



February 2016

## ESMA AIFMD Passport for Non-EU AIFMs and AIFs

On 19 January, 2016, the European Securities and Markets Authority (“ESMA”) published a letter received from the European Commission (the “Commission”) in respect of ESMA’s advice on the application of the Directive on Alternative Investment Fund Managers (Directive 2011/ 61/EU or “AIFMD”) passport to non-EU AIFMs and AIFs, and ESMA’s opinion on the functioning of the passport for EU AIFMs and on the national private placement regimes (“NPPRs”).

AIFMD regulates the management and marketing of Alternative Investment Funds (“AIFs”) and aims to provide for and harmonise an internal market for Alternative Investment Fund Managers (“AIFMs”) within the EU. AIFMD currently offers a marketing passport (“Passport”) to compliant EU AIFMs of EU AIFs. The AIFMD contemplates that this Passport can be extended to non-EU AIFs, and to non-EU AIFMs from 2015. The Passport has not yet been so extended and such extension is subject to the acceptance by the European Parliament, Council and the Commission of positive advices from ESMA.

Such advices are being issued by ESMA on a jurisdiction by jurisdiction basis.

As readers will be aware, on 30 July, 2015 ESMA issued its first advices and opinion in relation to the application of the Passport to non-EU AIFMs and AIFs together with its opinion on the functioning of the passport for EU AIFMs and the NPPRs (the “2015 Opinion”).

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The 2015 Opinion focused on six non-EU jurisdictions, namely Guernsey, Hong Kong, Jersey, Singapore, Switzerland and the United States of America.

The ESMA assessment concluded that no obstacles exist to the extension of the passport to Guernsey and Jersey, while it was noted that Switzerland will remove any remaining obstacles with the enactment of amendments to certain Swiss legislation.

However it was noted by ESMA that further assessment was required with respect to Hong Kong, Singapore and the United States of America owing to issues relating to competition, regulation and lack of sufficient evidence to properly assess relevant criteria. The Cayman Islands was excluded from this assessment process but this exclusion had been widely expected.

## ■ European Commission Letter

On 17 December, 2015, the Commission wrote to ESMA (the “**Commission Letter**”) setting out a timetable for ESMA with regard to the completion of its assessment of certain specific non-EU jurisdictions. The Commission Letter invited ESMA to complete the assessment as to whether or not to extend the AIFMD passport with respect to the following non-EU jurisdictions:

- (i) Hong Kong, Singapore and the United States of America; and
- (ii) Six other non-EU jurisdictions, namely Australia, Bermuda, Canada, the Cayman Islands, Isle of Man and Japan.

The Commission Letter has requested that ESMA complete the assessment of these countries by 30 June, 2016.

The Commission Letter makes it clear that the Commission agrees with ESMA’s country-by-country approach (rather than providing a blanket determination in respect of non-EU jurisdictions as a whole). The Commission notes in its letter that it will take a decision on whether or not to extend the Passport “when a sufficient number of countries have been appropriately assessed”. In regard to this latter statement, the Commission gives no indication as to what a ‘sufficient number of countries’ will be and it is not clear at the time of writing therefore when such a decision will be made.

## ■ Impact for Cayman Funds

As ESMA’s advice and opinion remains outstanding, the status quo for Cayman Funds will remain until such time as ESMA issues its assessment and advice to specifically deal with Cayman Islands entities. As a result, until a positive opinion is issued, Cayman Island funds will continue to be offered in the EU by way of private placement (where permitted) and in particular the relevant NPPRs of the

member state in which the target investor is based. The positive impact of the issuing of the Commission Letter is that the investment funds industry now has a somewhat visible timeline for the issuing of the assessment and advice by ESMA.

## Next Steps

Once its assessment is complete ESMA will submit its opinion and advice to the Commission for consideration. In the event that ESMA's opinion and advice is that the Passport should be extended to any or all of the assessed countries, then under AIFMD the Commission is obliged under Article 67(6) of the AIFMD to prepare and propose delegated legislations within three months of receipt of such advice to implement the rules set out in Articles 37-41 of the AIFMD (Passport for non EU AIFMs and non-EU AIFs) with respect to the countries which have been assessed.

It is worth noting that notwithstanding the requirements of Article 67(7) of the AIFMD, the Commission has yet to take any positive action arising from ESMA's positive advice, dated 30 July 2015, in respect of Jersey and Guernsey.

Accordingly, in the event that ESMA issues positive advice on 30 June 2016, the Commission will then be required to prepare and propose such delegated legislation by 30 September 2016. However, there is no certainty that ESMA will provide such a positive opinion at this stage and the outcome of the assessment and ESMA's opinion will be of great interest to all involved in the investment funds industry.

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**February 2016**

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