



Guernsey Financial  
Services Commission

**CONSULTATION PAPER  
SEPTEMBER 2013**

**DIRECTIVE 2011/61/EU ON  
ALTERNATIVE INVESTMENT FUND  
MANAGERS (“AIFMD”)**

**PROPOSALS ON A BAILIWICK OF GUERNSEY OPT  
IN AIFMD EQUIVALENT REGIME FOR GUERNSEY  
LICENSED FUND MANAGERS AND DEPOSITARIES**

The Guernsey Financial Services Commission invites comments on this consultation paper, preferably by e-mail, by no later than 18 October 2013.

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## **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>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>Marketing Rules</b>     | The AIFMD (Marketing) Rules, 2013   |

# 1: Executive Summary

## 1.1 Overview

AIFMD is a European Directive that seeks to regulate the non-UCITs fund sector, including hedge funds, private equity funds and real estate funds. All AIFMs established in the EEA<sup>1</sup>, whether they manage EEA or non-EEA AIFs are subject to AIFMD. AIFMD also governs the managing and marketing in the EEA of AIFs managed by an AIFM established outside the EEA. It is important to note that a non-EEA AIFM marketing a non-EEA AIF outside of the EEA and a non-EEA fund which does not market to EEA investors and which invests in EEA securities do not come within the scope of AIFMD. For the avoidance of doubt, AIFMD covers all funds other than UCITs Funds. Therefore, for the purposes of AIFMD, all Guernsey regulated funds which are marketed into the EEA fall within the definition of an AIF.

AIFMD entered into force on 21 July 2011. EEA Member States have been given two years from this date to transpose the Directive into national law. EEA Member States are required to implement AIFMD in local laws by 22 July 2013. However, it is important to note that some EEA Member States, such as the United Kingdom have inserted transitional provisions into their regulatory regimes, which in the case of the United Kingdom have been extended to include third country (non-EEA Member States) AIFMs.

AIFMD provides for an EEA passport for non-EEA AIFMs. 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-EEA AIFMs should comply with the same obligations, which means that non-EEA AIFMs will be able to benefit from the European passport so long as they abide by the rules of AIFMD. This does not mean that the non-EEA country where an AIFM is established would need to have AIFMD-equivalent rules, but that non-EEA AIFMs willing to operate in the EEA will have to comply with the AIFMD rules of a nominated EEA Member State of Reference as if they were European AIFMs. As a consequence, European competent authorities will have responsibility for supervising compliance with the AIFMD by AIFMs situated in non-EEA countries.

Prior to the introduction of a pan-European passport for non-EEA AIFMs, Guernsey fund managers will be able to market Guernsey funds and EEA AIFs to EEA professional investors under Member States' national private placement regimes. However, from 22 July 2013, subject to any transitional periods introduced by EEA Member States, Guernsey Fund Managers and self-managed Guernsey AIFs must comply with certain transparency and disclosure requirements and regulatory co-operation agreements have been concluded between the Commission and the EEA competent authorities in accordance with Article 42 of AIFMD.

To date, the Commission has signed co-operation agreements with the following 27 EEA securities regulators:

Austria - Finanzmarktaufsicht

Belgium - Financial Services and Markets Authority

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Although a European Union directive, AIFMD is also to be implemented in due course by Iceland, Liechtenstein and Norway (the three EEA members that are not also members of the EU)

Bulgaria - Financial Supervision Commission  
Cyprus - Cyprus Securities and Exchange Commission  
Czech Republic - Czech National Bank  
Denmark - Finanstilsynet  
Estonia - Estonian Financial Supervision Authority  
Finland - Finanssivalvonta  
France - Autorité des marchés financiers  
Germany - Bundesanstalt für Finanzdienstleistungsaufsicht  
Greece - Hellenic Capital Market Commission  
Hungary - Pénzügyi Szervezetek Állami Felügyelete  
Iceland - Fjármálaeftirlitið  
Ireland - Central Bank of Ireland  
Latvia - Finanšu un kapitāla tirgus komisija  
Liechtenstein - Finanzmarktaufsicht  
Lithuania - Bank of Lithuania  
Luxembourg - Commission de Surveillance du Sector Financier  
Malta - Malta Financial Services Authority  
The Netherlands - Autoriteit Financiële Markten  
Norway - Finanstilsynet  
Poland - Polish Financial Supervision Authority  
Portugal - Comissão do Mercado de Valores Mobiliários  
Romania - Financial Supervisory Authority  
Slovak Republic - Národná banka Slovenska  
Sweden - Finansinspektionen  
United Kingdom - Financial Conduct Authority

## **1.2 What is proposed?**

The Commission, in conjunction with a Working Group established in August 2012, consisting of Commission staff and locally based senior investment fund industry representatives, has been seeking to identify the most efficient means of accommodating AIFMD into the Bailiwick's regulatory framework with a view to minimising the impact on fund products, which are not in scope.

The general consensus of the Working Group indicates that a dual regime would be the best solution for the Bailiwick, not least because there are AIFMs currently managing Bailiwick funds which fall outside the scope of AIFMD and in the future it is likely that promoters will continue to use the Bailiwick as a base for such products. In practice this will mean operating two regulatory regimes; an AIFMD focussed regime and a non-AIFMD regime.

The Commission released a consultation paper earlier this year regarding the first part of the Bailiwick's AIFMD focussed regime regarding the Marketing Rules. Following industry consultation the Marketing Rules have been introduced and became effective from 22 July 2013. These rules have been introduced to ensure that Guernsey funds and Guernsey fund managers established in the Bailiwick who wish to market into the EEA by way of an EEA state's national private placement regime meet the requirements of Articles 42 and 43 of AIFMD.

This consultation paper relates to the second part of the Bailiwick's AIFMD focussed regime, being an AIFMD opt in regime for Guernsey fund managers and depositaries whose activities are caught by AIFMD. The Commission proposes The AIFMD Rules, 2013 be introduced to enable Guernsey licensed fund managers and depositaries to opt into an AIFMD equivalent regime. Those Guernsey licensed fund managers and depositaries who wish to be subject to The AIFMD Rules, 2013 will be able to apply to the Commission by using Form GAIFM (fund managers) and Form DAIFM (depositaries). Once the Commission has considered the application it is proposed that The AIFMD Rules, 2013 will be imposed as a condition on the licence of the respective fund manager or depositary.

### **1.3 Rationale for change**

As highlighted in the overview section AIFMD provides for an EEA passport for non-EEA AIFMs. 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-EEA AIFMs should comply with the same obligations, which means that non-EEA AIFMs will be able to benefit from the European passport so long as they abide by the rules of AIFMD. This does not mean that the non-EEA country where an AIFM is established would need to have AIFMD-equivalent rules, but that non-EEA AIFMs willing to operate in the EEA will have to comply with the AIFMD rules of a nominated EEA Member State of Reference as if they were European AIFMs. As a consequence, EEA competent authorities will have responsibility for supervising compliance with the AIFMD by AIFMs situated in non-EEA countries. Whilst the Bailiwick of Guernsey does not need to put in place an AIFMD equivalent regime to allow a Guernsey fund manager to apply to a nominated EEA Member State of Reference, the Commission understands that a Guernsey AIFMD equivalent regime may assist in this application process.

Furthermore, at the time of this consultation paper, the implementation of AIFMD across the whole of the EEA is unclear. Potentially some EEA Member States may require a non-EEA AIFM to be AIFMD equivalent in order to market into their territory under its respective national private placement regime. Accordingly, the Commission considers that The AIFMD Rules, 2013 may assist in this respect. However, ultimately it will be a commercial decision for AIFMs and depositaries based in Guernsey, whether or not to opt into this regime.

### **1.4 Who would be affected?**

Guernsey fund managers and depositaries licensed under the Protection of Investors (Bailiwick of Guernsey) 1987, as amended ("the POI Law") and internally managed authorised and registered collective investment schemes, whose controlled investment business falls under AIFMD and consider that it may be beneficial to their business to opt into a Guernsey AIFMD equivalent regime.

## 2: Consultation

### 2.1 Consultation Questions

- 2.2.1 The Commission would like to ascertain the number of depositaries and fund managers which are likely to opt in to comply with The AIFMD Rules, 2013. If it is likely that you will opt in to comply with The AIFMD Rules, 2013, please advise the Commission.
- 2.2.2 The current draft of The AIFMD Rules, 2013 requires a Guernsey licensed depositary be appointed to a Guernsey authorised or registered collective investment scheme. Should non-Guernsey depositaries be allowed to be appointed to Guernsey authorised or registered collective investment schemes?
- 2.2.3 It is likely that the implementation of AIFMD will vary across the various EEA territories, and in particular, transitional arrangements. The Commission would welcome any feedback which licensees have received regarding the implementation of AIFMD across the various EEA territories.
- 2.2.4 The creation of an AIFMD opt in regime is likely to lead to an increase in costs for both the fund industry and the Commission. Do you think depositaries and fund managers, which opt in to comply with The AIFMD Rules, 2013, should pay a higher regulatory fee than those which do not opt in or do you think the regulatory burden should be shared?
- 2.2.5 At present, there are no plans to amend the Class A, B and Q Rules, The Authorised Closed-Ended Investment Schemes Rules and The Registered Collective Investment Scheme Rules 2008. Do you think it would be beneficial to have a new set of Guernsey fund rules for AIFs which have an EEA AIFM?
- 2.2.6 The Commission has not signed co-operation agreements with Spain, Italy, Croatia and Slovenia. Should the Commission allocate additional resource in endeavouring to sign co-operation agreements with these jurisdictions?
- 2.2.7 To date the Commission has not drafted detailed guidance to accompany The AIFMD Rules, 2013. Any guidance issued by the Commission will largely be dictated by guidance issued by ESMA and other EEA Member States. Are there any key concepts in The AIFMD Rules, 2013 which require specific Commission guidance?
- 2.2.8 For those licensees that opt into The AIFMD Rules, 2013 there will be additional reporting to the Commission. Should the Commission use the template reports in the Level 2 Regulations or create bespoke reports? Any thoughts on the level and timing of reporting to the Commission pursuant to The AIFMD Rules, 2013 would be appreciated.
- 2.2.9 Do you have any general comments on The AIFMD Rules, 2013?



## **2.2 Next steps**

Please respond to this consultation paper by no later than 5.00pm on 18 October 2013. The Commission will take all responses into account before publishing The AIFMD Rules, 2013.