

Alert

AIFMD Update: ESMA Advice on Extension of Marketing Passport Published

3 August 2015

On 30 July 2015, the European Securities and Markets Authority ('ESMA') published its advice to the European Parliament, the Council and the Commission on the extension of the marketing passport to non-EU alternative investment managers ('AIFMs') and alternative investment funds ('AIFs') under the EU Alternative Investment Managers Directive ('AIFMD').

The marketing passport is currently only available to AIFMs and AIFs established in the EU. A passport allows such an AIFM to market its AIFs freely across the European Economic Area ('EEA') without the need to register the AIFs under the national private placement regimes ('NPPRs') in each EEA country. Positive advice was provided with respect to Guernsey, Jersey and Switzerland. No decision was reached and some concerns were expressed with respect to Hong Kong, Singapore and the United States.

On the same day, ESMA also published its opinion on the functioning of the current marketing passport and the NPPRs. Both of these steps were required to occur under AIFMD.

Country-by-Country Assessment

ESMA stated in its information-gathering exercise, launched in November 2014, that it had decided to adopt a country-by-country assessment of the potential extension of the AIFMD marketing passport. This has necessitated a detailed review of each non-EU country's laws and regulatory regime by reference to a range of criteria specified in AIFMD and an extensive information-gathering and analysis exercise.

The advice published on 30 July only includes a country-by-country assessment of six jurisdictions: Guernsey, Hong Kong, Jersey, Singapore, Switzerland and the United States.

Positive Advice on Guernsey, Jersey and Switzerland

ESMA has concluded that no significant obstacles exist to the extension of the passport to Guernsey, Jersey and (subject to the enactment of pending Swiss legislation) Switzerland. This means that the European Commission could now proceed with legislation to extend the marketing passport to AIFMs and AIFs from these countries.

No Decision Yet and Some Concerns Regarding Hong Kong, Singapore and the United States

Despite some effort in reviewing and analysing the regimes in Hong Kong, Singapore and the United States, ESMA has not yet offered a definitive decision on the extension of the passport to AIFMs and AIFs in these jurisdictions. ESMA also cited concerns relating to competition, regulatory issues, a lack of

sufficient detailed information and, in some respects, a lack of sufficient time to properly assess the relevant criteria.

ESMA has stated that it intends to finalise its assessments of Hong Kong, Singapore and the United States 'as soon as practicable' and to assess further groups of non-EU countries (see below) before providing advice on all the non-EU countries that it considers should be included in the extension of the passport. The timing for completion of this exercise is unclear and is potentially open-ended.

Other Non-EU Jurisdictions

ESMA has confirmed that it proposes to assess the following additional non-EU jurisdictions on a country-by-country basis:

- Australia
- Bahamas
- Bermuda
- Brazil
- British Virgin Islands
- Canada
- Cayman Islands
- Curacao
- Isle of Man
- Japan
- Mauritius
- Mexico
- South Africa
- South Korea
- Thailand
- US Virgin Island

The order in which these jurisdictions will be assessed, and the timing for completion of the overall exercise is unknown. ESMA's advice refers to 'other batches' of non-EU countries, implying that these may be divided into several groups.

ESMA's Opinion on the Current Marketing Passport and the NPPRs

ESMA's opinion only offers a 'preliminary assessment' of the functioning of the current marketing passport (available to EU AIFMs and AIFs) and the NPPRs and recommends preparing a further opinion after a longer period has elapsed since the implementation of AIFMD.

As to the functioning of the current marketing passport, ESMA concluded that a definitive assessment is not currently possible. ESMA did however identify two issues in relation to the use of the current marketing passport:

- Divergent approaches with respect to marketing rules, including differences in fees charged by national regulators where the AIFs are marketed, and the definition of what constitutes a 'professional investor'; and
- Varying interpretations of what activities constitute 'marketing' and 'material changes' under the AIFMD passport in the different EU Member States. ESMA stated that it sees merit in greater convergence in the definition of these terms.

As to the functioning of the NPPRs, ESMA's conclusion was positive — that there is insufficient evidence to indicate that the NPPRs have raised major issues in terms of the functioning and implementation of the AIFMD framework.

Next Steps

ESMA will continue with its country-by-country assessments of Hong Kong, Singapore and the United States 'as soon as practicable' and begin its assessment of the further group of 16 non-EU countries (including the Cayman Islands). No deadline has been set for completion of this exercise and further delay would not be surprising.

ESMA has also invited the European Commission to consider waiting until ESMA has delivered positive advice on a sufficient number of non-EU countries before introducing the passport in respect of Guernsey, Jersey and Switzerland in order to avoid any adverse market impact that extending the passport to only a few non-EU countries might have.

The European Commission has until 30 October 2015 to decide whether to adopt a 'Delegated Act' extending the marketing passport to those three jurisdictions or to delay matters further whilst ESMA continues its analysis of other non-EU jurisdictions.

Useful Links

Copies of the ESMA Press Release, Advice and Opinion are available via the ESMA website:

- [2015/1238 Press Release](#)
- [2015/1236 Advice](#)
- [2015/1235 Opinion](#)

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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