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ESMA’s advice on the application of the AIFMD passport to non-EU AIFMs and AIFs of 18 July 2016 (amended 12 September 2016)

Economic and Monetary Affairs Committee

European Parliament

Steven Maijoor

Chair

European Securities and Markets Authority

Dear Members of the European Parliament,

Ladies and gentlemen,

I am pleased to have been invited by the Chair and Members of ECON to speak to you about ESMA’s work in relation to the passport under the Alternative Investment Fund Managers Directive (AIFMD). In my remarks I will discuss the advice on whether to extend the passport to non-EU countries. I will also provide some details on the next steps. But before going into the details of the advice, allow me to recall briefly the context in which we carried out our work.

Since political agreement was reached on the AIFMD in October 2010, we treated the advice on whether to extend the passport to non-EU countries as a high priority and began the preparatory work as soon as possible.

It is important to recall that we decided to assess non-EU countries individually rather than as a single block. We did so because we felt that was the only way in which to carry out a proper assessment of the various criteria set out in the AIFMD. In particular, we considered it important to make a distinction between the very different situations of non-EU countries in terms of such factors as the demand for the passport, the access to the markets of these non-EU countries for EU funds and managers, and their regulatory framework as compared to the AIFMD.

Having made the decision to look at each non-EU country individually, we then developed a comprehensive assessment methodology that took as a basis the criteria in the AIFMD, namely i) investor protection, ii) market disruption, iii) competition and iv) the monitoring of systemic risk. The Directive itself provides that, where ESMA considers that there are no significant obstacles in relation to these four elements, ESMA should issue positive advice. It is important to mention that ESMA only assessed these jurisdictions from a regulatory and supervisory standpoint since those are clearly our areas of responsibility and expertise. We noted in our advice that other issues, such as fiscal matters or anti-money laundering rules, might be relevant to the decision on whether to extend the passport, but we did not consider ourselves as the appropriate body to look into those aspects.

This led to the publication of the first advice in July 2015. In that advice we assessed six non-EU countries: Guernsey, Hong Kong, Jersey, Switzerland, Singapore and the United States. It must be said that there is no perfect way to select non-EU countries but we made our selection of jurisdictions taking into account a number of factors including the amount of activity already being carried out by entities from these countries under the national private placement regimes (NPPRs), the existing knowledge and experience of EU NCAs with respect to their counterparts in these jurisdictions and the efforts made by stakeholders from these countries to engage with the assessment process.

This first advice was positive with respect to the extension of the passport to Guernsey and Jersey. Switzerland was also assessed positively subject to some legislative changes in relation to the national regulator’s enforcement powers (those changes have since been made). We did not reach a definitive view on the other three jurisdictions due to concerns related to competition, regulatory issues and a lack of sufficient evidence to carry out a proper assessment of the relevant criteria.

We also highlighted in this first advice that the EU institutions may wish to postpone the decision to trigger the relevant legislative procedures until such time as ESMA has delivered positive advice on a larger number of non-EU countries. This would allow account to be taken of other factors, such as the potential impact on the market of the decision to extend the passport.

In December 2015, we received a letter from the European Commission asking us to investigate further two specific topics, namely the effectiveness of enforcement in non-EU jurisdictions and a preliminary assessment of the expected inflow of funds into the EU from the relevant non-EU jurisdictions in case the AIFMD passport would be extended to these jurisdictions. This letter also included a list of 6 additional non-EU jurisdictions to be assessed: Australia, Bermuda, Canada, Cayman Islands, Isle of Man and Japan.

Consequently, ESMA published its second advice on the extension of the AIFMD passport on 18 July this year. In this second advice we assessed 12 non-EU countries in total and took into account the additional requests received from the European Commission.

This second advice was positive with respect to the extension of the passport to **Canada, Guernsey, Hong Kong, Japan, Jersey, Singapore and Switzerland**. However, ESMA noted that both Hong Kong and Singapore operate regimes that facilitate the access of UCITS from only certain EU Member States to retail investors in their territories.

With respect to **Australia**, ESMA noted that there are no significant obstacles regarding market disruption and obstacles to competition impeding the application of the AIFMD passport, provided the Australian Securities and Investment Commission (ASIC) extends to all EU Member States the ‘class order relief’, currently available only to some EU Member States, from some requirements of the Australian regulatory framework.

Regarding the **United States** (US), with respect to the competition and market disruption criteria, ESMA considered there is no significant obstacle for funds marketed by managers to professional investors which do not involve any public offering. However, ESMA considered that in the case of funds marketed by managers to professional investors which do involve a public offering, a potential extension of the AIFMD passport to the US risks an un-level playing field between EU and non-EU AIFMs. The market access conditions which would apply to these US funds in the EU under an AIFMD passport would be different from, and potentially less onerous than, the market access conditions applicable to EU funds in the US and marketed by managers involving a public offering. ESMA suggested, therefore, that the EU institutions consider options to mitigate this risk.

For **Bermuda** and the **Cayman Islands,** ESMA could not give definitive Advice with respect to the criteria on investor protection and effectiveness of enforcement since both countries are in the process of implementing new regulatory regimes and the assessment will need to take into account the final rules in place. For the **Isle of Man** ESMA found that the absence of an AIFMD-like regime made it difficult to assess whether the investor protection criterion is met.

Looking ahead to the next steps, we see three key areas on which further work by ESMA is required in the short term. First, we will continue our assessment of Bermuda and Cayman Islands with a view to reaching a definitive conclusion on whether to extend the passport to those countries. Secondly, we will start to assess a third group of non-EU countries, when we have more clarity on the next steps envisaged by the co-legislators. Thirdly, we will focus on putting in place the extensive framework foreseen by the co-legislators in case the passport is indeed extended to one or more non-EU countries. This last element includes making preparations for the significant role for ESMA in the functioning of the passporting system and the strengthened supervisory cooperation that will be crucial to its success. I feel that we are well placed to carry out this further work as it builds on the significant contribution made by ESMA in recent years towards making the EU financial market open to institutions from non-EU jurisdictions.

We also stand ready to respond to any further queries from the co-legislators on our advice.

I hope that these introductory remarks have been helpful and I look forward to hearing your views on our advice on the AIFMD passport.

Thank you for your attention.