

AIFMD Marketing Chart: Navigating the Passport and Private Placement Regimes

FROM 22 JULY:		EU AIFM		Non-EU AIFM	
EU AIF		EU Marketing under AIFMD Passport	EU Private Placement Marketing	EU Marketing under AIFMD Passport	EU Private Placement Marketing
	2013 (Transition Period to July 2014)	1. Passport available (Art. 31, 32), but (i) AIFM must be authorised (Art. 31(1); Art. 32(1)) and (ii) consent of AIFM home country regulator required (Art. 31(2); Art. 32(2))	1. May privately place if target member states permit 2. Permitted reverse solicitation	1. No passport available (Art. 39(1); Art. 67(6))	1. Permitted private placement under Art 42(1) if: (i) target member states allow; (ii) cooperation arrangements in place between AIFM third country, AIF member state and target member states; (iii) AIFM complies with AIFMD on transparency 2. Permitted reverse solicitation
	2014	Passport only applies	1. No private placement allowed (Recital 59) 2. Permitted reverse solicitation	No passport available (Art. 39(1); Art. 67(6))	Permitted private placement and reverse solicitation (as above)
	2015			1. Passport may become available provided that AIFM becomes authorised (Art. 39(1))	
	2018			2. AIF country to have agreed cooperation arrangements with EU (Art. 39(2), (4))	Possible decision on continuance of private placement (Art. 68(6))
Non-EU AIF		EU Marketing under AIFMD Passport	EU Private Placement Marketing	EU Marketing under AIFMD Passport	EU Private Placement Marketing
	2013 (Transition Period to July 2014)	No passport available (Art. 35; Art. 67(6))	1. Permitted private placement for authorised AIFM under Art. 36 if: (i) target member states allow; (ii) cooperation arrangements in place between AIF third country, AIFM member state and target member state; (iii) AIFM complies with AIFMD (but depositary rules relaxed); (iv) AIF not in non-cooperative FATF jurisdiction (Art. 36(2)) 2. Permitted reverse solicitation	No passport available (Art. 40(1); Art. 67(6))	1. Permitted private placement under Art 42(1) if: (i) target member states allow; (ii) cooperation arrangements in place between AIF and AIFM third countries and target member state; and (iii) AIFM complies with AIFMD on transparency and private equity funds 2. Permitted reverse solicitation
	2014				
	2015	Passport may become available if (i) positive opinion by ESMA and EU consent; (ii) AIF countries have agreed cooperation arrangements with EU; and (iii) AIFM home regulator has given consent (Art. 35(2); Art. 35(3), (5))	Possible decision on continuance of private placement (Art. 68(6))	Passport may become available if: (i) positive opinion by ESMA and EU consent; and (ii) AIFM and AIF countries have agreed cooperation arrangements with EU (Art. 40(1)-(5))	Possible decision on continuance of private placement regimes (Art. 68(6))
	2018				

This document is a basic summary of legal issues that (i) assumes all marketing is directed at professional investors in the case of the passport and relevant permitted investors in the case of private placement and (ii) should not be relied upon as an authoritative statement of the law. You should obtain detailed legal advice before taking action. This publication, provided by Dechert LLP as a general informational service, may be considered attorney advertising in some jurisdictions.

Notes to AIFMD Marketing Chart: Navigating the Passport and Private Placement Regimes

Notes on private placement marketing

- As described in more detail below, a passport will apply to the marketing of an EU AIF by an EU AIFM from the date of transposition of AIFMD into local law (July 2013) and will be the only permitted means of marketing such an AIF. EU AIFMs marketing non-EU AIFs and for non-EU AIFMs marketing within the EU will continue to be possible after 2013 on the basis of any local private placement exemptions.
- What is the scope of the “reverse solicitation” exemption? The Directive states that the offering or placement must be carried out “at the initiative of the AIFM”. To the extent that the AIFM offers or places units or shares at the initiative of the investor, there is no marketing. In the UK, the FCA’s draft guidance (which is subject to change) is that “in determining whether the marketing is at the initiative of the investor, consideration needs to be given to the course of communication or relationship between the investor and those involved with, or connected to, the AIFM or the AIF. Only communications which are solicited by the investor should be considered to have occurred at the initiative of the investor.” The scope of the “reverse solicitation” exemption is not clear. Judgment will need to be exercised in each case as to whether the offering or placement (which the FCA construes as “final offering”) took place at the initiative of the AIFM or the investor. Relevant factors will include whether: (i) there was a pre-existing relationship between the AIFM and the investor; (ii) the investor made a general approach or a specific approach to the AIFM; (iii) a third party made the approach on behalf of the investor; and (iv) the documentation and application form was provided by the AIFM or someone else on its behalf.
- HM Treasury issued draft guidance in its March 2013 consultation paper in relation to the transition period stating that: (i) an FCA-authorized UK manager which has not yet obtained an AIFM license will be able to conduct private placement in accordance with FSMA section 238 during the transition period; but (ii) other EU managers that have yet to obtain an AIFM license will not be able to proceed with private placement under section 238 (leaving the passport as the sole route to market in the UK for other EU managers). This draft guidance remains subject to change and revision.
- If ESMA recommends terminating the private placement regime, the AIFMD will be amended accordingly within three months, subject to the right of the European Parliament and Council to object.

Notes on passport marketing

- An EU marketing passport will be available to authorized EU AIFM managing EU AIF from transposition of the AIFMD into national law (2013).
- Two years after the 2013 transposition deadline (i.e. in 2015), ESMA will advise on whether the passport should be extended to cover non-EU AIFM and non-EU AIF. If ESMA recommends the extension, then the relevant provisions of AIFMD will come into force within three months (subject to the ability for the European Parliament and Council to object). The potential for objection means that although the earliest that the passport for non-EU AIFM/AIF could be available is 2015, it could become available after that, or not at all. (Art 67) 'Switching on' the passport regime in or after 2015 would result in it existing alongside the private placement regime for at least three years.