

Update

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AIFMD Update – ESMA published advice on extension of marketing passport – Implications for Switzerland

Fund managers (“AIFMs”), which are based in a non-EU country, such as Switzerland, are subject with respect to the marketing of their funds (“AIFs”) into EU countries to the national private placement regime of each EU Member State and cannot take benefit of the “EU passport” under the Alternative Investment Fund Managers Directive (“AIFMD”). The AIFMD provides that the passport may be extended to non-EU AIFMs and AIFs, provided that (i) ESMA issues to the attention of the EU Parliament, Council and Commission (the “Trilogue”) an advice on the application of the passport to non-EU AIFMs and AIFs and (ii) the EU Commission thereupon resolves to expand the passport to the relevant third countries.

This advice has now been published by ESMA addressing some of the non-EU jurisdictions only, including Switzerland. This Newsflash outlines the implications for Swiss AIFMs and AIFs.

Background

One of the key elements of AIFMD, which entered into force on July 21, 2011 and had to be implemented into the national laws of the EU Member States by July 22, 2013, is to grant to EU AIFMs the so-called “AIFMD passport” for the marketing of both EU and non-EU AIFs to professional investors in the EU. This AIFMD marketing passport is, together with the passport granted for the offer of UCITS funds, a fundamental aspect of the single market within the EU, but is currently not available for AIFMs based in third countries, such as Switzerland.

The marketing passport is currently only available to AIFMs and AIFs established in the EU. A passport allows such an AIFM to market its AIFs freely across the EU without the need to register the AIFs under the national private placement regimes (“NPPRs”) in each EU country.

As a reminder, the Swiss legislator had promptly proceeded with the partial revision of the Collective Investment Schemes Act (“CISA”), which entered into force on March 1st, 2013, with the objective to satisfy in many

respects the third country rules imposed by AIFMD on non-EU jurisdictions. The Swiss legislator had, with the collective support of the fund industry, the regulator and fund industry specialists, succeeded in proceeding with that significant revision of the Swiss investment funds laws in order to cope with the AIFMD requirements. The EU Commission has now a deadline of three months upon receipt of ESMA’s technical advice to render a decision whether or not to expand the AIFMD passport to AIFMs and AIFs in Switzerland. This decision will be based also on a political assessment of the relationships between the EU and Switzerland as a whole.

Assessment of the non-EU countries by ESMA

ESMA has, for the purposes of its analysis, reviewed the relevant legal framework in a selected number of countries in light of different criteria, such as (i) the existence of cooperation agreements among the competent supervisory authorities, (ii) the level of investors’ protection in each jurisdiction, (iii) the potential “market disruption” for the EU market as a result of the grant of the EU passport, (iv) the existence of any obstacles to competition as well as (v) the

monitoring of systemic risks in each jurisdiction. In this context, ESMA has identified more than twenty non-EU jurisdictions which may be examined for the purpose of ESMA's technical advice.

As a result of a first analysis and following a country-by-country approach, ESMA has limited its review to six jurisdictions, i.e. the United States, Guernsey, Jersey, Hong-Kong, Switzerland and Singapore. ESMA has, at this stage, only been in a position to confirm the absence of any obstacles to the extension of the passport as regards Jersey, Guernsey and Switzerland.

ESMA has noted that a few remaining obstacles will be levied shortly as a result of the revision of the Stock Exchanges and Securities Trading Act ("SESTA") and the expected entry into effect of the new Financial Infrastructures Act ("FINFRAG") on January 1st, 2016. These obstacles are of a technical nature and should be cleared without any further complications.

Next step

This means, in other words, that a formal technical advice of ESMA to the attention of the EU "Trilogue" now exists for Jersey, Guernsey and Switzerland, while the analysis for the other countries, including the United States, is still ongoing. The key question remains open, and will be for the EU Commission to decide, whether the EU will want to decide on the extension of the passport for a larger number of other third countries, including the United States (thus delaying the extension of passport to Jersey, Guernsey and Switzerland), or whether the EU may decide to clear formally already now the situation and grant up-front to Jersey, Guernsey and Switzerland the third country passport under AIFMD.

Assessment in the case of Switzerland

The Swiss legal framework has been assessed by ESMA, as for all countries which have been scrutinized, on the basis of the same above-mentioned criteria. Based on this review, ESMA is of the view that there are no obstacles regarding investors' protection, competition, market disruption and monitoring of systemic risks should the AIFMD passport be expanded to Switzerland. ESMA's advice is namely based on the following analysis:

- > As regards investors' protection, ESMA has noted that Switzerland has promptly enacted the AIFMD standards following the implementation on March 1st, 2013, of the revised CISA. As a result of this revision, a general authorization and supervisory regime for asset managers of collective investment schemes, tailored on the AIFMD, has been introduced in Switzerland.
- > In this context, ESMA has performed a detailed analysis of the revised CISA, noting that in many respects CISA imposes stricter requirements on asset managers and that the latter has a comparable status as compared to EU AIFMs, namely in terms of minimal capital and capital adequacy as well as in respect of the delegation of the asset management function, including as regards the "letter box entity" rules which were an important element at the time of the enactment of the AIFMD. ESMA has also assessed the capacity of FINMA to assume its supervisory functions in the context of Swiss collective investment schemes, distributors and AIFMs. In this respect, FINMA's long standing experience as regards the supervision of financial institutions, including asset managers of collective investment schemes, and also the enforcement in the specific context of fund distribution was positively assessed by ESMA.
- > ESMA has also noted the stricter regime which has been introduced as regards Swiss custodian banks, including as to the relevant liability standards towards investors. This issue was also a key element in the context of the financial crisis which leads to the enactment of AIFMD. ESMA has in particular noted that the new standards for custodians now largely in line with the liability of a custodian bank under AIFMD, even though the Swiss rules do not precisely match those under AIFMD. ESMA has however noted the fact that Switzerland has also enacted a new Swiss Federal Law on Intermediate Securities, which regulates the custody of certificated and uncertificated assets and provides for a

¹ See Newsflash of Lenz & Staehelin, dated July 2015

comprehensive legal framework. This was an important element in the context of the assessment of the responsibility of Swiss custodians under the AIFMD third country rules.

- > ESMA has also included in its review the remuneration policies imposed in Switzerland on AIFMs in order to see whether those standards are in line with the AIFMD remuneration policies. Indeed, where asset management is outsourced from an EU Country to a Swiss AIFM, the AIFMD requires that these remuneration rules should be complied with by the delegated asset manager. In this context, ESMA has noted that the Code of Conduct of the Swiss Funds & Asset Management Association SFAMA, which is a self-regulatory regulation formally acknowledged by FINMA, expressly imposes on Swiss managers of collective investment schemes the obligation to implement within their organization minimum standards for their remuneration schemes which match the standards of the FINMA Circular 2010/1. The latter imposes on large financial institutions in Switzerland principles for remuneration schemes. While the principles laid down in this FINMA Circular are less detailed as compared to those under the AIFMD remuneration policies, it is the general view that the Swiss principles conceptually follow the same targets than the AIFMD remuneration rules.
- > ESMA finally analysed the new rules on the distribution of funds in Switzerland, noting that, on the one part, some third countries, meaning France and Germany, have entered into mutual recognition agreements to distribute UCITS with Switzerland, while, by contrast, more stringent rules have been introduced by the Swiss legislator under the revised CISA as regards the marketing of AIFs, which are not registered with FINMA for distribution to non-qualified investors, to certain qualified investors (i.e. non-supervised qualified investors). ESMA noted that, at this stage, it is too early to assess the consequence of these new restrictive legislative changes as regard AIFs in Switzerland.

Conclusions

ESMA's formal advice in respect of a possible extension to Switzerland, together with Guernsey and Jersey, of the EU marketing passport is certainly a positive sign for the Swiss financial industry as a whole. This recognition on a technical level is in particular a comfort to the regulators, the financial industry as well as all of the market

participants who actively contributed within a very limited timeframe to the revision of the CISA in line with the AIFMD standards.

However, despite ESMA positive advice, a certain degree of uncertainty remains, both on a technical and a political level. On a technical level, an uncertainty exists in our view as regards the recognition of the Swiss remuneration policies, with which Swiss AIFMs must comply and in respect to which a detailed and stringent analysis may lead to the identification of a number of gaps. On this point, however, EU based AIFMs delegating the asset management functions to an AIFM based in Switzerland, may close those "gaps" by imposing, in the relevant contractual documentation, the obligation to comply with adequate standards in line with the AIFMD requirements. In practice, a relatively flexible approach is already followed in many EU jurisdictions as regards the delegation of the asset management functions into Switzerland.

A more delicate aspect for Switzerland is the political answer which will be given by the competent EU bodies in the respect of the extension of the passport under AIFMD. This is due to the fact that ESMA has not yet been in a position to assess other important third countries, such as notably the United States. In this respect, one may expect that the political bodies within the EU to decide to await the final advice by ESMA on a larger number of third countries, postponing as a result the implementation of that positive outcome for Jersey, Guernsey and Switzerland. Moreover, it cannot be excluded that any decision on a political level within the EU as regards Switzerland may be put within the wider context of the global relationship between Switzerland and the EU, which may then lead to a more intricate situation.

Furthermore, it remains to be seen whether the EU passport will be of any major practical relevance for Swiss AIFMs due to the fact that, in order to benefit from such passport, Swiss AIFMs will have to register with a Reference Member State within the EU and comply with the entire AIFMD framework. It also remains to be seen if Swiss managers will be able to utilize the national private placement regimes in the event the passport would be extended to Switzerland.

Please do not hesitate to contact us in case of any questions.

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