



AIFMD passport: latest developments

Financial Services

**ESMA recommends extension
of passport to Switzerland
and 11 other non-EU countries**

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Just about twelve months after the publication of its first set of advice on the application of the Alternative Investment Fund Managers Directive (AIFMD) passport to non-EU member states, the European Securities and Market Authority (ESMA) has issued a further set of advice. Currently, the AIFMD passport is only available for EU-domiciled AIFM (EU-AIFM); however, a non-EU country regulation shall allow asset managers from countries outside the EU to also benefit from the passport. ([See article: «EU-Pass» für alternative Anlagen bald auch für Schweizer Vermögensverwalter](#)).

Apart from a reassessment of those countries, including Switzerland, for which the ESMA has not issued a definitive recommendation in summer 2015, ESMA's second set of advice of 18 July 2016 contains an assessment of six new non-EU countries (Australia, Bermuda, Canada, Cayman Islands, Japan and the Isle of Man). In addition, the ESMA has provided more details on further criteria such as the capacity of the supervisory authorities and their track record in ensuring effective enforcement for the countries assessed in its first and second set of advice. Finally, the ESMA was also instructed to determine what kinds (types and size) of funds will be attracted from the different non-EU countries as a result of the proposed opening of the EU market.

In its first set of advice, the ESMA came to the conclusion that there were no notable obstacles for applying the EU passport to Guernsey and Jersey. This recommendation has now also be drawn for Switzerland, Hongkong, Singapore and the USA. Switzerland basically has met the preconditions for a positive ESMA statement upon the entering into force of the provisions concerning administrative co-operation laid down in the revised Financial Market Supervisory Act (FINMASA) on January 1, 2016. With respect to the newly applied criteria (capacity and track record of supervisory authorities) ESMA found that competent European supervisory authorities had mostly positive experiences when dealing with Swiss authorities. Furthermore, the ESMA expects more Swiss AIF to enter the European market upon extending the AIFMD passport regime to Switzerland.

In regard to Hongkong and Singapore, the ESMA remarked that both states foresee opening their markets for UCITS

domiciled in certain EU member states only. In the USA, the expansion of the AIFMD passport would also represent a competitive disadvantage for the public distribution of EU-AIFs in the USA. A further assessment round of another six countries deemed the three non-EU countries Canada, Japan and Australia to be fit for a positive ESMA recommendation. At this time, the ESMA did not provide any input on Bermuda, the Cayman Islands or the Isle of Man. ESMA's advice, required under the AIFMD, is now being considered by the European Commission, the European Parliament and Council.

With ESMA's positive advice, Swiss asset managers of AIFs have come one step closer to the AIFMD passport. The passport would allow non-EU asset managers to market alternative funds across the whole of the EU in reliance on a single EU authorization if certain conditions are met. The first of those preconditions has now just been satisfied. A positive ESMA recommendation means that Swiss asset managers managing and distributing alternative investment funds (AIF) can apply for an AIFMD passport as soon as the European Commission has issued a new delegated act opening the AIFMD passport to Switzerland. Upon being granted the passport, they will benefit from easier access to the European market.

According to Article 67(6) AIFMD, the European Commission is to issue delegated acts within three months after the ESMA has issued a positive recommendation. The Parliament and Council will then have three months to consider the delegated acts and object, if they wish. They can also extend the three month period by another three months. If Parliament and Council do not object to the



delegated acts, they will be published in the Official Journal of the EU and enter into effect shortly after that. Although it is not yet clear when the extended passport will be available for Swiss asset managers, there is a slight change that it will already be in place by the turn of this year.

In the meantime, the ESMA has announced that it will continue to assess ten other non-EU countries (among them the Bahamas, Brazil, the BVI, Mauritius and South Korea). Moreover, the ESMA has stated that the European Commission, the European Parliament and Council may also wish to discuss other aspects (taxes, money-laundering and combating terrorism as well as the implementation of a national private placement regime in addition to the EU passporting regime). This could result in the European Commission instructing the ESMA to perform further assessments. However, this would mean that the first and second set of advice do not constitute the required, "positive recommendation" within the meaning of Article 67(6) AIFMD after all. Moreover, the current political environment (Brexit, etc.) could mean that an opening of the AIFMD passport regime for non-EU countries is still a long way off.

In any case, for Swiss asset managers of alternative funds who want to quickly respond to the possible extension of the passport regime to Switzerland, it is now the time to start preparations. In particular, it may be worth assessing the different options for a development of their business model into the EU in the coming months. Thereby, it must not be forgotten that the pressure to obtain an AIFMD passport will significantly built up in expectation of the EU-wide abolition of the National Private Placement Regime (NPPR). Finally, it is important to note that the AIFMD passport does not only open new opportunities, but also comes along with additional requirements. This is why Swiss fund managers need to carefully assess whether the benefit of being able to market a Swiss AIF across the EU with a single passport outweighs the related costs.

Link:

ESMA advice dated 18 July 2016: <https://www.esma.europa.eu/press-news/esma-news/esma-advises-extension-funds-passport-12-non-eu-countries>

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