

## How the AIFMD marketing regime applies now, and how it may apply to UK AIFMs post-Brexit

		NOW		AFTER	
		Managing only (no marketing in EEA)	Marketing in the EEA under Private Placement Regimes (PPRs) <sup>1</sup>	Marketing in the EEA with a passport	Consequences for UK AIFMs on UK's withdrawal
EEA AIF	EEA AIFM	Full compliance with AIFMD	Not applicable for full-scope EEA AIFMs – must have a passport to market	Full compliance with AIFMD	UK AIFMs will become non-EEA AIFMs (see rows 2 of 4 below) - passports not available to them.
	Non-EEA AIFM	When available, full compliance with AIFMD  Conditions: (i) co-operation agreements in place; (ii) compliance with FATF listings; (iii) OECD tax exchange agreement; and (iv) MSR LR appointed.	AIFMD compliance only on annual report, disclosure to investors and reporting to regulators (and if applicable, on controlling interests and asset stripping)  Minimum conditions: (i) co-operation agreements in place; and (ii) compliance with FATF listings. Member states may impose stricter rules	Full compliance with AIFMD (pending access) <sup>2</sup>  Conditions: (i) co-operation agreements in place; (ii) compliance with FATF listings; (iii) OECD tax exchange agreement; and (iv) MSR LR appointed.	UK AIFMs, as non-EEA AIFMs, may become subject to these provisions, whereby they market using the PPRs, subject to minimum conditions, and pending access to the third country passport.
Non-EEA AIF	EEA AIFM	To comply with all AIFMD, except for depositary and annual report requirements  Co-operation agreement in place	Full AIFMD compliance, except on depositary <sup>3</sup>  Minimum conditions: (i) co-operation agreements in place; and (ii) compliance with FATF listings. Member states may impose stricter rules	Full compliance with AIFMD (pending access) <sup>2</sup>  Conditions: (i) co-operation agreements in place; (ii) compliance with FATF listings; and (iii) OECD tax exchange agreement.	UK AIFMs will become non-EEA AIFMs (see below) and these provisions will no longer be relevant to them. Marketing will be by way of a slightly different PPR pending access to the third country passport.
	Non-EEA AIFM	Outside scope	AIFMD compliance only on annual report, disclosure to investors and reporting to regulators (and if applicable, on controlling interests and asset stripping)  Minimum conditions: (i) co-operation agreements in place; and (ii) compliance with FATF listings. Member states may impose stricter rules	Full compliance with AIFMD (pending access) <sup>2</sup>  Conditions: (i) co-operation agreements in place; (ii) compliance with FATF listings; (iii) OECD tax exchange agreement; and (iv) MSR LR appointed.	UK AIFMs, as non-EEA AIFMs, may become subject to these provisions, whereby they market using the PPRs, subject to minimum conditions, and pending access to the third country passport.
	Small AIFM	Registration only <sup>4</sup> (with limited regulatory disclosure), authorisation or elect to opt-in (with full compliance)  Member states may impose stricter requirements	Member states to determine (eg UK: notification and submit information to the FCA)	Not applicable unless AIFM opts-in to AIFMD (full compliance)	No change. UK small AIFMs continue to access the market using PPRs. <sup>5</sup>

### Key:

"MSR LR" means a legal representative established in the non-EEA AIFM's member state of reference. To act as a contact point of the AIFM in the EEA, including between regulators and any EEA investors. It also performs a compliance function under AIFMD for management and marketing activities.

"FATF" means the Financial Action Task Force.

<sup>1</sup> Both (i) non-EEA AIFMs and (ii) EEA AIFMs marketing non-EEA AIFs can currently only market their funds in the EEA using the PPRs, but with conditions attached and at the discretion of member states. Subject to ESMA's opinion on the functioning of a non-EEA passport, non-EEA AIFMs (and for EEA AIFMs in respect of non-EEA AIFs) can either become authorised to use the passport when it becomes available, or continue to use the PPRs. PPRs may be compulsorily phased out in the future.

<sup>2</sup> To date ESMA has produced advice (July 2015 and July 2016) on the extension of the AIFMD passport in respect of 12 non-EEA countries. However, we still await to hear as to whether or not the European Commission, along with the European Council and Parliament, will proceed with implementing legislation. In the meantime, marketing in Europe by non-EEA AIFMs and by EEA AIFMs marketing non-EEA AIFs has to continue to be carried out using the PPRs.

<sup>3</sup> Although no depositary is required, there must be an entity that complies with AIFMD in respect of monitoring cash flow, custody and general oversight tasks (known as a "depo-lite").

<sup>4</sup> In the UK, as either a small registered AIFM (a small internal UK AIFM, a small property UK AIFM or a EuSEF manager) or a small authorised UK AIFM.

<sup>5</sup> Some jurisdictions, such as the Netherlands, have not enabled small AIFMs to market on a cross-border basis even though full-scope AIFMs can use the PPRs under AIFMD.