the second is in respect of managing an EU AIF located in a Member State other than the home Member State of the AIFM.

Marketing Passport

The marketing passport is only available to authorised EU AIFMs marketing EU AIFs to professional investors (at least until 2015). The passport permits an EU AIFM to market units or shares of any EU AIF that it manages to professional investors in the home Member State of the AIFM as well as other EU Member States. Where the EU AIF is a feeder fund, the right to market is subject to the condition that the master AIF has appointed an authorised AIFM.

For passporting purposes, a Professional Investor is an investor who satisfies the definition of Professional Investor set out in MiFID .

Marketing units/shares of EU AIFs in the home Member State of the AIFM

Process

The AIFM

- makes a notification to its home regulator in respect of each EU AIF that it intends to market
- provides its home regulator with the documentation set out in Annex III of the AIFMD

Documentation includes

- Notification letter;
- AIF rules or instruments of incorporation;
- identification of depositary;
- description of information on EU AIF available to investors;
- information on where the master EU AIF is established if it is a feeder EU AIF;
- pre-investment information to be made available to investors (as set out in Article 23(1) of AIFMD);
- where relevant, the information on the arrangements in place to prevent the units or shares in the EU AIF being marketed to retail investors including in the case where the AIFM relies on the activities of independent entities to provide investment services in respect of the EU AIF

Timing

The AIFMD prescribes that within 20 working days following receipt of a complete notification file, the AIFM's home regulator will inform the AIFM if it may start marketing the EU AIF. Where a positive notification is received, the AIFM can start marketing with effect from the date of receipt. The AIFM's home regulator can prevent marketing only if the AIFM's management of the AIF does not or will not comply with the terms of the AIFMD or the AIFM otherwise does not or will not comply with the terms of the AIFMD.

Ongoing requirements

Where there is a material change to any of the documentation submitted as part of the passport application, the AIFM has to provide its home regulator with at least 1 months' notice of the change where the change is planned by the AIFM or immediately after an unplanned change. The AIFM's home regulator can prevent a planned change from taking place where it would result in non-compliance with the AIFMD. If such a change goes ahead regardless or where an unplanned change results in non-compliance with AIFMD the AIFM's home regulator can expressly prohibit the marketing of the EU AIF and take other positive action against the AIF and the AIFM (as further set out in Article 46 of AIFMD).

Marketing units/shares of EU AIFs in a Member State other than the home Member State of the AIFM

The process is very similar to that set out above except that it becomes a regulator to regulator notification once the AIFM has notified its home regulator of its marketing plans. Where the EU AIF is a feeder fund, the right to market is subject to the condition that the master fund has appointed an authorised AIFM.

Process

The AIFM

- makes a notification to its home regulator in respect of each EU AIF that it intends to market;
- provides its home regulator with the documentation set out in Annex IV of the AIFMD

Documentation includes

- Notification letter;
- AIF rules or instruments of incorporation;
- identification of depositary;
- description of information on EU AIF available to investors;
- information on where the master EU AIF is established if it is a feeder EU AIF;
- pre-investment information to be made available to investors (as set out in Article 23(1) of AIFMD);
- indication of the Member State in which it intends to the market the EU AIF;
- information on the arrangements made for the marketing of the EU AIF and where relevant, the information on the arrangements in place to prevent the units or shares in the EU AIF being marketed to retail investors including in the case where the AIFM relies on the activities of independent entities to provide investment services in respect of the EU AIF (these arrangements will be subject to the laws and supervision of the host Member State)

Timing

The AIFMD prescribes that within 20 working days following receipt of a complete notification file, the AIFM's home regulator must transmit the complete notification file to the regulators of the Member States where it is intended to market the EU AIF (the host Member States). The file must include a statement to the effect that the AIFM is authorised to manage AIF with a particular investment strategy. Upon transmission of the file, the home regulator of the AIFM must notify the AIFM without delay and the AIFM can start marketing with effect from that notification. Where different, the home regulator of the AIFM will also notify the regulators of the EU AIFs that the AIFM can start marketing the EU AIF in the host Member State.

Ongoing requirements

Where there is a material change to any of the documentation submitted as part of the passport application, the AIFM has to provide its home regulator with at least 1 months' notice of the change where the change is planned by the AIFM or immediately after an unplanned change. The AIFM's home regulator can prevent a planned change from taking place where it would result in non-compliance with the AIFMD. If such a change goes ahead regardless or where an unplanned change results in non-compliance with AIFMD the AIFM's home regulator can expressly prohibit the marketing of the EU AIF and take other positive action against the AIF and the AIFM (as further set out in Article 46 of AIFMD).

Passport in respect of managing EU AIFs established in other Member States

An EU AIFM can manage EU AIFs established in another Member State either directly or by establishing a branch in that Member State.

In both cases the notification is made to the home regulator of the AIFM and the AIFM must provide details of the Member State in which it intends to manage the EU AIF, a programme of operations stating the services which it intends to provide and identify the AIFs it intends to manage.

Where a branch is being established, the AIFM must also provide details of

- the organisational structure of the branch;
- the address in the home Member State of the EU AIF from which documents may be obtained; and
- the names and contacts details of the persons responsible for the management of the branch.

Timing

The AIFMD prescribes that where the AIFM is being appointed directly (ie without establishing a branch), the AIFM's home regulator has 1 month to transmit the documentation to the home regulator of the EU AIF. Where the AIFM is establishing a branch, the home regulator has 2 months to transmit the documentation. The file must include a statement to the effect that the AIFM is authorised by the home regulator. Upon transmission of the file, the home regulator of the AIFM must notify the AIFM immediately and the AIFM can start to provide services with effect from that notification. The regulator of the host Member State cannot impose any additional requirements on the AIFM in respect of the matters set out in the AIFMD.

Where there is a material change to any of the documentation or information submitted as part of the passport application, the AIFM has to provide its home regulator with at least 1 months' notice of the change where the change is planned by the AIFM or immediately after an unplanned change. The AIFM's home regulator can prevent a planned change from taking place where it would result in non-compliance with the AIFMD. If such a change goes ahead regardless or where an unplanned change results in non-compliance with AIFMD the AIFM's home regulator can expressly prohibit the marketing of the EU AIF and take other positive action against the AIF and the AIFM (as further set out in Article 46 of AIFMD). Where the changes are acceptable, the AIFM's home regulator will notify the regulators of the host Member States of the changes.

Additional services – Article 6 (4) of AIFMD

The additional services provided for under Article 6 (4) of the AIFMD cannot be passported under AIFMD (these relate to management of portfolios and investments on a discretionary client by client basis and certain non-core services such as investment advice, safekeeping and administration in relation to shares or units of collective investment schemes and receipt and transmission of orders). The one exception to this will be that where AIFMs also manage UCITS and are in a position to obtain an authorisation under the UCITS Directive they will be free to offer Article 6(4) services cross-border under the UCITS passport.

Other considerations

The Central Bank has confirmed in its Q&A document that an authorised AIFM can operate under the passporting arrangements outlined in Article 32 and 33 of AIFMD even where the AIFMD has not been implemented in the host Member State. The Central Bank has also indicated in the Q&A document that it will endeavour to process marketing passporting notifications more quickly than the maximum timeframe of 20 days where it is important for the EU AIF to be marketed from 22 July 2013 pursuant to the AIFM passporting provisions. In these circumstances, applicants should submit applications for authorisation early and explain their concern regarding an interruption to marketing.

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