

MEMO# 28681

January 21, 2015

Letter Responding to ESMA's Call for Evidence on AIFMD Passport and Third Country AIFMs

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TO: ICI GLOBAL REGULATED FUNDS COMMITTEE No. 2-15
INTERNATIONAL COMMITTEE No. 4-15 RE: LETTER RESPONDING TO ESMA'S CALL FOR EVIDENCE ON AIFMD PASSPORT AND THIRD COUNTRY AIFMS

On January 8, we submitted a letter to the European Securities and Markets Authority (ESMA) responding to ESMA's call for evidence on the Alternative Investment Fund Managers Directive (AIFMD) passport and third country alternative investment fund managers (AIFMs). [\[1\]](#) By July 22, 2015, ESMA is required to submit an opinion to the European Commission on (i) the functioning of the EU passport under the AIFMD and (ii) the functioning of the marketing of non-EU AIFs by EU AIFMs in the EU and the management and/or marketing of AIFs by non-EU AIFMs in the EU. ESMA is also required to issue advice on whether the AIFMD passporting regime should be extended to the management and/or marketing of AIFs by non-EU AIFMs and to the marketing of non-EU AIFs by EU AIFMs.

ESMA issued the call for evidence to gather input on the key issues under its consideration. The call for evidence primarily seeks a response from EU asset managers regarding their specific experience with the AIFMD passport and private placement, as well as their views on the possible extension of the passport. The call for evidence also asks commenters to identify non-EU countries that grant market access to EU AIFMs and UCITS management companies under broadly equivalent conditions (Question 27). Our letter responds only to Question 27 and provides that we believe that the United States grants EU AIFMs and UCITS management companies access to the U.S. market under conditions that are broadly equivalent to those granted by the EU.

We explained in our response that U.S. domiciled asset managers can obtain access to fund investors in the EU under the UCITS Directive (the regulatory framework for funds that are authorized and appropriate for sale to retail investors) and the AIFMD (the regulatory framework for managers of all funds other than UCITS that are marketed in the EU). To access investors under the UCITS Directive, a non-EU management company must establish (or domicile) a UCITS fund in the EU and also locate the management company of the fund in the EU. Non-EU funds cannot be qualified as UCITS. To market an EU or non-EU fund

other than a UCITS to EU investors a non-EU asset manager must rely on the framework of the AIFMD, which is focused on professional investors. Currently, the marketing of non-EU funds must comply with certain provisions of the AIFMD and such funds may be marketed only as permitted under the individual Member State private placement rules. Member States can permit distribution of AIF to retail investors and can impose additional rules on such funds.

Similar to a U.S. manager wishing to access the EU retail market, an EU management company that wishes to access the retail market in the U.S. is practically required to register a fund under the Investment Company Act of 1940. Such a fund must be domiciled in the U.S., and the investment manager must be registered under the Investment Advisers Act of 1940. There is no requirement that the investment manager be domiciled or have a geographic presence in the U.S. To sell shares of a fund domiciled outside the U.S., a manager may sell such shares privately by relying on exemptions from certain U.S. laws, such as exemptions for limited offerings to institutional investors. Exemptions from registration as an investment adviser under the Investment Advisers Act of 1940 may also be available.

We encouraged ESMA to consider the Investment Company Institute's white paper on Market Access for Regulated Fund Managers in the United States and the European Union released in 2013 which discusses these issues in much more detail (available at <http://www.ici.org/pdf/27643.pdf>).

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[Attachment](#)

endnotes

[1] The call for evidence is available here: <http://www.esma.europa.eu/consultation/Call-evidence-AIFMD-passport-and-third-country-AIFMs>.