

## ESMA ADVISES ON EXTENSION OF FUNDS PASSPORT

The European Securities and Markets Authority (“**ESMA**”) has published its second set of advice (the “**Advice**”) on the possible extension of the Alternative Investment Fund Managers Directive (“**AIFMD**”) passport to non-EU alternative investment funds managers (“**AIFMs**”) and non-EU alternative investment funds (“**AIFs**”).

The Advice was issued on 19 July 2016 and it assesses whether a non-EU country is eligible for application of a third country AIFMD passport. The Advice sets out ESMA’s opinion on the application of the passport to twelve non-EU countries: the United States; Canada; Switzerland; Guernsey; Japan; Jersey; Cayman Islands; Australia; Hong Kong; Isle of Man; Bermuda; and Singapore.

### CURRENT STATUS

Under the AIFMD there are two ways for marketing to professional investors: (a) the EU marketing passport; and (b) the Member States’ private placement regimes. Currently, the AIFMD passport is only available to authorized EU AIFMs and EU AIFs, while marketing by non-EU AIFMs and marketing of non-EU AIFs is governed by national private placement regimes.

This is not a harmonized regime, given that Member States have adopted various approaches as to what is required under their national private placement regimes.

Nevertheless, AIFMD allows for the provision of the passport, currently reserved for EU AIFMs and AIFs, to be potentially extended to third country firms subject to the receipt of a positive advice from ESMA.

### THE OUTCOME

When issuing this Advice, ESMA has considered whether there are any significant obstacles to the extension of the passport to third countries in relation to:

- investor protection;
- market disruption;
- competition; and
- the monitoring of systemic risk.

As regards the United States, ESMA assessed that there were no significant obstacles with regard to investor protection and monitoring of systemic risk that would impede the application of the AIFMD passport to the United States. With respect to the competition and market disruption criteria, ESMA considers there are no significant obstacles for funds marketed to professional investors if there is no public offering, however, the

position is different for funds involving a public offering.

Hence, it may be construed that the United States has received a **qualified** positive assessment from ESMA, since ESMA has recommended that in relation to US funds, the EU legislators consider granting the AIFMD passport only to:

- US funds dedicated to professional investors marketed in the EU by managers not involving any public offering;
- US funds which are not mutual funds under the 1940 Investment Company Act; and/or
- US funds which restrict investment to professional investors.

Following two rounds of advice issued in July 2015 and 19 July 2016, ESMA has provided unqualified positive advice in relation to only 5 countries stating that no significant obstacles exist to the extension of the AIFMD passport for Canada, Guernsey, Japan, Jersey and Switzerland.

## CONCLUSIONS

ESMA has sent the Advice to the European Commission, European Parliament and European Council for their consideration. The main question remains whether or not the European Commission would consider that ESMA has given positive assessments for a sufficient number of third countries, in order to proceed with implementing legislation. The Commission may choose to wait until there are a larger number of positively assessed countries assessed positively, before triggering the legislative procedures regulated by Articles 67(5) and (6) of AIFMD, taking into account the potential impact on the market that a decision to extend the passport might have.

In the meantime, the marketing in Europe by non-EU AIFMs and by EU AIFMs marketing non-EU AIFs remains the same, i.e. it must have to be carried out using the private placement regimes.

The full text of ESMA's Advice can be found [here](#).

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