



European Banking Authority  
One Canada Square  
Canary Wharf  
London  
E14 5AA

22 January 2016

Dear Sirs

**Directive (EU) 2015/849 (“the Directive”)  
The Risk Factor Guidelines**

I refer to the joint Consultation Paper published on 21 October 2015 regarding the draft Joint Guidelines to be issued under Articles 17 and 18(4) of the Directive on simplified and enhanced due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions (“the Consultation Paper”).

This letter is in response to the invitation from the European Supervisory Authorities (“ESA”) as set out in the Consultation Paper, for comments on the proposals put forward in the Consultation Paper. In that respect, the ESA have asked whether the guidelines are conducive:

- to firms adopting risk-based, proportionate and effective AML/CFT policies and procedures in line with the requirements set out in the Directive; and
- to competent authorities effectively monitoring firms’ compliance with applicable AML/CFT requirements in relation to individual risk assessments and the application of both simplified and enhanced customer due diligence measures.

Before setting out our comments in relation to these matters I thought it would be useful to provide some background in relation to the Guernsey International Business Association and the financial services industry in Guernsey.

**Background to the Guernsey International Business Association**

The Guernsey International Business Association (“GIBA”) has a membership consisting of all the major financial institutions and professional firms in Guernsey and is the representative body of the financial services industry in Guernsey.

GIBA's main objects are:

- To represent the common interests of its members and of Guernsey's international finance industry;
- To provide a forum for the member associations to consider the interests of Guernsey's international finance industry and how they may be promoted;
- To work with the Island authorities to further the interests of Guernsey's international finance industry by informing and educating the authorities as to the industry's interests;
- To inform the members and member associations of issues that may affect their interests;
- To consult with the members and member associations upon issues of common interest.

GIBA has a governing Council, comprising of representatives of all sectors of the industry, that considers all current issues affecting the industry. GIBA representatives sit on sub-committees and working groups, working in consultation with States of Guernsey (the Island's Government) committees and the Island's financial services regulator, the Guernsey Financial Services Commission, on domestic and international issues relevant to the financial services industry.

GIBA's Member Associations are:

Association of Guernsey Banks  
Guernsey Association of Trustees  
Guernsey Commercial Bar Association  
Guernsey International Insurance Association  
Guernsey Investment Fund Association  
Guernsey Investment Managers and Stockbrokers Association  
Guernsey Society of Chartered & Certified Accountants

### **The Bailiwick of Guernsey and Financial Services**

The Bailiwick of Guernsey is not part of the European Union or the European Economic Area, it is a Third Country, in much the same way as other jurisdictions, including the United States of America, Canada, South Africa and China. Accordingly this jurisdiction does not have to comply with the requirements of EU legislation or similar, rather its domestic regime looks towards international requirements, for example in the anti-money laundering context the Financial Action Task Force ("FATF").

Guernsey is a major international finance centre with a mature legal and regulatory system. The finance sector is the largest single contributor to GDP of the Bailiwick. While deposits taken by the banking sector as at 30 September 2015 exceeded GBP 81 billion, the funds under management and administration by the collective investment fund sector stood at almost GBP 225 billion as at the same date. Guernsey is globally one of the largest fund domiciles, especially in the private equity sector. Another significant amount of assets is managed and administered by the fiduciary sector. Guernsey is also the largest captive insurance domicile in Europe and the fourth largest in the world with premiums written in excess of GBP 4.8 billion and gross assets of over GBP 23 billion as at the end of 2014.



## MONEYVAL assessment

MONEYVAL undertook an assessment of the effectiveness of this jurisdiction's measures in place to prevent money laundering and the financing of terrorism during 2014/15. MONEYVAL issued its report on its evaluation on 15 January 2016 and the conclusions are extremely positive. In addition to substantially strengthening anti-money laundering and combatting the funding of terrorism preventive measures to which its financial institutions are subject, MONEYVAL found that Guernsey has in place a range of measures to facilitate various forms of international cooperation and plays host to competent authorities and financial institutions that are highly competent, knowledgeable and aware of their obligations. Cooperation and coordination between Guernsey authorities was also found to be effective.

## **Response to the draft Joint Guidelines**

GIBA have the following comments in respect of the draft Joint Guidelines, as follows:

- **A Holistic Approach**

There are several references within the Consultation Paper to firms taking a holistic view in terms of risk assessment. It is noted that section 17 of the Consultation Paper (page 14) provides limited supporting comment, such that "Firms should note that the following risk factors are not exhaustive, nor is there an expectation that firms should consider all risk factors in all cases. Firms should take a holistic view of the risk associated with the situation and note that unless required by Directive (EU) 2015/849 or national legislation, the presence of isolated risk factors does not necessarily move a relationship into a higher or lower risk category." GIBA is concerned that firms will not necessarily take the expected "holistic view" but rather will consider any individual higher rated risk factors and move the relationship into a higher risk category, that is they will move the overall risk categorisation into a higher category notwithstanding all the overall risks presented. GIBA would request that additional guidance or comment be provided to clarify expectations in this respect in order to assist firms in considering individual and overall risk factors and categories.

- **Objective and Subjective Statements**

The following terms have been used in the Consultation Paper: "tax haven", "offshore jurisdiction", "offshore" and "secrecy haven". GIBA is not aware that any of these terms have been defined in a consistent way by any international body and is concerned that interpretations of such phrases will occur inconsistently, both by individual firms as well as EU Competent Authorities within the EU. In the absence of any consistently agreed objective criteria underpinning such subjective phraseology GIBA requests that these references are removed.

As noted above, the Bailiwick of Guernsey does not have to comply with the requirements of EU legislation or similar, rather its domestic regime looks towards international requirements, for example in the anti-money laundering context the FATF. In that respect, the jurisdiction is a member of MONEYVAL and reference is made above to the recent MONEYVAL evaluation undertaken and the recent publication of the final report.



GIBA is seriously concerned that, notwithstanding the provisions of the first two bullet points of section 23 of the Consultation Paper which appear to be met by the comments in the preceding paragraph of this letter, individual firms and EU Competent Authorities will assess the jurisdiction based on a subjective assessment under the later bullet point within section 23, namely: “Is the jurisdiction a known tax haven, secrecy haven or offshore jurisdiction?” Unfortunately those terms are used in various ways, especially by the media, and it is likely that irrespective of comments refuting them by this jurisdiction’s government and authorities, firms are likely to take a simplistic approach to this matter rather than consider all of the supportive information and evidence.

In addition, there are additional requirements under section 23 of the Consultation Paper that refer to “credible and trustworthy source”. In the case of “Is the jurisdiction politically stable?” this appears to be another subjective assessment that is required. In order to assist firms and EU Competent Authorities would it not be better to make all of the requirements under this section consistent, for example referring them all back to the findings of relevant bodies’ published evaluations? Alternatively, any apparently subjective assessments need to be made clear in terms of what is actually expected. In the absence of consistently agreed and adopted objective criteria that are clearly articulated it is unlikely that individual firms will be able to make an assessment consistent with their counterparts within the EU, or even within a Member State. Surely consideration of the risk assessment of any third country should result in a consistent conclusion across the EU, with firms having to focus instead on the particular issues relating to the specific business being undertaken?

- Equivalence with the Directive by Third Countries

GIBA notes that the Fourth Anti-Money Laundering Directive does not require equivalence on third countries. However, the Risk Factor Guidelines includes various references to equivalence with, or requirements being consistent with, the Directive. These include sections 30, 78, 99 and 180.

It is unclear to GIBA what form of equivalence is being considered, for example is it technical equivalence or outcomes based equivalence? Whilst firms located in this jurisdiction will have had to meet Guernsey’s AML/CFT requirements and therefore it will not be difficult for them to provide CDD information we would suggest that technical equivalence would be a potentially considerable burden for both EU firms and competent authorities. In effect this issue is tied into the comments made above regarding objective information and a third country adopting international requirements, rather than being subject to EU requirements. It is suggested that the current “EU equivalence” provisions are therefore replaced by equivalence to the FATF recommendations or that equivalence to the FATF recommendations is an acceptable alternative.

- Financial Intermediaries regarded as the Firm’s Customer

The Risk Factor Guidelines state that in specific circumstances a financial intermediary may be regarded as the firm’s customer (section 212). However, the Risk Factor Guidelines (section 215) then go on to state that this treatment cannot be applied to a financial intermediary established in a third country. GIBA considers that this approach will, inter alia, cause increased

burdens on EU firms undertaking business with Guernsey financial intermediaries which could impact wider EU capital markets initiatives.

GIBA does not understand why it is proposed to exclude third countries from the scope of section 212. Whilst firms located in this jurisdiction will have had to meet Guernsey's AML/CFT requirements and therefore it will not be difficult for them to provide CDD information we would suggest that technical equivalence would be a potentially considerable burden for both firms and competent authorities. GIBA suggests that, rather than focussing on whether the entity is located in a third country (outside the EU), the emphasis needs to be upon a risk based assessment that takes account a consistent objective assessment of the jurisdiction (see comments made above in that respect) as well as the type and nature of the business to be undertaken between the EU firm and the third country intermediary.

Finally, GIBA questions the current proposals regarding the treatment of third country intermediaries, especially at a time when the EU is looking to open its capital markets, by way of potential inward investment to the EU, to the rest of the World. Proposals such as this would appear to result in a potentially significant obstacle to that objective.

Yours faithfully

A handwritten signature in black ink, appearing to read 'C J Rosumek', written in a cursive style.

C J Rosumek

Guernsey International Business Association – Technical Resource