

December 16, 2015

Via Electronic Delivery

Steven Maijoor
Chair, European Markets and Securities Authority
103, rue de Grenelle,
75007 Paris
France

Re: Extension of the AIFMD Passport and the United States

Dear Mr. Maijoor:

On behalf of the members of the Investment Company Institute,¹ I am writing to convey our concerns with the advice of the European Securities and Markets Authority (ESMA) 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.² The passport under Article 35 of the AIFMD is a mechanism by which a manager may market non-EU alternative investment funds (AIF) to professional investors (as defined in the AIFMD) across the European Union (EU). Importantly, it does *not* grant the right to distribute AIF to non-professional investors throughout the EU.³

¹ The Investment Company Institute (ICI) is a leading, global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's US fund members manage total assets of US\$17.9 trillion and serve more than 90 million US shareholders. Members of ICI Global, the international arm of ICI, manage total assets of US\$1.5 trillion.

² 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.

³ Article 43 of the AIFMD provides that Member States may allow an alternative investment fund manager (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.

To assess the appropriateness of extending the passport under Article 67 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 is approaching this process on a country-by-country basis.

In assessing the United States, however, it seems clear that ESMA confused the regulation of mutual funds eligible for sale to the retail public with the regulation of funds that are able to be sold only to professional investors. Specifically, ESMA's advice cites not only various provisions of the Investment Company Act of 1940 (ICA) regarding custody, advisory contracts and governance, but also the provisions of Section 7(d) regarding the public sale of a foreign fund in the United States.⁵ The ICA and regulations thereunder govern mutual funds that are eligible for sale to the retail public. In weighing possible obstacles to competition, ESMA stated that if the passport were extended to the United States, there is 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 support, ESMA referenced Section 7(d) as well as the Volcker Rule.⁶

We respectfully submit that the US laws applicable to investment funds marketed to the retail public are *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. Neither Section 7(d) nor the ICA more generally are the appropriate US regulatory corollaries for considering how fund managers may distribute funds in the United States to professional investors. Instead, the relevant inquiry should focus on the distribution of funds to professional investors through US private placements. To this end, we urge that ESMA consider our paper entitled, “Market Access for Regulated Fund Managers in

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) 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 The Volcker Rule sets forth restrictions for banks related to certain fund activities. ESMA states the Volcker Rule may have implications for European asset managers with respect to entities that may be “banking entities” or “covered funds.” ESMA does not explain how the Volcker Rule results in an unlevel playing field between EU and US fund managers in terms of market access. *See* ESMA's Advice at 22-23.

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the United States and the European Union,” which includes a general description of the US laws for selling funds privately to professional investors.⁷ Importantly, the paper illustrates that non-US fund managers are readily able to enter the United States and access a nation-wide market to sell funds, including through private placements.

Thank you for your consideration of our views. We would be pleased to discuss this issue further with you or your staff. Please do not hesitate to contact me at +1-202-326-5800 or pstevens@ici.org, or Susan Olson, Chief Counsel, ICI Global, at +1-202-326-5813 or susan.olson@iciglobal.org.

With kind regards, and best wishes this holiday season and in the New Year,

/s/ Paul Schott Stevens

Paul Schott Stevens
President and CEO
Investment Company Institute

cc: Sven Gentner, Acting Head of Unit, Asset Management, DG for Financial Stability, Financial Services and Capital Markets Union, European Commission

Susan L. Baker, Director, Office of International Banking and Securities, U.S. Department of Treasury

David Grim, Director, Division of Investment Management, U.S. Securities and Exchange Commission

Paul Leder, Director, Office of International Affairs, U.S. Securities and Exchange Commission

⁷ The paper is available at <https://www.ici.org/pdf/27643.pdf>.