MATHESON ORMSBY PRENTICE

FEEDBACK IN RESPECT OF CONSULTATION PAPER (ESMA/2011/270) ON ESMA'S DRAFT TECHNICAL ADVICE TO THE EUROPEAN COMMISSION ON POSSIBLE IMPLEMENTING MEASURES OF THE ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE IN RELATION TO SUPERVISION AND THIRD COUNTRIES

Introduction

Matheson Ormsby Prentice is Ireland's largest law firm. We have a large banking and financial services division which serves both domestic and international financial institutions, and our asset management practice is a dedicated group providing legal and regulatory advice to the international mutual funds industry based in Ireland including fund promoters, depositories, administrators, prime brokers and other service providers.

Ireland is the leading centre for alternative investment funds (AIFs), servicing over 40 per cent of all hedge fund assets globally[1]. Therefore, all developments relating to the regulation of the alternative investment industry are of particular importance to Ireland and we welcome the opportunity to respond to this consultation on possible implementing measures on the Alternative Investment Fund Managers Directive (AIFMD).

As a general comment, the global alternative investment fund industry faces increasing investor expectations regarding regulation, transparency and safe custody of assets. In this environment, the importance and value of encouraging and facilitating investment in AIFs which are subject to prudent regulation over those which are unregulated or lightly regulated should not be underestimated. If implemented appropriately, the AIFMD could represent a positive development in this regard by establishing a common regulatory framework for AIFMs and for AIFs managed or marketed in the EU. Permitting continued access to the market by third country AIFs remains critical to ensure that investors continue to have a suitable choice and range of vehicles through which to access the markets and strategies of their choice. Nonetheless, we believe that AIFMD must also recognise and protect the crucial role played by EU AIFs in offering a regulated product to investors in the EU and elsewhere. We believe that it remains important that EU legislation such as the AIFMD continues to foster the development of prudently regulated EU AIFs. In particular, we believe that in considering the implementing provisions in respect of marketing, both with and without the benefit of the AIFMD passport, it is vitally important that great care is taken to avoid inadvertently creating an unlevel playing field between EU AIFs and non-EU AIFs which operates to the advantage of non-EU AIFs.

We set out our general comments and responses to specific questions below.

Any capitalised terms used in this submission and not defined herein shall have the meaning given in the Consultation.

III. Delegation (Articles 20(1)(c), 20(1)(d) and 20(4))

Article 20(1)(c)

As you will be aware, an authorised investment fund will often seek to avail of the specialised knowledge of managers, including managers located in third countries. This is done in order to ensure that investors in the fund will have access to the best possible service providers,

1. Source: HFMWeek Survey, December 2010

including where appropriate, managers with specialised knowledge in local markets. In the Irish case, this may involve an EU based AIFM or an Irish self-managed AIF delegating portfolio management and risk management functions to an entity established in another EU member state or to a third country entity. It is important that such delegation structures will continue to be facilitated upon implementation of AIFMD and that experienced and properly regulated investment managers in established jurisdictions including the US, Hong Kong, Switzerland and elsewhere do not face undue barriers in respect of their appointment to provide their services to AIFs. In this regard, we believe that a role for ESMA in the agreement and implementation of written arrangements with third country supervisory authorities will be very useful in ensuring certainty and standardised terms of agreement between EU and third party supervisory authorities. However, given the need to ensure continuity of existing arrangements, we believe that it is also important that individual member states retain the ability to agree bilateral agreements with third countries in accordance with the requirements of AIFMD. In this regard, we note that Article 20 of the AIFMD contemplates the cooperation agreements at individual member state level and welcome the provisions in the consultation which provide that written arrangement may be agreed at individual member state level.

We welcome the clarification in the explanatory text at paragraph 12 stating that where the conditions set out in the first part of Article 20(1)(c) cannot be met, delegation may still take place subject to the prior approval by the competent authorities of the home member state of the AIFM. We would submit that this text should be included in Box 1.

Article 20(1)(d)

The proposal set out in Box 1 suggests that written cooperation arrangements should exist between competent authorities of the home member state of the AIFM or ESMA and the supervisory authorities of the undertaking to which delegation is conferred. While this potentially goes beyond the Level 1 text in Article 20(1)(d) (which contemplates cooperation without reference to ESMA), we believe this is consistent with Article 45(11) and would support the additional possibility of ESMA centrally negotiating an MMoU, provided that it was clear competent authorities retained the right set out in the Level 1 text to enter into bilateral co-operation arrangements with third countries which may or may not have signed up to the MMoU. As well as permitting competent authorities to build on the extensive range of cooperation arrangements that they already have in place, it would also provide an alternative to the potentially complex central, collective, multilateral negotiation process ESMA would be required to undertake and would allow for continuity, where appropriate, in respect of existing delegation arrangements.

In addition, many competent authorities already have in place extensive bilateral co-operation arrangements with third countries. A procedure whereby these arrangements may be deemed to comply with Article 20(1)(d) (and any corresponding Level 2 provisions) for a reasonable period following the implementation of AIFMD should be included, so that the competent authorities concerned have sufficient time to consider, and revise if necessary, the existing arrangements. Without this period, competent authorities may have insufficient time to render the existing arrangements compliant with Article 20(1)(d) and existing, mature, developed delegation arrangements may, overnight, become unauthorised to the detriment of AIFs and ultimately investors. In this regard we note that Article 61 of AIFMD provides that AIFMs providing activities subject to AIFMD before 1 July 2013 have until 22 July 2014 to take all measures necessary to comply with national law stemming from AIFMD and to submit their application for authorisation under AIFMD and believe that it would be appropriate to clarify that this period also applies in relation to the update of existing delegation arrangements in order to comply with AIFMD requirements.

Q1: Do you agree with the above proposal? If not, please give reasons.

We agree with the proposal to the extent that it refers to cooperation arrangements being entered into by the home member state of the AIFM or ESMA, but submit that it should be clarified that competent authorities retain the ability to enter into bilateral cooperation arrangements with the supervisory authorities in third countries, even where ESMA has

centrally negotiated an MMoU. In addition, we submit that the explanatory text at paragraph 12 should be included in Box 1.

Q2: In particular, do you support the suggestion to use as a basis for the co-operation arrangements to be signed at EU level the IOSCO Multilateral Memorandum of Understanding of May 2002 and the IOSCO Technical Committee Principles for Supervisory Co-operation?

We agree with this proposal, provided competent authorities retain the ability to negotiate bilateral arrangements.

IV. Depositaries (Article 21(6))

Q3: Do you agree with the above proposal? If not, please give reasons

Where a depositary is appointed in a third country, we would support the application of strict standards of supervision, given the core importance of the depositary function for the protection of investors under AIFMD. Such standards of supervision should be equivalent to those application to an EU depositary. However, given that divergence of approaches which may be taken by supervisory authorities and the fact that it is unlikely that different jurisdictions will have exactly matching requirements, we believe it would be useful to provide some general principles in the advices to the Commission, outlining how this standard may be applied in assessing different regimes in order to determine whether they show an equivalent level of protection for investors.

Q4: Do you have an alternative proposal on the equivalence criteria to be used instead of those suggested in point b above?

See response to question 3.

V. Supervision

V.I Co-operation between EU and third country competent authorities for the purposes of Article 34 (1), 36 (1) and 42 (1) of AIFMD

Q5: Do you agree with the above proposal? If not, please give reasons.

We agree that where EU or non-EU AIFMs are managing or marketing AIF under private placement rules, appropriate safeguards regarding supervision ought to be put in place, as set out in the proposals. Care should be taken to ensure a global industry is maintained, and that there are not unreasonable barriers to access to the EU market. However as mentioned above, and recognised by ESMA in its explanatory text, we believe that it is equally important that AIFMD recognises the importance of EU AIFs and does not inadvertently create an unlevel playing field between EU AIFs and non-EU AIFs by permitting the latter better access to EU investors on the basis of regulatory standards which are less than equivalent to those applicable to EU AIFs.

Under current standards in Ireland for the private placement of AIF established in jurisdictions other than Ireland, such AIFs must be authorised by a supervisory authority set up in order to ensure the protection of unitholders and which, in the opinion of the Central Bank of Ireland, provides a similar level of investor protection to that provided under Irish laws, regulations and conditions governing collective investment schemes. Alternatively, the management and trustee/custodian arrangements, constitution and investment objectives of any scheme which it is proposed to market in Ireland provide a similar level of investor protection to that provided by schemes authorised under the Irish laws, regulations and conditions governing collective investment schemes.

This standard may provide, in conjunction with the proposed co-operation arrangement, an appropriate guide for the marketing of non-EU AIF by non-EU AIFM.

Q6: In particular, do you support the suggestion to use as a basis for the co-operation arrangement to be signed at EU level the IOSCO Multilateral Memorandum of Understanding of May 2002 and the IOSCO Technical Committee Principles for Supervisory Co-operation?

We support this suggestion, subject to the additional comments above.

V.II Co-operation arrangements between EU and non-EU competent authorities a required by Articles 35(2), 37(7)(d) and 39(2)(a) of AIFMD

Q7: Do you agree with the above proposal? If not, please give reasons.

Where EU AIFM or non-EU AIFM are availing of the passport to manage and market non-EU AIF in the EU, strict standards of equivalence need to be in place in order to maintain a level playing field and to ensure that the same standards are complied with by all entities availing of the passport. We agree that the relevant provisions set out in Box 3 should apply.

V.III Co-operation and Exchange of Information between EU competent authorities

Q8: Do you agree with the above proposal? If not, please give reasons.

We agree with this proposal. We suggest that the UCITS IV framework (Directive 584/2010) for cooperation and exchange of information may provide an appropriate basis for some of this advice.

V.IV Member State of reference: authorisation of non-EU AIFMs – Opt-in (Article 37(4))

Q9: Do you have any suggestions on possible further criteria to identify the Member State of reference?

In determining the member state of reference, Box 5 suggests that the member state of reference should be identified taking into account the member state in which the AIFM intends to develop most effective marketing for its AIFs pursuant to Article 37(4)(h). The "development of effective marketing" test is used throughout Article 34(4) and Box 5 should be expanded to apply to each such use of the test.

Paragraph 2 of the explanatory text seeks to provide clarification by providing that the member state where the AIFM develops most effective marketing for its AIFs should mean the member state where the AIFM intends to target investors by promoting and offering, including through third party distributors, most of the AIFs.

It is important to establish clear criteria to establish the member state of reference in cases where there are several possible member states of reference. The criteria should lead to a single, objectively justifiable conclusion. The question of which Member State is the Member State where the AIFM intends to target investors has the potential to yield several competing answers and does not lend itself to providing one objectively certain response. This is so because (i) AIFMs may target investors in several Member States; (ii) it is difficult to assess objectively the extent to which investors in any one Member State have been targeted; (iii) AIFMs may legitimately target investors in two or more Member States equally; and (iv) an AIFM may legitimately change, to any extent and at any time or over a period of time, the investors it targets. The tests set out in Article 37(11) in relation to changes in marketing strategy and the 'arbitration' system to resolve competing claims to qualify as the member state of reference in such circumstances highlight the unwieldy results of applying this test solely by reference to the jurisdiction of targeted investors.

Article 37(4) and paragraph 1 of Box 5 refer to the Member State in which the AIFM intends to develop its marketing. We submit that the development of marketing refers to the development of a marketing strategy, including the approval, review and oversight of marketing materials. The development of marketing does not refer to the location of the targeted investors.

Q10: Do you think that any implementing measures are necessary in the context of Member State of reference given the relatively comprehensive framework in the AIFMD itself?

Subject to our comments above in relation to question 9, no further implementing measures are required.

Q11: Do you agree with the proposed time period for competent authorities identified as potential authorities of reference to contact each other and ESMA?

We believe that the 48 hour period is appropriate. There would appear to be an inconsistency between the AIFMD and Box 5, as AIFMD requires that the competent authorities shall jointly decide the member state of reference for the non-EU AIFM within one month of receipt of the request (Article 37(4)). Box 5 proposes that within one week of their initial consultation, the competent authorities should exchange views and jointly take a decision on the identification of the member state of reference.

MATHESON ORMSBY PRENTICE

SEPTEMBER 2011

James Scanlon
E: james.scanlon@mop.ie
T: +353 1 232 2218

Michael Jackson
E: michael.jackson@mop.ie
T: +353 1 232 2219

Tara Doyle
E: tara.doyle@mop.ie
T: +353 1 232 2221

Dualta Counihan
E: dualta.counihan@mop.ie
T: +353 1 232 2451

Barry Lynch
E: barry.lynch@mop.ie
T: +353 1 232 2281

Joe Beashel
E: joe.beashel@mop.ie
T: +353 1 232 2101

Shay Lydon
E: shay.lydon@mop.ie
T: +353 1 232 2735

Anne-MarieBohan
E: anne-marie.bohan@mop.ie
T: +353 1 232 2212

Elizabeth Grace
E: elizabeth.grace@mop.ie
T: +353 1 232 2104

Aiden Kelly (New York)
E: aiden.kelly@mop.ie
T: +1 212 792 4153

Matheson Ormsby Prentice
70, Sir John Rogerson's Quay, Dublin 2
T: +353 1 232 2000
F: +353 1 232 3333
www.mop.ie