

Update

Newsflash July 2016

AIFMD Update – ESMA confirms its positive advice to the EU Commission on the extension of the marketing passport to Switzerland

Fund managers (“AIFMs”), which are subject to the European Union's (“EU”) Alternative Investment Fund Managers Directive (“AIFMD”) and are based in a non-EU country, such as Switzerland, are subject with respect to the marketing of their funds covered by the AIFMD (“AIFs”) into EU countries to the national private placement regimes of each EU member state, where available, and cannot benefit of the “EU passport” granted by the AIFMD. In July 2015, the European Securities and Markets Authority (“ESMA”) published a first set of advice on the application of the passport to a limited number of non-EU countries, resulting in a positive advice as regards to Switzerland, Guernsey and Jersey. The purpose of such advice is to allow the EU Commission, the EU Parliament as well as the EU Council (“the EU Institutions”) to issue, based on the AIFMD, a delegated act extending the “EU passport” to AIFMs of such third countries and specifying the date on which the passport granted under AIFMD becomes available (subject of course to the condition that each such AIFM requests its registration within the EU as third country AIFM). Following various exchanges between ESMA and the EU Commission, ESMA has published on July 18, 2016, a revised set of advice to the attention of the EU Institutions on the application of the passport to an extended circle of third countries, including, in addition to Switzerland, the United States, Australia, Bermuda, Canada, the Cayman Islands, Hong Kong, Isle of Man, Japan, Singapore, as well as Guernsey and Jersey.

Background

Further to our Newsflash dated August 2015, to which we refer, relating to ESMA’s initial advice to the EU Institutions on the extension of the passport under AIFMD to Switzerland, Guernsey and Jersey, we note that AIFMD provides for a marketing passport which, together with the passport granted for the offer of UCITS funds, is a fundamental aspect of the laws of the EU to

implement within the EU single market. However, this passport is not available to AIFMs based in third countries, such as Switzerland, unless the EU Institutions, based on the technical advice of ESMA, expressly resolve to extend the availability of the passport to such third country AIFMs. Therefore, today, third country AIFMs, including those based in Switzerland, have to rely for their marketing activities on national private placement regimes (“NPPRs”) in each

EU country. We note, however, that these NPPRs (if available) differ substantially from one EU member state to another. For this reason, the Swiss legislator has promptly proceeded with the revision of the Swiss Collective Investment Schemes Act (“CISA”) which entered into force on March 1, 2013. The objective of this revision of the CISA was to satisfy, on most substantial aspects, the requirements of the third country provisions of the AIFMD.

Confirmation of the assessment of Switzerland as non-EU country by ESMA

In its revised advice, dated July 18, 2016, ESMA confirms its positive advice to the EU Institutions to extend the passport under AIFMD to Swiss-based AIFMs. ESMA concluded that there are no significant obstacles under Swiss law regarding investors’ protection, competition, market disruption, as well as the monitoring of systemic risks which would impede the application of the AIFMD passport as regards to Swiss AIFMs. In this respect, ESMA’s advice, which is made without significant reservations, is based namely on the following considerations:

- › ESMA has in the first instances pointed out the generally positive experience made by EU national authorities as regards to the cooperation with Swiss authorities, in particular with the Swiss Financial Markets Supervisory Authority FINMA. In particular, ESMA has noted that the modalities for the transmission of information by FINMA to the national competent authorities has been revised following the enactment of the Swiss Financial Market Infrastructure Act (“FMIA”), which entered into force on January 1, 2016, as well as the revision of the Swiss Financial Market Supervisory Act. The former reservation made by ESMA in its advice of July 2015 as regards to the Swiss Stock Exchange Act (which has been revised by the FMIA in this respect), has allowed to confirm effectiveness of the cooperation process and to waive the qualification made in ESMA’s advice of July 2015 to the competent EU Institutions. ESMA has, however, noted that it wanted to monitor in practice whether these revised cooperation modalities will be effectively handled by FINMA and may revert in this respect in a subsequent opinion.
- › As regards to custodians governed by CISA, ESMA has noted that the provisions on the responsibilities and liability of a Swiss

custodian are comparable to those provided under AIFMD, even though the responsibilities and liability under CISA, as applied to Swiss custodians, may vary in certain important points. This additional positive assessment allows to conclude that, based on the provisions of CISA as well as on the self-regulatory framework imposed on Swiss custodians, the latter are subject to a comparable regime as the one which applies to EU custodians.

- › A key element of the assessment process as regards to AIFMs based in Switzerland is the remuneration rules imposed on Swiss AIFMs. In this respect, ESMA has noted that FINMA has issued a Circular 2010/1 on Remuneration Schemes, which entered into force on January 1, 2010. While this Circular also applies, in addition to banks and securities dealers as well as insurance companies, to Swiss fund management companies as well as licensed investment fund managers, it provides for rules which ESMA considers to be more flexible than those imposed under AIFMD. This being said, ESMA has noted that on October 7, 2014, the Swiss Funds & Asset Management Association (“SFAMA”) has issued its Code of Conduct, which imposes on CISA regulated institutions to apply a remuneration and salary policy which is appropriate in light of the circumstances and implements the fundamental principles of the above mentioned FINMA Circular. Therefore, ESMA has confirmed that it considers the Swiss remuneration rules to be equivalent to the AIFMD standards.
- › Finally, as regards to the distribution of EU funds to retail investors in Switzerland, ESMA has noted that under the CISA such distribution requires the conclusion of cooperation agreements with the relevant third countries. ESMA has, however, noted that FINMA has entered into such cooperation and exchange of information agreements with most of the EU countries. ESMA thus concluded that there should be no distortion of competition due to different treatments among various EU jurisdictions depending on the existence, or not, of such cooperation agreements. In this context, we note that while Switzerland is very flexible as regards to the registration for the distribution to retail clients of EU funds, there is no such reciprocity as regards to the distribution of Swiss funds to retail clients in the EU. In this

respect, EU funds are in a significantly more favorable situation than Swiss funds.

Conclusion

The positive nature of ESMA's confirmation of its initial advice as regards to Switzerland, and also Jersey and Guernsey, which were already confirmed as being equivalent under the AIFMD standards pursuant to ESMA's July 2015 advice, was to be expected. The positive conclusions as regards to Japan and Canada are also noted. As regards to other jurisdictions, including Hong Kong, Singapore, Australia and, most significantly, the United States, ESMA has made an initial positive assessment, but has not yet confirmed a positive advice. ESMA has, however, indicated that a positive confirmation is likely, subject to certain conditions being met.

In this respect, one has to note the "result oriented" analysis of ESMA, which has, rather than reviewing the modalities of the third country regulations, focused on the result of the Swiss legislation in order to make its assessment on the equivalency with AIFMD standards. This being said, as already noted in our Newsflash of August 2015, there remains a certain degree of uncertainty on a political level as to the definitive decision by the EU Institutions on the delegated act which will extend the passport to the relevant third countries, and in particular to Switzerland. One may still fear that, as ESMA is not yet in a position to definitively assess other important third countries, such as the United

States, the competent EU Institutions will want to wait until these other important third countries have been confirmed by ESMA as being equivalent before extending the passport to the initially recognized third countries, such as Switzerland. For the time being, Swiss AIFMs will have to continue to market their funds under each EU country NPPR (if available).

Furthermore, considering the fact that recognition by the EU Institutions of the equivalency of third country legislations does not *per se* lead to the grant of a passport under AIFMD, but requires that third country AIFMs register with a Reference Member State under AIFMD, it still remains to be seen what specific conditions the EU jurisdictions will impose on such third country AIFMs in order to allow them to register under AIFMD as third country AIFMs. The modalities of the registration, if they lead to a full compliance by the third country AIFMs with the rules of AIFMD, may lead third country AIFMs to be reluctant to apply for their registration under AIFMD. Finally, in its July 18, 2016 advice, ESMA has also clarified that once the AIFMD passport is extended, non-EU AIFMs will be able to continue marketing their funds into the EU countries under the NPPR (for so long as those NPPRs continue), notwithstanding that they could be authorized under AIFMD so as to take advantage of the EU passport.

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

Legal Note: The information contained in this UPDATE Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

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