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EU-passport for Non-EU fund manager

<http://docs.bepartners.pro/news/ESMA-2015.pdf>

The European Securities and Markets Authority (ESMA) has published its Advice in relation to the application of the Alternative Investment Fund Managers Directive (AIFMD) passport to non-EU Alternative Investment Fund Managers (AIFMs) and Alternative Investment Funds (AIFs). ESMA's Advice addresses only six jurisdictions. ESMA does not currently advise the application of the EU passport for US AIFs and US AIFMs.

1. EU Passport for Management and Marketing

Following the implementation of the AIFMD, AIFMs, which have their seat in an EU Member State, are permitted to manage EU AIFs in all EU Member States and market such EU AIFs to professional investors without obtaining the authorization of the relevant national competent authority. The competent authority of the AIFM's home Member State must merely be notified of the intended management or marketing of an EU AIF in another EU Member State.

The AIFMD also envisages making the so-called EU passport available to AIFs and AIFMs from third countries. However, this will only go into effect when the European Commission adopts a delegated act (Article 67 (6) of the AIFMD). Prior to the Commission undertaking the necessary steps in connection therewith, ESMA must submit positive advice on the application of the passport to the marketing of non-EU AIFs by EU AIFs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States by 22 July 2015. ESMA has published its Advice with a one-week delay.

2. 6 out of 164

Rather than publishing an across-the-board advice, ESMA has decided to publish individual advice for individual third countries. In this fashion, ESMA wishes to take into account the different circumstances of the third countries with regard to the criteria addressed in its assessment.

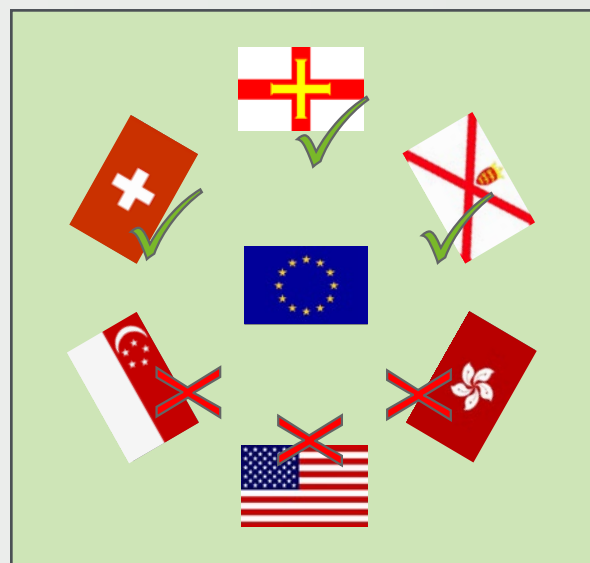
ESMA's Advice currently assesses six of the 164 jurisdictions outside of the EU and the EEA: Guernsey, Hong Kong, Jersey, Switzerland, Singapore and the United States of America (USA).

The choice of jurisdictions is based on an initial list of 22 third countries that have AIFMs active in the EU. In a second step, ESMA has prepared a recommendation for those jurisdictions for which information was available to ESMA. Additional jurisdictions will follow in the next few months.

3. What did ESMA assess?

ESMA explains the criteria on which it has based its assessment in accordance with Article 67 (4) of the AIFMD: investor protection, market disruption, competition and the monitoring of systemic risk.

ESMA points out that a comparable regulatory regime in third countries is not a condition for positive advice. However, it is necessary to analyze the differences between the AIFMD and the regulatory framework of the relevant third country. In our opinion, this contradictory statement is to be understood to mean that a relatively low regulatory standard can be compensated by a particularly intensive cooperation between the competent authority of the third country and the EU competent authorities. Thus, the regulatory framework is in fact a criteria for the EU passport for third countries.





4. Passed

ESMA gives unconditional positive advice only for Guernsey and Jersey. ESMA only gives positive advice for Switzerland under the condition that the amended version of Article 38 of the Swiss Federal Act on Stock Exchanges and Securities Trading (SESTA) enters into force on 1 January 2016 as planned.

5. Failed

ESMA has not reached any definitive view for Hong Kong, Singapore and the USA.

ESMA did not have sufficient information regarding the regulatory framework of Hong Kong and Singapore. In addition, according to ESMA, it was not clear whether all EU Member States would be granted market access that is equivalent to the EU passport. In this instance, ESMA sees an information deficit.

In the case of the USA, ESMA reached the conclusion that the risk of disparate competitive conditions would arise for EU AIFMs. ESMA therefore recommends postponing the decision on the expansion of the EU passport to US AIFMs until the US competent authority grants better market conditions for EU AIFMs. In addition, ESMA believes that it needs more

time to analyze the information about the regulatory framework in the USA and analyze the extent the differences between the US regulatory framework and the AIFMD are material to the assessment.

6. Outlook for US funds

(Positive) advice for the expansion of the EU passport to US AIFs and US AIFMs is thus delayed until further notice. In light of ESMA's explanation – disparate competitive conditions – positive advice is not expected in the short run.

Until then, US fund initiators, who seek to raise funding in Europe, may market their funds in accordance with the individual national marketing rules of the EU Member States or set up a European fund structure to benefit from the EU passport.

In light of the fact that only three third countries were given positive, it is doubtful whether the Commission will adopt the delegated act for the expansion of the EU passport. The Commission's discretion is however limited: According to Article 67 (6) of the AIFMD, the Commission is to adopt the delegated act within 3 months after having received positive advice and an opinion from ESMA, albeit subject to certain criteria.

be in touch: If you have any questions, please do not hesitate to contact us!



Dr. Carsten Bödecker

Partner . Steuerberater . Rechtsanwalt

Tel. +49 211 946847-51

Fax +49 211 946847-01

carsten.boedecker@bepartners.pro



Carsten Ernst

Partner . Steuerberater

Tel. +49 211 946847-52

Fax +49 211 946847-01

carsten.ernst@bepartners.pro



Harald Kuhn

Partner . Rechtsanwalt

Tel. +49 211 946847-54

Fax +49 211 946847-01

harald.kuhn@bepartners.pro



Nathalie Grenewitz

US-Attorney at Law

Tel. +49 211 946847-57

Fax +49 211 946847-01

nathalie.grenewitz@bepartners.pro