

Feedback Statement

# Guidance Notes

Guernsey Depositary Requirements – Article 36 of AIFMD



Guernsey Financial  
Services Commission

## **Glossary of Terms**

<b>AIFMD</b>	Directive 2011/61/EU on Alternative Investment Fund Managers
<b>AIFM</b>	Alternative Investment Fund Manager
<b>AIF</b>	Alternative Investment Fund
<b>EEA</b>	European Economic Area
<b>ESMA</b>	European Securities and Markets Authority
<b>EU</b>	European Union
<b>Guernsey Depository</b>	A person licensed to conduct the restricted activity of custody in respect of Category 1: Collective Investment Schemes as defined under the POI Law, and is carrying out one or all of the depository duties referred to in Articles 21(7), (8) and (9) of AIFMD to a non-EEA AIF, with an EEA AIFM.
<b>Guidance Notes</b>	Guidance Notes – Depository Requirements under Article 36 of AIFMD
<b>Level 2 Regulations</b>	Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision
<b>the “POI Law”</b>	The Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended

## **1. Background**

Article 36 of AIFMD provides that EEA Member States may allow an authorised EEA AIFM to market to professional investors, units or shares of a non-EEA AIF in their territory. This marketing is subject to a number of restrictions including amongst other things, a requirement that the AIFM ensures that one or more entities are appointed to carry out the duties referred to in Article 21(7) (monitoring of cash flows of the AIF), (8) (safe-keeping or asset verification of the AIF assets, if applicable) and (9) (oversight of the AIFM operations) of AIFMD.

The Commission, in conjunction with the GIFA Custodian and Depositary Committee, sought to identify the most efficient means of accommodating Article 36 of AIFMD into the Bailiwick's regulatory framework with a view to minimising the impact on fund products which are not in scope. Accordingly, the Guidance Notes, which provide guidance on how Article 36 of AIFMD interacts with the Bailiwick of Guernsey's existing regulatory regime for collective investment schemes, were released for consultation in July 2014.

## **2. Purpose**

The purpose of this document is to outline the specific issues raised from the consultation regarding the Guidance Notes. The Guidance Notes, which have been approved by the Commissioners, have been placed on the Commission's website with an effective date of 10 November 2014.

## **3. Consultation Responses**

The Commission has considered the consultation responses as follows:

- a. It was suggested that the paragraph describing when AIFMD came into force be deleted because AIFMD is in force in most EEA jurisdictions. The Commission concurs and has removed this paragraph.
- b. There was a suggestion that the term "Guernsey Depositary" should be replaced by "Article 36 Service Providers" so as to avoid any confusion between the fuller AIFMD concept of Depositary and the lighter Article 36 duties which one or more relevant entities can provide. Whilst the above has some merit, following consultation with the GIFA Custodian and

Depository Committee it was considered that the term “Guernsey Depository” would be more widely understood by EU financial services regulators.

- c. Comments were received regarding the application of the Commission’s Flexible Hedge Fund Policy. The Commission has previously confirmed in its AIFMD FAQ page that it will continue to apply the Flexible Hedge Fund Policy; however practitioners should ensure that the structure of the AIF complies with an EEA jurisdiction’s national private placement regime. The Commission requests that this confirmation is provided at the time of an application for waivers in connection with the use of prime brokers. Please note that the segregation of assets by prime brokers as imposed under AIFMD is currently under review by ESMA.
- d. The Commission has clarified that in the case of an authorised or registered closed-ended scheme, there is no obligation to appoint a custodian as long as it is clear in the prospectus of the AIF who is responsible for safe-keeping of the assets. This service may be carried out by the Designated Manager of the relevant scheme. In such circumstances, the Designated Manager of the scheme must be licensed to provide custody services under the Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended.
- e. Article 19(4) of the AIFMD specifies that the AIFM shall ensure that the valuation function is either performed by: "(a) an external valuer, being a legal or natural person independent from the AIF, the AIFM and any other persons with close links to the AIF or the AIFM; or (b) the AIFM itself, provided the valuation task is functionally independent from the portfolio management and remuneration policy and other measures ensure that conflicts of interest are mitigated and that undue influence upon the employees is prevented". For the purposes of identifying whether a legal or natural person is independent from the AIF and has no "close links" the AIFMD specifies that "close links" means:

*"A situation in which two or more natural or legal persons are linked by*

- i. participation, namely ownership, directly or by way of control, of 20% or more of the voting rights or capital of an undertaking;*
- ii. control, namely the relationship between a parent undertaking and a subsidiary, as referred to in Article 1 of the Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts, or a similar relationship between a natural person and an undertaking; for the purposes of this paragraph a subsidiary undertaking of a subsidiary undertaking shall*

*also be considered to be a subsidiary of the parent undertaking of those subsidiaries.*

*A situation in which two or more natural or legal persons are permanently linked to the same person by a control relationship shall also be regarded as constituting a "close link" between such persons."*

It was suggested that the Commission confirm that where the EEA AIFM itself is performing the valuation function for the purposes of Article 19, a derogation might be sought by the Designated Manager from its Guernsey regulatory obligations (certainly in respect of the open-ended schemes) to value the units in the AIF.

In principle, the Commission would be open to such a request; however, the ramifications of this on the Guernsey fund sector require further consideration. Initially, the Commission will liaise further with the Guernsey Investment Fund Association on how to continue to accommodate AIFMD into the Bailiwick's regulatory framework, and, if necessary, consult further with the wider fund industry.

- f. Under Article 92 of the Level 2 Regulations a depositary shall establish clear and comprehensive procedures to deal with situations where potential irregularities are detected in the course of its oversight duties. It was suggested that the Commission may wish to request these. The Commission will not request these as a matter of course, however, it is likely that these escalation procedures will be reviewed as part of the Commission's impact and risk based on-site visit regime.
- g. In paragraph 2.1 "Commission's Expectations" it was suggested that reference to Articles 21(7) and (8) be removed as AIFMD does not require a risk based approach to those responsibilities and duties, in the same way that it affords through Article 92 of the Level 2 Regulations in respect of its oversight duties. Whilst this may be true, it is the Commission's expectation that Guernsey Depositaries apply a risk based approach to all of its responsibilities under 21(7), (8) and (9) of AIFMD and that this be documented in writing.
- h. It was pointed out that sub-paragraph (2) of Article 89 of the Level 2 Regulations has been included, but in the context of an Article 36 appointment, the delegation requirements of Article 21(11) of the AIFMD should not be relevant. The Commission agrees and has removed this reference.

- i. It was suggested that the final paragraph of section 3 “Notifications to the Commission” be deleted because it did not appear that the Commission had moved from its current position of requiring a Designated Custodian for a Guernsey open-ended AIF and accordingly, the requirements about a change of Designated Custodian on the AIF authorisation/ registration did not appear relevant in the context of the Guidance Notes. The Commission has not removed this paragraph as it is considered that this reinforces the Commission’s current expectations.
- j. A number of stylistic changes were suggested and these have been incorporated into the Guidance Notes.

Thank you to those of you who contributed to the consultation process, in particular, the GIFA Custodian and Depositary Committee and Carey Olsen’s response based on comments received from their clients.

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