Jersey Financial
Services Commission

European Securities and Markets Authority (ESMA)
103 Rue de Grenelle
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France

Your Ref.:

Our Ref.: DJB/ka

23 September 2011

Dear Sir/Madam

Response to ESMA's Consultation Paper on Third Countries – issued 23 August 2011

The Jersey Financial Services Commission is grateful for the opportunity to comment on ESMA's draft advice on proposals in respect of third countries. In the main we have no particular issues with the proposals insofar as they concern us other than those specifically identified below. Where we do have comments our intention is to be helpful and to put forward constructive proposals.

From the background and introduction to the consultation paper we note the implementing measures concerning third country passports are considered to be less urgent than some of the other measures given the longer deadline for implementation. Nonetheless we remain anxious to have an opportunity to consider any proposals in good time before the operational date in order to make whatever local law changes may be required in order to be in compliance, and to allow industry time to make appropriate plans for adoption. We presume the implementing measures will be put out to open consultation and should be grateful for an indication when this is likely to happen.

By way of background hedge funds and hedge fund managers have been regulated in Jersey for many years and will continue to be so.

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

Generally

We strongly support the use of MMoUs based predominantly on international standards. Jersey was a founding signatory to the IOSCO MMoU in 2002 and in that time has complied with a significant number of requests in accordance with its articles. The Commission has responded to 31 requests since 2008.

The IOSCO MMoU has demonstrated its effectiveness in cross-border issues affecting securities, and is recognized and adopted by a significant number of jurisdictions both within and outside the EU. In short, it is understandable, comprehensive and durable.

Question 1 – Do you agree with the above proposal?

For the above reasons, we believe the most expedient course is for the written arrangement of the type described in paragraphs 1, 2 and 3 of box 1 to be based substantively on the IOSCO MMoU. We believe the IOSCO MMoU should itself be adopted as the appropriate co-operation arrangement.

With reference to paragraph 5 of box 1 and paragraph 10 of the explanatory text, it is said the eligibility criteria will be compared to corresponding or equivalent requirements in the EU. We strongly advocate using international standards as the appropriate benchmarks, namely the IOSCO Principles for investments firms and the Basel Committee Core Principles for credit institutions. Both sets of international standards are well known and understood by third countries, have comprehensive assessment methodologies, and there are existing reviews available that have been conducted by expert bodies such as the IMF and IOSCO.

Paragraph 9 of the explanatory text states a third country authority should be deemed to be independent if it fulfils the criteria set out in the IOSCO Principles and Methodology and the Basel Core Principles. It is not clear what "fulfils" means in this context and some guidance would be helpful. For example, the IOSCO Methodology has a number of categories of compliance such as 'fully compliant' and 'broadly compliant'; would either category be sufficient here? Moreover, how will compliance be measured? For instance would it by self-assessment, ESMA review, IMF reports and so on?

If ESMA is proposing to conduct the review jurisdiction by jurisdiction it may face significant resourcing and cost implications. These factors would point towards measuring compliance by means of an "assisted self-assessment" of the type prescribed by IOSCO.

With reference to paragraph 11 of the explanatory text, we would not be opposed to conducting our own supervisory visit on an entity established in this jurisdiction at the request of a Member State and sharing the results of our visit with that Member State.

But we may have an issue in respect of allowing a competent authority of an EU Member State to conduct its own regulatory inspection in the absence of an agreement to allow access by the relevant undertaking (i.e. the fund manager) in this jurisdiction. We note an arrangement of that nature appears to go beyond the IOSCO MMoU which is more concerned with the provision or exchange of information. The IOSCO Technical Committee's Cross-Border Principles for Supervisory Co-operation only speaks of 'collaboration' between supervising authorities when arranging cross-border on-site visits. Nevertheless, the Jersey Financial Services Commission would always be willing to assist a Member State in the interests of comity, however we may wish to see a degree of reciprocity from the Member State concerned on our ability to conduct on-site visits on the delegating entity located within the Member State.

Question 2 - 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 [Cross-Border] Principles for Supervisory Co-operation?

We strongly support the suggestion for the reasons stated above. We believe the IOSCO MMoU should of itself count as the appropriate co-operation agreement.

We recommend the MMoU is centrally negotiated and also signed by ESMA in order to avoid different arrangements imposed across Member States. This could lead to uncertainty and, potentially, arbitrage between the requirements of individual Member States where delegation is proposed.

It may take some time to negotiate a central MMoU. In that period we believe bilateral arrangements between individual Member States and third countries should be permitted. Such bilateral arrangements would automatically cease on the third country's acceptance of the MMoU.

It follows we believe it is vital in the interests of fairness to ensure there is a level playing field between all third country participants within the scope of the Directive. This is with regard to the contents of the arrangements with individual third countries, and also in respect of the timing for concluding agreements between ESMA and individual third countries.

We would be interested to learn whether there are any proposals for determining the order in which third country arrangements will be considered by ESMA, both with regard to delegation and generally across all the matters in the consultation paper, (assuming it is agreed ESMA is the body appointed to centralise agreements on behalf of Member States). A difference in timing of approval may well unfairly advantage those jurisdictions considered first at the expense of other jurisdictions remaining on the waiting list.

IV. Depositary - Article 21(6)

Question 3 - Do you agree with the above proposal? If not, please give reasons.

We agree with paragraphs (a), (f) and (g) of box 1 and paragraph 2 of the explanatory text. With regard to paragraph (a), we believe independence and resources should be assessed by reference to IOSCO Principles, (see Principles 2 and 3 of Part A). This appears to be acknowledged in explanatory note 5 insofar as independence is concerned, but not for resources. If IOSCO standards are applied, we repeat our comments concerning the appropriate assessment criteria, i.e. fully or broadly implemented.

We do not agree with some other aspects of the proposal for the following reasons, however we feel they are close to providing a workable framework.

First, Article 21(6) of the Directive states, in part, that the third country depositary should be subject to prudential regulation, including minimum capital requirements and supervision, *which have the same effect* as Union law. Paragraph 1 (c) of box 2 requires there to be equivalent capital requirements which appears to go further than the Level 1 wording warrants. The same point applies to paragraph (d) and operating conditions.

In that context we note also the Commission's request to CESR is only in terms to assess whether the third country regulation and supervision is to the same effect as European law.

Secondly, we note Article 21(3) permits depositaries for non-EU AIFs that are credit institutions *or any other entity of the same nature*. Accordingly we do not agree with the proposal to the extent

it implies the third country depositary must be the exact equivalent of an EU credit institution or investment firm.

Overall, we believe it will be very difficult for non-EU institutions to demonstrate they are exactly equivalent in every respect to those regulated in the EU. In our view it would be helpful to clarify the meaning of equivalence to include equivalent effect, and then set out some transparent and objective criteria by which equivalence can be measured. (Jersey has already been found to be equivalent in other areas such as data protection and anti-money laundering regulations).

With regard to explanatory note 6 and the references to comparing eligibility criteria and operating conditions, we repeat our response to question 1 of the preceding section.

Question 4 - Do you have an alternative proposal on the equivalence criteria to be used instead of those suggested in point b above?

As stated above, we propose reference is made to regulation and capitalisation of depositaries *to the same effect* as EU requirements in place of an express equivalence test. In our view such a change would provide greater concordance with the actual wording of Article 21.

V. Supervision - Articles 34(1), 36(1) and 42(1)

Generally

We strongly support the use of IOSCO international standards for the reasons stated above. Article 42(1)(b) states, in the context of systemic risk, that cooperation and oversight between Member States and the jurisdiction where the non-EU AIFM is located should be in line with international standards. In our view IOSCO is the appropriate body to set those standards given its history of dealing with issues such as this, and the breadth of expertise at its disposal on a technical level and on a geographic level.

We note Article 37(7)(g) refers to potential limitations in the third country's investigatory and supervisory powers, however there is no indication how any such limitations are to be assessed.

Question 5 - Do you agree with the above proposal? If not, please give reasons.

We agree with paragraphs 1 (a) (b) and (c) of box 3 (although we are unsure how (c) differs from (a) and (b)). We also agree with paragraphs 2 through to 12 of the explanatory text (but with reservations about paragraph 4).

With reference to paragraph 1(d) of box 1 we repeat our response to Question 1. In short we would not object to our conducting an on-site visit on the entity located here and sharing the findings with the Member State, however we may have an issue if the Member State wished to conduct its visit without the agreement of the entity concerned.

By way of observation, our reading of Articles 34(1), 36(1) and 42(1) is that, taken overall, they are concerned with the establishment of appropriate cooperation arrangements designed to ensure an efficient exchange of information, rather than requests for on-site inspections.

The second sentence of paragraph 4 of the explanatory text states the MMoU should allow the European competent authority to have the same powers set out in Article 46 of the Directive. That Article includes provisions allowing the competent authority to carry out inspections without notice, sequestrate assets and so on. If that part is adopted into the MMoU there could be significant issues concerning sovereignty making acceptance of the MMoU very problematic. It seems to run counter to the rest of the provisions on supervision and co-operation, with which we are in broad agreement, and we suggest that part is omitted.

The reference to Article 46 is also at odds with paragraph 5 where it states that the co-operation agreement should be established taking into account international standards and, in particular, the IOSCO MMoU.

With reference to paragraph 3 of box 1 dealing with exchange of information between the EU competent authority and the third country authority, in our view the agreement should provide for some degree of reciprocity. In other words, the third country authority would be allowed to receive information on an ongoing basis from the EU authority.

Question 6: 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 on May 2002 and the IOSCO Technical Committee Principles for Supervisory Co-operation?

For the reasons given above we strongly believe the basis for co-operation between regulators should be aligned as closely as possible with the IOSCO MMoU and related works. It follows

we believe being a signatory to the IOSCO MMoU should in itself be regarded as an acceptable co-operation arrangement.

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

Generally

We strongly support the use of IOSCO standards for the reasons stated above. We also support the recommendation to publish a central public database detailing the co-operation agreements in place from time to time.

Question 7: Do you agree with the above proposal? If not, please give reasons.

We agree with the above proposal subject to the caveats below.

Paragraph 6 refers to the co-operation arrangements required under Article 37(7) and indicates these arrangements could take the form of a MMoU centrally negotiated by ESMA. We would strongly support that proposal. As stated above, if a centrally agreed MMoU is not established, different arrangements by individual Member States could ensue leading to uncertainty.

We disagree with paragraph 1 of box 4 to the extent it proposes, by reference to box 3, the right to conduct on-site inspections of the third country entity directly. Our reasons are set out in our reply to Question 5.

V.III Co-operation and exchange of information between EU competent authorities

Question 8: Do you agree with the above proposal? If not, please give reasons.

We agree.

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

Question 9: Do you have any suggestions on possible further criteria to identify the Member State of reference?

In our view the existing criteria is satisfactory and may provide a workable solution to the issue subject to clarification on what is meant by the expression "most effective marketing".

Question 10: Do think that any implementing measures are necessary in the context of Member State of reference given the relatively comprehensive framework in the AIFMD itself?

Assuming the meaning of "most effective marketing" is clarified, it does not appear to us to be necessary although we are largely neutral on the point.

Question 11: Do you agree with the proposed time period for competent authorities identified as potential authorities of reference to contact each other and ESMA?

We agree with the proposed time period.

We are again grateful for the opportunity to present our views and for the time ESMA is taking to consider them. We would be pleased to consider any further drafts of the advice or any points arising from our comments above.

Yours faithfully,

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