

ESMA stalls on extending the AIFMD Marketing Passport to Non-European Managers

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The European Securities and Markets Agency (ESMA) today published its advice on extending the application of the marketing 'passport' under the Alternative Investment Fund Managers Directive (AIFMD) to non-European managers – the ESMA advice can be found [here](#).

The AIFMD applies to alternative investment fund managers (AIFMs) seeking to manage or market alternative investment funds (AIFs) in the European Union ("EU"). Currently, the AIFMD's application to AIFMs not established in the European Union (non-EU AIFMs) is relatively limited, and as a consequence these non-EU AIFMs do not have the same freedom as their European counterparts when seeking to market their funds across the EU.

Before detailing the outcome of ESMA's advice, the current position with respect to marketing under the AIFMD, for both the EU and non-EU AIFMs, is summarised below.

Current AIFMD position

EU AIFMs marketing AIFs

An EU AIFM that wishes to market an EU AIF must do so via the AIFMD marketing 'passport'. This requires a notification by the AIFM to its Home country regulator setting out specific information on the AIF to be marketed and a list of the other EU countries into which marketing will take place. Within twenty (20) working days after the submission of this notification the AIFM is permitted to market to professional investors in the specified EU countries.

For non-EU AIFs or for EU AIFs that are feeder funds to non-EU master AIFs, the marketing passport is not currently available and marketing may only be carried out pursuant to the national private placement regimes (NPPRs) and applications for marketing must be made for each respective EU country that will be marketed into. The AIFMD sets out minimum requirements that must be complied with for marketing under the NPPRs but each European country's national regulator is permitted to impose additional requirements to those of the AIFMD. This has resulted in substantial variations in the regulatory requirements arising from marketing such AIFs across the EU, increasing the cost and complexity of marketing such products on a pan-European basis.

Non-EU AIFMs marketing AIFs in the EU

The AIFMD marketing passport is not currently available for non-EU AIFMs wishing to market AIFs in the EU. Instead these managers must comply with the NPPR requirements for each of the EU countries into which they wish to market. These requirements differ between EU countries, in some cases (such as in the UK and Luxembourg) the NPPR requirements are relatively 'light', in others (such as in France and Germany) the requirements are more extensive, and in some EU countries marketing under the NPPR is not available at all (such as in Italy). The overall impact of the AIFMD has been to limit the access that non-EU AIFMs have to European investors. In circumstances where NPPR notifications have been made the non-EU AIFMs are subject to on-going requirements (such as periodic reporting), which have further increased the cost and regulatory burden of marketing in the EU.

ESMA's advice

Background

Under the provisions of the AIFMD, ESMA had been tasked with assessing and advising on the possible extension of the 'marketing passport' to non-EU AIFMs and also to AIFs which are currently subject to the NPPRs.

ESMA assessed six jurisdictions – Guernsey, Jersey, Switzerland, Hong Kong, Singapore and the USA – taking into account the different circumstances of each country and their respective regulatory regimes, including: investor protection, competition, potential market disruption and monitoring of systemic risk. ESMA did not carry out a substantive assessment of any countries other than these six jurisdictions.

Today's ESMA advice reflects the outcome of its assessment process.

Outcome of ESMA's assessment

ESMA has advised that there are no obstacles for the extension of the marketing passport to Guernsey, Jersey and Switzerland (subject to Switzerland enacting certain pending legislation).

Significantly, ESMA could not reach a definitive view on Hong Kong, Singapore and the USA, citing concerns on competition, regulatory issues, and a lack of sufficient evidence to properly assess the relevant criteria. ESMA's advice is therefore that the extension of the marketing passport to Hong Kong, Singapore and the USA should be delayed until its concerns are addressed. ESMA has stated that it will continue to work on the assessment on non-EU countries with a view to delivering further submissions in the coming months.

It remains to be seen if the EU Commission, Council and Parliament (the EU Institutions) will decide to extend the marketing passport to Guernsey, Jersey and Switzerland in the short term and if they do what transitional provisions may be made available. It may be that the EU Institutions will wait until ESMA has delivered positive advice on a larger number of countries before making the necessary legislative changes that will extend the passport.

Ultimately, for the majority of non-European managers seeking to market funds in Europe, today's ESMA advice means that there is no change to the status quo and they will need to continue to comply with each European country's NPPR requirements for the foreseeable future.

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