



European Securities and Markets Authority
103 rue de Grenelle
Paris
France

8 January 2015

Dear Sir or Madam,

Re: BVCA response to the ESMA Call for Evidence on the AIFMD Passport and Third Country AIFMs

The British Private Equity and Venture Capital Association ("BVCA") is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 500 firms, the BVCA represents the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers.

Our members have invested £30 billion in over 3,900 UK-based companies over the last five years. Companies backed by private equity and venture capital in the UK employ around 790,000 people and almost 90% of UK investments in 2013 were directed at small and medium-sized businesses. As major investors in private companies, and some public companies, our members have an interest in reporting matters, the conduct and information presented by such companies, and the burdens placed on the management of such companies.

This submission has been prepared by the BVCA's Channel Islands (Jersey and Guernsey) Working Group. As Jersey and Guernsey are each third countries and currently unable to utilise the AIFMD passport, certain questions have not been answered as they are not applicable.

The BVCA is a member of the Public Affairs Executive of the European Private Equity and Venture Capital industry. A separate response by the European Private Equity and Venture Capital Association, which incorporates the views of the BVCA, has also been submitted.

1 Please describe your experience using the AIFMD passport:

(a) Indicate your home Member State

Question not applicable as the Channel Islands are non-EU Jurisdictions.

(b) Number of funds marketed in other Member States (please provide a breakdown by host Member State)

Question not applicable as the Channel Islands are non-EU Jurisdictions.



- (c) **Number of funds managed in other Member States (please provide a breakdown by host Member State)**

Question not applicable as the Channel Islands are non-EU Jurisdictions.

2 How have you found the passport application process?

- (a) **Very satisfactory**
- (b) **Satisfactory**
- (c) **Problems encountered. Please explain**

Question not applicable as the Channel Islands are non-EU Jurisdictions.

3 What is your overall experience of using the passport of the AIFMD? Please explain

Question not applicable as the Channel Islands are non-EU Jurisdictions.

4 What difficulties have you encountered when trying to use the passport?

Question not applicable as the Channel Islands are non-EU Jurisdictions.

5 Have you been deterred from using the passport and if so – why?

Question not applicable as the Channel Islands are non-EU Jurisdictions.

6 Have you experienced issues of investor protection in relation to AIFs marketed or managed from another Member State, including AIFs marketed to retail investors under Article 43? If so, please provide details (e.g. number of complaints from investors, the reasons for those complaints etc).

Question not applicable as the Channel Islands are non-EU Jurisdictions.

7 Please describe the activity of your organisation in the EU:

- (a) **Identify whether your organisation operates under Article 36 (marketing of non-EU AIFs by EU AIFMs in a Member State) or Article 42 (management and/or marketing of AIFs by non-EU AIFMs in a Member State) of the AIFMD**

The BVCA Channel Islands working group members include both AIFMs and other service providers operating under both Article 36 and Article 42.



(b) **Identify the non-EU country of the AIFM and/or the AIF**

The working group members are principally engaged with AIFMs and/or AIFs in Jersey and Guernsey. In addition members are engaged with a variety of AIFMs/AIFs in EU countries or other non-EU countries.

(c) **Number of funds marketed in an EU Member State (please provide a breakdown by Member State)**

As at 1 January 2015 and on the basis of information provided by the Jersey Financial Services Commission (“JFSC”), the number of Jersey established entities which are engaged in EEA marketing for the purpose of the AIFMD in accordance with Jersey’s AIFMD – compliant regime include 60 Jersey AIFMs and 186 Jersey AIFs, with Jersey depositories acting in relation to 14 AIFs.

Furthermore, as at 1 January 2015, the Guernsey Financial Services Commission (“GFSC”) has confirmed that 45 Guernsey AIFMs are marketing 96 AIFs by way of private placement into the EEA. Please note that the figures provided by the GFSC do not include the marketing of Guernsey AIFs by non-Guernsey AIFMs.

(d) **Number of funds managed in an EU Member State (please breakdown by Member State)**

The private equity and venture capital funds serviced in Jersey and Guernsey for BVCA members consist of a mixture of:

- Jersey/Guernsey AIFs with a Jersey/Guernsey AIFM and an EU investment advisor;
or
- Jersey/Guernsey AIFs with a Jersey/Guernsey general partner but EU AIFM; or
- EU AIFs with a Jersey/Guernsey AIFM.

Although we do not have a definitive statistics to hand, it is believed that the number of such structures with an EU AIFM is in the minority.

8 How many times has your organisation received a request for information from an EU NCA? Please indicate your average time of response.

To date none of the working group members have received a request for information from an EU NCA. The BVCA understands from data provided by the JFSC that the JFSC received 54 requests from EU NCAs for the two year period 1 January 2013 to 31 December 2014. The GFSC has also confirmed that it is co-operating effectively with EU NCAs.



9 How many times has your organisation refused to provide the information requested by an EU NCA? Please explain the reasons.

To date none of the working group members have refused to provide information requested from an EU NCA.

10 How many times has an EU NCA performed an on-site visit at your organisation?

To date none of the working group members have been visited by an EU NCA.

11 How many times has an EU NCA initiated enforcement action against your organisation?

To date none of the working group members have been subject to enforcement action against their organisation.

12 How many times has an EU NCA imposed a sanction on your organisation?

To date none of the working group members have been subject to sanctions imposed on their organisation by an EU NCA.

13 Are there any specific limitations in the legal framework in your country that impede or limit your organisation from collaborating with an EU NCA? If yes, please specify.

Both Jersey and Guernsey have a well-established and long-standing legal framework that underpin the fund regimes in both islands respectively and there are no such limitations. Both the JFSC and GFSC were early signatories to the ESMA MOUs regarding regulatory co-operation with EU NCAs, and indeed assisted ESMA with the preparation of the model cooperation agreement that was subsequently rolled out to third country regulators worldwide. The JFSC and GFSC have each entered into cooperation agreements with all of the EEA member states that have opted in to the AIFMD, with the exception of Spain, Italy, Slovenia and Croatia

The Protection of Investors (Bailiwick of Guernsey) Law, 1987 (as amended) provides the statutory structure for the regulation and administration of funds and fund managers in Guernsey. The AIFMD (Marketing) Rules, 2013 were brought into force by the GFSC with effect from 22 July 2013 for the express purpose of assisting the GFSC with cooperating with EU NCAs. Meanwhile in Jersey the regulation of funds and fund managers is underpinned principally by the Collective Investment Funds (Jersey) Law 1988, the Control of Borrowing (Jersey) Order 1958, the Financial Services (Jersey) Law 1998, the Alternative Investment Funds (Jersey) Regulations 2012 and the Alternative Investment Funds (Jersey) Order 2013 – this legislation provides a clear legal basis for collaboration between the JFSC and a relevant NCA. In particular this expressly provides for the ability of the JFSC to assist and to liaise with relevant NCAs.



The respective laws detailed above provide for appropriate investor protection, regulatory oversight and disclosure. In both Guernsey and Jersey a full review has taken place during 2012 and 2013 to ensure the laws provide for full collaboration with EU NCAs. Both Jersey and Guernsey have subsequently implemented a fully compliant AIFMD regulatory structure.

14 Has your organisation experienced issues of investor protection in relation to AIFs marketed or managed in an EU Member State? If so, please describe (e.g. number of complaints from investors, the reasons for those complaints etc).

The working group has no specific information on such requests, but is not aware of any such situations.

15 What have been the benefits of the National Private Placement Regimes (NPPR) to you?

The private equity industry in the Channel Islands is international in the raising of funds from investors through to the investment of that capital in portfolio companies and the subsequent distribution of the returns generated. As such we deem the Channel Islands to be a facilitator in the international free movement of capital.

The National Private Placement Regimes (“NPPRs”) existed (to varying degrees) prior to the introduction of AIFMD and the current status of the NPPRs have been seen as an evolution of the previous marketing and fund raising mechanisms. The NPPRs have enabled the industry to continue with a similar regulatory process, subject to the appropriate enhancements, for marketing funds within the EU and the regime has allowed for the continued capital flows both in to and out of the EU.

NPPRs have also continued to allow EU investors the ability to maintain diversification within their investment allocations to a variety of AIFMs and advisors in appropriately regulated jurisdictions enabling institutional investors to continue to provide greater investor protection and reduce their exposure to systemic risk appropriately.

The NPPRs have also continued to expose AIFMs to global competition, and therefore AIFMs have had to provide their investors with the best possible terms as the international competition that has developed between AIFMs allows investors to choose those AIFMs offering best possible terms of investment.

16 What have been the obstacles or barriers to entry of the NPPR to you?

The differing interpretation and the different approaches taken by certain EU Member States have, as part of the AIFMD implementation process, added new and more onerous requirements to their NPPRs. Others, notably France and Italy, have chosen in effect not to operate a NPPR, which creates significant restrictions for a non-EU Manager to raise funds from these jurisdictions. This has an impact both for managers



and investors as it restricts the amount of capital that can be raised by the manager and it also restricts the investment opportunities and diversification available to investors.

17 What obstacles did you encounter when trying to register through the NPPR?

The differing interpretations across EU member states have created a number of obstacles. The definition of marketing under the AIFMD varies from state to state and therefore the point at which a manager may have to register with an EU NCA is unclear. This has forced managers to allocate significant resources to monitoring when a registration may be required in a particular state as opposed to establishing a common basis of approach. These costs are often ultimately borne by investors.

A number of AIFMs have filled NPPR registrations with multiple EU NCAs, each with their own respective requirements for reporting. For some AIFMs they are required to provide regulatory reporting, in similar but different formats, to multiple NCAs. This has created significant operational and resourcing costs in the preparation and submission of reporting information. A central reporting system would provide consistency across NCAs and ensure efficiency for AIFMs.

18 What have been the costs?

The costs of operating under the NPPRs have varied significantly depending on the number of jurisdictions an AIFM has/or is potentially planning on marketing to. In particular, the inconsistent approach to NPPRs and AIFMD more generally adopted by different EU member states has led to a substantial increase in legal and other professional advisory costs. Again these costs are often ultimately borne by investors.

19 Have you exited countries since the entry into force of the AIFMD NPPR – and if so, why?

Where an EU NCA has closed NPPR members have ceased marketing activities in that jurisdiction. In addition where the requirements of the NCA are unclear, costly or overly restrictive members have exited those countries.

20 Have you been deterred from undertaking private placement, and if so why?

Where it has been deemed that there are a limited number of potential investors and/or the operational cost of compliance with differing NPPR requirements is too high members have been deterred from undertaking NPPR.



21 What is the possible impact of an eventual extension of the passport to non-EU AIFMs on competition?

Extension of the passport to non-EU AIFMs should, in theory increase competition. The passport will enable more non-EU AIFMs the ability to market AIFs in the EU, therefore increasing the number of AIFMs in the market and increasing investors choice of AIFMs and AIFs

The benefits of extending the passport to non-EU AIFMs would be maximised by addressing the current teething issues that have been experienced with the issuance of EU AIFM passports and ensuring that the passport regime is tailored to the specific circumstances of non EU AIFMs.

In order to continue to provide market stability and to create effective increased competition the continuation of NPPRs in parallel to third country passport will be required.

22 What are the risks of an eventual extension of the passport to non-EU AIFMs in relation to market disruptions and investor protection?

The extension of the passport to non-EU AIFMs, subject to an appropriate and efficient introduction, would not create any risk of market disruption or reduced investor protection. If successful the passport would provide greater investor choice, therefore decreasing concentration and systemic risk and provide greater investor protection. However, an ineffective passport will potentially limit the number of non-EU AIFMs that can utilise the passport and may potentially reduce the number of AIFMs marketing AIFs in the EU, creating greater investor concentration and reducing competition.

23 Is there any particular non-EU country where, as a consequence of the regulatory environment (financial regulation, supervision, tax and anti-money laundering provisions), an eventual extension of the passport would put EU AIFMs and UCITS management companies at a disadvantage vis-a-vis the AIFMs from that country? Please specify and explain.

There are a significant number of laws, regulatory requirements and tax provisions across jurisdictions that deal with the establishment, marketing and operation of private equity and venture capital funds. The regulatory requirements are one aspect of the framework in which an AIFM has to operate.

Please also refer to our response to Question 13 above. Where the AIFMD applies to the activities of a Channel Islands AIFM, a Channel Islands AIF, or a Channel Islands Depository, Jersey and Guernsey have each implemented the necessary regulation to



comply fully with AIFMD as from 22 July 2013. The Jersey and Guernsey regulatory requirements are in line with AIFMD requirements and, in the event of a passport being available to Channel Island AIFMs, or for those Channel Island AIFMs who wish to be fully AIFMD compliant earlier, fully in line with EEA AIFMD passport requirements (under Level 1 and Level 2 AIFMD).

Compliance with international standards to counter money laundering and terrorist financing, as required by the Financial Action Task Force (FATF):

As referred to in a footnote included in the list of third countries that are currently considered as having equivalent AML/CFT systems to the EU (published under the Common Understanding between member states on third country equivalence under the Anti-Money Laundering Directive (Directive 2005/60/EC), Jersey and Guernsey are each treated as “equivalent” by member states of the EU.

Commitment to effective exchange of information in tax matters:

Article 40(2)(c) of the AIFMD refers to both bilateral and multilateral tax agreements for the effective exchange of information in tax matters and requires that all such agreements should fully comply with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital. The Tax Information Exchange Agreements entered into by Jersey and Guernsey with EU member states are all in accordance with the OECD Model Tax Convention on Exchange of Information on Tax Matters and this is consistent with Article 26 of the OECD Model Tax Convention on Income and on Capital. This has been confirmed by the Global Forum on Transparency and Exchange of Information for Tax Purposes when assessing each of Jersey and Guernsey. In addition Jersey and Guernsey have each been subject to the multilateral convention since mid-2014.

The OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters provides for exchange of information on request in accordance with the OECD Model Tax Convention on Exchange of Information on Tax Matters and the OECD Model Tax Convention on Income and on Capital. This is clear from the Global Forum assessments that treat the multilateral agreement and the bilateral agreements as of equal merit.

- 24 Is there any particular non-EU country that imposes heavier requirements for EU AIFMs or UCITS management companies in comparison to those that non-EU AIFMs have to comply with in order to do business in the EU? Please specify and explain.**

The working group is unaware of any instances where EU AIFMs or UCITS management companies are subject to heavier requirements than their non-EU competitors in order to do business in the EU.



Jersey has a well-established regulatory regime for the circulation in Jersey of prospectuses related to, and the investment by Jersey investors in, non-Jersey funds, without the need for filing fees and, where necessary, subject to swift JFSC approval. It should also be noted that there is an express statutory exemption from additional regulation by the JFSC for EU based distributors of UCITS funds and equivalents.

The GFSC permits UCITS funds and equivalents to be promoted into Guernsey by distributors based in certain EU member states without the need (ordinarily required) to obtain a license from the GFSC, provided such promotion is first notified to the GFSC.

- 25 Have you experienced difficulties or limitations in establishing or marketing AIFs or UCITS in any non-EU country? Please specify the non-EU country and the specific difficulties or limitations that you have encountered.**

Question not applicable.

- 26 Do you have evidence showing that existing difficulties or limitations in non-EU countries have deterred fund managers in your jurisdiction from deciding to establish or market AIFs or UCITS they manage in the non-EU country? Please specify the non-EU country and explain the difficulties or limitations.**

Question not applicable.

- 27 Could you please identify the non-EU countries that, in your opinion, grant market access to EU AIFMs and UCITS management companies under broadly equivalent conditions?**

Please refer to our response to Question 23 above.

- 28 What are the conditions that EU AIFMs and UCITS management companies have to comply with in order to manage or market AIFs or UCITS in your jurisdiction? Please specify.**

Please refer to our response to Question 24 above.

- 29 In what way is your current regime (regulatory, tax etc.) different from the EU framework? Please explain.**

Please refer to our response to Questions 13 and 23 above.

Where the AIFMD applies to the activities of a Channel Islands AIFM, a Channel Islands AIF, or a Channel Islands Depository, Jersey and Guernsey have each implemented the necessary regulation to comply fully with the AIFMD as from 22 July 2013. The Jersey and Guernsey regulatory requirements are each in line with AIFMD requirements and, in the event of a passport being available to Channel Island AIFMs, or for those Channel Island AIFMs who wish to be fully AIFMD compliant earlier, fully in line with EEA AIFMD passport requirements (under Level 1 and Level 2 AIFMD).



We would be delighted to provide further information on our comments above and please contact Gurpreet Manku at the BVCA (gmanku@bvca.co.uk)

Yours faithfully,

A handwritten signature in black ink, appearing to read 'A Whitaker', is written above a solid black horizontal line.

Andrew Whitaker
Chairman of the BVCA Channel Islands Working Group