



Newgate Alert



IMPORTANT: Please read

Important for investment managers: ESMA issues its advice on the extension of the AIFMD Passport to non-EU funds and managers.

On 30th July 2015, ESMA issued its overdue 'Advice' on the possible extension of the marketing passport to non-EU AIFMs and AIFs to the European Parliament, Council and Commission.

ESMA also issued its 'Opinion' on the functioning of the EU AIFM passport and National Private Placement Regimes. A link to both the 'Advice' and 'Opinion' are provided below.

http://www.esma.europa.eu/system/files/2015-1236_advice_to_ep-council-com_on_aifmd_passport.pdf

http://www.esma.europa.eu/system/files/2015-1235_opinion_to_ep-council-com_on_aifmd_passport_for_publication.pdf

Extending the passport to non-EU AIFMs and AIF's

The Advice explains ESMA is taking a country-by-country approach in assessing extending the application of the AIFMD passport. The list of 22 non-EU countries to be assessed is at section 32 of the Advice. Of the 22 non-EU countries, ESMA has carried out "detailed assessments" of the regulatory regimes in only 6 non-EU jurisdiction; Jersey, Guernsey, Switzerland, Hong Kong, Singapore and the USA. Of the six, ESMA has stated that only three (Jersey, Guernsey and Switzerland) are likely to meet all AIFMD requirements.

The six jurisdictions were selected based on a number of factors including the amount of activity already being carried out by entities from these countries under the National Private Placement Regime ("NPPR"), EU national authorities' knowledge and experience of dealing with their counterparts and the efforts by stakeholders from these countries to engage with ESMA's process. ESMA used four specific tests to assess each jurisdiction;

- The adequacy of investor protection arrangements,
- The likelihood of existing EU AIFMs and AIFs being disadvantaged by new entrants,
- Corresponding barriers to entry in the 3rd country, and
- The effectiveness of monitoring of systemic risk

ESMA concluded that in respect of Hong Kong and Singapore it did not yet have sufficient information to fully understand their regulatory frameworks or whether reciprocal market access existed. With regard to the USA, ESMA concluded that it would not be appropriate to extend the AIFMD passport until better conditions of market access are granted by the US Authorities to EU AIFMs as there is the risk of an unlevel playing field. The situation in each will remain under review.

ESMA's review of the remaining 16 jurisdictions could clearly take a long time and may require the Competent Authorities to introduce AIFMD equivalent regimes to satisfy ESMA's assessment criteria to grant a passport.

Newgate Compliance
Limited

Contact us:

☐ [email](#); or

☐ 020 7947 4136



Newgate Alert



IMPORTANT: Please read

ESMA Opinion on the functioning of the EU Passport and NPPR

ESMA's view is that the delay in implementing the AIFMD together with the delay in the transposition in some Member states makes it difficult to give a definitive assessment of the effectiveness of the EU passport and the NPPR.

ESMA did identify various issues to the use of the passport;

- divergent approaches with respect to marketing rules (including of fees charged by the Competent Authorities in Member States);
- the definition of what constitutes a "professional investor"; and
- varying interpretations of what activities constitute "marketing" and "material changes" under the AIFMD passport in the different Member States.

ESMA is of the opinion that there is insufficient evidence to indicate that the NPPRs have raised major issues in terms of the functioning and implementation of the AIFMD framework. However, given the short period of time since the implementation of the AIFMD in Member States, ESMA recommends preparing a further opinion after a longer period has elapsed. The timing of this is unknown.

Next Steps

The European Commission will decide on whether to extend the non-EU passport to Jersey, Guernsey and Switzerland via a delegated act or hold off from making a decision pending ESMA providing positive recommendations on some of the other non-EU jurisdictions yet to be assessed by ESMA.

For non-EU AIFM's managing non-EU AIF's and EU managers of non-EU AIF's outside of these three jurisdictions there is, for now, no change. Fund managers will, as they do now, continue to register the funds with the Competent Authority in each EU member state they wish to market into under Article 36 (for EU AIFMs) and Article 42 (for non-EU AIFMs) of the AIFMD.

Newgate Compliance
Limited

Contact us:

☐ [email](#); or

☐ 020 7947 4136