Proskauer

AIFMD 2.0 – Evolution Rather than Revolution

Regulatory & Compliance on **March 28, 2024**

On 26 March 2024, the legislative package amending the Alternative Investment Fund Managers Directive 2011/61/EU ("the "**AIFMD**") and (to a certain extent) the UCITS Directive was published in the Official Journal of the European Union ("**Official Journal**"), with an adoption date of 15 April 2024 (the "**Adoption Date**"). Having been published in the Official Journal, the legislative changes to the AIFMD (known informally as "**AIFMD 2.0**") will predominantly come into force two years from the Adoption Date – on 16 April 2026.

In this alert, we have summarised the key areas of change which are relevant to alternative investment fund managers ("**AIFMs**") under AIFMD 2.0. The majority of these proposals apply to EU full-scope AIFMs and should not affect EU sub-threshold AIFMs. Some of the requirements will also impact non-European AIFMs (including US and UK managers) that market their alternative investment funds ("**AIFs**") in the EU under the national private placement regimes ("**NPPRs**").

The overall impact of AIFMD 2.0 on asset managers will largely depend on the relevant strategy which they employ – credit fund managers (in particular) are expected to be impacted by the new requirements relating to "loan originating AIFs", but otherwise the changes introduced by AIFMD 2.0 do not constitute a major overhaul of the existing regime.

1. Delegation

Under AIFMD 2.0, EU AIFMs will be required to provide additional information in relation to their delegation arrangements as part of their Annex IV reporting under Article 24 of the AIFMD. The European Securities and Markets Authority ("**ESMA**") will develop regulatory technical standards in relation to these reporting requirements.

EU AIFMs will also be required to provide additional, detailed information in relation to delegation as part of the EU AIFM's application for authorisation, including detailed descriptions of the human and technical resources to be used by the EU AIFM for day-to-day portfolio and risk management, and details relating to the monitoring of the delegated activity. EU AIFMs will also need to report any material changes that could affect their delegation arrangements. The concept of "delegation" itself has also been broadened, such that it includes delegations of Article 6(4) ancillary services (such as segregated portfolio management services).

Overall, the changes on delegation in the finalised text are not expected to have a major impact on the operations of EU AIFMs.

2. A new "loan originating AIF" regime

A key change under AIFMD 2.0 is the introduction of a new regime for "loan originating AIFs" and the full-scope EU AIFMs managing those AIFs. "Loan origination" is defined as:

1. granting a loan either directly where the AIF is the original lender; or
2. indirectly originating a loan through a special-purpose vehicle or another party (where the manager structures the loan or sets out its characteristics before gaining exposure to it).

Some of the key obligations that will apply to loan origination under AIFMD 2.0 are as follows:

1. **Risk retention requirements:** the AIF will have to retain an economic interest of 5% of the notional value of the loans granted and sold to a third party. This is until maturity of the loan or for at least eight years (where the term of the loan is beyond eight years). This requirement is subject to certain carve-outs, such as:
    1. where the AIF is being wound down and selling assets to allow investors to redeem interests as part of the AIF's liquidation;
    2. where such disposal is necessary to comply with EU sanctions rules;
    3. where necessary for the EU AIFM to implement the AIF's investment strategy *"in the best interests of the AIF's investors"*; or
    4. where there is a sale of assets as a result of a deterioration in the risk associated with the loan and the purchaser is informed of that deterioration when acquiring the loan.

2. **Diversification:** EU AIFMs must ensure that a loan originated to any single borrower by an AIF it manages does not exceed 20% of the capital of the AIF where the borrower is itself an AIF, a UCITs or a financial undertaking. This rule applies from the date specified in the fund's constitutional documents / prospectus and it cannot be later than 24 months from the date of first closing. This requirement will also cease to apply once the EU AIFM starts to sell assets of the AIF in order to redeem units or shares as part of its liquidation and can be temporarily suspended where the capital of the AIF is increased or reduced;
3. **Lending to connected parties**: an AIF may not lend money to its EU AIFM, its staff, the depositary or members of the EU AIFM's group (save for certain exceptions). Member States will also be able to prohibit loan origination to consumers;
4. **Loan-originating AIFs are to be closed-ended:** EU AIFMs must ensure that loan-originating AIFs are closed-ended unless the EU AIFM can demonstrate that the AIF's liquidity risk management system is "*compatible with its investment strategy and redemption policy*";
5. **Leverage restrictions for loan-originating AIFs:** The leverage of a loan originating AIF cannot exceed: (i) 175% where that AIF is open-ended; or (ii) 300% where the AIF is closed-ended. These limits do not apply to lending activities solely consisting of shareholder loans as long as the notional value of those loans does not exceed in aggregate 150% of that AIF's capital. Leverage for these purposes reflects the definition in the original text of AIFMD (which can be interpreted quite broadly);
6. **Prohibition on AIFs which "originate-to-distribute":** EU AIFMs are prohibited from managing AIFs that originate loans with an "originate-to-distribute strategy" (i.e. where their sole purpose is to sell those loans to third parties); and
7. **Policies and procedures:** EU AIFMs are required to *"implement effective policies and procedures and processes for the granting of credit"* and, where an EU AIFM manages AIFs which carry out loan origination, they must implement effective policies, procedures and processes to assess credit risk. These policies and procedures must be reviewed on an annual basis.

While the loan originating AIF regime will generally come into force on the 16 April 2026, there is a five-year transition period from the Adoption Date for pre-existing AIFs (i.e. AIFs constituted prior to the Adoption Date) that originate loans (the "**Transition Period**").

AIFs that take advantage of the Transition Period, will have until 16 April 2029 to comply with the leverage limits, diversification rules and closed-ended requirement (rather than 16 April 2026, without the Transition Period). Please note, however, that during the Transition Period:

1. if such AIFs are below the leverage and/or diversification limits set out above, these limits cannot then be exceeded; and
2. if such AIFs have already exceeded the leverage and/or diversification limits set out above, these limits cannot be exceeded any further.

In effect, this means that EU AIFMs seeking to take advantage of the Transition Period (for example, open-ended funds that need this time to transition to being closed-ended) will need to be mindful of these limits from the Adoption Date. Alternatively, EU AIFMs can continue their business as usual until 16 April 2026 (including exceeding the leverage and/or diversification limits if needed), but will then need to be compliant with the full requirements of AIFMD 2.0 from that date.

The additional transitional provisions applicable to pre-existing AIFs that originate loans are as follows:

1. if no further capital is raised after the Adoption Date, such AIFs will not be required to comply with the leverage limits, diversification rules and the closed-ended requirement; and
2. if loans are originated before the Adoption Date, certain requirements (e.g. lending to certain parties, risk retention and the prohibition on “originate to distribute” strategies) will not apply.

3. Disclosure and reporting

Under AIFMD 2.0, the Article 23 pre-contractual disclosures are expanded to now include, amongst other things, a description of the conditions under which the EU AIFM (or non-EU AIFM, to the extent AIFs are marketed in the EU under NPPRs) may use liquidity risk management tools. These AIFMs will also be required to disclose on an annual basis all direct and indirect fees and charges incurred by the AIF.

Such AIFMs will also be required to comply with additional regulatory reporting. Currently, EU AIFMs / non-EU AIFMs marketing in the EU under NPPRs are required to report on the principal markets and instruments in which they trade, provide information on the main instruments in which they are trading and on the principal exposures and the most important concentrations of each AIF managed. Under AIFMD 2.0, these EU AIFMs will have to report on all markets, instruments, exposures and assets of each AIF managed. The total amount of leverage employed by an AIF will need to be reported and additional reporting on delegation arrangements (as noted above) will apply.

4. Marketing and distribution

AIFMD 2.0 makes clear that where marketing is carried on by distributors acting on their own behalf under the Markets in Financial Instruments Directive 2014/65/EU ("**MiFID II**") or the Insurance Distribution Directive 2016/97/EU ("**IDD**"), even where a distribution agreement is in place with an AIFM, this is not considered to be "delegation" under AIFMD II.

This should be distinguished from arrangements where a distributor acts on behalf of the AIFM (e.g. as a sub-distributor), which would be considered a delegation and subject to the AIFMD 2.0 delegation requirements.

Marketing by non-EU entities is not generally considered to fall under MiFID II or the IDD. As such, it seems that such entities would necessarily be treated as "delegates", even if acting on their own behalf. This should continue to be monitored as guidance and market approach develops.

Separately, Non-EU AIFMs which market their funds in the EU under NPPRs must not be established in jurisdictions identified as "high risk" under the Fourth Anti-Money Laundering Directive 2015/849/EU and they will need to have signed an agreement with Member States in which the units or shares of the non-EU AIF are intended to be marketed, fully complying with the standards laid down in the OECD Model Tax Convention on Income and on Capital and ensuring an effective exchange of information in tax matters, and they must not be on the EU list of non-cooperative jurisdictions for tax purposes.

5. No depositary passport

While AIFMD 2.0 does not provide for a “depositary passport”, it does allow for Member State regulators to permit EU AIFMs to appoint depositaries in a different Member State to the home Member State of the AIF, subject to certain conditions being:

1. the EU AIFM having made a request to appoint a depositary in another Member State, with that request demonstrating the lack of an effective depositary service in the AIF’s home Member State to meet the AIF’s needs; and
2. the aggregate amount in the national depositary market of the home Member State of the AIF not exceeding €50bn.

6. Broader permitted activities for EU AIFMs

Currently, EU AIFMs can only perform the AIF management and ancillary activities set out in the AIFMD, as well as certain “top up” MiFID activities and UCITS management activities.

Under AIFMD 2.0, EU AIFMs can also provide “*any other function or activity*” that they already provide while managing an AIF as long as any potential conflict of interest is appropriately managed. It also introduces additional services that an EU AIFM will be able to provide, including loan origination on behalf of an AIF, servicing securitisation special purpose entities, benchmark administration and credit servicing. A further positive development is that portfolio management will no longer be a mandatory permission to carry out other “top up” MiFID activities, meaning that firms will be able to hold “top-up” permissions for other activities (e.g. investment advice and/or the reception and transmission of orders in relation to financial instruments) without also having to be authorised for portfolio management.

7. Authorisation and substance requirements

Under AIFMD 2.0, an EU AIFM will need to conduct its business with at least two full-time people in the EU (either employed full-time by the AIFM or who are executive members of its governing body). EU AIFMs will also need to provide more information as part of their authorisation applications regarding the individuals conducting the business of the AIFM, including a description of their reporting lines and an overview of their time allocated to each responsibility, as well as a description of the technical and human resources that support the EU AIFM's activities.

8. Liquidity management

The current liquidity management provisions have been broadened such that there will be new liquidity management rules for open-ended funds. In particular, EU AIFMs that manage open-ended AIFs are required to select at least two liquidity management tools from a specified list set out in a new Annex V of AIFMD 2.0 and comply with certain additional requirements. ESMA will also be required to provide further details on these liquidity management requirements in their regulatory technical standards.

9. Fund names

AIFMD 2.0 has introduced a mandate for ESMA to develop guidelines that specify the circumstances where the name of an AIF or UCITS is "unclear, unfair or misleading" (the "**Guidelines**"). Although ESMA has two years from the Adoption Date to develop the Guidelines, its latest public statement on this topic has confirmed that it intends to publish the Guidelines "shortly" after the Adoption Date.

The Guidelines are expected to apply three months after the date of their publication. EU AIFMs and non-EU AIFMs marketing AIFs in the EU under the NPPR regime will be expected to comply with the Guidelines from the application date, in relation to new funds, and six months following this date in relation to existing funds.

10. Impact on non-EU AIFMs

Overall, the AIFMD 2.0 requirements will primarily apply to EU full-scope AIFMs. They will not affect sub-threshold EU AIFMs nor will they impact non-EU AIFMs, unless those AIFMs market AIFs in the EU under the NPPRs. Where AIFs are marketed by non-EU AIFMs under the NPPRs, some limited requirements will likely apply (in particular, they will be impacted by the Annex IV reporting and the AIFMD Article 23 disclosure requirements, noted above). It may be that some Member States add further "gold-plating" requirements for non-EU AIFMs which market funds in those particular jurisdictions, but this will not become clear until AIFMD 2.0 has taken effect.

It is worth noting that these changes will not impact UK AIFMs (unless they market their funds in the EU as noted above) and there is no current expectation that the UK Financial Conduct Authority ("**FCA**") will implement similar changes for UK AIFMs, although the FCA is expected to consult on the UK alternative investment fund regime in due course.

11. What next?

As detailed above, the majority of the AIFMD 2.0 provisions will come into force on 16 April 2026. With the exception of the loan originating AIF regime, AIFMD 2.0 is not expected to constitute a major overhaul of the current AIFMD regime. However, EU AIFMs should ensure that they are aware of the changes coming into effect, monitor any associated EU guidance, and start taking steps to prepare for compliance with the new AIFMD 2.0 requirements.

Please do not hesitate to contact the Proskauer UK Regulatory team if you have any questions.

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