

# ESMA Advises On The Extension of The AIFMD Passport To 12 Non-EU Jurisdictions

July 28, 2016

On July 19, 2016 the European Securities and Markets Authority (“ESMA”) published its advice (the “Advice”) to the European Commission (“Commission”), the European Parliament and the European Council (collectively the “EU Institutions”) regarding the possible extension of the AIFMD passport (the “Passport”) to non-EU AIFMs managing and/or marketing AIFs within the EU and the marketing of non-EU AIFs into the EU. The Advice follows on from the publication in July 2015 of a first set of advice on the application of the Passport to Guernsey, Hong Kong, Jersey, Switzerland, Singapore and the United States (the “July 2015 Advice”) and covers each of the third countries assessed in the July 2015 Advice as well as Australia, Bermuda, Canada, Cayman Islands, the Isle of Man and Japan.

ESMA has considered whether there are significant obstacles which may inhibit the application of the Passport in each of the countries assessed in relation to investor protection, market disruption, competition and monitoring of systemic risk.

This memorandum summarizes ESMA’s advice and sets out the next steps which must be taken before the passport is extended to each jurisdiction.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

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### 1. Unqualified Positive Advice

*Canada, Guernsey, Japan, Jersey and Switzerland*

The Advice provides that there are no significant obstacles that would prevent the application of the Passport to Canada, Guernsey, Japan, Jersey and Switzerland.

### 2. Qualified Positive Advice

#### *a. The U.S.*

ESMA is of the view that:

- There are no significant obstacles regarding the monitoring of systemic risk.
- There are differences between the U.S. regulatory framework and the AIFMD with respect to investor protection; including with respect to the AIFMD rules on remuneration, however, ESMA is of the view that overall, the rules in the U.S. are comparable to the rules in the EU and these differences are not regarded as a significant obstacle to the extension of the Passport to the U.S..
- With respect to market access conditions ESMA noted the registration requirements under the U.S. regulatory framework, particularly in relation to funds marketed by managers involving public offerings<sup>1</sup>, which create the risk of an “unlevel playing field between EU and non-EU AIFMs as regards market access.”. Accordingly, U.S. funds being managed and/or marketed in the EU with the benefit of Passport would be subject to a less onerous regime than that which would govern EU funds being managed and/or marketed in the U.S.. ESMA noted, however, that funds marketed by managers not involving any public offering would enjoy broadly comparable market access conditions in each jurisdiction.

ESMA has invited the EU Institutions to consider possible options on how best to address the disparity in market access between the two jurisdictions

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<sup>1</sup> Public offerings in this context refers to the term “public offerings” as it is used in Section 3(c)(1) and Section 3(c)(7) of the Investment Company Act of 1940 and has the same meaning as in Section 4(2) of the Securities Act of 1933.

should the Passport be granted to the U.S. including granting the Passport only to those U.S. funds which:

- are open only to professional investors which do not involve any public offering;
- are not mutual funds (or what is known as an “open-ended company” under the Investment Company Act of 1940); or
- restrict investment to professional investors (as defined in the AIFMD).

#### *b. Australia*

If the Australian Securities and Investment Committee extends the “class order relief” (which relieves “foreign financial services providers of foreign services to wholesale clients” from the requirements to hold an Australian financial services license), which is currently available only to certain EU Member States, to all EU Member States, ESMA has confirmed that there are no significant obstacles impeding the application of the Passport to Australian AIFMs. The Australian Securities and Investment Committee has indicated they are willing to discuss extending the “class order relief” to EU AIFMs more generally on a reciprocal basis.

#### *c. Hong Kong and Singapore*

ESMA confirmed that with respect to AIFs, there are no significant obstacles impeding the application of the Passport to AIFs in Hong Kong and Singapore.

### 3. No Definitive Advice

#### *a. Bermuda and the Cayman Islands*

ESMA is of the view that there are no significant obstacles to expanding the Passport with regard to competition, market disruption and the monitoring of systemic risk. ESMA gave no definitive advice regarding the criteria of investor protection and effectiveness of enforcement in Bermuda and the Cayman Islands as both countries are presently implementing new regulatory regimes. Any assessment will need to be based on the final rules adopted in those countries.

#### *b. Isle of Man*

ESMA is of the view that there are no significant obstacles to expanding the Passport with regard to competition, market disruption and the monitoring of

systemic risk. ESMA cannot give definitive guidance regarding the criteria of investor protection in the Isle of Man given the absence of an AIFMD-like regime especially regarding depositary and remuneration requirements, and the lack of an International Monetary Fund Financial Sector Assessment Program on the Isle of Man. ESMA note that the Isle of Man does not intend to put in place an AIFMD-like regime.

#### 4. No Assessment

In addition to the non-EU jurisdictions on which a detailed assessment was carried out ESMA gathered intelligence on investor protection, competition, potential market disruption and monitoring of systemic risk with respect to Chile, China, Egypt, India, Malaysia, Peru and Taiwan. These jurisdictions have not been assessed in detail by ESMA at this stage because:

- no memorandum of understanding has been agreed between the supervisory authorities of these non-EU jurisdictions and ESMA (acting on behalf of the national authorities within the EU); or
- the current level of marketing and management activity by entities from these countries within the EU did not justify a detailed assessment at this stage.

#### **Next Steps**

- ESMA will continue to work on its assessment of other non-EU countries not covered in the Advice with a view to delivering further submissions to the EU Institutions.
- The Advice with respect to Australia, Canada, Guernsey, Hong Kong, Japan, Jersey, Singapore, Switzerland and the U.S. should now be considered by the EU Institutions. The AIFMD provides that the Commission will adopt a delegated act that will specify the date when the Passport will be extended to those non-EU jurisdictions who were the subject of such positive advice within 3 months after having received positive advice and an opinion from ESMA, taking into account the criteria that ESMA is required to consider in its advice.

- However, ESMA states that the EU Institutions may wish to consider whether to wait until ESMA has delivered positive advice on a sufficient number of non-EU countries before beginning the legislative process to extend the Passport, taking into account such factors as the potential impact on the market of a decision to extend the Passport.
- Once the Commission adopts legislative measures to extend the Passport to a third country, AIFMs from that third country marketing AIFs within the EU and for at least 3 years from then may either:
  - become fully AIFMD authorized (and comply with all substantive requirements under the AIFMD) and benefit from the Passport; or
  - continue to rely on national private placement regimes (“NPPRs”).
- The Passport regime will operate in parallel with NPPRs for 3 years after the entry into force of the delegated act extending the Passport. At the end of this period, ESMA will issue an opinion on the functioning of the Passport regime and will issue advice as to whether the NPPRs should be terminated. Following the termination of the NPPRs, a non-EU AIFM based in a non-EU jurisdiction which benefits from the extended Passport may only market to EU investors by (i) becoming fully AIFMD compliant (and complying with all substantive requirements under the AIFMD) or (ii) relying on available exemptions from the application of the AIFMD (such as reverse solicitation or marketing outside of a jurisdiction, when available) and/or conduct activities that do not constitute marketing under the national AIFMD implementing rules. Non-EU jurisdictions that are not covered by the delegated act are likely to generally be able to continue marketing under NPPRs.
- However, there is a lack of clear guidance from either ESMA or any national EU regulator on when the 3 year period will begin. In order to ensure the smooth functioning of the Passport regime before the NPPR is terminated, it is possible that the 3 year period may not start

automatically from the date that the Passport is extended to the first set of “approved” non-EU jurisdictions.

- In contrast to the other EU Member States, the German NPPR will expire on the date of implementation of the first delegated act discussed above (in the second paragraph of this Next Steps section) with respect to the jurisdictions covered by the act.
- As a result, from that date, non-EU AIFMs from the jurisdictions covered by the delegated act wishing to market AIFs in Germany will either (i) need to become fully AIFMD authorized (and therefore comply with all substantive requirements under the AIFMD) and benefit from the Passport or (ii) rely on available exemptions (i.e., reverse solicitation and marketing outside of Germany) and/or conduct only those activities that do not constitute “marketing” within the German AIFMD regime.
- Pursuant to a grandfathering provision contained in the German Capital Investment Act, non-EU AIFMs which have relied on the German NPPR and obtained an authorization to market one or more AIFs to German investors thereunder prior to the date of implementation of the delegated act will be able to continue to market such AIFs on this basis following that date. The wording of the grandfathering provision and the corresponding remarks in the explanatory memorandum suggest, however, that pre-existing marketing authorizations can only be relied on by non-EU AIFMs intending to market exclusively in Germany (as opposed to non-EU AIFMs wishing to market in other EU Member States in addition to Germany) but this interpretation appears disputable and it remains to be seen whether additional guidance will be issued in this regard.

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