

MEMO# 29653

January 20, 2016

ICI Letter to ESMA on ESMA AIFMD Third-Country Passport Advice

[29653]

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TO: INTERNATIONAL COMMITTEE No. 5-16

ICI GLOBAL REGULATED FUNDS COMMITTEE No. 5-16 RE: ICI LETTER TO ESMA ON ESMA
AIFMD THIRD-COUNTRY PASSPORT ADVICE

On December 16, 2015, the Institute submitted the attached letter to the European Securities and Markets Authority (ESMA) regarding ESMA's advice recommending that the European Parliament, the Council and the Commission delay their decision on the application of the passport under the Alternative Investment Fund Managers Directive (AIFMD) to the United States (Advice). [\[1\]](#) In the letter, the Institute reiterated its concerns that ESMA had confused the regulation of mutual funds eligible for sale to the retail public with the regulation of funds sold only to professional investors. [\[2\]](#)

The passport under Article 35 of the AIFMD is a mechanism by which a fund manager may market non-EU alternative investment funds (AIF) to professional investors (as defined in the AIFMD) across the European Union (EU). It does not grant the right to distribute AIF to non-professional investors throughout the EU. [\[3\]](#) To assess the appropriateness of extending the passport under Article 67 of the AIFMD for marketing and managing third-country AIF, ESMA must consider whether there are any significant obstacles regarding investor protection, market disruption, competition and the monitoring of systemic risk that would mitigate against the extension of the passport. [\[4\]](#)

ESMA's advice cited various provisions of the Investment Company Act of 1940 (ICA), including Section 7(d) regarding the public sale of a foreign fund in the United States. [\[5\]](#) ESMA stated that if the passport were extended to the United States, there would be a risk of an unlevel playing field because market access for US funds for professional investors in the EU would be less restrictive than the market access of EU funds for professional investors in the United States. In the letter, the Institute asserted that the US laws applicable to investment funds marketed to the retail public were not relevant for assessing whether there are any obstacles to competition for purposes of extending the AIFMD passport – an EU-wide passport only for AIF marketed to professional investors. Instead, the relevant inquiry should focus on the distribution of funds to professional investors through US private placements.

On January 19, 2016, ESMA published a letter that it received from the European Commission regarding ESMA's Advice. [6] Among other requests, the European Commission requested that ESMA complete by June 30, 2016, the assessment of the United States, Hong Kong and Singapore, as well as Japan, Canada, Isle of Man, Cayman, Bermuda and Australia.

Eva M. Mykolenko
Associate Chief Counsel - Securities Regulation

[Attachment](#)

endnotes

[1] ESMA, Advice to the European Parliament, the Council and the Commission on the application of the AIFMD passport to non-EU AIFMs and AIFs, July 30, 2015 (ESMA's Advice), available at

http://www.esma.europa.eu/system/files/2015-1236_advice_to_ep-council-com_on_aifmd_passport.pdf.

[2] See ICI Statement on ESMA AIFMD Passport Recommendations (July 30, 2015) available at https://www.ici.org/pressroom/news/15_news_esma_aifmd_passport_statement.

[3] Article 43 of the AIFMD provides that Member States may allow an AIFM to market to retail investors in their territory units or shares of AIF and may impose on the AIFM or the AIF stricter requirements than those applicable to AIF marketed to professional investors in their territory. Member States, however, may not impose stricter or additional requirements on EU AIFs established in another Member State and marketed on a cross-border basis than on AIFs marketed domestically.

[4] ESMA acknowledges that under Article 37 a non-EU AIFM must comply with the AIFMD with some limited exceptions. See ESMA's Advice at 9, paragraph 18.

[5] Section 7(d) of the ICA is a prudential standard for publicly distributed funds in the United States that empowers the Securities and Exchange Commission (SEC) to permit a foreign fund to publicly offer its securities in the United States only when the SEC finds that it is both legally and practically feasible to effectively enforce the ICA. For a detailed explanation of the history of, and rationale for, Section 7(d) as a prudential standard, see ICI, "Section 7(d) of the Investment Company Act of 1940 and National Treatment," January 16, 1996, available at http://www.ici.org/pdf/96_7d_national_paper.pdf.

[6] ESMA's announcement is available at <https://www.esma.europa.eu/press-news/esma-news/esma-publishes-letter-european-commission-aifmd-passport> and the letter is available at <https://www.esma.europa.eu/file/14864/download?token=mpTV1UwV>.