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EU Alternative Investment Fund Managers Directive third country passport

Ten things to know



EU Alternative Investment Fund Managers Directive third country passport: ten things you need to know

01 | Legal framework

The legal framework for non-EEA alternative investment fund managers (AIFMs) marketing or managing alternative investment funds (AIFs) in the European Economic Area (EEA) will likely change significantly between now and 2016, following the issuance (expected by July 22, 2015) of the European Securities and Markets Authority's (ESMA's) opinion and advice on the application of the AIFMD passport to third-country fund structures.

02 | AIFMD

The AIFMD created an EEA-wide passport for EEA AIFMs to market and manage EEA AIFs across all Member States, but denied this benefit to non-EEA AIFMs until at least late 2015. Currently, non-EEA AIFMs can market AIF interests to EEA investors only where permitted by Member State law and subject to compliance with certain AIFMD disclosure and transparency obligations.

03 | EEA-wide passport

If ESMA's advice is positive, the European Commission must adopt a delegated act within three months extending the passport to non-EEA AIFMs and AIFs. Given that all key fund services jurisdictions have signed co-operation agreements with Member State authorities, it is reasonable to expect that ESMA's advice will be positive.

04 | Extension of the AIFMD passport

It is worth noting, however, that not all industry bodies are in favour of an extension of the AIFMD passport. The Association of the Luxembourg Fund Industry, for instance, has suggested that extending the passport to non-EEA AIFMs would be premature.

05 | Non-EEA AIFMs

Extending the AIFMD passport will be, at best, a mixed blessing for non-EEA AIFMs. Non-EEA AIFMs registering under the AIFMD will become subject to substantially all the obligations of the AIFMD, including those relating to capital requirements, depositaries and remuneration. Moreover, some EEA Member States will tighten or completely eliminate the possibility for non-EEA AIFMs to market fund interests to EEA investors under current national private placement regimes.

06 | Three choices

If the passport is extended, non-EEA AIFMs will be faced with three choices: (i) register under the AIFMD, thereby subjecting their global operations to EEA rules; (ii) continue marketing under national private placement regimes, even though these will become even more burdensome and restrictive than they already are; or (iii) establish an EEA presence to market to EEA investors, either through a group entity registered as an EEA AIFM or through contractual arrangements with a third-party AIFM.

07 | Grandfathering and transition rules

For the non-EEA AIFM passport to be an attractive option, the Commission's delegated act will need to address a number of important issues, including grandfathering and transition rules, the procedures for selecting a 'Member State of reference' where the non-EEA AIFM will be regulated, and the proportionate application of onerous EEA rules to global fund structures.

08 | Protectionism and trade-law agendas

ESMA and the Commission are reportedly considering extending the passport to non-EEA AIFMs on a country-by-country basis, opening the door to protectionism and trade-law agendas within the Commission, notably vis-à-vis the United States (US).

09 | US AIFMs

Non-EEA AIFMs, in particular US AIFMs, may therefore face the worst of all worlds, without access to the EEA passport but also more restrictive conditions for private placements.

10 | Next phase in 2018

How ESMA and the Commission handle this initial phase will set the stage for the next phase in late 2018. At that point, depending on ESMA's opinion on the success of the passport, the Commission may adopt a delegated act to completely terminate national private placement regimes, resulting in the AIFMD passport becoming the sole and mandatory regime for non-EEA AIFMs wishing to access the EEA's €15.5 trillion asset management market without establishing their own EEA AIFM or contracting with a third-party manager.

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