

Financial Services and Markets

AIFMD "third country" passport: slowly does it

The European Securities and Markets Authority (ESMA) has today published two documents required by Article 67(1) AIFMD: its Opinion to the European Parliament, Council and Commission on the functioning of both the AIFMD EU passport and the National Private Placement Regimes (NPPRs); and its Advice to those institutions on the extension of the AIFMD passport to non-EU AIFMs and EU AIFMs managing non-EU AIFS.

The main message which emerges from both documents is that the institutions should proceed slowly on the road towards a third country passport, waiting until ESMA is in a position to deliver a positive opinion in relation to the functioning of the EU passport and not extending the passport until it has delivered positive advice in respect of a greater number of non-EU countries (only two currently pass muster).

The Opinion

The functioning of the EU passport

ESMA's views are that:

- it is too early to express a positive opinion with regards to the functioning of the EU passport. Delays in the implementation of AIFMD, together with delays in transposition in certain Member States, mean that ESMA cannot make a definitive assessment. It recommends that it should prepare a further opinion "after a longer period of implementation in all Member States";
- however, it has identified even at this early stage a number of "issues" in relation to the use of the EU passport, including:
 - o the existence of divergent approaches with regards to marketing rules – these include "heterogeneity" of fees charges by national competent authorities for the marketing of AIFs in their jurisdictions and the definition of what constitutes a "professional investor"; and
 - o different interpretations across Member States as to what activities constitute "marketing" and "material changes" under the passport.

Therefore, despite concluding that there is not enough evidence to suggest that the AIFMD EU passport has raised "major issues" in terms of the functioning and implementation of the AIFMD framework as a whole, ESMA sees merit in there being greater convergence in the definition of these terms. It is unclear whether ESMA sees such harmonisation as a prerequisite to the delivery of a further, positive opinion.

The functioning of the NPPRs

ESMA's opinion is that:

- as with the functioning of the passport, it sees merit in the preparation of another opinion on the functioning of the NPPRs at some point in the future in order to give the AIFMD framework longer to bed down – although it notes that this may be influenced by the Commission's decision on whether to extend the passport to non-EU countries in the meantime; and
- it has not found sufficient evidence to suggest that the NPPRs have raised major issues.

The Advice

In the preparation of its advice on the extension of the passport, ESMA received survey results in relation to 22 non-EU countries from national competent authorities. However, it found that it did not have sufficient information to enable it to make a substantive assessment in relation to the majority of those jurisdictions. Therefore, its Advice is confined to six jurisdictions: Guernsey, Jersey, Switzerland, Hong Kong, Singapore and the USA. In respect of these, ESMA advises that:

- no obstacles exist to extending the passport to Guernsey and Jersey;
- Switzerland will remove any remaining obstacles with the enactment of pending legislation; and
- the decision on whether to extend the passport to the USA, Singapore and Hong Kong should be delayed due to concerns relating to competition, regulatory issues and a lack of sufficient evidence to assess those jurisdictions definitively.

What happens next?

The Advice and Opinion have been sent to the European Parliament, Council and Commission. Those institutions will consider whether to extend the passport by way of a delegated act. However, ESMA suggests they "may wish to consider waiting until ESMA has delivered positive advice on a sufficient number of non-EU countries, before introducing the passport in order to avoid any adverse market impact that a decision to extend the passport to only a few non-EU countries might have". It remains to be seen how much note the institutions will take of that suggestion in the light of the positive advice given in relation to Guernsey and Jersey and the qualified advice in relation to Switzerland. Presumably those jurisdictions will be lobbying hard in order to get an early extension of the passport, particularly if it is unclear how long it will take ESMA to deliver advice in relation to other countries.

ESMA is working on finalising its assessments of Hong Kong, Singapore and the USA as soon as practicable, although there is no indication as to how long that will take. It will presumably take some further time before ESMA can turn to the other countries that it did not feel ready to assess for the purposes of today's Advice.

ESMA's Opinion and Advice are available at: <http://www.esma.europa.eu/news/ESMA-advises-extension-AIFMD-passport-non-EU-jurisdictions?t=326&o=home>.

For detailed advice on the matters discussed above please contact any of the partners named below or your usual contact in the Financial Services and Markets Department or the Investment Funds Group.

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