

Background

Since the Alternative Investment Fund Managers Directive (AIFMD) came into force in the European Union (EU) in June 2011, a marketing passport has only been available to alternative investment fund managers (AIFMs) when both the AIFM and alternative investment funds (AIFs) are established in the EU.

The marketing passport allows EU AIFMs to be authorised in one member state and market EU AIFs freely across the European Economic Area (EEA) without the need to have regard for differing registration requirements in each EEA state where the AIFM markets the AIF to investors.

US and other third country managers have, without access to the marketing passport, been required to avail themselves of each EU member states' private placement regimes in order to be able to market AIFs in EU jurisdictions, or rely on solicitations made at the initiative of the investor (reverse solicitation) to raise funds for an AIF.

Extension of the Marketing Passport to US/Third Country Managers – ESMA Advice

The AIFMD envisaged that the marketing passport may be extended to non-EU AIFMs, and the marketing of non-EU AIFs subject to positive advice and opinion from the European Markets and Securities Authority (ESMA) (see Article 67 of the AIFMD). Any ESMA advice recommending an extension would require the approval of the European Commission.

July 2015 Advice

ESMA issued advice in July 2015 that concluded that no significant obstacle exists to the extension of the marketing passport to Guernsey, Jersey and Switzerland.

July 2016 Advice

ESMA has subsequently issued advice dated 19 July 2016 that provides further information in relation to Hong Kong, Singapore and the US (jurisdictions covered in the July 2015 advice) and, for the first time, Australia, Bermuda, Canada, the Cayman Islands, the Isle of Man, and Japan. The advice concluded that no significant obstacles exist to the extension of the marketing passport to Canada and Japan.

For the other jurisdictions listed above, the 2016 advice highlights certain obstacles specific to each jurisdiction to the extension of the marketing passport to such jurisdictions. Such obstacles are not insurmountable but will delay the extension of the marketing passport to non-EU AIFM.

Current Obstacles to the Extension of the Marketing Passport

Jurisdiction	Obstacle
US	<p>If the passport were to be granted, EU legislators may only make it available on a limited basis to certain types of funds as ESMA raised concerns as to obstacles in the areas of market disruption and competition in the case of funds marketed by managers to professional investors which involve a public offering.</p> <p>The market access conditions which would apply to such US funds in the EU under an AIFMD passport would be potentially less onerous than the market access conditions applicable to EU funds subject to a public offering in the US. This is due to registration requirements under the US regulatory framework (which generate additional costs).</p>
Hong Kong	There are no significant obstacles in relation to AIFs in Hong Kong. However, ESMA noted that Hong Kong operates a regime that facilitates the access of undertakings for collective investment in transferable securities (UCITS) from only certain EU member states to retail investors in their territories. This may need to be extended to all EU member states before a passport is granted.
Singapore	The obstacle is similar to the one set out for Hong Kong.
Australia	The Australian Securities and Investment Committee (ASIC) is required to extend to all EU member states the "class order relief", currently available only to some EU member states, from some requirements of the Australian regulatory framework.
Bermuda	Bermuda is in the process of implementing a new regulatory regime. ESMA cannot give definitive advice as it will need, in any assessment of the regime, to take into account the final rules in place.
Cayman Islands	The obstacle is similar to the one set out for Bermuda.
Isle of Man	There is currently no AIFMD-like regime in the Isle of Man for ESMA to assess.

Next Steps

The European Commission has the final say on approving the extension of the marketing passport and it is not currently clear when such approval will be granted, given the obstacles set out in the 2016 advice to be overcome and ESMA's intention to assess a further 10 jurisdictions in relation to the extension of the marketing passport.

[Source](#)

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