Sep. 4, 2025

AIFMD

A U.S. Fund Sponsor's Perspective on AIFMD 2.0

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As the April 2026 implementation date for the recast Alternative Investment Fund Managers Directive (AIFMD and, as recast, AIFMD 2.0) draws closer, U.S. private fund sponsors face a targeted shift in the E.U. fund regulatory landscape that requires careful consideration and planning. Although AIFMD 2.0 amounts more to a series of targeted amendments than a complete overhaul of the existing AIFMD framework, a number of changes will be of particular importance to U.S. fund sponsors marketing into or otherwise operating in Europe.

This article focuses in detail on two specific changes introduced under AIFMD 2.0: amendments to the conditions to marketing under the National Private Placement Regime (NPPR), and the introduction of a harmonised E.U. regime for direct lending (or "loan originating") funds. In addition, this article briefly discusses other changes relevant to U.S. fund sponsors, including revisions to the delegation regime, and the expansion of the information required under the investor disclosure and regulatory (Annex IV) reporting requirements.

See "Gauging European Investors' Appetite for U.S. Funds and Considerations in Marketing to Them" (Nov. 14, 2024).

Background

Following a multi-year legislative process, AIFMD 2.0 entered into force on 15 April 2024. At that point, E.U. Member States were given a two-year window – until 16 April 2026 – to transpose the directive into national law (subject to transitional or grandfathering provisions for certain changes).

The reforms introduced by AIFMD 2.0 can be broadly categorized into two sets:

- those applicable to non-E.U. AIFMs, including U.S. fund sponsors, that market their alternative investment funds (AIFs) into one or more E.U. Member States under the NPPR; and
- those applicable only to E.U. AIFMs.

The amendments applicable to U.S. and other non-E.U. AIFMs include revisions to the NPPR and an increase in the information to be included in, respectively, the investor disclosures and Annex IV reporting.

The AIFMD 2.0 amendments applicable to E.U. AIFMs are more extensive, including:

- a harmonised loan origination regime;
- more stringent rules on delegation, authorization and local substance;
- revisions to the liquidity management and depositary frameworks; and
- an extended list of permitted activities that AIFMs may undertake.

From a U.S. fund sponsor's perspective, the impact of AIFMD 2.0 will depend on the nature of a sponsor's engagement with the E.U. market. Those U.S. fund sponsors whose sole touchpoint with AIFMD is the marketing of their AIFs under the NPPR will only be affected by the changes applicable to non-E.U. AIFMs. However, U.S. fund sponsors that have established an E.U. AIFM and/or have engaged a third-party "host" E.U. AIFM – or are considering either such arrangement – should consider the broader reforms applicable to E.U. AIFMs.

See "The European Commission and ESMA Lay Groundwork for AIFMD II" (Nov. 3, 2020); and "KPMG Reports on AIFMD's Efficacy Five Years After Implementation" (Apr. 16, 2019).

The NPPR – the E.U. AML List and E.U. Tax List

Since AIFMD came into force in July 2014, the NPPR framework under Article 42 has served as a widely used means for U.S. and other non-E.U. AIFMs to market their funds to E.U. investors.

Rules and Reforms

Under the existing NPPR framework, one of the conditions to access the NPPR is that neither the AIFM nor the AIF be established in a jurisdiction listed as a "Non-Cooperative Country and Territory" by the Financial Action Task Force (FATF).

AIFMD 2.0 amends the NPPR conditions to:

- replace the FATF list condition referenced above with a condition that neither the AIFM nor the AIF be domiciled in a "high-risk jurisdiction" for purposes of the E.U. Anti-Money Laundering (AML) Directive (E.U. AML List) – *i.e.*, applying E.U. criteria rather than the global FATF criteria; and
- introduce as new conditions that the jurisdiction of both the AIFM and the AIF must:
    - have signed tax cooperation agreements with each E.U. Member State where the AIF is marketed, such agreements fully complying with Article 26 of the Organisation for Economic Co-operation and Development's Model Tax Convention, and
    - not be on the E.U. list of non-cooperative tax jurisdictions (E.U. Tax List).

Those changes mirror amendments made in 2021 to the E.U. Securitisation Regulation (Regulation (EU) 2017/2402), which introduced the same AML and tax conditions to the permitted domicile of securitisation special purpose entities. Similar provisions have also appeared in other E.U. regulations, such as the E.U. Crowdfunding Regulation (Regulation (EU) 2020/1503).

Implications for Sponsors

The new NPPR conditions are unlikely to present issues for most of the major non-E.U. AIFM jurisdictions, including the U.S., the U.K. and Switzerland. The conditions could be problematic, however, for certain offshore fund jurisdictions. For example, the Cayman Islands has appeared on both lists in the past – it was on the E.U. Tax List from February 2020 to October 2020, and the E.U. AML List from March 2022 until February 2024. Therefore, there is a risk that common offshore fund domiciles could be relisted on a future revision to either list.

Further, there is a notable absence of any grace period in the E.U. AML List and E.U. Tax List conditions to NPPR marketing, which compounds the significant uncertainty should a major fund domicile be added to either the E.U. AML List or E.U. Tax List at any time. In particular, it is uncertain how a U.S. fund sponsor that has already registered a fund for marketing under the NPPR in one or more E.U. Member States would be expected to proceed if the fund's jurisdiction were subsequently added to one of the lists.

Specifically, it is unclear whether a given E.U. Member State would require the U.S. sponsor only to cease actively marketing the fund, or whether it would go further and require the AIFM to deregister the fund from the NPPR. However, it does not appear likely that any investors that may have subscribed previously as a result of the marketing in that E.U. Member State would be required to disinvest.

The absence of a grace period contrasts with corresponding conditions that AIFMD 2.0 introduces in certain other contexts, including as to the third country management passport – *i.e.*, a passport for non-E.U. AIFMs contemplated under the original AIFMD text but which has, to date, never been brought into effect. AIFMD 2.0 amends the provisions relating to the third country management passport - should it ever be activated - to allow each non-E.U. AIFM a two-year period to "take such measures as are necessary to rectify the situation in respect of the AIFs that it manages" in the event the non-E.U. AIFM's jurisdiction is added to the E.U. Tax List or E.U. AML List.

Finally, it is worth noting that revisions to the E.U. AML List and E.U. Tax List are the subject of an E.U. political process rather than that of another global body. That raises the concern that, once AIFMD 2.0 is implemented, AIF marketing could be affected by E.U. political decision-making processes that may not be transparent.

See "How the E.U. Tax Haven Blacklist May Affect Private Funds Formed in Blacklisted Jurisdictions" (Nov. 2, 2017).

Implementation Status

At the time of writing, E.U. Member States are at different stages in their transposition of AIFMD 2.0 into domestic laws, with many countries yet to start work on implementation. It therefore remains to be seen how E.U. Member States will approach this in their domestic legislation, as well as the approach that national regulators will take in practice. The European Securities and Markets Authority (ESMA) may also issue a Q&A on various issues arising under AIFMD 2.0, including as to the E.U. AML List and E.U. Tax List.

Loan Origination Regime

One of the most significant components of the AIFMD 2.0 reforms is the introduction of a dedicated regime for AIFs that engage in "loan origination" (*i.e.*, direct lending). The overarching objective of the new loan origination regime is to harmonise national rules across the E.U. for funds engaging in those activities.

"Loan origination" is defined as the granting of a loan, either directly by an AIF as the original lender, or indirectly through a third party or special purpose vehicle (SPV) on behalf of the AIF/AIFM, where the AIF/AIFM is involved in structuring the loan, including defining or pre-agreeing its characteristics. The definition does not, on the face of it, include secondary loan acquisitions. Shareholder loans that meet certain conditions are also excluded from the definition.

E.U. AIFMs that manage AIFs that originate loans are required to establish a loan origination policy and comply with a suite of new rules, including as to risk retention and concentration limits. E.U. AIFMs will also be required to navigate restrictions on related party lending, as well as a ban on an AIF having an "originate-to-distribute" strategy.

An AIF whose investment strategy is mainly to originate loans or whose originated loans have a notional value that represents at least 50 percent of the AIF's net asset value (NAV) is subject to additional requirements:

- be a closed-end fund, unless certain conditions are satisfied; and
- comply with specified leverage limits – 175 percent of NAV for open-end AIFs and 300 percent for closed-end AIFs.

See "Previewing AIFMD 2.0: New Loan Origination Standards, Undisrupted Marketing Practices and Surprising Omissions (Part Two of Two)" (Dec. 14, 2023).

No Lending "Passport"

AIFMD 2.0 expands the list of permitted activities an E.U. AIFM may undertake to include loan origination on behalf of an AIF. As a result, an E.U. AIFM in one E.U. Member State could manage an AIF established in another E.U. Member State, and that AIF will be permitted to engage in loan origination. That does not, however, amount to a lending passport – *i.e.*, the loan origination regime does not allow an AIF managed by an AIFM authorised in one E.U. Member State to lend to borrowers in another E.U. Member State. As a general matter, lending is regulated under the E.U. Capital Requirements Directive (CRD), which applies to credit institutions (*i.e.*, banks).

Although the recitals to AIFMD 2.0 indicate an intention to create such a lending passport – *e.g.*, stating that rules should be harmonised to make it possible for AIFs to originate loans in all Member States – there is no operative provision actually giving effect to a lending passport. Accordingly, AIFMD 2.0 does not require any change to the current licensing position in this regard. To date, the licensing of cross-border lending in the E.U. has been a matter of the domestic law of

each E.U. Member State. In a number of Member States, funds lending to borrowers in their jurisdiction are subject to licensing requirements under local laws implementing the CRD.

It remains to be seen whether the introduction of harmonised rules on loan origination across the E.U. will prompt Member States to amend their domestic laws to remove the current barriers to cross-border lending that the banking framework presents. A useful precedent in that regard is set by Germany. The German bank licensing framework exempts lending conducted as part of the investment management activities of an E.U. AIF managed by an E.U. AIFM. The framework also exempts AIF lending in certain other circumstances linked to the German NPPR.

Harmonisation of the E.U.'s loan origination rules may prompt other E.U. Member States to take a similar approach to Germany, whether by introducing similar exemptions for AIFs or otherwise. That would help achieve the facilitation of access to finance by E.U. companies that formed one of the objectives of AIFMD 2.0, but which is somewhat undermined by the absence of a lending passport. If those changes did occur, however, it could become increasingly favourable for U.S. private credit sponsors to establish an E.U. AIFM – or engage a host E.U. AIFM – to access E.U. borrowers.

As Member States continue to implement AIFMD 2.0 in the period leading up to April 2026, U.S. private credit sponsors should keep an eye on developments on this front.

Revisions to the Delegation Regime

Many U.S. firms manage fund portfolios on a delegated basis for E.U. AIFMs. Those arrangements commonly occur in the context of the "host AIFM" model, whereby a third-party E.U. AIFM is engaged effectively as a platform for the U.S. firm to manage and market its own funds in the E.U. Typically, the primary driver for a host AIFM arrangement is to allow the U.S. fund sponsor to market its funds throughout the E.U. via a simple notification to the E.U. AIFM's home state regulator, rather than relying on the country-by-country registration approach under the NPPR.

An E.U. AIFM's delegation of portfolio management functions to a U.S. fund sponsor or other third party is subject to the AIFMD delegation framework. AIFMD 2.0 makes a number of changes to the delegation regime, including:

- extending the range of functions that fall within scope of the rules;
- requiring the E.U. AIFM to report more extensive information to its regulators on its delegation arrangements; and
- introducing an explicit requirement for the E.U. AIFM to ensure its delegates (and sub-delegates) comply with AIFMD.

Further, AIFMD 2.0 introduces specific requirements as to host AIFM arrangements. Most notably, E.U. AIFMs that intend to provide host AIFM services will need to submit detailed explanations and evidence of compliance with AIFMD conflicts of interest requirements to their regulator, including specifying reasonable steps taken to prevent conflicts from their relationship with the third party for which they act as a host.

Although the fundamental ability to delegate functions to U.S. and other non-E.U. firms remains, the additional reporting to regulators – and renewed focus from supervisors – should result in closer scrutiny of those arrangements. U.S. fund sponsors acting as delegates of E.U. AIFMs may feel the knock-on impact of the new rules in the form of stricter contractual provisions, as well as more extensive due diligence and monitoring from their E.U. AIFMs.

In addition, it is worth noting that AIFMD 2.0 makes similar changes to the delegation regime applicable to Undertakings for Collective Investment in Transferable Securities (UCITS) management companies. As such, U.S. fund sponsors acting as delegates of E.U. UCITS management companies may see similar knock-on impacts in the context of their UCITS mandates.

See "Previewing AIFMD 2.0: Updated Rules on Delegation, Annex I Services and Liquidity Management Tools (Part One of Two)" (Nov. 30, 2023); and "FCA Details Shortcomings of 'Host' Authorized Fund Managers" (Oct. 12, 2021).

Investor Disclosures and Annex IV Reporting

Finally, AIFMD 2.0 introduces targeted revisions to the investor disclosure and regulatory (Annex IV) reporting requirements. Those requirements apply to E.U. AIFMs, as well as U.S. and other non-E.U. AIFMs marketing AIFs into the E.U. under the NPPR.

In particular, AIFMD 2.0 broadens the scope of pre-contractual disclosures to investors to include, among other things:

- the name of the AIF, with ESMA mandated to develop guidelines on unfair, unclear or misleading names; and
- a list of fees and charges borne by the AIFM in connection with the AIF's operation that are to be directly or indirectly allocated to the AIF.

Periodic investor disclosures are also to be expanded to cover:

- the composition of any originated loan portfolio;
- on an annual basis, all fees and charges that were directly or indirectly borne by investors; and
- on an annual basis, any parent undertaking, subsidiary or SPV used as to the AIF's investments.

AIFMD 2.0 similarly updates the Annex IV reporting framework as to certain details on delegation arrangements applicable to portfolio or risk management functions, including new reporting requirements concerning:

- all exposures and assets of each managed AIF, as opposed to only the "principal" or "main" instruments, markets, exposures and assets;
- the total amount of leverage employed by the AIF; and
- the list of Member States in which the AIF is marketed.

ESMA is required to develop technical standards to supplement the Annex IV changes by 16 April 2027. However, that will be a full year after the revised Article 24 reporting obligations take effect. It is therefore unclear what will be expected of AIFMs during the interim period between Article 24 being expanded to include the additional items above and the publication of the updated versions of the detailed reporting templates.

U.S. fund sponsors registered under the NPPR – as well as those that operate through E.U. AIFMs and support the E.U. AIFM's investor disclosures and Annex IV reporting – should familiarise themselves with the changes ahead of 16 April 2026 (and monitor the position on the ESMA reporting templates, once available) to ensure they are in a position to comply once the changes take effect.

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