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ESMA's Call for Evidence on Extending the EU AIFMD Passport Regime to Non-EEA Fund Managers and Funds

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Fund managers established outside the European Economic Area (EEA) marketing funds into the EEA under national private placement regimes must comply (subject to available exemptions) with the transparency requirements under the EU Alternative Investment Fund Managers Directive (AIFMD or Directive) relating to the preparation of annual reports, investor disclosure, reporting, the notification of substantial holdings in portfolio companies and anti-asset stripping rules. However, the Directive does not currently apply more broadly to non-EEA fund managers.

That may change as early as the latter half of 2015.

The Directive makes provision for non-EEA managers to be brought fully within the scope of the Directive if they manage alternative investment funds (AIFs) which are established in EEA countries (EEA AIFs) or to enable them to market their managed funds (whether or not established in the EEA) into the EEA on a passported basis (third country manager authorisation provisions). These provisions have not yet been brought into force and are subject to a decision of the European Commission.

The Directive contemplates that the decision will be based on an opinion and advice to be given to the

Commission by the European Securities and Markets Authority (ESMA) by July 22, 2015. If ESMA delivers positive advice and an opinion, the Commission is required, within three months, to legislate to bring the third country manager authorisation provisions into effect. Before doing so, the Commission must take into account the objectives of the Directive, including those relating to investor protection and the monitoring of systemic risk and certain other criteria.

ESMA Call for Evidence

On November 7, 2014, ESMA published a Call for Evidence which marks the first step in this process.

The principal aim of the Call for Evidence is to gather input on key issues concerning the current passport arrangements within the EEA and the possible extension of the passport regime. More specifically, ESMA is required to issue an opinion on the current passport arrangements for EEA fund managers in relation to the management and marketing of EEA AIFs and on the national private placement regimes applicable to non-EEA managers marketing funds, and to EEA fund managers marketing non-EEA AIFs, into EEA countries. Additionally, ESMA is required to issue advice on the application of the passport arrangements under the Directive to the management by non-EEA fund managers of EEA AIFs and/or the marketing by non-EEA fund

managers of EEA AIFs or non-EEA AIFs into EEA countries as well as to the marketing into EEA countries of non-EEA AIFs by EEA fund managers.

ESMA's advice and opinion must be based on specified criteria relating to the functioning of the current passporting arrangements for EU fund managers and the functioning of national private placement regimes for marketing by non-EEA fund managers and the marketing by EEA managers of non-EEA AIFs. In particular, ESMA must consider whether there are significant obstacles regarding investor protection, market disruption, competition and the monitoring of systemic risk, which might impede the broader application of the passport. If ESMA concludes that there are no such significant obstacles, it is required to issue positive advice on the broader application of the passport.

The Call for Evidence invites both EEA and non-EEA fund managers and other stakeholders to provide information to ESMA on certain key topics in order to enable ESMA to determine the orientation of its opinion and advice. These include experiences in relation to the use of national private placement regimes (in terms of benefits, obstacles, costs and other matters) and the possible impact and risks of the third country manager authorisation provisions being brought into effect.

Responses to the Call for Evidence must be received by January 8, 2015.

ESMA has indicated that it expects to deliver its opinion and advice to the Commission by the scheduled date of July 22, 2015.

ESMA has also indicated that its advice will take a country-by-country approach and will not treat all non-EEA countries as a single bloc. ESMA will distinguish between non-EEA countries, so that only the funds or managers of non-EEA countries that satisfy the criteria referred to above will benefit from the extension of the passport.

Implications

If the third country manager authorisation provisions are brought into effect, non-EEA fund managers managing EEA funds would be required to be authorised in accordance with the Directive and would be subject to the operational, organisational and capital requirements currently imposed by the Directive on EEA fund managers (including requirements in relation to the remuneration of staff and the appointment of depositaries by managed funds). Commission regulations would set out the manner in which non-EEA fund managers would need to comply with these requirements, taking into account the fact of their establishment in non-EEA countries.

Non-EEA fund managers managing EEA funds also would be subject to supervision by the regulator in the manager's "home" EEA country (the Directive sets out the basis upon which a non-EEA fund manager's "home" EEA country is to be determined).

Additionally, authorised non-EEA managers would be required to appoint a legal representative established in the manager's "home" EEA country. This legal representative would act as the contact point between the manager and the EEA regulators and investors, and would, together with the manager, perform the compliance function relating to management and marketing activities covered by the Directive. Furthermore, the law of an EEA country would have to be applied to the settlement of disputes between EEA investors and authorised non-EEA managers and their managed AIFs marketed to EEA investors on a passported basis.

Exemptions under the Directive (in particular for fund managers with aggregate funds under management of less than 500 million euros (U.S.\$622 million), or less than 100 million euros (U.S.\$124.4 million) for managers of open-ended or leveraged funds) should apply equally to non-EEA fund managers.

It is currently unclear whether any transitional arrangements would be introduced for non-EEA fund managers managing EEA AIFs as at the date on which the third country manager authorisation provisions are brought into effect. This date would be determined by the Commission.

Non-EEA fund managers that do not manage EEA funds would have the option to become authorised in accordance with the Directive to take advantage of the passport, or to remain unauthorised and market their AIFs using national private placement regimes.

It should be noted, however, that there is considerable doubt as to whether national private placement regimes will continue to be available after 2018. If the third country manager authorisation provisions are brought into effect by the Commission, the continuation of national private placement regimes would, three years later, be subject to a further review by ESMA, which is likely to result in the removal by the Commission of national private placement regimes, if this action is recommended by ESMA. This would leave authorisation under the Directive as the only route for non-EEA fund managers to market their funds to EEA investors.

Suggested Action

The outcome of the Call for Evidence will have significant implications for non-EEA fund managers. The Call for Evidence is an opportunity to provide input to ESMA on this next phase of the development of the AIFMD regime, and non-EEA fund managers should consider whether they wish to contribute to and participate in the process by responding to it.

The text of ESMA's Call for Evidence is available at http://www.esma.europa.eu/system/files/2014-esma-1340_call_for_evidence_aifmd_passport_3rd_country_aifms.pdf.

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