

Client Update

U.S. Fund Managers – The Latest AIFMD News

LONDON

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As things stand currently, a non-European fund manager wishing to market a private investment fund in Europe must (a) rely on the national private placement regimes then effective in the relevant European jurisdictions, and (b) comply with the AIFMD disclosure rules and the “no asset stripping” provisions.

On Thursday, July 30, 2015, the European Securities and Markets Authority (“ESMA”) published its advice on the application of the AIFMD passport to non-European fund managers (“ESMA Advice”), along with an opinion on the functioning of the AIFMD marketing passport (currently available only to European fund managers) and the functioning of the national private placement regimes.

The purpose of last week’s ESMA advice and opinion was to determine how the second stage of the AIFMD is to be implemented. A key aspect of the second stage of the AIFMD is the extension of the AIFMD passport to non-European fund managers – meaning that a non-European fund manager may opt to become an AIFM authorized manager and freely market its funds to professional investors in Europe pursuant to an AIFMD “marketing passport,” thereby no longer having to rely on the national private placement regime in each European jurisdiction where it wishes to market.

ESMA’S ADVICE: KEY TAKEAWAYS

- ESMA is analyzing the extension of the AIFMD passport on a non-European jurisdiction by non-European jurisdiction basis. ESMA is of the view that there are 22 non-European jurisdictions to be so analyzed. The ESMA Advice only considers the following non-European countries: Guernsey, Hong Kong, Jersey, Switzerland, Singapore and the United States.

- In order to determine whether a non-European jurisdiction is “up to scratch” from an AIFMD perspective, ESMA assesses that jurisdiction based on the following criteria: investor protection; market disruption; obstacles to competition; and monitoring of systemic risk.
- According to the ESMA Advice, the AIFMD passport should be extended to fund managers established in Guernsey, Jersey and Switzerland (subject to certain legislative amendments).
- According to the ESMA Advice, currently the AIFMD passport *should not be extended* to fund managers established in the *United States*, Hong Kong or Singapore.
- In respect of the United States, ESMA considers that the regulatory regime does not provide for a level playing field for European fund managers seeking to market their funds in the United States and therefore the “obstacles to competition” criterion cannot be positively reviewed. ESMA seems to focus its attention on mutual funds and the difficulties associated with a European fund manager seeking to market its funds to U.S. retail investors. It is not clear why the assessment focused so extensively on the marketing of funds to retail investors, given that the AIFMD is concerned with marketing to professional investors. Despite formal submissions by various trade associates explaining the U.S. regulatory regime for private funds, it appears that ESMA may not have fully considered that the U.S. private placement regime permits European fund managers to market private funds to institutional investors on a level playing field with U.S. fund managers.

ESMA has recommended that the decision in respect of the extension of the AIFMD passport to the United States be delayed until such time as conditions which might lead to a distortion of competition are addressed.

- The ESMA Advice does not assess the Cayman Islands. Given the importance of the Cayman Islands as a center for offshore funds, it is puzzling that ESMA did not include the Cayman Islands in the first batch of non-European jurisdictions it assessed. ESMA indicated that it did not assess the Cayman Islands on the basis that it lacks sufficient information to issue advice.

WHAT HAPPENS NEXT?

ESMA has not given any indication of the order or timing for assessment of the remaining 16 non-European jurisdictions, or the process to be followed to re-

consider the position for those non-European jurisdictions – including the United States – that “failed” the first round of assessment.

Under the terms of the AIFMD, the European Commission has three months following the receipt of positive advice from ESMA to adopt a delegated act to implement ESMA’s positive advice. As such, in the last quarter of 2015, it may be possible for a fund manager established in Guernsey, Jersey or Switzerland to apply for an AIFMD passport and to market its funds to professional investors throughout Europe utilizing the AIFMD marketing passport rather than relying on the different national private placement regimes in the relevant European jurisdictions. However, the ESMA Advice indicates that the European Commission may wish to consider whether to delay this process until ESMA has delivered its advice on more non-European jurisdictions.

NEAR AND LONG-TERM IMPACT

The *third stage* of AIFMD implementation will occur, at the earliest, in the fourth quarter of 2018. The national private placement regimes will be withdrawn and a non-European fund manager will only be able to market its funds in Europe with the benefit of an AIFMD marketing passport. To the extent that ESMA has not issued positive advice regarding the extension of the AIFMD passport to particular non-European jurisdictions, presumably it will be impossible for fund managers established in those jurisdictions to market their funds to European investors.

In the meantime, for U.S. fund managers, hopefully the status quo remains – that is, marketing in Europe based on the now-established national private placement regimes and subject to compliance with the AIFMD disclosure rules and the “no asset stripping” provisions. However, it is not mandatory for a European jurisdiction to maintain a national private placement regime. In particular:

- We understand that, on and from the date on which the AIFMD passport is extended to non-European fund managers, Germany will no longer allow a non-European fund manager actively to market its funds to German professional investors unless such non-European fund manager holds an AIFMD marketing passport. What this means for a U.S. fund manager – where ESMA has not yet issued positive advice in respect of the extension of the AIFMD passport – is unclear.
- A number of existing national private placement regimes include a review by the national regulator of the regulatory status of the non-European fund manager that is seeking to market in the relevant jurisdiction. How a

national regulator will view U.S. fund managers in light of ESMA's decision not to issue positive advice in respect of the United States remains to be seen.

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Please do not hesitate to contact us with any questions.