ESMA issues advice on extending AIFMD marketing passport

The AIFMD marketing passport could be extended to some non-EU managers and funds marketing to professional investors in the EU. Such is the advice from ESMA in relation to the application of the AIFMD (Alternative Investment Fund Managers Directive) passport to non-EU Alternative Investment Fund Managers (AIFMs) and Alternative Investment Funds (AIFs).

Key Points

- ESMA recommends extension of passport to Guernsey, Jersey and potentially Switzerland
- ESMA has delayed its decision on Hong Kong, Singapore and the United States
- ESMA will conduct further assessments of other non-EU countries in the future
- Non-EU countries for future assessment include Australia, Bermuda, BVI, Cayman Islands, Isle of Man and Mauritius
- No timetable is given for future assessments
- The European Commission must adopt a delegated act within 3 months specifying the date when the passporting rules become applicable in all member states
- ESMA suggests the Commission may want to delay extending the passport until it has given a positive recommendation for a 'sufficient number' of non-EU jurisdictions
- Not clear under AIFMD that the passport can be extended country by country
- No further guidance on the definition of marketing or reverse enquiry

Notably, ESMA has not treated non-EU countries as a single block, so potentially only the funds or managers of those non-EU countries deemed by ESMA to have satisfied certain criteria specified under the AIFMD will, if the advice is accepted by the European institutions, benefit from the extension of the passport. The countries in the 'first wave' potentially able to benefit from the extension of the marketing passport are Jersey, Guernsey and, provided certain domestic legislation is passed, Switzerland. The USA, Hong Kong and Singapore were assessed, but ESMA has delayed their decision on extending the passport to those countries. ESMA aims to finalise the assessments of Hong Kong, Singapore and the USA 'as soon as practicable' and to assess further groups of non-EU countries 'in batches beyond July 2015'.

The advice from ESMA will now be considered by the European Commission, Parliament and Council. Under the Directive, the European Commission must adopt a delegated act within 3 months specifying the date when this extension of the AIFMD marketing passport will become applicable in all member states of the European Union. However, ESMA has suggested that the European Commission may want to wait before extending the passport until ESMA has given a positive recommendation on 'a sufficient number' of non-EU jurisdictions. Additionally, it is not clear under AIFMD that the Commission is only able to "switch on" the passport for some non-EU jurisdictions and not others. This may influence whether the Commission decides to switch on the passport for non-EU jurisdictions at this stage, even with positive advice from ESMA for some non-EU jurisdictions.

Extending the AIFMD marketing passport

So far, under the AIFMD, the marketing passport has only been available to EU managers marketing EU funds. EU managers marketing non-EU funds and non-EU managers marketing either their EU or non-EU funds have, instead, been required to use the 'marketing without a passport' route, using national private placement regimes (NPPRs).

However, the AIFMD did provide for the marketing passport to be potentially extended, to non-EU managers and to EU managers of non-EU funds, should this be advised by ESMA. ESMA has now issued this advice, concluding that the passport could be extended to Guernsey, Jersey and (conditionally) Switzerland, on the basis that there are no significant obstacles regarding investor protection, market disruption, competition and the monitoring of systemic risk in those countries that would impede funds and managers located in these countries applying for a passport.

It is unclear at the moment how quickly assessment will be made of other non-EU countries for the passport, and it is not certain that ESMA will recommend the extension of the passport to all major asset management and fund jurisdictions. ESMA has not indicated a timetable for assessment and it is possible that the assessment process may become protracted. For example, ESMA has noted that assessing the extent to which the regulatory framework of the particular non-EU country varies from AIFMD is a necessary consideration. Experience from the implementation of EMIR in the OTC derivatives context shows that satisfying the test for reciprocity and equivalence is a hurdle not easily overcome (and since the equivalence process stared in 2012 under EMIR, only a handful of equivalence determinations have been made). Furthermore, as the assessment methodology focuses on regulatory issues, ESMA suggests that the co-legislators may also wish to consider other factors, such as the fiscal and anti-money laundering and counter-terrorism regimes in the non-EU country, which will also add to the complexity of the assessment.

Additionally, it is also unclear under AIFMD whether the Commission has the discretion to extend the passport on a jurisdiction by jurisdiction basis, rather than to the non-EU as a single block. The Commission is required to take into account the criteria assessed by ESMA, but there is no indication that the Commission can extend the passport on a staggered basis, country-by-country (even where ESMA has given a positive recommendation in respect of some non-EU jurisdictions and not others). This will be relevant to the Commission's decision to switch on the passport or not, particularly the additional advice from ESMA that the Commission may want to wait before extending the passport until ESMA has completed its assessment of a larger number of non-EU jurisdictions.

Where a positive recommendation from ESMA is important (assuming the passport is extended to the non-EU as a single block), and so why many non-EU jurisdictions are interested in ESMA's assessment, is that being able to rely on the passport will require the non-EU manager to obtain prior authorisation in an EU "member state of reference". It is not clear whether such prior authorisation will be possible if the manager's home jurisdiction is not a non-EU jurisdiction for which ESMA has given positive advice.

AIFMD marketing and reverse-enquiry

As part of considering its advice, ESMA had also consulted on the workings of the AIFMD passport (for EU managers in respect of EU funds) and the AIFMD national private placement regimes (for non-EU managers, and EU managers marketing non-EU funds). Consultation feedback to ESMA included that AIFMD marketing was hampered by a lack of consistency across EU countries on what is "marketing" under AIFMD and a lack of guidance around reverse-enquiry. ESMA has noted the issues caused by divergent approaches across the EU (particularly around what is "marketing", the definition of "professional investor" and, for the current AIFMD passport, the charging of fees by some EU countries for the exercise of passport rights). However, ESMA has not included in its advice any additional guidance around the definition of marketing or reverse enquiry.

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