

FEEDBACK ON:

**CONSULTATION PAPER NO.4 2013 ON
ALTERNATIVE INVESTMENT FUND
MANAGERS DIRECTIVE (“AIFMD”)**

AND

**CONSULTATION PAPER NO.5 2013 ON
ALTERNATIVE INVESTMENT FUNDS (JERSEY)
REGULATIONS 2012 - AIF FEES**

AND

**FINANCIAL SERVICES (JERSEY) LAW 1998 -
AIF SERVICES BUSINESS FEES**

ISSUED AUGUST 2013

CONSULTATION FEEDBACK

This feedback paper reports on the responses received by the Jersey Financial Services Commission (the “**Commission**”) on its Consultation Paper No.4 2013 on AIFMD and on its Consultation Paper No.5 2013 on AIF fees and AIF services business fees (the “**AIFMD Feedback Paper**”).

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1 INTRODUCTION

1.1 New area of the Commission's Website¹

- 1.1.1 The Commission has provided a dedicated area of its Website which aims to reflect all Commission documentation relating to the AIFMD regulatory regime, including, *inter alia*, copies of the Commission's Consultation Paper No. 4 2013 on AIFMD ("CP No.4") and Consultation Paper No.5 2013 on AIF fees and AIF services business fees ("CP No.5").

1.2 New and updated codes of practice

- 1.2.1 This AIFMD Feedback Paper should be read in conjunction with the Codes of Practice on Alternative Investment Funds and AIF Services Business (the "AIF Codes"), the updated Codes of Practice for Certified Funds (the "CIF Codes") and the updated Codes of Practice for Fund Services Business (the "FSB Codes"), issued by the Commission on 22 July 2013.
- 1.2.2 Copies of the AIF Codes, the CIF Codes and the FSB Codes are available from the Commission's website.

1.3 Interpretation

- 1.3.1 Unless otherwise defined, terms when used in this AIFMD Feedback Paper shall have the same meanings as are ascribed to them in the AIF Codes and, where appropriate, the CIF Codes and/or the FSB Codes. Any references to laws are to such laws as amended, consolidated, or re-enacted from time to time.

¹ http://www.jerseyfsc.org/funds_security_issues/AIFMD/index.asp

2 OVERVIEW

2.1 Background

- 2.1.1 The AIFMD has a potentially far-reaching effect on Jersey's fund industry on the basis that from the Implementation Date, it applies to:
- 2.1.1.1 AIFMs who are managing an EU AIF;
 - 2.1.1.2 AIFMs who are marketing a Directive AIF in the Union, irrespective of whether such Directive AIF is an AIF, an EU AIF or a Non-EU AIF; and
 - 2.1.1.3 Jersey Depositaries.
- 2.1.2 In response to AIFMD, the Commission published CP No.4 and CP No.5 on 7 June 2013.
- 2.1.3 CP No.4 proposed the implementation of Jersey's regulatory regime in relation to AIFMD comprising:
- stand-alone Regulations;
 - Orders;
 - the cooperation agreements;
 - AIF Codes;
 - CIF Codes and FSB Codes (as amended); and
 - a new Jersey investment fund product known as the Jersey Eligible Investor Fund.
- 2.1.4 CP No.5 proposed the introduction of application fees in relation to certain AIFs and certain AIF services businesses.

2.2 Feedback from AIFMD industry working groups

- 2.2.1 The Commission received AIFMD-related feedback on the proposals contained in CP No.4 from the legal AIFMD industry working group and the depositary AIFMD industry working group (which focused principally on the draft AIF Codes).
- 2.2.2 A list of members of each of the AIFMD industry working groups is provided in Appendix A to this AIFMD Feedback Paper and a summary of the feedback received from the industry working groups, along with the Commission's response to such feedback, can be found in Section 3 of this AIFMD Feedback Paper.

- 2.2.3 The Commission is grateful to the AIFMD industry working groups for their valuable contribution to the implementation of Jersey's AIFMD framework. Members of each of the AIFMD industry working groups have been sent a copy of this AIFMD Feedback Paper.

2.3 Feedback on the proposals contained in CP No.4

- 2.3.1 In addition to the feedback received from the AIFMD industry working groups, the Commission received formal feedback on the proposals contained in CP No.4 from various fund industry professionals (the majority of the feedback was received directly by the Commission from industry but in a few cases, the feedback was received indirectly through Jersey Finance Limited).
- 2.3.2 A full list of respondents to CP No.4 is provided in Appendix B to this AIFMD Feedback Paper and a summary of the feedback received, along with the Commission's response to such feedback, can be found in Section 3 of this AIFMD Feedback Paper.
- 2.3.3 The Commission is grateful to respondents for taking the time to consider and comment on the proposals contained in CP No.4. Each respondent has been sent a copy of this AIFMD Feedback Paper.

2.4 Feedback on the proposals contained in CP No.5

- 2.4.1 The Commission received no formal public feedback in relation to the proposals contained in CP No.5.

2.5 Further AIFMD guidance from the Commission

- 2.5.1 In addition to the feedback from the AIFMD industry working groups and the feedback on the proposals contained in CP No.4 from various fund industry professionals, the Commission has taken the opportunity to highlight some further AIFMD-related issues which have occurred since the publication of CP No. 4 and CP No.5.

3 SUMMARY OF RESPONSES

3.1 Structure of this section

- 3.1.1 A summary of the feedback received from each of the funds industry working groups is set out in paragraphs 3.2 to 3.13 of this AIFMD Feedback Paper together with the Commission's response to such feedback.
- 3.1.2 The questions raised in CP No.4 are set out (in the same order of points raised) in paragraphs 3.14 to 3.19 of this AIFMD Feedback Paper, together with a summary of the feedback received and the Commission's response to such feedback.
- 3.1.3 The question raised in CP No.5 is set out in paragraph 3.20 of this AIFMD Feedback Paper. As previously noted, the Commission received no formal public feedback in relation to the proposals contained in CP No.5.
- 3.1.4 Some further AIFMD-related issues which have occurred to the Commission since the publication of CP No.4 and CP No.5 are set out in Section 4 of this AIFMD Feedback Paper.

3.2 Fully compliant AIFMD regime – how does it measure up with other jurisdictions?

- 3.2.1 One member of the AIFMD legal working group suggested that it would be good to bottom out the position of AIFMs subject to full compliance with the AIF Codes in relation to the potential additional application of any conflicting or "similar but different" sections of the FSB Codes and Commission policies on licensing and outsourcing. The member questioned whether those other FSB requirements may be dis-applied (so as to create a Jersey AIFMD-compliant product which can be easily compared with, say, the Luxembourg or Irish product and which doesn't appear overly burdensome or complicated by comparison).

Commission response

- 3.2.2 The Commission intends, in due course, to undertake an analysis of the conflicting or "similar but different" sections of the FSB Codes and its FS(J)L Licensing Policy and the Policy and Guidance Notes on Outsourcing and Delegation by Jersey Certified Funds and Fund Services Businesses against the equivalent requirements under the AIF Codes for fully compliant AIFMs. It is intended to issue formal guidance on how such differences should be dealt with. However, it should be noted that the AIFMD requirements are in addition to the existing Jersey regulatory requirements and that this analysis will also be more relevant if full compliance with the AIF Codes is required by AIFMs as opposed to Private Placement Rules only.

3.3 Accounting standards

- 3.3.1 Paragraph 3 of Article 22 of the Level 1 AIFM Directive states that *“The accounting information given in the annual report shall be prepared in accordance with the accounting standards of the home Member State of the [Directive] AIF or in accordance with the accounting standards of the third country where the [Directive] AIF is established and with the accounting rules laid down in the AIF rules or instruments of incorporation.”*
- 3.3.2 The legal AIFMD industry working group proposed that by fully transposing Article 22 of Level 1 AIFM Directive in paragraph 16 of the AIF Codes, it would create issues for funds and managers looking to use Jersey structures in the future and would remove the flexibility currently enjoyed by existing AIFs which, under their accounting rules may follow a recognised GAAP subject to certain departures (in accordance with paragraph 3.7.3 of the CIF Codes).
- 3.3.3 The legal AIFMD industry working group further pointed out that the Level 2 AIFMD Regulation has no clear statement on the position where there is a conflict or dissimilarity between the accounting standards of the home Member State/accounting standards in the third country where the Directive AIF is established, and the accounting rules laid down in the AIF rules or instruments constituting the Directive AIF (the **“Constitutional Documents”**).

Commission response

- 3.3.4 Paragraph 16.8 of the AIF Codes has been amended to fully transpose paragraph 3 of Article 22 of the Level 1 AIFM Directive.
- 3.3.5 Paragraph 16.9 of the AIF Codes does however provide guidance and a certain element of flexibility in respect of the requirements pursuant to Article 22 of the Level 1 AIFM Directive.
- 3.3.6 The Commission considers that paragraph 16.9 of the AIF Codes makes it clear that where there is a conflict or dissimilarity between the accounting standards and the accounting rules provided for in the Constitutional Documents, departures may be made but the Commission would expect to be notified of any such departure(s) at the application stage. If any departures are intended to be made which in the Commission’s view, may prejudice the interests of investors, the Commission will follow up as appropriate.
- 3.3.7 The Commission does not wish to be too prescriptive in terms of permitted departures but recognises that it must ensure that the information which will flow to investors is fair and reliable (in accordance with the International Organization of Securities Commissions’ principles).
- 3.3.8 The Commission is simply following the basis of what it provides for in the CIF Codes in requesting that a framework be followed, and if not, the Commission must understand what departures have been made from the relevant framework(s).

3.3.9 The Commission is still allowing AIFs not to use a full accounting framework so long as the Commission understands what departures have been made from those frameworks and believes those frameworks to be fair and reasonable for investors.

3.4 Disclosure of investor side letter terms

3.4.1 One member of the legal AIFMD industry working group raised concern over the “significant headache” paragraph 17.1.10 of the draft AIF Codes (Disclosure to investors (Article 23 of the Level 1 AIFM Directive)) raises for practitioners. The member wished the Commission to consider amending paragraph 17.1.10 of the draft AIF Codes to ensure that the requirement with regard to the treatment (i.e. disclosure) of investor side letter terms is not “overly burdensome” for AIFMs, promoters or investors.

Commission response

3.4.2 Paragraph 17.1.10 of the AIF Codes (which transposes Article 23 paragraph 1.(j) of Level 1 AIFM Directive) has been retained in its entirety due to the Commission wanting to limit material departures from Level 1 AIFM Directive as far as possible. The Commission does however appreciate the member’s concern over the requirements for disclosure of side letter terms and intends to issue formal guidance on the disclosure of investor side letter terms in due course. The key concern from the Commission’s perspective is that all material matters should be fully disclosed to investors.

3.5 Exclusion of non-domiciled funds from the scope of the Regulations

3.5.1 The legal AIFMD industry working group raised the point that there was some uncertainty as to exactly which, if any, non-domiciled Directive AIFs might be required to obtain an AIF certificate from the Implementation Date, specifically with regard to the interpretation of the word “authorised” in Regulation 3(1)(c) of the draft Alternative Investment Funds (Amendment of Regulations) (Jersey) Order 201-, given that Regulation 3(1)(d) of the draft Order also required the AIF to be authorised under existing Jersey fund legislation.

Commission response

3.5.2 Following detailed discussion with the legal AIFMD industry working group it was agreed that the definition of an “AIF” pursuant to the Regulations should be limited to entities which are registered in Jersey (a company, a limited partnership or a limited liability partnership) or a Jersey trust which is a unit trust. Please refer to Regulation 3 of the Regulations as amended by the final form Alternative Investment Funds (Amendment of Regulations) (Jersey) Order 2013.

3.5.3 The amendment to the term “AIF” within the meaning of the Regulations has the effect that paragraphs 4.3.15 and 4.3.16 of CP No.4 are no longer relevant and the fees for non-domiciled funds as proposed in CP No.5 are no longer applicable.

3.5.4 For the avoidance of doubt, AIFMs acting for non-domiciled alternative investment funds remain subject to the requirements of the Jersey AIFMD regime.

3.6 Application of Jersey's AIFMD regime to an AIFM managing an EU AIF but no longer marketing

3.6.1 The legal AIFMD industry working group questioned how and when Jersey's AIFMD regime applies to an AIFM managing an EU AIF, particularly where the EU AIF has finished marketing prior to the Implementation Date. It appeared to the working group that Article 37 (or 41) of the Level 1 AIFM Directive can only have actual application when the "Member State of reference" authorisation mechanism is in place following the end of the Transitional Period. A member of the working group suggested, in the context of an AIFM acting for an EU AIF which is not marketing, that Part I of the AIF Codes (which illustrates how the AIF Codes apply to AIFs, AIFMs and Jersey Depositaries in practice) be amended to cross refer only to compliance with paragraph 27 of the AIF Codes and for paragraph 27 of the AIF Codes to have a more explicit explanation that it applies (requiring full AIF Codes compliance by AIFMs) only from 2015. This would make it clear that during the Transitional Period an AIFM which is not marketing an EU AIF need do no more under the AIF Codes.

Commission response

3.6.2 The Commission noted that Article 37 of Level 1 AIFM Directive can only come into effect following the end of the Transitional Period. On this basis, Part I of the AIF Codes has been amended to refer persons in respect of an AIFM of an EU AIF which is not marketing, to paragraph 27. The Commission has also amended the heading of paragraph 27 to include the words "with a passport" and has limited the relevance of references to "Member State of reference" in paragraph 27 only to circumstances where such concept is applicable.

3.7 Ambiguity over the meaning of "documented process"

3.7.1 One of the members of the legal AIFMD industry working group requested that the Commission add some more detail around the "documented process" to be readily available to the Commission, pursuant to paragraph 15.28.2 of the AIF Codes: (Loss of financial instrument held in custody (Article 100 of Level 2 AIFMD Regulation)).

Commission response

3.7.2 It is anticipated that guidance on this point and other Jersey Depositary related matters will be set out in the depositary AIFMD industry working group Q&A which is due to be published on the Commission's Website in due course.

3.8 Guidance notes required where discretion needs to be exercised pursuant to the AIF Codes

- 3.8.1 With reference to paragraph 5.8.7 of the AIF Codes, which requires an AIFM to “*maintain financial resources adequate to its assessed risk profile*”, and paragraph 6.3.2 of the AIF Codes, which requires AIFMs to “*ensure that the Directive AIFs they manage or the investors in these Directive AIFs are not charged undue costs*”, one of the members of the legal AIFMD industry working group suggested that additional clarification (or guidance notes) should be included where discretion needs to be exercised pursuant to the AIF Codes.

Commission response

- 3.8.2 The Commission intends to issue a formal guidance note in due course which, *inter alia* will deal with these examples of where discretion needs to be exercised pursuant to the AIF Codes. It should be noted however, that such guidance will be relevant if full compliance with the AIF Codes is required by AIFMs as opposed to compliance with the Private Placement Rules only.

3.9 Prospectus content requirements

- 3.9.1 One of the members of the legal AIFMD industry working group suggested that it would be ideal if prospectus content requirements were all found in one place. The member suggested that, it may be helpful to include an FAQ section on the Commission’s Website directing attention to the various sources of such content requirements (including those in paragraph 17.1 of the AIF Codes (Disclosure to investors (Article 23 of the Level 1 AIFM Directive)), the Collective Investment Funds (Certified Funds – Prospectuses) (Jersey) Order 2012, and the various Commission Guides relating to private placement funds, expert funds and listed funds.

Commission response

- 3.9.2 The Commission intends to issue a formal guidance note on the differing prospectus content requirements in due course. It should be noted however, that the AIFMD requirements are in addition to the existing Jersey regulatory requirements.

3.10 Meaning of “preferential treatment”

- 3.10.1 One of the members of the legal AIFMD working group queried whether the term ‘preferential treatment’ referred to under paragraph 6.2 of the AIF Codes (General principles (Article 12 of Level 1 AIFM Directive)) refers to any actual preferential terms, or merely the possibility that such terms may be granted to investors? The member asked whether a guidance note could be issued by the Commission to put the point beyond doubt.

Commission response

3.10.2 The Commission intends to issue a formal guidance note *inter alia* on the meaning of 'preferential treatment' for the purposes of paragraph 6.2 of the AIF Codes. It should be noted, however, that such guidance will be relevant if full compliance with the AIF Codes is required by AIFMs as opposed to compliance with the Private Placement Rules only.

3.11 Correct form of reporting?

3.11.1 One of the members of the legal AIFMD working group queried whether the Commission will produce a template form of report for the purposes of paragraph 18.2 of the AIF Codes (Reporting obligations to the Commission (Article 24 of the Level 1 AIFM Directive)), akin to the pro-forma reporting template set out in Annex IV of Level 2 AIFMD Regulation template referred to under paragraph 18.3.5 of the AIF Codes and asked how frequently should AIFMs provide the reports referred to under paragraph 18?

Commission response

3.11.2 The Commission recommends that the pro-forma reporting template set out in Annex IV of Level 2 AIFMD Regulation template be used for the purposes of reporting to the Commission under paragraph 18.2 of the AIF Codes. In terms of expected frequency of reporting under paragraph 18.2 of the AIF Codes, the Commission would refer the respondent to the requirements set out under paragraphs 18.3 and 18.4 of the AIF Codes.

3.12 Capital requirement for closed-ended depositary

3.12.1 The depositary AIFMD industry working group queried the level of paid up share capital and non-distributable reserves a Jersey Depositary falling within the scope of paragraph 15.4.1 of the AIF Codes (acting as a closed-ended private equity/real estate depositary) is required to have.

Commission response

3.12.2 Following discussions with the depositary AIFMD industry working group, this was determined at £25,000.

3.13 Additional requirements of Member State(s)

3.13.1 The depositary AIFMD industry working group requested that the Commission make reference (under paragraph 15 of the AIF Codes) to the additional requirements of a Member State, which require the appointment of a depositary under the Level 1 AIFM Directive in respect of compliance with the Private Placement Rules.

Commission response

3.13.2 Paragraph 15.1 of the AIF Codes has been amended accordingly.

3.14 Question 4.3.17 from CP No.4

Have you any comments on the impact of the Regulations on Jersey funds? If so, please provide your comments together with the reasons for such comments.

Requirement for COBO AIFs to appoint 'key persons'

3.14.1 One respondent remarked that Article 18(1) of the Regulations requires an individual to seek the prior approval of the Commission before appointing a 'key person' as defined pursuant to the Regulations however, the AIF Codes do not specifically state that an AIF has to formally appoint a key person. Given that all categories of COBO funds, which are AIFs, are required to adhere to the Regulations and the applicable sections of the AIF Codes, the respondent asked the Commission to clarify whether these funds will need to appoint key persons?

Commission response

3.14.2 There is no requirement for a COBO AIF to appoint a compliance officer ("CO") pursuant to the AIF Codes however there is a requirement for the AIF to appoint a money laundering compliance officer ("MLCO") and a money laundering reporting officer ("MLRO") pursuant to the requirements of the Money Laundering (Jersey) Order 2008.

Approval of service providers under the Regulations

3.14.3 The same respondent remarked that paragraph 4.1.7.2 of CP No.4 states that the approval of the Commission is already deemed to have been given if the service provider is: the holder of a permit granted under Article 7 of the CIF Law - but not if the holder of the permit is a functionary that is a company issuing units ("CIU") within the meaning of the CIF Law. The respondent questioned whether this meant that the CIU has to apply for an AIF Certificate or has to make a written AIF Notification to the Commission if already regulated under the CIF Law? The respondent asked that the Commission provide more information regarding registration/notification requirements, applicability of the AIF Codes, fees and the impact of AIFMD generally in respect of CIU's.

3.14.4 Another respondent said that it would be useful to understand the timing in respect of the application process and how that will operate in practice. E.g. for existing CIFs what form should the notification take and who is the Commission expecting to make such notification -the AIFM or possibly the administrator? If the Commission is going to issue guidance, when is that likely to be available?

Commission response

- 3.14.5 As a starting point, it should be noted that a recognized fund CIU cannot be a service provider. In addition, it should be noted that the provision of the Alternative Investment Funds (Jersey) Order 2013 referred to by the respondent relates solely to Commission approval being granted automatically to service providers to carry out any service prescribed under the Regulations. Such prescribed services are a Jersey Depositary (which is not an FSB/CIF custodian, trustee or depositary) or a sub-threshold AIFM (which is not a recognized fund manager or FSB performing AIF services business or an AIF services business).
- 3.14.6 As a separate point, it should be noted that the recognized fund CIU under the Regulations should file a completed AIF/EXEMPT Notification Form with the Commission to avail itself of the exemption available to recognized funds, which are AIFs, from having to comply with the Regulations.
- 3.14.7 The Commission would refer the respondents to the Commission's dedicated AIFMD area of its Website which *inter alia*, includes copies of the Commission's Guidance Notes on 'Transitional arrangements, exemptions, and Commission forms relating to AIFMD' and 'Additional guidance on the AIFMD regime - including flowcharts' and the Commission's Fees Notice in relation to AIF and AIF services business which were issued in July 2013.

3.15 Question 4.3.18 from CP No.4

Have you any comments which relate to the Jersey Eligible Investor Fund Guide? If so, please provide your comments together with the reasons for such comments.

Requirement for all Jersey service providers to be a fund services business

- 3.15.1 Paragraph 2.22 of the Jersey Eligible Investor Fund Guide requires the fund service provider of a Jersey Eligible Investor Fund ("JEIF") to be registered as a fund services business under the FS(J)L. Two respondents expressed concern that this regulatory requirement may cause concern in the transitional year for the relevant service provider, specifically in relation to:
- 3.15.1.1 the shorter timeframe for preparing accounts from ten months under the Companies (Jersey) Law 1991, to four months under the Financial Services (Fund Services Business (Accounts, Audits and Reports)) (Jersey) Order 2007; and
- 3.15.1.2 the requirement to prepare an annual declaration.

Commission response

- 3.15.2 A JEIF is a type of Certified Fund under the CIF Law. On this basis, all Jersey service providers to a JEIF (including an SPV trustee and an SPV general partner company (both of whom were previously exempt from having to register for the conduct of fund services business ("FSB") under Article 2(10) of the FS(J)L in relation to an unregulated fund)) are now required to be registered FSB's. A number of respondents did not understand or appreciate this point.

3.15.3 On conversion from an unregulated fund to a JEIF, the Commission will consider, on a case by case basis, a request from an SPV trustee or an SPV general partner from the Financial Services (Fund Services Business (Accounts, Audits and Reports)) (Jersey) Order 2007 (the “**Accounts Order**”) to extend the deadline for submission of accounts as a transitional arrangement. The Commission would refer the applicant to Article 10 (1)-(4) of the Accounts Order, however please note that a transitional arrangement would only be granted to an FSB by the Commission for valid reasons.

Requirement to appoint CO, MLCO and MLRO

3.15.4 One respondent commented that paragraph 4.3.10 of CP No.4 provides that a JEIF, once converted from an unregulated fund, will be subject to the CIF Codes. It was therefore their understanding that the JEIF will be required to appoint a CO, a MLCO and a MLRO in accordance with the CIF Codes.

Commission response

3.15.5 The respondent is correct in its assumption that being a Certified Fund, a JEIF will be subject to the CIF Codes and therefore required to appoint a CO, and in accordance with the requirements of the Money Laundering (Jersey) Order 2008, also required to appoint an MLCO and an MLRO.

3.16 Question 4.4.19 from CP No.4

Have you any comments on the impact of the Regulations on Jersey service providers? If so, please provide your comments together with the reasons for such comments.

3.16.1 One respondent pointed out that paragraph 4.2.1.3 of CP No.4 states that an AIFM which acts only for a COBO AIF will need to be licensed for the conduct of AIF services business under Article 2(11) of the FS(J)L. It is their understanding that as the AIFM to a COBO AIF is subject to the FS(J)L, it is therefore required to appoint a CO.

Commission response

3.16.2 There is a requirement for the AIFM to appoint an MLCO and an MLRO pursuant to the requirements of the Money Laundering (Jersey) Order 2008. Where the AIFM is acting for a COBO AIF only, there is no requirement for the AIFM to appoint a CO pursuant to the AIF Codes unless the AIFM opts to comply in full with the AIF Codes (paragraph 12.6.3.2). However, if the AIFM does choose to appoint a CO the Commission’s no objection under the FS(J)L is required.

3.17 Question 4.5.21 from CP No.4

Having regard to the constraints (referred to in CP No.4) which influenced the preparation of the new AIF Codes, and recognising that the AIF Codes form part of a new regime in relation to which further European guidance may be created, have you any comments on the AIF Codes or on their practical application? If so, please provide your comments together with the reasons for such comments.

Transposition of Level 1 AIFM Directive and Level 2 AIFMD Regulation

- 3.17.1 Whilst, on the whole, respondents expressed the view that the AIF Codes were an appropriate way of introducing into Jersey the requirements of the Level 1 AIFM Directive and Level 2 AIFMD Regulation, one respondent expressed concern over the direct copy out of the Level 1 AIFM Directive and Level 2 AIFMD Regulation without guidance to assist application.
- 3.17.2 Another said that generally, the AIF Codes are difficult to follow and perhaps are too comprehensive at this stage considering Private Placement is currently the only option. The respondent said that whilst it is noted that the Part I of the AIF Codes assists with navigating the AIF Codes, it would be more useful to have split the AIF Codes between the Private Placement Rules and the fully compliant AIF Codes for passporting purposes.

Commission response

- 3.17.3 The Commission intends, in due course, to issue formal guidance on various points concerning the application of the AIF Codes. Please refer to the summary of the feedback received from each of the Funds industry working groups set out in paragraphs 3.2 to 3.13 of this AIFMD Feedback Paper, together with the Commission's response to such feedback, for an indication of the type of guidance the Commission intends to issue.
- 3.17.4 Part I of the AIF Codes explains fully which parts of the AIF Codes apply to which activities. In addition, taking account of the relatively short timeframe for the Transitional Period, the majority of the work has been completed ahead of when full compliance with the AIF Codes may become the only option available for AIFs and AIFMs. The Commission believes that such an approach will give AIFs and AIFMs a valuable opportunity to consider, at an earlier stage, the requirements which will be applicable when full compliance with the AIF Codes is required, as opposed to compliance with the Private Placement Rules only.

Meaning of AIF and AIFM in the context of the Jersey AIFMD regime and the EU/EEA AIFMD regime

- 3.17.5 Respondents (and the legal AIFMD working group) raised the point that it needed to be made clearer in the AIF Codes whether a particular provision applied in the context of a Jersey AIF or AIFM or in the context of an EU/EEA AIF or EU/EEA AIFM or in the context of a Non-EU/EEA AIF/AIFM (which would include a Jersey AIF/AIFM).

Commission response

- 3.17.6 For the purposes of interpreting the AIF Codes, in respect of an AIF, the Commission has distinguished between the meaning of a Jersey AIF (as defined in Regulation 3 of the Regulations), an EU AIF and a Non-EU AIF (as defined under Article 4 of the Level 1 AIFM Directive) and a Directive AIF (which includes a Jersey AIF, an EU AIF and a Non-EU AIF). Similarly, in respect of an AIFM, the Commission has distinguished between the meaning of a Jersey AIFM, an EU AIFM, a Non-EU AIFM and a Directive AIFM (which includes a Jersey AIFM, an EU AIFM, and a Non-EU AIFM).

Accounting standards

- 3.17.7 Two respondents said the detail in paragraphs 16.8 and 16.9 of the draft AIF Codes went ‘over and above’ the requirements outlined in the Level 1 AIFM Directive.
- 3.17.8 One respondent stated that it is not uncommon for entities to prepare accounts in accordance with Constitutional Documents only, and sometimes there will not be an established accounting framework as a starting point. The same respondent further raised the point that the UK’s Financial Conduct Authority (the “FCA”) has indicated that they agreed with the UK fund industry’s interpretation of the accounting requirements under Level 1 AIFM Directive and Level 2 AIFMD Regulation in that there is no requirement to prepare UK GAAP accounts for non-qualifying partnerships so long as compliance with the minimum standards set out in Level 1 AIFM Directive and Level 2 AIFMD Regulation and the limited partnership agreement are met, which in the respondent’s opinion reinforces its view that the Commission should not be seeking to introduce accounting requirements for AIFs that go beyond that required in Level 1 AIFM Directive and Level 2 AIFMD Regulation.
- 3.17.9 Respondents raised the point that paragraph 16.9 of the draft AIF Codes was mixing up two requirements: (i) the requirements for accounts to be audited; and (ii) the accounting standards or other standards the accounts are required to be prepared under.

Commission response

- 3.17.10 Please refer to the Commission’s response set out in paragraphs 3.3.4 to 3.3.9 of this AIFMD Feedback Paper which also relates to paragraph 16 of the AIF Codes: Annual Report (Article 22 of the Level 1 AIFM Directive) and which addresses the same issues raised under paragraphs 3.17.7 and 3.17.8 of this AIFMD Feedback Paper above.
- 3.17.11 Paragraphs 16.8, 16.9 and 16.10 of the AIF Codes have been amended accordingly. Following comment from one respondent, the Commission has also incorporated the derogation which is provided in the Level 1 AIFM Directive to permit AIFMs marketing Non-EU AIFs to subject the annual reports of those Non-EU AIFs to an audit meeting international auditing standards in force in the country where the Non-EU AIF has its registered office.

Concerns relating to the Private Placement Rules

- 3.17.12 One respondent raised the point that paragraph 19 of the AIF Codes should not apply to the marketing without a passport of Directive AIFs managed by a Non-EU AIFM under Article 42 of the Level 1 AIFM Directive. The respondent suggested that Part I and paragraph 25 of the AIF Codes be amended to make this clear.

- 3.17.13 The respondent further suggested that, as in the case for the text of Level 1 AIFM Directive, certain provisions of paragraphs 17 and 18 of the AIF Codes refer to provisions which do not apply to Directive AIFs being marketed under Article 42 of the Level 1 AIFM Directive, viz:
- 3.17.13.1 paragraph 17.1.1, 17.6.1: “the maximum level of leverage which the AIFM are [sic] entitled to employ on behalf of the Directive AIF”;
 - 3.17.13.2 paragraph 17.1.4: “the identity of ... the Directive AIF’s depositary”;
 - 3.17.13.3 paragraph 17.1.5: “requirements of paragraph 5.6”;
 - 3.17.13.4 paragraph 17.1.7 and 17.1.13: “in accordance with paragraph 13”;
 - 3.17.13.5 paragraph 17.7.2 and 17.7.3: “gross and commitment methods” of calculating leverage; and
 - 3.17.13.6 paragraph 18.2.5: “in accordance with paragraph 9.11.2 and the second paragraph of paragraph 10.1”.
- 3.17.14 In this regard, the respondent had understood that, in the case of the UK requirements, a Non-EU AIFM may not market a Directive AIF in the UK without, among other things, confirming to the FCA that “the Non-EU AIFM complies with the requirements of Articles 22 to 24 of the Level 1 AIFM Directive in so far as such provisions are relevant to the Non-EU AIFM and the Directive AIF to be marketed”. The respondent recommended that it would be very helpful to include an equivalent provision in the AIF Codes.

Commission response

3.17.15 Part I and paragraphs 25.1 and 25.2 of the AIF Codes have been amended to address the respondent’s concerns.

3.17.16 One respondent made the point that under Article 42(1) of Level 1 AIFM Directive, a non-EU AIFM is only required to comply with Articles 22, 23, and 24 of the Level 1 AIFM Directive (assuming that the private equity provisions of Articles 26 to 30 do not apply). Accordingly, there is no requirement for a Non-EU AIFM to comply with the requirement for each Directive AIF to have a single AIFM under Article 5 of the Level 1 AIFM Directive and therefore paragraph 3.1 of the AIF Codes should not apply in such a case.

Commission response

3.17.17 The Commission notes that for the purpose of the Private Placement Rules only, paragraph 25 of the AIF Codes (Article 42 of the Level 1 AIFM Directive) makes no requirement for a Directive AIF to appoint a single Non-EU AIFM. However, it should be remembered that this point only applies up until the end of the Transitional Period and will always be subject to the individual Member States’ own private placement requirements (which may be over and above the minimum requirements set out in the AIF Codes). On this basis, the Commission has amended paragraph 3.1 of the AIF Codes to address the respondent’s concerns.

- 3.17.18 One respondent raised the point that in the Introduction to the draft AIF Codes, there was a reference as follows:

“From the Implementation Date, AIFMs established in the Union are subject to the full impact of Level 1 AIFM Directive, in return for which, they are permitted to market AIFs in the Union with the benefit of a Union-wide marketing passport.”

- 3.17.19 The respondent’s understanding was that in the case of an EU AIFM of a Non-EU AIF under Article 36 of the Level 1 AIFM Directive (as also included in paragraph 26 of the AIF Codes) the EU AIFM will not have a passport from the Implementation Date but rather only from 2015 (if granted to third countries from such date).

Commission response

- 3.17.20 The Commission has amended the paragraph in the Introduction to the AIF Codes to make clear that “From the Implementation Date and pursuant to Article 36 of the Level 1 AIFM Directive, with the exception of marketing in Member States without a passport of Non-EU AIFs managed by an EU AIFM, EU AIFMs are subject to the full impact of the Level 1 AIFM Directive, in return for which, they are permitted to market Directive AIFs in the Union with the benefit of a Union-wide marketing “passport”.

No uniform approach to the sub-threshold AIFM regime

- 3.17.21 One respondent made the point that not all Member States will have adopted a sub-threshold regime. For example, as far as the respondent was aware, the UK has adopted a sub-threshold regime for Directive AIFMs but France has not.

Commission response

- 3.17.22 The Commission notes the respondent’s point that where an AIFM qualifies as a sub-threshold AIFM under paragraph 2.1 of the AIF Codes (AUM < EUR 100 Million (leveraged)/ AUM < EUR 500 Million (unleveraged and no redemption rights for 5 years following first closing) then that sub-threshold AIFM may have to comply with the additional requirements of the relevant Member State. This accords with the Commission’s general warning in the Introduction to the AIF Codes which provides that *“The requirements of any Member State in relation to the Level 1 AIFM Directive and to the Level 2 AIFMD Regulation will need to be considered separately and, to the extent applicable, complied with in addition to the requirements set out in the AIF Codes directly or through the application of Principle 9 to the CIF Codes or Principle 8 of the FSB Codes.”*

Gold plating by Member States

- 3.17.23 One respondent proposed that it would be useful to know when guidance will be issued and asked whether the Commission will be offering guidance in respect of the different criteria likely to exist between Member States, or will it be expected that the Certificate Holder make their own interpretation?

Commission response

3.17.24 The requirements of any Member State in relation to Level 1 AIFM Directive and Level 2 AIFMD Regulation will need to be considered separately and, to the extent applicable, complied with in addition to the requirements set out in the AIF Codes. It is a matter for AIFs and/or AIFMs to inquire into the requirements in each Member State by seeking legal or professional advice on the laws of the relevant Member State.

Two passports available from the end of the Transitional Period

3.17.25 One respondent proposed that the Introduction to the draft AIF Codes be amended to reflect the fact that it is anticipated that there will be two passports available from the end of the Transitional Period; one for Non-EU AIFs and one for Non-EU AIFMs.

Commission response

3.17.26 The Introduction to the AIF Codes has been amended to provide as follows:

“Union-wide marketing passports will not be available to Non-EU AIFMs, or Non-EU AIFs which are managed by an EU AIFM, until the end of the Transitional Period at the earliest. Following the Transitional Period, ESMA is due to conduct a review of the passporting regime with a view to recommending that it be extended to introduce two new types of passport; one passport for Non-EU AIFMs and another passport for Non-EU AIFs managed by an EU AIFM.”

3.18 Question 4.8.1 from CP No.4

Do you have any general comments on the AIFMD framework outlined in CP No.4 including the Appendices? If so, please provide your comments together with the reasons for such comments.

3.18.1 No feedback was provided by respondents in relation to this question.

3.19 Question 4.8.2 from CP No.4

The Commission is aware that a number of Member States are currently giving active consideration to transitional arrangements for implementation of the Directive. These are yet to be finalised and are likely to differ from Member State to Member State. Would you please provide any views you have as to the impact of potential differing implementation dates across the Union on the Jersey AIFMD regime.

3.19.1 Almost all respondents requested that the Commission not introduce requirements which are more rigorous than those which apply in the relevant Member States.

3.19.2 One respondent noted that it would be useful to receive guidance from the Commission as and when Member States finalise their own AIFMD framework, and how that might impact on the interpretation of the AIF Codes.

Commission response

- 3.19.3 The Commission and the legal AIFMD industry working group put forward law drafting instructions to amend the draft Orders to provide for transitional arrangements. The respective Orders were amended and finalised incorporating transitional arrangements. For further details, please refer to the Commission's Guidance Notes on: "AIFMD Regime Transitional Arrangements, Exemptions and Commission Forms" and "Additional guidance on the AIFMD regime - including flowcharts" which can be accessed on the Commission's dedicated AIFMD Webpage.
- 3.19.4 It is not the function of the Commission to prepare the sort of legal guidance proposed under paragraph 3.19.2 of this AIFMD Feedback Paper. As previously referred to under paragraph 3.17.24 of this AIFMD Feedback Paper, it is a matter for service providers to inquire into the requirements in each Member State by seeking legal or professional advice on the laws of the relevant Member State, however the Commission will assist where it is able to do so.

3.20 Question 3.3.1 from CP No.5

Do you have any comments to make in relation to the proposals outlined in this CP No.5?

- 3.20.1 No feedback was provided by respondents in relation to this question.

4 Further AIFMD guidance

4.1 Treatment of self-managed AIFs

4.1.1 Following receipt of a number of queries concerning the application of Jersey's AIFMD regime to self-managed funds the Commission has the following comments:

CIF analysis

4.1.2 A public self-managed company which is an AIF requires a CIF certificate plus an AIF services business registration or sub-threshold AIFM approval under the Regulations.

4.1.3 An AIF which is regulated as a Certified Fund under the CIF Law should notify the Commission (using the AIF/EXEMPT notification form) that it intends to rely on an exemption from the Regulations subject to certain requirements. Based on that notification it will need to comply with the applicable sections of the AIF Codes (indirectly through the application of Principle 9 to the CIF Codes).

4.1.4 As the self-managed AIF is a CIU it cannot be an FSB and the FSB exemption (using the AIFSB/EXEMPT notification form) is therefore not available. The self-managed AIF will instead need to be authorised for the conduct of AIF services business under Article 2(11) of the FS(J)L (using the FSJ/AIFSB application form) or be approved as a sub-threshold AIFM within the meaning of paragraph 2.1 of the AIF Codes for the purposes of the Regulations (using the AIF/SUB AIFM application form) and will, in either case, need to comply with the applicable sections of the AIF Codes.

4.1.5 As the Commission will have the comfort that the AIFM is a CIF the Commission will consider a fast-track authorisation process for the AIF services business authorisation under the FS(J)L or sub-threshold AIFM approval under the Regulations.

COBO analysis

4.1.6 A private self-managed company which is an AIF requires a COBO consent plus an AIF certificate plus either an AIF services business registration or sub-threshold AIFM approval under the Regulations.

4.1.7 An AIF certificate is required under the Regulations for the AIF product (using the AIF application form).

4.1.8 The self-managed AIF will also need to be authorised for the conduct of AIF services business under Article 2(11) of the FS(J)L (using the FSJ/AIFSB application form) or be approved as a sub-threshold AIFM within the meaning of paragraph 2.1 of the AIF Codes for the purposes of the Regulations (using the AIF/SUB AIFM application form) and will, in either case, need to comply with the applicable sections of the AIF Codes.

- 4.1.9 The Commission's standard AIF services business authorisation process will apply and this will include the requirement that principal persons of an AIF services business submit Personal Questionnaires to receive a no objection under the FS(J)L.

4.2 Treatment of unregulated funds

- 4.2.1 Following receipt of a number of queries concerning the impact of Jersey's AIFMD regime on unregulated funds the Commission comments as follows:
- 4.2.1.1 By way of background, there are two types of unregulated funds: unregulated exchange traded funds; and unregulated eligible investor funds. Unregulated funds are not subject to authorisation and supervision by the Commission. For this reason, from the Implementation Date, it will not be possible to market an unregulated fund in the Union. In order to continue marketing activities in the Union, the options detailed in the following paragraphs may be taken in relation to unregulated funds.

Unregulated exchange traded funds

- 4.2.2 Subject to the relevant application process and the eligibility criteria set out in the Jersey Listed Fund Guide or the OCIF Guide, issued by the Commission, it may be possible for unregulated exchange traded funds to convert into Jersey Listed Funds or, alternatively, OCIFs (that is, to become regulated as CIFs) and submit an AIF/EXEMPT notification form.

Unregulated eligible investor funds

- 4.2.3 Recognising that unregulated eligible investor funds are suitable only for professional or experienced investors, the Commission has introduced the JEIF pursuant to the Jersey Eligible Investor Fund Guide which can be accessed on the Commission's Website. Subject to the relevant application process and the eligibility criteria it may be possible for such funds to convert to a JEIF, which is a Certified Fund under the CIF Law. JEIFs will be issued with a CIF Certificate and regulated under the CIF Law and accordingly will be subject to the CIF Codes.
- 4.2.4 However, for JEIFs the current licensing and authorisation regime applicable to CIFs will be relaxed in certain areas. Similar to the Jersey Expert Fund Guide, a self-certification regime will apply, which will enable a 72-hour fast-track authorisation process in relation to the issue of CIF Certificates and a 10-day fast-track authorisation process in relation to the issue of any requisite fund services business licences under the FS(J)L.
- 4.2.5 The application process for the JEIF will be that for a CIF Certificate and will include where there has been fund activity, in addition to the provision and review of the latest audited financial statements, certain other undertakings from the directors of the governing body of the existing fund.

General points

- 4.2.6 It should also be noted, as previously referred to under paragraph 3.15.2 of this AIFMD Feedback Paper, that general partner and trustee service providers to unregulated funds, which previously benefitted from a specific exemption to the requirement to be registered under the FS(J)L for fund services business will, from the Implementation Date, require a fund services business licence under the FS(J)L to act as service providers to JEIFs, Jersey Expert Funds, Jersey Listed Funds, or OCIFs.

By way of further context, with the exception of this specific exemption, it should be noted that all Jersey fund service providers to an unclassified fund or an unregulated fund are required to be registered for the conduct of fund services business under the FS(J)L. In addition, it is Commission policy not to authorise fund service providers which are only to act for unregulated funds.

- 4.2.7 Please refer back to paragraph 3.15.3 of this AIFMD Feedback Paper for the Commission's position on granting a derogation request from the Accounts Order on conversion from an unregulated fund to a JEIF.
- 4.2.8 Finally, it is worth noting that an unregulated umbrella fund, including those funds structured as protected cell companies or incorporated cell companies, would not be permitted to have a sub-fund/cell approved as an AIF when the rest of the fund remains an unregulated fund. From the Commission's perspective, it would be too complicated and confusing for investors for one part of the umbrella fund to be regulated as an AIF and the other part(s) of the umbrella fund not to be subject to authorisation and supervision by the Commission.

4.3 Treatment of umbrella funds

- 4.3.1 It should be noted that the Commission will give careful consideration to applications in respect of umbrella funds, including those funds structured as protected cell companies or incorporated cell companies, where one sub-fund/cell falls within the scope of the AIFMD and other sub funds/cells do not. The reason for this is that the Commission is concerned that it may be confusing and potentially prejudicial to the interests of some investors when one sub-fund/cell is treated as being 'in' and another sub-fund/cell is treated as being 'out' of the scope of AIFMD. It should be noted however, that such consideration will be of greater relevance where full compliance with the AIF Codes by the AIFM for passporting is required as opposed to compliance with the Private Placement Rules only.

4.4 Retail investors

- 4.4.1 A new paragraph 28 of the AIF Codes was inserted (for guidance purposes only) to reflect the requirements of Article 43 of the Level 1 AIFM Directive.

4.5 What is meant by a Directive AIF?

- 4.5.1 For a clearer understanding of what is meant by a Directive AIF, the Commission would refer all interested parties to ESMA's final report published on 24 May 2013 providing "Guidelines on key concepts of the AIFMD" (the "**ESMA Final Report**") which can be found on the Commission's dedicated AIFMD webpage. Specifically, Annex III of the ESMA Final Report provides guidelines on what constitutes a Directive AIF. These guidelines were further published by ESMA under a standalone document on 13 August 2013 which can also be found on the Commission's webpage.

APPENDIX A

List of members of the industry working groups

Legal

- Daniel O' Connor of Carey Olsen
- Emily Haithwaite of Bedell Cristin
- Tim Morgan and Niamh Lalor of Ogier
- Ben Robins of Mourant Ozannes
- Andrew Weaver of Appleby

Representatives of the following Jersey Depositaries

- Aztec Group
- BNP Paribas Group
- Citibank
- J P Morgan
- Ogier
- Saltgate Limited
- Sanne Group
- State Street Global Services

APPENDIX B

List of respondents to CP No.4:

- Aztec Group
- BNP Paribas Group
- Collas Crill
- Jersey Finance Limited
- Jersey Society of Chartered and Certified Accountants
- KPMG
- Maurant Ozannes on behalf of Brevan Howard Capital Management LP
- PwC