

AIFMD: ESMA Recommends the First Wave of Non-EU Countries to Obtain a Europe-Wide Marketing Passport

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On July 30, 2015, the European Securities and Markets Authority (ESMA) released its advice to the European Parliament, Council of the European Union and the European Commission on the application of the passport to non-EU alternative investment fund managers (AIFM) and non-EU alternative investment funds (AIF) from six jurisdictions marketing in the European Union. Currently under the Alternative Investment Fund Managers Directive (AIFMD), non-EU AIFM and non-EU AIFs are subject to the national private placement regime (NPPR) of each of the member states of the European Union where the AIFs are marketed or managed while only EU AIFM and EU AIFs can currently obtain a marketing passport to market their funds in Europe.

The Advice assessed six countries (Guernsey, Hong Kong, Jersey, Singapore, Switzerland and the United States) of the 22 non-EU countries expected to be assessed for the purposes of the extension of the AIFMD passport. Of these six countries, the ESMA provided a favorable recommendation for Guernsey, Jersey and pending enactment of certain legislation, Switzerland. The ESMA recommended a delay on the application of the passport to the United States until the “distortion of competition” issues are addressed because “there would be significant obstacles regarding investor protection, competition, market disruption and the monitoring of systemic risk impeding the application of the AIFMD passport to the U.S.” Similar concerns were assessed by ESMA with Singapore and more detailed information was needed on the Hong Kong regulatory framework. The Cayman Islands and the British Virgin Islands were not on this initial list of countries to be assessed.

ESMA has also advised that the Parliament, Council and Commission may wish to consider waiting until ESMA has delivered positive advice on a sufficient number of non-EU countries, before triggering the legislative procedures to introduce the passport. This would avoid any adverse market impact that a decision to extend the passport to only a few non-EU countries might have. The Commission could follow ESMA’s recommendation or proceed with extending the passport for AIFMs and AIFs from these first three countries. It is expected that further Advices from ESMA on additional countries will follow in the next months, although the timeline for those is unclear at this point.

In addition to the Advice, ESMA also published its opinion on the functioning of the passport for EU AIFMs and on the functioning of the national private placement regimes. In broad terms, ESMA was of the view that there is insufficient evidence to indicate that either the AIFMD EU passport or the NPPRs have raised major issues in terms of the functioning and implementation of the AIFMD framework.

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