



JERSEY FINANCE

VOICE OF THE INTERNATIONAL FINANCE CENTRE

13 September 2011

European Securities and Markets Authority ("ESMA")
103 Rue de Grenelle 75007, PARIS

SUBMITTED ONLINE ON 13 SEPTEMBER 2011

Dear Sir/Madam,

Response to Consultation Paper (the "Consultation Paper") on ESMA's draft technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive (the "Directive")

Jersey Finance welcomes the opportunity to provide comments on the Consultation Paper.

A. Jersey Finance

Jersey Finance ("JFL") is the promotional body that represents the finance industry in Jersey.

Our key objective is to promote and develop the benefits of Jersey as an international finance centre. The funds sector, alongside banking and fiduciary services, represents one of the three key pillars which underpin Jersey's success as an International Finance Centre. Funds under administration in Jersey are valued at £197 billion.

Jersey's funds industry specialises in funds for institutional, specialist and expert investors. In particular, alternative investments have become increasingly important as a way of supporting inward investment and Jersey has attracted a significant number of venture capital, private equity, mezzanine, real estate and hedge funds.

Jersey is recognised by institutional investors as having a strong and appropriate regulatory environment with significant depth and breadth of professional expertise developed over more than 30 years.

While the Island of Jersey is in legal terms a third country for the purposes of the EU single market, in practice its finance industry has a long history of trading financial services in the EU single market, notably with the City of London. Meanwhile, the data consistently shows a net inflow of globally sourced funds into the EU via the Channel Islands, which, as the UK's independent Foot Report noted, provided vital net liquidity during the financial crisis of 2008. JFL therefore appreciates this opportunity to help develop EU rules for fund management in a way that ensures the single market is also an open market.



B. Structure of this response

Attention has been focussed on the following sections of the Consultation Paper:

- (a) 'Possible Implementing Measures on Delegation' (IV.IX);
- (b) 'Depositaries' (V);
- (c) 'Transparency Requirements' (VIII)

Set out at section C below are specific responses to the Box provisions as well as some of the numbered questions.

C. Specific Comments

Possible Implementing Measures on Delegation (IV.IX)

Box 63 (Delegation)	We generally support the comments made here. Whilst we appreciate that it is difficult to specify each and every activity/arrangement which is unlikely to constitute delegation, if it is possible, please specify whether or not each of the activities listed in paragraph 2 of Annex I of the Directive is to be regarded as "critical or important" for this possible. It might be assumed that they do not since they are not included in the activities that define "Managing AIF" under Article 4 of the Directive. We would also like clarification as to whether the intent is for all software outside the core operating platform to be excluded, and if so, that this be specified. Recommended change: 3(b) "... the purchase of standardised services, including <u>all non-business critical software / software outside the core operating platform</u>, market information services and the provision of price feeds."
Box 64 (General Principles)	Please confirm that the requirement under 1 (e) "...necessary expertise and resources ..." does not include non-core resource such as human resources/personnel. It would appear that the 'general principles' provisions are wider than the provisions of Article 20(1) of the Directive, for instance what does "admittance and access" in paragraph 16 mean? It would assist to have an understanding of the standard of reviewing and monitoring which is being proposed. The view taken typically now is that "admittance and access" would oblige the delegate to allow the AIFM access to its premises and, possibly, systems. Any such access needs to respect the ability of the delegate to keep those aspects of its business which are not to do with the AIFM private and confidential. We assume that it is not intended that the AIFM has the obligation to monitor any aspect of delegate operations other than those directly relative to it.



Box 65 (Objective Reasons)	Option 1 is preferred. The Jersey model (like the models in Dublin and Luxembourg) frequently uses an SPV manager domiciled in Jersey which acts in relation to a single AIF, with a substantive adviser which acts in relation to multiple AIFs, for efficiency of conduct.
Box 67 (Types of institution that should be considered to be authorized or registered for asset management and subject to supervision)	Box 67 is too narrowly drafted - third countries do not fit into any of the requirements. Expansion of these provisions is requested to incorporate the relevant third country provisions from the Consultation Paper on Third Countries, or reference should be made to those here. In the same way as 3rd country custodians can satisfy requirements, so, too, should 3rd country delegates be able to satisfy them if they are subject to supervision. For delegates, though, where there is an AIFM which retains responsibility for compliance with AIFMD obligations, it is not appropriate to require the delegate to be supervised to a standard which is equivalent to the Directive or where there is mutual recognition under the 3rd country regime. This is an unnecessarily high standard and, in any event, may not be in place in time and might therefore seriously adversely affect existing and perfectly satisfactory structures.
Box 68 (Prevention of effective supervision of the AIFM through delegation)	It would appear that these requirements go beyond the scope of regulation required by the Directive; in particular the focus on the direct supervision by the competent authorities of the manager's delegates, including rights of access to the business premises of those delegates. There needs, as well, to be respect for domestic law duties of confidentiality. Recommended change: 1(a) - "... the AIFM, its auditors and the relevant competent authorities must have effective access to data <u>and information</u> related to the delegated functions, as well as to the business premises of the delegate; and the competent authorities must be able ensure that its co-operation <u>agreement with the local regulator enables it to request the local regulator to exercise those its rights of access</u>"
Boxes 69-72	We agree with the proposals.
Box 73 (Letter box entity)	We generally support the comments here, but it would be helpful to have clarification on the nature of the "resources" referred to - for instance we would not agree that this should be related to the number of employees or the existence of property resources. Instead we would prefer to focus on the quality of supervision. Additionally, we believe that the requirements in Box 48 could be incorporated as guidance for determining whether or not effective supervision is occurring. It would be helpful to receive confirmation of whether the "senior management functions" described in Box 73 are intended to be the same as those contemplated by Box 48.



Depositories (V)

Box 76 (Proper monitoring of all AIF's cash flows)	Option 2 is preferred.
Box 91 (Definition of "external event...")	We do not agree that acts and omissions of any sub-custodians should automatically be deemed not to be "external events"; in practice, a depository will need to delegate to unaffiliated sub-custodians over whom the depository would have little or no control. In that instance, for example, it is difficult to envisage how events relating to the insolvency of an unaffiliated sub-custodian should be considered as an "internal" event of the depository. It is suggested that an 'external' event should be anything beyond the reasonable control of the depository or any of its affiliates or which would not reasonably be expected to be identified as a part of either the rigorous initial or subsequent due diligence which depositaries are going to be expected to carry out on an on-going basis on their networks of sub-custodians.

Transparency Requirements (VIII)

Box 104 (Primary Financial Statements required under Article 22)	We note that this provision perpetuates an issue which was alluded to by various industry groups when commenting on the first CESR call for evidence, which is that the ESMA CP does not recognise that in many fund structures there will be a governing body of the fund (e.g. a board, or collective of partners or a general partner) which will have the fiduciary obligation to investors (and, indeed frequently, a legal or contractual obligation) to prepare annual accounts for the fund of which they comprise the governing body. The proposals should recognise this and deem the AIFM's duties to have been complied with to the extent the AIFM procures preparation of audited accounts and it compiles a document which sets forth the audited accounts so prepared. The AIFM, though, should not have the power to "restate" these accounts, once they have been audited.
Box 106 (Content and format of remuneration disclosure)	It would assist to have clarity that the disclosure obligation imposed on 3 rd country managers under Article 22 does not operate so as to impose on them the obligation to comply with the substantive provisions of the Directive with regard to compensation and remuneration.
Box 107 (Periodic disclosure to investors)	Option 2 is preferred. However, we do not feel that disclosing risk limits, or situations where those limits are or may be exceeded should be an obligation of managers. Risk limits are an internal management tool, and can be exceeded, for example, simply as a product of market movement. It is how an AIFM responds that will be important for the benefit of investors. We would, therefore, suggest the deletion of section (c).



Box 108 (Regular disclosure to investors)

In respect of Note 13 on page 193, specifically footnote 28, please specify in what circumstances there would be such an “expectation that the AIF will contribute to a third party even though there is no legally enforceable obligation”. This provision appears ambiguous, open to interpretation and possible very wide in its application.

Question 69 – we are of the view that quarterly reporting would pose severe administrative burdens on both the manager and the competent authority, and the costs would be disproportionate to the perceived benefits. For example, while it is market practice within the private equity arena for portfolio companies to submit reports to the general partner within 45 days following the quarter end, and thereafter the general partner discloses the reports to the investors. We note that this information is not audited and managers would be hesitant to supply it without further assurance to regulators. As a general point, we also take the view that the frequency of reporting should be much less, with annual reporting for most AIF which are not systemically significant, unless there is a very material change to report. For systemically significant funds, a quarterly reporting would appear to be satisfactory. We also note that in this regard, the Directive is inconsistent with the reporting requirement in the Transparency Directive (as to disclosure being required up to 60 days after quarter end for interim information).

Should you have any questions at all regarding the above, or would like to discuss these matters further, please don't hesitate to contact me using the contact details at Appendix 1 below.

Yours faithfully,

P.P. Heather Bestwick
Technical Director



Appendix 1: contact details

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