Guernsey Financial Services Commission

Industry Seminar – 6 December 2013

Investment Supervision and Policy Division Presentation:
The Alternative Investment Fund Managers Directive – Past, Present and Future

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Good morning ladies and gentlemen and welcome to the Investment Supervision and Policy Division's annual industry update.

As a number of yesterday afternoon's speakers commented, developments arising outside the Bailiwick, and especially from the EU have got to be considered in order to ensure that Guernsey's finance sector can maintain access to relevant markets.

During this session I will provide an update on the Alternative Investment Fund Managers Directive before passing over to Louise Bougourd who will cover MIFID and the importance of that directive to the Bailiwick. Emma Bailey will then bring things into a more divisional or domestic focus looking at some of the issues that we have encountered over the past year together with a few comments relating to the investment fund statistics before Samantha Sheen provides some feedback regarding the issues seen by the Commission's Financial Crime Division.

There will also be an opportunity for questions at the end of the session.

The Alternative Investment Fund Managers Directive

<u>Background</u>

You will be pleased to know that I am not going to go into great detail regarding the genesis of the directive and all of the discussions and negotiations that have taken place both locally and with EU authorities and regulators over the past four years.

In summary and hopefully already known to most, if not all, of you here today:-

- AIFMD, which came into force in July this year, seeks to regulate the alternative investment fund sector, including hedge funds, private equity funds and real estate funds.

- Due to the Directive's legal definitions all Guernsey domiciled and regulated funds marketed into the EU fall within its scope, hence its significance to us.

- The general consensus, between the States of Guernsey, Industry and the Commission, was that a dual regime would be the best solution in terms of Guernsey's response to the directive so that firms seeking to do business with European markets would be able to demonstrate appropriate equivalence with those requirements. On the other hand, non EU focused business could continue to operate under existing rules and regulations without having to consider the directive. Thus promoters of Guernsey funds would be given the regulatory foundation upon which they could establish their funds recognising the target market of potential investors.

Current Position

As noted above the Directive came into force in July this year so we are dealing with live active EU legislation. You will be aware that, in addition to EU countries, certain EEA states have also implemented AIFMD but for the purposes of today's presentation I will use the terms EU or Europe.

With effect from July 2013 jurisdictions outside the EU such as Guernsey are still able to market their funds into the Union, albeit under different requirements to EU funds, such that they must meet individual Member State requirements. One of the issues that industry and the Commission face is that because the requirements are driven at individual jurisdiction level rather than being EU wide there are many inconsistencies. In addition, progress by some member States in implementing the Directive has been slow, with several still to complete full implementation.

One of the important considerations in maintaining marketing options from July 2013 was that the Commission had to enter into regulatory co-operation agreements with its European counterparts. The European Securities and Markets Authority (ESMA) played a key role in negotiating the proposed co-operation arrangements but the agreements themselves are signed by the relevant regulators. You will be aware that the Commission was successful in signing 27 out of 31 agreements with counterpart authorities. Whilst this is considered as a satisfactory result, concluding over two years of detailed work and discussions, it is not the end of the story as, following the recent consultation on the AIFMD Rules which I will mention shortly, further efforts have been (and will be) made in respect of the remaining jurisdictions.

The Commission implemented the AIFMD (Marketing) Rules, 2013 earlier this year. These rules act as formal notification to the Commission regarding fund managers undertaking marketing into European countries as well as acting as a reminder that those managers must consider the specific requirements in the jurisdiction(s) into which they market. In addition, the rules allow the Commission to have an understanding of the marketing undertaken in the EU emanating from this jurisdiction.

We have received a couple of dozen notifications since the Marketing Rules went live and it is probably no surprise that the UK is named in the vast majority of them, followed by the Netherlands and various Scandinavian countries. It is still early days and whilst the geographic split is of interest I am not sure that the results so far are wholly representative of wider experience in terms of where Guernsey funds are, or are to be, marketed.

Finally, in relation to marketing I would remind firms and their advisers to seek specific advice and/or input to any issues they may face, either directly from EU regulators or from appropriate professional advisers linked with the specific EU country. Whilst the

Commission can point firms in, hopefully, the right direction as far as their issues are concerned we are not experts in other countries' regulatory requirements and may not provide full or accurate responses to any queries that we receive.

Looking Forward

The Commission undertook consultation during September and October on the second part of the Bailiwick's dual regulatory regime arising from the Directive. This consists of a set of rules that relevant firms can opt into in the lead in to the introduction of a Europe wide marketing passport which I will discuss in a minute. The AIFMD Rules, 2013 were approved by Commissioners on 29 November and come into effect on 2 January 2014.

The Commission has commenced, and will continue to, work with the Guernsey investment fund industry in developing relevant guidance for the Bailiwick of Guernsey. In the meantime, we have updated the FAQs page on AIFMD on the Commission website and will continue to provide updates by this medium. I would encourage firms, and their advisers, to contact the Commission regarding any practical issues that they face in terms of operating under the new European regime. We are committed to working with industry in terms of addressing issues as well as providing any information that we may receive that is considered useful for Guernsey licensees and their promoter clients.

As I said earlier the signing of 27 regulatory co-operation arrangements can be considered a satisfactory outcome, however that is not the end of the story or the work. Commission staff have continued to discuss issues relating to the Directive with counterparts at various authorities and I would expect this to continue over the coming months and years. Part of these discussions surround the remaining cooperation agreements whilst we are also liaising with counterparts over issues of practical concern including possible reciprocal marketing access to assist with Guernsey notifications of marketing into the EU.

AIFMD provides for a Europe wide passport for non-European Managers. This passport could potentially be applicable from 2015 or 2016. The principle of the passport is that, in order to enjoy the same rights, non-European Managers should comply with the same obligations, which means that they will be able to benefit from the Europe wide passport so long as they abide by the rules of the AIFMD.

As part of that process, Article 67 of AIFMD requires ESMA to report to the European Parliament, Council and Commission by 22 July 2015 on passporting. Experience gleaned between now and 2015, both in terms of existing provisions within the Directive as well as the marketing of non-EU funds into the EU will be considered as part of that report. The overall equivalence of regulatory regime is also likely to be considered. It is therefore important that the Commission not only builds on the work undertaken so far in terms of its relationship with the European regulatory authorities but also is able to demonstrate that it is an effective independent regulator in its own right. A recent speech given by the Chairman of ESMA indicated that they would be turning their attention to drafting the report "soon".

One slight fly in the ointment is that at the end of Article 67 it says "If ESMA has not issued its advice within the time limit referred to……, the Commission (that is the European Commission) shall request the advice to be provided within a new time limit".

Many of you are probably aware that throughout the discussions relating to the implementation of the directive and the underlying regulation and guidance issued by ESMA there have been numerous rumours and claims made by various industry practitioners and commentators. The latest of these refer to whether the third country passport will be available as set out and also whether national private placement regimes will be discontinued from 2018 as laid down in the directive. Based on our experience over the past four years we have tended to ignore rumours and gossip until they have been officially confirmed, in this situation we are looking forward to the ESMA report currently due in 2015.

All in all, whilst we have begun and are making progress on the journey that is AIFMD, there is still much to do and we have a long way to go until we reach the end.

Ladies and gentlemen that concludes my comments today, I will now hand over to Louise who will share some thoughts on the next significant EU Directive, MIFID.