ESMA issues more advice on extending the AIFMD passport to non-EU managers

The Alternative Investment Fund Managers Directive passport (AIFMD passport) could be extended to managers in some non-EU countries, enabling them to market and manage funds throughout the European Union. Such is the advice from ESMA to the European Parliament, the Council and the Commission, issued on the 19 July 2016, on the application of the AIFMD passport to non-EU alternative investment managers (AIFMs) and alternative investment funds (AIFs) in 12 non-EU countries.

Key points

- Canada, Guernsey, Japan, Jersey and Switzerland likely to get a passport
- US, Australia, Hong Kong and Singapore, could also get a passport, although the advice is qualified, so may require further consideration by the European Commission
- Decision on Bermuda and the Cayman Islands deferred pending further assessment
- AIFMD passport unlikely to be extended to the Isle of Man at this stage

The Advice

ESMA concludes that the passport could be given to Canada, Guernsey, Japan, Jersey and Switzerland, but should not yet be given to the Cayman Islands, Bermuda or the Isle of Man. For the US, Hong Kong, Singapore and Australia, ESMA advises that the passport could be given, although the advice was qualified.

The ESMA view on the US is more positive this time around, and suggests that the AIFMD passport could be extended to the US. Interestingly, ESMA has noted that extending the passport to the US could create an unlevel playing field in respect of any funds marketed to the public (because of differences between the US and EU regimes around public offering of funds), and so suggest that the European Commission might want to consider only extending the passport to certain types of US funds (primarily, those funds limited to professional investors). This might mean more work for the European Commission to evaluate how to treat US managers before the Commission takes a decision to extend the AIFMD passport.

If the assessment was restricted only to AIFs, there are no significant obstacles impeding the application of the AIFMD passport to AIFs in Hong Kong and Singapore. However, ESMA notes that both Hong Kong and Singapore operate regimes that facilitate the access of UCITS from only certain EU Member States to retail investors in their territories and this may be taken into account by the Commission. So it is not completely clear at the moment how Hong Kong and Singapore managers are viewed in the context of extending the passport.

It is possible that the AIFMD passport could be extended also to Australia, if Australia were to extend a local licensing exemption to all EU countries (currently only some EU countries can benefit from that exemption).

Extension of the AIFMD passport to Bermuda and the Cayman Islands is a "watch this space". Both Bermuda and the Cayman Islands have been reforming their local fund marketing rules to position themselves for the extension of the AIFMD passport, and ESMA will need to make a further assessment once those rules become more established.

It does not seem at this stage that the AIFMD passport will be extended to the Isle of Man. ESMA cites the absence of an AIFMD-like regime in the Isle of Man, making it difficult to assess whether the investor protection criterion (one of the criteria necessary for positive advice to be given) is met.

Why is the advice needed?

Currently, 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 because they cannot use the AIFMD passport. However, the AIFMD makes provision for the passport, which is currently reserved to EU AIFMs and AIFs, to be potentially extended to non-EU AIFMs and AIFs in future, following positive advice from ESMA.

ESMA published its first advice in relation to six non-EU countries (Guernsey, Hong Kong, Jersey, Switzerland, Singapore and the United States) in July 2015, setting out that the passport could be extended to Guernsey, Jersey and potentially Switzerland. The decision on Hong Kong, Singapore and the USA was delayed and ESMA suggested that the European Commission may want to delay extending the passport until ESMA had given a positive recommendation for a 'sufficient number' of non-EU jurisdictions.

Following this first advice, the European Commission invited ESMA to complete its advice, by 30 June

2016, in respect to Hong Kong, Singapore and the USA and assess six other non-EU countries: Australia, Bermuda, Canada, Cayman Islands, Isle of Man, and Japan. This advice has just been issued, on 19 July 2016.

What happens next?

The advice will now be considered by the European Commission, Parliament and the Council.

ESMA has opted for a country-by-country assessment of the potential extension of the AIFMD passport, so will continue to assess other non-EU countries with a view to delivering further 'submissions' to the EU authorities. Interestingly, ESMA sets out in its advice a list of the main non-EU countries currently using AIFMD NPPRs to market into the EU. This includes jurisdictions not yet assessed by ESMA for the extension of the AIFMD passport (such as South Africa and Mauritius) and it is not clear whether the European Commission will see a need for ESMA to do further work on those other jurisdictions before deciding whether to extend the AIFMD passport. In addition, it is not certain when future assessments will be made, as there is no timetable for these set out in the advice.

Finally, although ESMA is carrying out the assessments on a country-by-country basis, and providing its advice 'batches', it is not clear whether, under the AIFMD, the European Commission can extend the AIFMD passport on a country-by-country basis.

Summary of ESMA advice

Third Country	ESMA advice in relation to the extension of the AIFMD passport to non-EU AIFMs and AIFs
Canada Guernsey Japan Jersey Switzerland	No significant obstacles impeding the application of the AIFMD passport.
Hong Kong Singapore	If the assessment was restricted only to AIFs, there are no significant obstacles impeding the application of the AIFMD passport to AIFs in Hong Kong and Singapore. However, ESMA notes that both Hong Kong and Singapore operate regimes that facilitate the access of UCITS from only certain EU Member States to retail investors in their territories.
Australia	No significant obstacles regarding market disruption and obstacles to competition impeding the application of the AIFMD passport to Australia, provided the Australian Securities and Investment Committee (ASIC) extends to all EU Member States the 'class order relief', currently available only to some EU Member States, from some requirements of the Australian regulatory framework.
USA	No significant obstacles regarding investor protection and the monitoring of systemic risk which would impede the application of the AIFMD passport to the United States (US). With respect to the competition and market disruption criteria, ESMA considers there is no significant obstacle for funds marketed by managers to professional investors which do not involve any public offering. However, ESMA considers that in the case of funds marketed by managers to professional investors which do involve a public offering, a potential extension of the AIFMD passport to the US risks an un-level playing field between EU and non-EU AIFMs. The market access conditions which would apply to these US funds in the EU under an AIFMD passport would be different from, and potentially less onerous than, the market access conditions applicable to EU funds in the US and marketed by managers involving a public offering. ESMA suggests, therefore, that the EU institutions consider options to mitigate this risk.
Bermuda Cayman Islands	ESMA cannot give definitive advice with respect to the criteria on investor protection and effectiveness of enforcement since both countries are in the process of implementing new regulatory regimes and the assessment will need to take into account the final rules in place.
Isle of Man	The absence of an AIFMD-like regime makes it difficult to assess whether the investor protection criterion is met.

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