

Investment Management Alert

July 20, 2016

Four things you need to know:

- ESMA has been undertaking a review of whether or not a number of jurisdictions outside the EU might be eligible to benefit from the various passporting rights, which could be extended to them under the AIFMD regime.
- ESMA has advised the European Commission that there are no significant obstacles that would hinder the extension of the AIFMD passport to Canada, Guernsey, Japan, Jersey, Switzerland, Hong Kong and Singapore.
- Subject to certain conditions being met, ESMA has also advised the European Commission that the AIFMD passport could be extended to Australia.
- ESMA has not recommended the extension of the AIFMD passport to the United States, the Isle of Man, Bermuda and the Cayman Islands.



ESMA Guidance Published On Application Of AIFMD Passport to Non-EU Jurisdictions

Introduction

Non-EU alternative investment fund managers (“AIFMs”) and alternative investment funds (“AIFs”) are currently restricted from accessing the EU-wide marketing passport under the Alternative Investment Fund Managers Directive (2011/61/EU) (the “AIFMD”). These passports allow the marketing of AIFs to professional investors throughout the EU without having to obtain a license or approval in each of the member states where the AIF is marketed. Instead, non-EU AIFMs and non-EU AIFs managed by EU AIFMs are subject to the national private placement regime (“NPPR”) of each of the member states where the AIFs are marketed or managed.

ESMA is mandated by the AIFMD to advise the European Commission on whether the marketing passport should be extended to non-EU AIFMs and non-EU AIFs managed by EU AIFMs. In advice published on 19th July, ESMA reviewed and assessed 12 non-EU jurisdictions to establish whether there were any significant obstacles in respect of investor protection, competition, market disruption and the monitoring of systemic risk, which may hinder the availability of the AIFMD passport to such jurisdictions.

Results of ESMA Advice

ESMA found no significant obstacles hindering the application of the AIFMD passport to Canada, Guernsey, Japan, Jersey and Switzerland.

ESMA found no significant obstacles hindering the application of the AIFMD passport to AIFs in Hong Kong and Singapore. However, ESMA noted that both Hong Kong and Singapore have regulatory regimes that restrict the access of UCITS from certain EU member states to retail investors in their territories. This could be deemed a competition risk by the European Commission that may impede its decision to extend the AIFMD passport to these jurisdictions.

ESMA found no significant obstacles regarding market disruption and obstacles to competition hindering the application of the AIFMD passport to Australia, provided that the Australian Securities and Investment Committee (“ASIC”) makes available to all EU member states the “class order relief” from certain of the requirements of the Australian regulatory regime.

ESMA’s conclusions with respect to the United States are more complex. ESMA found no significant obstacles regarding investor protection and the monitoring of systemic risk which would impede the extension of the AIFMD passport to the United States. However, ESMA flagged a competition risk and identified concerns that the “equivalent” United States rules relate to marketing of funds in the U.S, by EU AIFMs are less favourable than the rules that would apply to US AIFMs and AIFs accessing the EU if the passport is extended. ESMA’s recommendation with respect to the United States, therefore, is that the EU should seek to identify measures to address this disparity in treatment. Given the lengthy failed attempts over the last two decades to create reciprocal recognition arrangements between the United States and EU over 1940 Act Mutual Funds and UCITS funds respectively, it is difficult to see how much progress will be made on this issue in the near term.

ESMA has further delayed its assessment of Bermuda and the Cayman Islands by noting that it cannot advise on the criteria on investor protection and effectiveness of enforcement in Bermuda or the Cayman Islands. This is because both jurisdictions are currently implementing new investor protection regimes. In light of the recent result of the U.K. referendum on EU membership and the status of the Cayman Islands and Bermuda as crown dependencies of the United Kingdom, there is clearly a risk that the changes in the U.K.’s relationship with the EU will also reduce the likelihood of the passport being extended to the Cayman Islands and Bermuda in the near term.

ESMA noted that it was difficult to assess whether the investor protection criterion was met for the Isle of Man, as the Isle of Man has not implemented a regulatory regime equivalent to the AIFMD.

As part of its review, ESMA also collected information on investor protection, competition, potential market disruption and monitoring of systemic risk with respect to Malaysia, Egypt, Chile, Peru, India, China and Taiwan and will continue to work towards a memorandum of understanding with the authorities of these jurisdictions. ESMA will also monitor the continuing activity levels of AIFs and AIFMs to determine whether a detailed assessment should be made in respect of the availability of the AIFMD passport to a relevant

non-EU jurisdiction. This has particular relevance for the United Kingdom, following its referendum decision to leave the EU membership, as the United Kingdom will be a non-EU jurisdiction following its exit and will likely seek to ensure that the AIFMD passport is extended to the United Kingdom prior to its departure

Next Steps

The European Commission, European Parliament and the Council of the EU will consider ESMA's guidance to determine the applicability of the AIFMD passport to those non-EU jurisdictions covered in its review, however, currently the AIFMD passport rights remain unavailable to any non-EU jurisdiction and it is uncertain as to when or if the passport will be made available as no timetable has yet been set for the granting of passport rights.

Contact Information

If you have any questions regarding this alert, please contact the Akin Gump lawyer with whom you usually work or

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