

## LawFlash

### ESMA Advice on Extending the AIFMD Passport to Non-EU Countries

**William Yonge, Partner, Morgan Lewis (London)**

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ESMA sees no significant obstacles to extending the AIFMD passport to nine key countries.

The European Securities and Markets Authority (ESMA) has published advice to the European Commission, the European Parliament, and the European Council in relation to the application of the Alternative Investment Fund Managers Directive (AIFMD) passport to non-EU alternative investment fund managers (AIFMs) and alternative investment funds (AIFs) in 12 countries. This advice follows ESMA's earlier advice published on 30 June 2015 on the application of the AIFMD passport to non-EU countries.

The AIFMD requires ESMA to issue positive advice in relation to the application of the AIFMD passport to non-EU AIFMs and AIFs where ESMA considers that there are no significant obstacles regarding investor protection, market disruption, competition, and the monitoring of systemic risk.

This [newsletter?] summarises ESMA's latest advice and draws attention to the salient points.

ESMA has given positive advice in relation to Canada, Guernsey, Japan, Jersey, and Switzerland. Additionally, ESMA has given positive advice, although qualified, in relation to Hong Kong, Singapore, Australia, and the United States. However, in relation to Bermuda and the Cayman Islands, ESMA has indicated that it is unable to complete its advice until those countries take additional legislative steps and, in relation to the Isle of Man, ESMA has been unable to provide positive advice with respect to investor protection issues. We summarise below ESMA's advice for each country.

ESMA has noted in its advice that, once the AIFMD passport is extended to non-EU AIFMs, those non-EU AIFMs will be able to continue to market their AIFs into the European Union under national private placement regimes permitted by article 42 of the directive (for so long as those private placement regimes continue), notwithstanding that they could be authorised under the directive so as to take advantage of the passport. ESMA indicates that it sees merit in this issue being clarified.

Further, ESMA notes that extending the AIFMD passport to non-EU AIFMs would permit non-EU AIFMs to be authorised under the directive but that no mention is made in the directive of registration for non-EU AIFMs below the thresholds set in article 3(2) of the directive (i.e., small AIFMs). ESMA states that, if and when the AIFMD passport is extended

to non-EU AIFMs, it will be important to ensure that EU Member States have a common understanding on the treatment of non-EU AIFMs that are small AIFMs.

## **Canada, Guernsey, Japan, Jersey, and Switzerland**

ESMA has advised that there are no significant obstacles regarding investor protection, competition, market disruption, and the monitoring of systemic risk impeding the application of the AIFMD passport to these countries.

## **Hong Kong**

ESMA has advised that, based on an assessment only in relation to AIFs, there are no significant obstacles impeding the application of the AIFMD passport to Hong Kong.

ESMA has noted, however, that the Hong Kong Securities and Futures Commission operates a regime in relation to the access of retail funds (including Undertakings for the Collective Investment in Transferable Securities (UCITS)) in Hong Kong under which UCITS (marketed to retail investors) established in certain EU Member States are subject to different market access conditions than UCITS established in other EU Member States as a result of those certain EU Member States being deemed to be “acceptable inspection regimes”.

## **Singapore**

ESMA has advised that, based on an assessment only in relation to AIFs, there are no significant obstacles impeding the application of the AIFMD passport to Singapore.

ESMA has noted, however, that in relation to Singapore, UCITS (marketed to retail investors) established in certain EU Member States are subject to different market access conditions than UCITS established in other EU Member States as a result of those certain EU Member States being “recognised” by the Monetary Authority of Singapore.

## **Australia**

ESMA has advised that there are no significant obstacles impeding the application of the AIFMD passport to Australia, provided that the Australian Securities and Investments Commission extends to all EU Member States the class order reliefs (i.e., relief from the requirement for foreign financial service providers to hold an Australian Financial Services Licence in order to provide particular financial services in Australia) currently granted to UK and German fund managers.

## **United States**

ESMA has advised that there are no significant obstacles regarding the monitoring of systemic risk or investor protection impeding the application of the AIFMD passport to the

United States. However, with regard to market disruption and obstacles to competition, ESMA's advice is qualified.

ESMA takes the view that, because of US registration requirements, if the AIFMD passport were to be extended to the United States, the market access conditions that would apply to US funds dedicated to professional investors in the European Union would be different from the market access conditions applicable to EU funds dedicated to professional investors in the United States, but that the market access conditions would be broadly comparable in the case of funds marketed by managers not involving any public offering.

Accordingly, ESMA has set out three options for EU legislators to consider in the context of extending the AIFMD passport to the United States:

1. Granting the AIFMD passport only to those US funds dedicated to professional investors to be marketed in the European Union by managers not involving any public offering
2. Granting the AIFMD passport only to those US funds that are not mutual funds (under the US 1940 Investment Company Act)
3. Granting the AIFMD passport only to those US funds that restricted investment to professional investors as defined in AIFMD

## **Bermuda**

ESMA has advised that there are no significant obstacles regarding competition, market disruption, and the monitoring of systemic risk impeding the application of the AIFMD passport to Bermuda. However, with respect to investor protection and the assessment of the effectiveness of enforcement, ESMA has stated that it cannot provide definitive advice until (i) the final version of the proposed AIFMD-like opt-in regime is available (this is due to the differences between the current Bermudan regime and the AIFMD) and (ii) the Bermuda Monetary Authority's review of the investment funds and management frameworks as set out under the Investment Funds Act 2006 and Investment Business Act 2003 is complete.

## **Cayman Islands**

ESMA has advised that there are no significant obstacles regarding competition and market disruption impeding the application of the AIFMD passport to the Cayman Islands. However, with respect to investor protection, the assessment of the effectiveness of enforcement, and the monitoring of systemic risk, ESMA has stated that it cannot provide definitive advice until (i) the final version of the proposed AIFMD-like opt-in regime is available (this is due to the differences between the current Cayman regime and the AIFMD); (ii) a legislative amendment has been implemented that will give the Cayman Island Monetary Authority (CIMA) the power to impose administrative fines for breaches of regulatory laws, regulations, and rules; and (iii) CIMA's proposal on implementation of a macro-prudential policy framework (which is expected to enhance its current systemic risk monitoring) is put in place.

## **Isle of Man**

ESMA has advised that there are no significant obstacles regarding competition, the monitoring of systemic risk, and market disruption impeding the application of the AIFMD passport to the Isle of Man. However, ESMA indicates the absence of a regulatory project to put in place an AIFMD-like regime or an International Monetary Fund financial sector assessment program makes it difficult to assess the investor protection criterion to the same level of certainty and consistently with the assessments made in relation to the other non-EU countries. ESMA also indicates that it has been unable to undertake a more thorough assessment than the one presented due to the nature and timeline of the assessment.

Further, ESMA notes that UCITS (marketed to retail investors) established in certain EU Member States are subject to different market access conditions in the Isle of Man than UCITS established in other EU Member States as a result of those certain EU Member States being considered “designated territories” but also notes that the Isle of Man Financial Services Authority has indicated that it would have no objection to extending the list of designated territories such that any European Economic Area UCITS could apply for recognition through that route.

## **Implementation of the AIFMD Passport Extension**

For an extension of the AIFMD passport to any country to become effective, the Commission must adopt a delegated act specifying the date upon which the extension becomes applicable. The AIFMD specifies a period of three months from the receipt of positive advice from ESMA for the Commission to make the delegated act (which is subject, effectively, to agreement by the EU Parliament and Council). In its advice relating to the countries referred to above, ESMA has indicated that it will undertake assessments of additional countries and has suggested that the Commission, along with the EU Parliament and Council, may wish to consider waiting until ESMA has delivered positive advice on a sufficient number of non-EU countries before triggering the legislative procedures necessary to bring the extension of the AIFMD passport into effect.

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