

EU and Swiss Securities Regulators to Cooperate on Cross-Border Supervision of Alternative Investment Funds

On December 3, 2012, the European Securities and Markets Authority (ESMA) approved cooperation arrangements between the Swiss Financial Market Supervisory Authority (FINMA) and the European Union Securities Regulators for the supervision of alternative investment funds. ESMA negotiated the agreement (Cooperation Agreement) with FINMA on behalf of all 27 EU Supervisory Authorities.

Precondition to Access EU Markets

The existence of cooperation arrangements between the EU and non-EU authorities is a precondition of the [Alternative Investment Fund Managers Directive](#) (AIFMD) for allowing managers from third countries to access EU markets or perform fund management by delegation from EU Alternative Investment Fund Managers (AIFMs).

Articles 37, 40 and 42 of the AIFMD (described below) only allow related activities if specific cooperation arrangements are in place:

<p>Article 37 Non-EU AIFMs intending to manage EU Alternative Investment Funds (AIFs) and/or market AIFs managed by them in the Union</p>	<p>Permitted, provided that appropriate cooperation arrangements are in place between the competent authorities of the Member State of reference of the non-EU AIFM, the competent authorities of the home Member State of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established in order to ensure at least an efficient exchange of information that allows the competent authorities to carry out their duties in accordance with the AIFMD.</p>
<p>Article 40 Conditions for marketing of non-EU AIFs managed by a non-EU AIFM with a passport in the EU</p>	<p>Permitted, provided that appropriate cooperation arrangements are in place between the competent authorities of the Member State of reference of the non-EU AIFM and the supervisory authority of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows the competent authorities to carry out their duties in accordance with the AIFMD.</p>
<p>Article 42 Conditions for marketing in Member States for AIFs managed by a Non-EU AIFM without a passport</p>	<p>Permitted, provided that appropriate cooperation arrangements for the purpose of systematic risk oversight and in line with international standards are in place between the competent authorities of the Member States where the AIFs are marketed, insofar as applicable, the competent authorities of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, insofar as applicable, the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows competent authorities of the relevant Member States to carry out their duties in accordance with the AIFMD.</p>

Addressees and Form

The cooperation arrangements deal with the exchange of information, cross-border on-site visits and mutual assistance in the enforcement of the respective supervisory laws and will apply (1) to Swiss AIFMs that manage or market AIFs in the EU and (2) to EU AIFMs that manage or market AIFs in Switzerland. The Cooperation Agreement also covers the cross-border supervision of depositaries (see Article 21) and AIFMs' delegates (see Article 20).

The Cooperation Agreement will take the form of a Memorandum of Understanding (MoU) between the EU Securities Supervisors and FINMA. The MoU negotiating process can be regarded as time-saving compared to initiating national legislation. The MoU will be applicable beginning July 21, 2013. The content of the MoU follows the International Organization of Securities Commissions (IOSCO) Principles on Cross-Border Supervisory Cooperation of 2010 and complements the terms and conditions of the IOSCO Multilateral MoU Concerning Consultation and Cooperation and the Exchange of Information of 2002.

Key Elements

The key elements of the Cooperation Agreement are:

- EU and Swiss supervisors will be able to supervise AIFs that operate on a cross-border basis in the EU and Switzerland
- The Cooperation between the authorities includes the exchange of information, cross-border on-site visits and assistance in the enforcement of the respective laws (i.e., AIFMD and the Swiss Federal Act on Collective Investment Schemes (*Bundesgesetz über die kollektiven Kapitalanlagen*, KAG) of June 23, 2006, as currently amended through September 1, 2011)
- Subject to certain additional requirements, EU authorities will be able to share relevant information received from FINMA with other EU authorities, ESMA and the European Systemic Risk Board.

ESMA is currently in contact with other non-EU authorities that are members of IOSCO, and is continuing to negotiate cooperation arrangements with the relevant authorities with a view of having these in place before July 2013.

Conclusion

The conclusion of the Cooperation Agreement is a significant milestone for EU securities supervisors. Switzerland is an important non-EU jurisdiction catering to a diverse range of financial institutions and high-net worth individuals. Still, Switzerland is not a major fund hub when it comes to efficient cross-border fund structures, and therefore it remains to be seen whether, in particular, other third-country fund hubs will follow suit to ensure uninterrupted access to the EU market.

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