



11th November 2014

ESMA Call for Evidence on the extension of the AIFMD EU Passport to Third Countries

Background

The European Securities and Markets Authority (“ESMA”) has issued a “call for evidence” in relation to:

- ▣ the functioning of the current EU passport under Directive 2011/61/EU on Alternative Investment Fund Managers (“AIFMD”); and
- ▣ the functioning of the marketing of non-EU Alternative Investment Funds (“AIFs”) by EU Alternative Investment Fund Managers (“AIFMs”) in the EU and the management and/or marketing of AIFs by non-EU AIFMs in the EU.

ESMA intends to consider the feedback it receives before issuing to the European Parliament, the Commission and the Council by 22nd July 2015:

- ▣ an opinion the functioning of the existing passporting arrangements pursuant to Articles 32 and 33 of AIFMD; and
- ▣ an advice on the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the EU and/or marketing AIFs by non-EU AIFMs in the EU in accordance with Article 35 and Articles 37 to 41.

Should ESMA’s advice on the extension of the EU passport be positive, the European Commission is required to legislate within 3 months of receipt of such advice for the extension of the EU passport to third country AIFMs and AIFs.

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In light of those considerations, ESMA is seeking information from stakeholders as to their experience using the current AIFMD EU passport and stakeholders' views on the extension of the passport to third country AIFMs and AIFs.

The deadline for submission of responses is 8th January 2015.

Current Position

As the law stands, only a legal person having its registered office in an EU Member State can be authorised as an AIFM and only EU authorized AIFMs can market EU AIFs to professional investors in any Member State of the European Economic Area pursuant to a straightforward regulator to regulator notification procedure known as the EU "passport". EU authorised AIFMs have the benefit of a similar "passport" which allows them to be appointed as AIFM to AIFs established in other Member States.

The marketing of non-EU AIFs by EU AIFMs and the marketing of AIFs by non-EU AIFMs are currently subject to certain minimum requirements under, respectively, Article 36 and Article 42 of the AIFMD, as well as, potentially, additional individual Member State rules, which may be imposed by any Member States where the AIF are marketed (i.e. Member State private placement rules).

Possible Changes

The provisions of the AIFMD that permit;

- ▣ an EU AIFM to market a non-EU AIF using the EU passport;
- ▣ a non-EU AIFM to obtain authorisation in the EU as an AIFM; and
- ▣ a non-EU AIFM to market an AIF using the passport,

will only come into force if ESMA issues positive advice in that regard to the European Parliament, the Commission and the Council. Should ESMA issue positive advice, the European Commission is required to adopt a Regulation within 3 months, specifying the date when the rules set out in Article 35 and Articles 37 to 41 of the AIFMD become applicable in all Member States.

In order to issue this positive advice, ESMA must consider that there are "*no significant obstacles regarding investor protection, market disruption, competition and the monitoring of systemic risk*" that would impede the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the EU and the management and/or marketing of AIFs by non-EU AIFMs in the EU.

Points to Consider

It is worth bearing a number of points in mind in relation to the extension of the EU passport to third country AIFMs and AIFs;

- ▣ The precise date by which affected AIFMs may, or may be required to, take action is not currently known but it would appear that it will be January, 2016 at the very earliest.
- ▣ Non-EU entities are not free to choose the Member State by which they wish to become authorised as an AIFM: the identify of this Member State, the “Member State of Reference”, is determined by reference to rules set out in the AIFMD based on the Member States where the manager manages or markets its AIFs.
- ▣ Any non-EU AIFM acting as the de facto AIFM of an EU AIF will be required to either seek authorization as an AIFM or to re-structure the arrangements with the relevant EU AIF such that a separate EU authorized AIFM is appointed to act as AIFM of the AIF in question even if the EU AIF is not being marketed in the EU.
- ▣ The AIFMD envisages that, subject to receiving a similar positive advice and opinion from ESMA within 3 years of the entry into force of the aforementioned Commission Regulation, the Commission will abolish national private placement regimes in all Member States and the EU passport will become the sole and mandatory regime applicable in all Member States. This may happen by as early as 2018.

Dillon Eustace is actively participating in EMSA’s Call for Evidence and would be delighted to speak with any stakeholder to help formulate a response or provide any further insight and assistance.

The ESMA Paper can be found [here](#)

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