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ESMA Issues Advice and Opinion on for European Passport Extension

Introduction

The Directive on Alternative Investment Fund Managers (Directive 2011/ 61/EU or “**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 extension of the Passport is subject to the acceptance by European Parliament, Council and Commission of positive advices from the European Securities and Markets Authority (“**ESMA**”).

ESMA has today published its advice in relation to the application of the Passport to non-EU AIFMs and AIFs (“**Advice**”) together with its opinion on the functioning of the passport for EU AIFMs and the national private placement regimes (“**NPPRs**”) (“**Opinion**”). The Advice and Opinion, required under AIFMD, will now be considered by the European Commission, Parliament and Council.

Advices Issued on a Country by Country Basis

Regarding the advice on the potential extension of the passport, ESMA opted for a country-by-country assessment to allow for a distinction to be made between the different situations of non-EU

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countries with respect to the aspects that ESMA has to consider in its assessment. In the advices issued today, ESMA assessed six jurisdictions (Guernsey, Hong Kong, Jersey, Singapore, Switzerland and the United States of America). ESMA has stated that it intends to continue its assessments until it has provided advice on all the non-EU countries that it considers relevant for the purposes of the extension of the Passport under Article 67 of AIFMD.

▣ Advices Not all “Positive”

Of the six assessed jurisdictions, (who were selected for assessment based on a number of factors including the amount of activity already being carried out by entities from these countries under the NPPRs as well as EU national authorities interactions with those jurisdictions to date and efforts by those jurisdictions in engaging with ESMA), only Guernsey and Jersey were found to have no obstacles to the extension of the passport, while Switzerland was found to be able to remove any remaining obstacles with the enactment of pending legislation. No definitive view has been reached on the other three jurisdictions, though ESMA stated in respect of Hong Kong that more time was required to analyse the extent to which the potential differences between the Hong Kong regulatory framework and the AIFMD may be material to the assessment on the potential application of the AIFMD passport to Hong Kong.

▣ Next Steps for European Institutions

The Advice and Opinion have been sent to the European Commission, Parliament and Council for their consideration on whether to activate the relevant provision of the AIFMD in respect of extending the Passport.

In issuing its Advice, ESMA has indicated that those institutions may wish to consider delaying any activation of the Passport until a sufficient number of non-EU countries have been assessed positively by ESMA, taking into account such factors as the potential impact on the market that a decision to extend the passport might have.

In issuing its Opinion on the functioning of the Passport and NPPRs, ESMA has stated that its preliminary view is that in light of the short timeframe between implementation of AIFMD in the EU, and the date of the issue of the Opinion, a definitive assessment on the functioning of the Passport and NPPRs is difficult. ESMA has therefore recommended that a further opinion be issued by it after a longer period.

▣ Next Steps for Fund Managers

Guernsey, Jersey and Swiss managers that are acting as de-facto AIFMs of EU AIFs may need to start planning for compliance with AIFMD, but it appears very unlikely that the Commission will legislate for those countries by October 22, 2015 as contemplated. April 22, 2016 was the earliest that such legislation could have become effective and it would now appear that this date will be

pushed out further though the revised timetable is unknown at present.

Other non-EU managers acting as de-facto AIFMs of EU AIFs have now more time to maintain the status quo if they so wish.

Managers seeking to avail of the EU marketing passport for their non-EU AIFs will have to wait or, those seeking the EU marketing passport in the near term will need to re-assess their EU marketing strategy.

It appears to us in light of the criteria which ESMA indicates it is using to assess which jurisdictions will be in a position to avail of the AIFMD passport that certain jurisdictions traditionally regarded as lightly regulated or unregulated may be a long way away from being in a position to access the passport.

Further Information

Dillon Eustace's Release on the Topic For Cayman can be found here:

<http://www.dilloneustace.ie/download/1/Publications/Cayman/ESMA%20Advice%20and%20Opinion%20on%20European%20Passport%20Extension%20Cayman%20Excluded%20from%20Initial%20Assessment.pdf>

Further details from ESMA can be found here: <http://www.esma.europa.eu/news/ESMA-advises-extension-AIFMD-passport-non-EU-jurisdictions?t=326&o=home>

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