Mrs. Cindy Scotland, Managing Director
The Cayman Islands Monetary Authority
Elizabethan Square,
P.O. Box 10052, Grand Cayman KY1-1001
Cayman Islands

BY HAND

WITHOUT PREJUDICE

August 15th 2013

Dear Madam

Private Sector Consultation Paper dated July 16th 2013 ("July Consultation"):
Corporate Governance Statement of Guidance for Mutual Funds ("Guidance")[1]

This letter contains the responses of DMS Offshore Investment Services (DMS) to the July Consultation and Guidance. We are delighted to finally engage with the Authority on this important matter. We are writing directly to the Authority, given our professionals' and stakeholders' collective position as a major stakeholder in the fund governance industry and the unique issues that exist between DMS and the Authority. We are copying this letter to certain of the Private Sector Associations and Sectors to which the July Consultation and Guidance was sent because our professionals are members thereof. Also, because this consultation process is open to the public, we are publishing this letter on our website to provide transparency into our views for all industry stakeholders.

DMS supports principles-based regulatory Guidance

DMS reiterates its long standing support of effective fund governance regulation and believes that directors should be regulated (authorisation, supervision and enforcement) in the same manner as the other service providers to a regulated mutual fund, under the Mutual Funds Law (2012 Revision) (as amended) ("**Mutual Funds Law**") as intended. Principles based guidance is a useful step towards this objective and we commend the Authority's recent decision to address the issue of fund governance for

[1] http://www.cimoney.com.ky/regulatory_framework/reg_frame.aspx?id=360

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99%[2] of regulated mutual funds ("**Regulated Mutual Fund/s**") separately from that of corporate governance of other regulated financial services. This is a significant improvement from the Authority's initial proposal to include all fund governance within the scope of the Corporate Governance Private Sector Consultation Paper dated January 14th 2013 ("**January Consultation**").

Fund governance needs are very different than those of other companies

It is important for the Authority to recognise that corporate governance and fund governance are not the same and each requires a distinct approach. Acknowledging these differences may help the Authority to bridge the expectations gap within the industry. First, not all funds are structured as corporations, so a pure focus on structure ignores the fundamental aspect of function. Second and most importantly, a corporation is, by definition, a "body of people" and a typical Regulated Mutual Fund does not have any employees. A Regulated Mutual Fund is operated by its directors through various service provider delegates and the employees of a service provider to a fund are not employees of the fund. Each service provider has its own governing body, independent of the fund and it is generally ultra vires for the directors of a fund to direct the actions of any employee of a service provider. The nature of the relationship and the responsibilities of the service provider (and its associated employees) are contained in the terms of the service provider agreements with the fund. The function of the directors of the fund is to properly operate the fund in accordance with those agreements. That is the essence of fund governance and the Authority should recognise that this is fundamentally different from the corporate governance of a typical corporation, where directors have direct oversight and authority over employees and their work. While some similarities exist, any effort to equate these two is deeply flawed and fails to comprehend the nuances and unique aspects of hedge fund structure and operation.

DMS stakeholders

As the worldwide leader in fund governance, our professionals and the stakeholders we represent have much at stake regarding the Authority's regulation of Corporate Governance of Regulated Mutual Funds ("**Fund Governance**"). Any changes made by the Authority may have a direct bearing upon our business practices and, potentially, our competitiveness within the global financial services marketplace. Our professionals are dedicated to providing fund governance services by serving in their personal capacity as directors of Regulated Mutual Funds and also representing our subsidiary, DMS Fund Governance Ltd. ("**DFG**") – which holds a full mutual fund administrators licence – and its subsidiaries which serve as directors to such entities. These directors are supported by a team of associate directors and associates and our proprietary fund governance technologies. DMS voluntarily adopted the SEC's fund governance standards in 2004 and these principles have guided our work to deliver an exemplary track record of

[2] http://www.cimoney.com.ky/Stats_Reg_Ent/stats_reg_ent.aspx?id=256&ekmensel=e2f22c9a_14_84_256_6

success for our stakeholders. In our now 13 year history, we have not suffered any criminal, civil or administrative judgments, censures, settlements, disciplines or investigations of any kind.

Institutional approach

With more than 200 people and our renowned institutional process, DMS has the largest capacity in the industry and successfully operate more fund directorships than anyone else in the world. Our market-leading size and position is a major advantage to the fund stakeholders we serve and DMS represents leading funds with AUM exceeding $330 billion. The DMS institutional governance approach is consistently selected by sophisticated fund stakeholders in a highly competitive market and DMS represents the largest number of regulated mutual funds and stakeholders in the industry. We are bound to advocate these industry viewpoints to the Authority and, in summary, we respectfully request the Authority to revise the Guidance as follows:

1. Reflect The Appropriate And Rational Expectations Of All Stakeholders.

a. **DMS's specific comments on the Guidance.** The Guidance should reflect established law and realistic expectations of the majority of hedge fund stakeholders regarding fund governance, not the agenda of an infinitesimally small special interest group or irrelevant standards or unscientific surveys.

b. **Fund Governance is not deficient.** There is substantial evidence to support the proposition that Fund Governance in the Cayman Islands is already appropriate, rational and well understood and that investors already have appropriate legal recourse against directors who breach their fiduciary duties.

c. **Inappropriate increase in burdens, risks and costs.** The Guidance, as presently drafted, would impose substantially greater burdens, risks and costs on a regulated mutual fund and an independent non-executive director than currently exists.

2. Broaden Scope.

a. **Licenced Mutual Funds.** The Guidance should apply to all Regulated Mutual Funds, i.e. registered, master, administered and licenced, without excluding the latter.

b. **Sole Corporate Director.** The Guidance should reaffirm that a Regulated Mutual Fund may have a sole corporate director, which is a Licenced Mutual Fund Administrator ("**LMFA**") or wholly owned subsidiary thereof as permitted under the Mutual Funds Law.

3. Enforcement Action Must Not Offend the Constitution's Bill of Rights.

a. The Authority should not take any enforcement action against a regulated mutual fund or its directors for alleged infraction of the Guidance without a fair hearing.

b. That is, the Mutual Funds Law should be amended to ensure that there is a complaints procedure which can be referred to an impartial disciplinary tribunal which would afford the parties the right to a fair hearing with the right of appeal to the Grand Court – Financial Services Division.

c. This is imperative because all decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.

Reasons

Our reasons for the above submissions are set out below:

1. Reflect The Appropriate And Rational Expectations Of All Stakeholders.

DMS's Specific Comments on the Guidance. The Guidance should reflect the established law and realistic expectations of hedge fund stakeholders regarding Fund Governance, not the agenda of an infinitesimally small special interest group who seek to have directors act ultra vires of their obligations under Cayman Islands law, which requires them to act in the best interest of the fund, not any particular investor. Nor should the Authority seek to act for those few stakeholders that implore the Authority to "reallocate the market". Such actions would be illegal uses of the Authority's power and, while we accept that the Authority has broad discretion under the Mutual Funds Law and Monetary Authority Law, neither broad discretion nor good intentions is an excuse for abuse. The Authority is bound to be sober and fair minded in its work and, as a public institution, the Authority must, at all times, be impartial and make fact-based decisions to maintain the public trust and confidence. The Authority must remain neutral, act with caution and care and not advocate for one service provider over another.

The wrong message

Misuse or overreach of the Authority's power would send the wrong message to the business community, putting the Cayman Islands at risk of losing jobs and damaging its reputation and economy. The Mutual Funds Law and Monetary Authority Law should be applied appropriately – not stretched or abused to favour any special interests. This concern is not theoretical as studies[3] have shown that "the unpredictable nature of the legal [regulatory] system" is a major factor

[3] Bloomberg-Schumer report and other similar reports.

undermining competitiveness as a global financial centre and that "attractiveness to international companies" is diminished by the "perception that penalties are arbitrary and unfair".

US approach to Fund Governance

It is puzzling – yet instructive – why the Authority fails to make one single mention of the United States Securities and Exchange Commission's (SEC) views on governance, such as its pillars of investor protection[4] or its fund governance standards[5], in either of the Consultation papers, and completely ignores these considerations in formulating this Guidance; when nearly 80% of hedge fund assets are managed by US based managers and the majority of stakeholders in Cayman Islands regulated mutual funds (hedge funds) are US based. The SEC generally requires hedge fund managers to be registered and operate their funds within what are widely believed to be the strongest regulatory standards in the industry. Locally it is commonplace for service providers, such as auditors and administrators, to voluntarily comply with SEC standards in their work in an effort to maintain best practice standards. Has the Authority even considered these standards in promulgating this Guidance? Instead, as dissected below, the Authority seems to have arbitrarily selected a few arcane and irrelevant data points that defy logic and serve only to perpetuate a false narrative that Fund Governance is deficient in the Cayman Islands.

DMS is highly engaged with the hedge fund industry. We conduct thousands of hedge fund board meetings every year plus tens of thousands of interactions with hedge fund stakeholders annually. IOSCO standards have not been raised as a concern in these board meetings or any interactions by any stakeholder. IOSCO standards remain on the fringe of an industry dominated by mainstream regulatory issues promulgated by national regulators such as the SEC, CFTC, FCA and SFC. It is highly questionable why the Authority would seek to subject regulated mutual funds to substantial increased costs by imposing on them esoteric standards of no discernible value or benefit to industry stakeholders. This is one of the risks of relying on hastily and improperly conducted

[4] The US Investment Company Act of 1940 created the "four pillars of protection" for mutual fund investors. These protections give investors confidence that:

(i) Their investments will be managed in accordance with the fund's investment objectives;

(ii) The assets of the fund will be kept safe;

(iii) When they redeem, they will get their pro rata share of the fund's assets; and

(iv) The fund will be managed for the benefit of the fund's shareholders and not the fund's adviser or its affiliates.
Speech by SEC Staff: "Maintaining the Pillars of Protection in the New Millennium." May 21, 1999.
http://www.sec.gov/news/speech/speecharchive/1999/spch279.htm

[5] Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF. Joint final rules by CFTC and SEC. dated October 31, 2011.
http://www.sec.gov/rules/final/2011/ia-3308.pdf

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surveys: i.e. if the right questions are not asked, of the right people, the right answers will not be found.

Is it necessary?

IOSCO international standards are intended to fill the gap where no national standards exist and imposing these standards on an industry already heavily regulated from the recent tsunami of national regulation would be duplicative at best or dubious at worst. The key test should be, "is it necessary?" While implementing international regulatory standards is a commendable conceptual goal, the day-to-day reality is that hedge fund stakeholders are most concerned with complying with the rules of national regulators. This is what keeps the industry up at night. For instance, the Commodity Futures Trading Commission (CFTC) has no vote within IOSCO as an associate member, yet the CFTC is one of the most dominant and widely respected regulators in the hedge fund industry.

As reported in the UK press, it also surprising that the Authority did not solicit the views of the leading hedge fund law firms[6] in the United States who are most influential in guiding the decisions of sponsors on establishing and operating hedge funds in various jurisdictions.
Taken together, the Authority has failed to show how excluding the standards and viewpoints of the leading national regulators and hedge fund law firms, two key stakeholders within our most important market, meets the Authority's obligations under Section 6(2) and 6(3) of the Monetary Authority Law.

While DMS believes that effective regulation of fund governance as intended under the Mutual Funds Law is prudent for the continued development of the industry in a safe and sustainable manner, the Authority has not addressed this issue – meeting the appropriate and rational expectations of all stakeholders – nor has it presented a convincing case for the reforms it seeks. Based on our careful examination of the evidentiary information disclosed by the Authority in its two Consultation papers, survey and its other public disclosures, we are deeply concerned that the Authority, in pursuing these reforms, has wholly and imprudently relied on: (1) the narrow, conflicted views of a vocal, but infinitesimally small number of investors – without verifying the veracity of their allegations in accordance with the principles of natural justice; and (2) intellectually or statistically irrelevant studies or surveys. This creates a real possibility of bias; yet the Authority continues to cite this counterfactual information as authoritative, without presenting the Public Sector with any evidence that this information has been properly investigated and verified.

[6] The NED, May 2013

Our specific comments on the Guidance appear in Exhibit DMS1 – Specific Comments on the July Consultation. These are subject to our general comments below.

a. **Fund Governance is not deficient.** We, like most in the industry other than the infinitesimally small special interest group previously mentioned, are perplexed why the Authority considers that Fund Governance is deficient in the Cayman Islands. Anyone, anywhere in the world can serve as a director of a Regulated Mutual Fund and there are more than 10,000 directors currently serving Regulated Mutual Funds worldwide, of which only approximately 250 are based in the Cayman Islands. There is substantial evidence – the Islands' position as the global jurisdiction of choice for Regulated Mutual Funds, the large number of directors available in the market, twenty years of case law and the IOSCO report itself – to support the propositions that Fund Governance is already appropriate, rational, well understood and that investors already have appropriate legal recourse against directors who breach their fiduciary duties.

i. Success of the Islands' Regulated Mutual Fund business.

1. The Cayman Islands are the leading offshore jurisdiction for Regulated Mutual Funds. According to the Authority's website, there are now 11,209 Regulated Mutual Funds. The annual growth since 2005 was 14% in 2006, 16% in 2007, 5% in 2008, down 4% in 2009, down 1% in 2010, down 2% in 2011, up 17% in 2012 with the registration of 1,891 master funds and up another 3% as of June 30th 2013. This is particularly impressive in light of the global financial crisis in 2007–2009.

ii. Cayman case law.

1. Fund Governance in the Cayman Islands is already robust and well understood and has been for many years by virtue of the common law, the existing regulatory framework and the high quality of the Islands' judiciary and legal profession. Stakeholders have recourse to the Authority or to the Cayman Islands courts for any instances of wrongdoing from directors. Indeed, the reputation of the Cayman Islands' legal and judicial system is one of the primary reasons Regulated Mutual Funds are in such high demand by hedge fund promoters and investors worldwide. We can illustrate the good health of Fund Governance in the Islands by pointing to the results of a simple search for reported cases with the words "fund" and "director" in the Cayman Islands Law Reports freely available on the Judicial & Legal Information Website[7]. The results are attached as "**Exhibit DMS2: CILR Search**".

[7] http://www.judicial.ky/CILRSearch/index.php

2. Exhibit DMS2 reveals that since the Mutual Funds Law was first enacted in 1993, over twenty years ago, there have only been 80 reported cases in the Cayman Islands which include both the words "fund" and "director". These include 58 cases at first instance; 35 cases in the Grand Court and 23 cases in the Grand Court, Financial Services Division (including the now famous Weavering case). That is, on average there have been less than three cases per year. Seventeen cases went to the Court of Appeal and four cases made it to the Judicial Committee of the Privy Council. Those numbers would be smaller for those actually concerning breach of fiduciary duties by a director of a Regulated Mutual Fund, but this simple analysis makes the point.

3. Further, the Authority has brought 13 enforcement cases to date against Regulated Mutual Funds for breaches of the Mutual Funds Law and Companies Law (2012 Revision) (as amended). All enforcement cases resulted in the Authority cancelling the offending mutual funds' registration to operate in the Cayman Islands. It is instructive that all 13 of these enforcement cases involved non-professional directors based outside of the Cayman Islands.

4. The enforcement data from the Authority provides two significant revelations.

5. First, these 13 enforcement cases do not include the famous Weavering case that also involved non professional directors based outside the Cayman Islands; because the Authority has inexplicably not taken any enforcement action against these directors despite the Grand Court's ruling in August 2011 – exactly two years ago. To date, the Weavering Fixed Income Macro Fund maintains a valid Certificate of Registration #6838 to operate as an active regulated mutual fund in the Cayman Islands[8]. Such inaction and selective application of the Mutual Funds Law is incompatible with pursuing effective fund governance reform.

6. Second, these 13 enforcement cases do not include any cases of misconduct of Cayman Islands directors during the global financial crisis – as alleged by some and adopted as a dictum of the Authority for pursuing fund governance reform. If the Authority has evidence of director misconduct, why hasn't the Authority taken enforcement actions against these perpetrators? Also, why were no cases brought by stakeholders in the courts as discussed above? These are important unanswered questions that the Authority is bound to comprehensively answer for all stakeholders.

[8] http://cimoney.com.ky/search/searchforentity.aspx?searchtext=

7. It would be erroneous for the Authority to suggest that it has sufficient basis for fund governance reform, but insufficient basis for taking enforcement action. Both of these cannot be true at the same time. The Authority is duty bound to properly investigate any allegations of director misconduct. It should not blindly rely on anecdotes and accept them at face value without fully investigating them in accordance with the principles of natural justice. Trust but verify. Even if the allegations prove credible, then surely it would be more rational for the Authority to use its enforcement powers to single out and punish the offenders, rather than striking the entire industry with common regulation to solve an uncommon problem. It is strange and unprecedented that, in its pursuit of fund governance reform, the Authority has disregarded its own established practices by first proposing a range of regulatory 'solutions', without first investigating and understanding the nature and extent of any problems that may exist.

8. Based on these statistics, underscored by the fact that they include the period of the worst financial crisis in our history, we do not understand why the Authority considers that Fund Governance in the Cayman Islands is deficient. Surely there would be substantially more enforcement cases in the Authority or the courts involving Cayman Islands based directors if Fund Governance was deficient.

iii. IOSCO.

1. The Authority has placed inappropriate and irrational reliance upon the IOSCO Objectives and Principles of Securities Regulation[9] ("**IOSCO Principles**") as a basis for reform of Fund Governance[10]. The Authority made an inaccurate and misleading statement[11] by suggesting that IOSCO's recommendations expect higher corporate governance standards from hedge funds, whereas the focus of the IOSCO Principles is almost exclusively on hedge fund managers/advisers and their exposure or contribution to systemic risks in the financial

[9] http://www.iosco.org/library/pubdocs/pdf/IOSCOPD359.pdf. See in particular Principle 28 on pages 167 to 176.

[10] Paragraph 19 on page 5 of the July Consultation states:

> "The IOSCO recommendations now include a greater focus on the corporate governance standards expected from fund managers and funds themselves. Two amendments in particular, signal an increased emphasis on corporate governance standards. The first being Principle 24, now requiring the regulatory system to set governance standards for Collective Investment Schemes. The second amendment is the introduction of a new principle (Principle 28) recommending that regulatory standards should ensure that hedge funds and/or hedge fund managers/advisers are subject to appropriate oversight. Principle 28 and the accompanying methodology speak to organisational and operational standards, as well as disclosure and conduct of business standards that should apply to funds, imposing many of the governance obligations via the fund manager and management of funds and some on the fund directly."

[11] See paragraph 19 on page 5 of the July Consultation. The July Consultation introduces responsibilities, and therefore liabilities, on hedge fund directors. However, it appears that Principle 28 in the IOSCO paper relates almost exclusively to hedge fund managers/advisers, not to hedge fund directors.

markets. The IOSCO Principles' focus is decidedly not on the protection of hedge fund investors by imposing greater fiduciary duties on hedge fund directors. We have summarised The Key Questions of IOSCO's Principle 28[12] in Exhibit DMS3 – Ten Key Questions under IOSCO Principle 28.

2. Essentially, only Key Question 8 has any direct bearing on a hedge fund and, by extension its directors, and even that provision applies equally to the hedge fund's manager/adviser. Key Question 8 provides:

> **"Supervision and enforcement**
>
> 8.(a) Does the regulatory system provide for ongoing supervision of the hedge fund managers/advisers which are required to register?
>
> (b) Does the regulator have the power to access and inspect the hedge fund managers/advisers and their records and/or the hedge funds?
>
> (c) Does the regulator have the authority to enforce against wrongdoers?"

3. Thus, IOSCO's only implication for the Authority in terms of the regulation of Regulated Mutual Funds is that 8(b) recommends that the Authority should have power to access and inspect their records. The Authority already has this statutory right in prescribed circumstances[13]. If these circumstances are too narrow, it may be that the Mutual Funds Law should be further amended. In any event, the Authority already has enforcement powers under §30(3) of the Mutual Funds Law which should satisfy the recommendation in 8(c) quoted above.

4. In the circumstances, it is inappropriate and irrational for the Authority to rely on the IOSCO Principles for the Guidance. Every single point the Authority makes in the Guidance that is sourced from the IOSCO Principles was intended by IOSCO to apply to hedge fund managers/advisers and not to hedge funds or their directors. Every single one of those points must be substantially modified to clarify that the directors of Regulated Mutual Funds' role is high-level oversight of the functions of their delegates, including the investment manager/adviser and the usual service providers.

[12] "Key Questions" on pages 170 to 176 in this document: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD359.pdf

[13] Mutual Funds Law (2012 Revision), §30 – Powers of Authority in respect of regulated mutual funds.

5. Neither IOSCO nor the common law imposes any expectation or obligation upon non-executive directors of Regulated Mutual Funds to continuously monitor investment performance and risk management. Those functions are delegated to the Investment Manager which is in a position to monitor these issues "real time"; the directors are not, so it is unfair and irrational to impose this responsibility, and therefore liability, on them. The EU AIFM Directive for instance, imposes risk management functions on the AIF Manager, not on the AIF itself[14].

iv. **Survey Results.**

1. Bad facts make bad law and it's evident that the Authority's survey results are arbitrary – taken from statistically unrepresentative samples of the entire population of investors, investment managers, administrators and directors. The mere fact that the Authority's powers affect rights or interests obliges it to act within natural justice principles. Such principles require that legal decisions can only be legitimately based on survey research if data collection uses proper scientific methods and the studies are neutral, valid and understandable. The Authority has provided no information whereby the Private Sector can evaluate the integrity of the survey process. The Authority's July Consultation indicated that 86% of the 28 investors who responded to the Survey thought the industry would benefit from some improvement on corporate governance practices. However, those 24 investors represent at most about 0.002% of the total investor population in Regulated Mutual Funds of more than 1.8 million[15]. We submit that this finding is infinitesimally small, unscientific and disproportionate by any measure. To extrapolate this mediocre finding and promote it as conclusive evidence for a rational decision would be reckless.

Alternative view

Thus, we would challenge and counter the Authority's shocking extrapolation and assertion that 86% of investors think Fund Governance needs improvement with the assertion that at least 99.998% of investors are satisfied with Fund Governance "as is". As explained above, the responses to the Authority's survey are statistically insignificant and therefore cannot rationally be taken to represent all investors or form any basis for any rational decision. That is not to say that the respondents' opinions should be dismissed. All opinions are valuable and appreciated, but rather it is clearly an unsafe and unreasonable assumption for

[14] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers, Recital 21
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:01:EN:PDF

[15] 2011 CIMA Investment Statistical Digest showing total industry assets of $1.8 trillion and 86% of funds having a minimum investment of $1m or less.

the Authority to posit that these respondents are truly representative of all the persons in their class.

2. This means that the Authority's decision to treat the collective opinions of the sampled investors as an accurate representative of the entire population of investors is fundamentally flawed, inappropriate and irrational.

b. **Inappropriate increase in burdens, risks and costs.** The Guidance as presently drafted would impose substantially greater burdens on the directors of a Regulated Mutual Fund, resulting in substantially greater costs to the fund since directors are paid by the fund. While the Guidance would result in significant benefits for DMS and other service providers by increasing our revenues from additional governance services, this short-term benefit would come at the expense of the long term sustainability of the industry. It is highly questionable whether the proposed increased burdens, which are of limited to no incremental value, would justify the significant increased cost in an industry where the majority of funds are small – 68% being less than $100m – and funds are already facing challenging market conditions. These increased costs would factor significantly into total expense ratios and make it more difficult for funds to remain competitive. The Authority has not made any cogent argument to support what benefits would accrue to the investors in these funds that would be worthwhile to outweigh these increased costs.

Funds and their directors' reputations are inextricably linked

The Guidance would also vastly increase the reputational risks the Regulated Mutual Fund and its directors would face. It's unreasonable to believe sanctions under the Guidance can solely impact the director but not the Regulated Mutual Fund. The two parties are inextricably linked. The Guidance is, after all, attempting to hold the director responsible for the conduct of the Regulated Mutual Fund. The Authority could use an alleged infraction of the Guidance to sanction a director or a Regulated Mutual Fund where conduct does not breach the fund documents or fiduciary duties owed to the Regulated Mutual Fund. Nevertheless, such sanction could have a devastating effect on the commercial prospects of the Regulated Mutual Fund and its directors.

Although DMS has continually supported a director disqualification regime, the Authority should take great care in wielding this power and there should be appropriate statutory checks and balances in place. We address these in section 3 below titled "***Enforcement Action Must Not Offend the Constitution's Bill of Rights***".

2. Broaden Scope.

a. **Licenced Mutual Funds.** The Guidance should apply to all Regulated Mutual Funds, i.e. registered, master, administered and licenced, without excluding the latter.

i. The Authority proposes that the Guidance would apply to registered mutual funds (including master funds) and administered mutual funds and not to licenced mutual funds. The Authority's most recent statistics show 8,243 registered, 2,449 master, 400 administered and 117 licenced mutual funds.

ii. The Authority relied on a false premise – i.e. that Regulated Mutual Funds' deficient corporate governance was somehow responsible for the Global Banking Crisis of 2008 – for reforming corporate governance in the January Consultation with the inevitable result that the proposals were wholly inappropriate and irrational for Fund Governance.

iii. We do not see a good reason why directors of licenced mutual funds should be subject to different governance standards than directors of other Regulated Mutual Funds. Both administered and licenced mutual funds may be sold to "retail" investors and therefore they cannot be distinguished on that basis as justification for having different governance standards. Registered (including master) mutual funds and licenced mutual funds are not required to have a mutual fund administrator licence by the Authority and therefore they cannot be distinguished on that basis as justification for having different governance standards.

iv. The main premise for the Authority's January Consultation was the October 21st 2009 report by the Senior Supervisor Group ("**SSG**") to the Financial Stability Board of the Bank for International Settlements entitled "Risk Management Lessons From The Global Banking Crisis of 2008". The report was based on a survey of "twenty global financial institutions in our respective jurisdictions[16] to assess during the first quarter of 2009 their risk management practices against a compilation of recommendations and observations drawn from several industry and supervisory studies published in 2008".

v. The SSG stated, inter alia:

[16] The Senior Supervisors Group comprised representatives of six countries' top financial services regulators, namely: Canada's Office of Superintendent of Financial Institutions, France's Banking Commission, Germany's Federal Financial Supervisory Authority, Japan's Financial Services Authority, Switzerland's Financial Market Supervisory Authority, United Kingdom's Financial Services Authority and United States' Federal Reserve, Comptroller of the Currency and Securities and Exchange Commission.

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> "The events of 2007-09 underscored the vulnerabilities of those firms (i.e. global financial services organisations) whose business models were highly dependent on uninterrupted access to secured funding markets.
>
> Beginning in the summer of 2007 and continuing through 2009, lenders' willingness to finance less traditional, harder to price collateral diminished. In addition, counterparties and creditors sought to lessen their exposure to firms perceived to be "weaker" by reducing the amount of credit provided, increasing haircuts on positions financed and shortening the term for which credit was extended. Moreover, secured lenders tightened their definitions of acceptable collateral. These trends posed particular difficulties for firms that, lacking adequate liquidity reserves or contingent sources of funding, relied heavily on short-term repo funding collateralised by illiquid assets."

vi. That report clearly shows that the global banking crisis emanated from over-leveraged, under-regulated, systemically important banks in major onshore financial centres; those banks' hedge fund clients and counterparties were merely collateral damage. We submit that more onerous Fund Governance requirements – of the sort contemplated in the Proposed Measure – would have been and, if imposed would be, totally ineffective to insulate Regulated Mutual Funds from losses arising from contagion risks caused by systemically important banks.

b. **Sole Corporate Director.** The Guidance should reaffirm that a Regulated Mutual Fund may have a sole regulated corporate director which is an LMFA or wholly owned subsidiary thereof acting as a nominee of its parent. This is consistent with the Mutual Funds Law. It would be discriminatory and illegal to do otherwise.

i. The UK has long recognised the concept of a sole corporate director. This is particularly so in the case of the authorised corporate director ("ACD") of an open-ended investment company ("OEIC")[17], which is a well respected type of entity with a defined statutory function, analogous to an LMFA and used by leading fund sponsors worldwide. For example, JPMorgan Funds Limited is the ACD of JP Morgan Fund ICVC, an open-ended investment company registered in England and Wales[18]. JPMorgan Funds Limited is ultimately owned by JPMorgan Chase & Co., one of the largest banks in the world.

[17] Open-Ended Investment Companies Regulations 2001, §15(6):

> "If the company has only one director, that director must be a body corporate which is an authorised person and which has permission under Part IV of the Act to act as sole director of an open-ended investment company."

[18] Prospectus of JPMorgan Fund ICVC effective from July 29th 2013.
http://am.jpmorgan.co.uk/adviser/_documents/jpmorgan-fund-icvc-pro-gb-en-29-07-13-with-05-08-13-insert.pdf

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ii. On July 22nd 2013 the UK implemented the European Alternative Investment Managers Directive with The Alternative Investment Fund Managers Regulations 2013. The following provision[19] shows that the sole corporate director continues to be recognised as a statutory entity in the new context of Alternative Investment Funds:

> "**Open-Ended Investment Companies Regulations 2001**
>
> 10. – (1) The Open-Ended Investment Companies Regulations 2001(b) are amended as follows
>
> (2) In regulation 15 (requirements for authorisation) –
>
> (a) for paragraph (6) substitute –
>
> "(6) If the company has only one director, that director must be a body corporate which is an authorised person and which has a Part 4A[20] permission to carry on the regulated activity of managing an UCITS or, as the case may be, managing an AIF.";…"

iii. The Authority apparently has an unwritten policy of insisting that every Regulated Mutual Fund must have at least two directors, one of whom must be an individual (i.e. natural person). We are aware of a least one instance where the Authority has previously refused to register a regulated mutual fund with a regulated corporate director as sole director and insisted on the appointment of at least one other director who is an individual. We also have evidence of the discriminatory application of this policy by the Authority in arbitrarily permitting some corporate directors while disallowing others with the same facts and circumstances.

iv. We consider that the Authority's said unwritten policy is unconstitutional. That is, it is not lawful, rational, proportionate and procedurally fair[21]. As noted above, the Authority's approach is seriously out of step with the UK's approach to the regulation of investment funds insofar as the Financial Conduct Authority will permit investment funds including both UCITS (i.e. retail) and AIFs (i.e. hedge funds), to have a sole corporate director. Stakeholders have been adversely affected by that policy and have the right to request and receive written reasons

[19] The Alternative Investment Fund Managers Regulations 2013, Schedule 1 – Amendments to Preliminary Legislation, Part 1 – Amendments to the Financial Services and Markets Act 2000.

[20] Financial Services Act 2012, PART 2, Permission to carry on regulated activities, §11. http://www.legislation.gov.uk/ukpga/2012/21/section/11

[21] The Cayman Islands Constitution Order 2009, Bill of Rights, §19. http://www.constitution.gov.ky/pls/portal/docs/PAGE/CRSHOME/CONSTITUTION/2009%20CONSTITUTION%20ORDER.PDF

for that decision or act. This matter can be simply resolved by revising the Statement of Guidance for Regulated Mutual Funds as indicated in §9.1-§9.4 in Exhibit DMS1[22].

v. It is unclear why the Authority creates uncertainty about the ability of regulated corporate directors to serve Regulated Mutual Funds, since it is plainly provided for in the Mutual Funds Law and the Public Sector has relied on this provision in the Mutual Funds Law since 1993 with a legitimate expectation to continue such reliance. This decision of the Authority is inconsistent with established law and practice.

vi. We request that the Proposed Guidance be revised to expressly confirm that an LMFA may act as the sole director of a Regulated Mutual Fund. This is simply an institutional approach to the provision of fiduciary services and clearly permitted under the Mutual Funds Law since 1993.

vii. The Mutual Funds Law has always provided that:

> "'mutual fund administration', in respect of a mutual fund, means… to provide an operator to the mutual fund…"
>
> "operator", in respect of a mutual fund, means –
>
> (a) where the mutual fund is a unit trust, a trustee of that trust;
> (b) where the mutual fund is a partnership, a general partner in that partnership; or
> (c) where the mutual fund is a company, a director of that company[23];"

viii. Since at least 2005, the Authority has recognised that a licenced mutual fund administrator may provide a sole corporate director to a licenced mutual fund[24]:

"Unless a corporate director is appointed, a minimum of two individuals must be named as directors of all funds. In the case of corporate directors, one director is acceptable if that corporation is licenced by the Authority or is otherwise acceptable to the Authority and a current register of directors should be filed with the licence application. Any change in directors must be approved by the Authority."

[22] Statement of Guidance – Licensing Mutual Funds, §3.1.
http://www.cimoney.com.ky/regulatory_framework/reg_frame.aspx?id=366

[23] Mutual Funds Law (2012 Revision), §2

ix. It follows that there should be no doubt that the LMFA may provide itself as a Regulated Mutual Fund's sole operator, whether that is a director, general partner or, if the LMFA is a licenced trust company, trustee of a company, limited partnership or unit trust, as the case may be. The Authority already requires all LMFAs to have at least two directors[25].

x. An LMFA is licenced to act as the investment manager or administrator of a Regulated Mutual Fund. When an LMFA acts in either of those capacities, the Authority does not require a second person to share the same responsibility; yet a Regulated Mutual Fund is more vulnerable to wrongdoing or errors by an investment manager or administrator because they directly control the Regulated Mutual Fund's assets and most of its liabilities.

xi. The Authority does not require two separate persons to fulfill any other discrete function to a Regulated Mutual Fund, such as investment manager, share registrar, auditor or law firm. In fact, the Authority will not question an LMFA's appointment as sole investment manager or share registrar of a Regulated Mutual Fund in the absence of some regulatory infraction by the LMFA.

xii. If the LMFA is also a licenced trust company, it may act as sole trustee, i.e. operator, of a unit trust that is a Regulated Mutual Fund or sole director of a licenced mutual fund. It is irrational to prohibit that LMFA also acting as sole director, i.e. operator, of a company that is any other type of Regulated Mutual Fund, i.e. registered, master or administered.

3. Enforcement Action Must Not Offend the Constitution's Bill of Rights.

a. The Authority must take great caution and care in crafting the Proposed Measure for three reasons.

b. First, the Authority has statutory duties to ensure that any burden or restriction imposed by the Proposed Measure is in the best economic interests of the Cayman Islands[26] and is competitive[27,] relevant and appropriate[28] and proportionate[29].

[25] A licenced mutual fund administrator that is a company shall, at all times, have at least two directors. A person who contravenes this provision commits an offence and is liable on conviction to a fine of CI$20,000. Mutual Funds Law (2012 Revision), §22.

[26] Monetary Authority Law (2011 Revision), §6(2)(a)

[27] Ibid., §6(3)(c)

[28] Ibid., §6(3)(c)

[29] Ibid., §6(3)(d)

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c. Second, the Authority intends to rely on breach of the governance standards in the Proposed Measure[30] as justification to take enforcement action against a Regulated Mutual Fund, its promoter and/or any director[31]; this could cause any one of them irreversible reputational and financial losses.

d. Third, the Bill of Rights in the Cayman Islands Constitution provides, inter alia[32]:

> "**Lawful administrative action**
> 19. – (1) All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.
>
> (2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act."

e. There is no doubt that certain people should not be trusted to manage or oversee the management of other people's money. This may be due to their lack of relevant experience or their track record as a "bad actor". However, it is a basic principle of natural justice and the rule of law in these Islands that everyone should have the right to a fair hearing and this should certainly be the case when any individual's livelihood is at stake.

f. The Authority should not take any enforcement action against a director for alleged infraction of the Guidance before there is an appropriate statutory mechanism for a fair hearing.

g. That is, the Mutual Funds Law should be amended to ensure that there is a complaints procedure which can be referred to an impartial disciplinary tribunal which would afford the parties the right to a fair hearing with the right of appeal to the Grand Court – Financial Services Division[33].

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[30] §3.1, SoG-MF

[31] Mutual Funds Law (2012 Revision) (as amended), §30(3). Enforcement powers include requiring substitution of any promoter or director, cancellation of the mutual fund's registration and appointment of a person to advise the fund on the proper conduct of its affairs to assume control of its affairs.

[32] The Cayman Islands Constitution Order 2009.
http://www.constitution.gov.ky/pls/portal/docs/PAGE/CRSHOME/CONSTITUTION/2009%20CONSTITUTION%20ORDER.PDF

[33] For example, see The Legal Practitioners Bill, 2012, PART 6- DISCIPLINE WITHIN THE LEGAL PROFESSION:
http://www.gov.ky/pls/portal/docs/PAGE/CIGHOME/FIND/ORGANISATIONS/AZAGENCIES/LGB/DOCUMENTS/LEGAL%20PRACTITIONERS%20BILL%202012%20NOVEMBER%2025TH%20CONSULTATION%20DISCUSSION%20DRAFT.PDF

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4. The only statutory right of appeal to the Grand Court against the Authority's decisions[34] is that of Licenced Mutual Funds[35] or Licenced Mutual Fund Administrators[36] which have had their licences revoked. As mentioned above, the Authority's Proposed Measure would significantly broaden the scope of its statutory enforcement – against Directors and others considered to be in breach of the new governance standards. This should be balanced by providing a statutory right of appeal to anyone aggrieved by the Authority's enforcement actions taken pursuant to the Proposed Measure. The appeal should be handled administratively by a tribunal in the first instance, rather than by the Grand Court. However, even a direct appeal to the Grand Court would be preferable to judicial review, the only existing common law alternative, because such an application requires leave of the Court and must be made within three months of the Authority's decision[37].

5. Accordingly, we request that the Authority not proceed with the Proposed Measure until the Mutual Funds Law is amended to provide aggrieved persons with the right to appeal any enforcement action for alleged breach of the Proposed Measure to an appropriate statutory tribunal and with the right of further appeal from the tribunal to the Grand Court. We consider that failure to provide such an appeal mechanism would be inconsistent with principles of natural justice.

Conclusion

In conclusion, we request the Authority to revise the Guidance to reflect the appropriate and rational expectations of all stakeholders. In summary, the Guidance should be consistent with a director's fiduciary duties at common law and not attempt to impose inappropriate burdens, risks and costs on Regulated Mutual Funds and their directors, particularly obligations that have been appropriately delegated to the investment manager, administrator or other service providers. DMS's revisions in Exhibit DMS1 should achieve that objective for the reasons provided therein. The Guidance should apply equally to all Regulated Mutual Funds, whether registered, master, administered or licenced; the latter should not also be subject to a different Statement of Guidance on Corporate Governance. The Guidance should reaffirm the use of a sole corporate director that is a licenced mutual fund administrator or wholly owned subsidiary thereof. The Mutual Funds Law should be amended to provide a new statutory appeal mechanism available to directors and operators who are the subject of complaints and/or enforcement action in accordance with the Bill of Rights.

[34] Mutual Funds Law (2012 Revision) (as amended), §36(1).

[35] Ibid., §30(3)(a) or (15).

[36] Ibid., §31(3)(a) or (12).

[37] Grand Court Rules 1995 (Revised Edition), Order 53, rule 1.

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Please contact me if you have any questions regarding DMS's responses to the July Consultation or Guidance. We look forward to your reply and confirm that we are fully reserving our rights in every regard.

Yours sincerely,

Don Seymour
Managing Director

cc: Alternative Investment Management Association (Cayman Islands)
Cayman Islands Company Managers Association
Cayman Islands Directors Association
Cayman Islands Fund Administrators Association
Cayman Islands Society of Professional Accountants
Cayman Islands Compliance Association

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EXHIBIT DMS1:

SPECIFIC COMMENTS ON THE JULY CONSULTATION

We have the following specific comments on the July Consultation which are made in addition to, and without derogation from, our general comments mentioned above.

We have highlighted cross-references to IOSCO Principle 28, Key Questions listed in Exhibit DMS3 hereto. All of these cross-references show IOSCO's expectations regarding hedge fund managers/advisers and not regarding the hedge funds themselves or hedge fund directors.

Statement of Guidance for Regulated Mutual Funds	**DMS's Comments: CIMA SOG Fund Governance**
[1.] Application	
1.1. This Statement of Guidance applies to ~~administered mutual funds and registered~~all regulated mutual funds ('Regulated Mutual Fund') as defined by ~~section 4(1)(b) and 4(3) respectively of~~ the Mutual Funds Law (2012 Revision) (as amended) ('the Law~~Regulated Mutual Fund'~~).	The Guidance should be compulsory for all Regulated Mutual Funds, i.e. Registered, Administered, Master and Licenced.
~~1.2 A fund licensed under section 4(1)(a) of the Mutual Funds Law (2012 revision) (as amended) shall be guided by the Statement of Guidance – Corporate Governance for licensees of the Authority; however such licensed fund may look to this statement of guidance for additional guidance.~~	Licenced Mutual Funds should be subject to the Guidance (i.e. this Guidance on Mutual Funds) and not to the Statement of Guidance on Corporate Governance that was the subject of the January Consultation.
[2.] Statement of Objectives	
2.1 Section 29(2)(b) of the ~~Mutual Funds~~ Law ~~(2012 Revision) (as amended)~~ provides that the Authority shall, inter alia, 'be responsible for supervision and enforcement in respect of persons to whom this Law applies,…' . Section 30(1)(d) stipulates the Authority may take any or all of the supervisory or enforcement actions specified in section 30(3) if the direction and management of a Regulated Mutual Fund has not been conducted in a fit and proper manner. Accordingly, this Guidance relates to section 30(3)	**IOSCO Principle 28, Key Question 1(a): The regulatory system should set standards for hedge fund managers/advisers.** **IOSCO has no such expectation for the hedge fund or its directors.** **Thus, IOSCO expects governance standards of hedge fund managers/advisers, not hedge fund directors.** **This Guidance has a false premise, i.e. it is necessary for Regulated Mutual Funds because**

Statement of Guidance for Regulated Mutual Funds	DMS's Comments: CIMA SOG Fund Governance
and provides guidance on the governance standards expected from a Regulated Mutual Fund.	**IOSCO said so. The simple truth is, IOSCO's expectations apply to managers/advisers, not to hedge funds and their directors.**
2.2 The Authority expects the oversight, direction and management of a Regulated Mutual Fund to be conducted in a fit and proper manner. The purpose of this Guidance is to provide the Board of Regulated Mutual Funds and their operators as defined by the ~~Mutual Funds~~ Law ~~(2012 Revision) (as amended)~~ ('Operator') with guidance on minimum expectations for the sound and prudent governance of Regulated Mutual Funds; and to emphasise the factors Operators should consider.	If an Operator fails to consider these factors, there is heightened risk of liability for breach of fiduciary duties in the event they become entrenched over time. This greater risk would mean directors would have to demand higher fees which would ultimately make Regulated Mutual Funds uncompetitive with mutual/hedge funds in competing jurisdictions that are more commercially minded about what stakeholders really require of directors, i.e. high-level oversight of the investment manager/adviser and other service providers versus continuously monitoring them. There is also the risk of reputational damage and personal loss as a result of the Authority's enforcement action for infraction of the Guidance, even where the director would be entitled to an indemnity from the Regulated Mutual Fund if the action were brought by the Regulated Mutual Fund itself or an investor by way of derivative action.
2.3 This Guidance sets out the key corporate governance principles pertaining to Regulated Mutual Funds, their boards and Operators. This Guidance is not intended as ~~a prescriptive or~~ an exhaustive guide to the Authority's governance expectations.	We have amended 2.3 because it appears that what the Authority actually intends is that: (a) the Guidance will be prescriptive, but (b) will not be exhaustive. Our comments on this are as follows: (a) The Guidance cannot be described as key corporate governance principles and simultaneously not prescriptive of the Authority's governance expectations. (b) This begs the question what other fund governance expectations does the Authority have which are not set out in the Guidance? The Guidance should at least cross-refer to the

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Statement of Guidance for Regulated Mutual Funds	DMS's Comments: CIMA SOG Fund Governance
	Authority's additional expectations.
2.4 The Guidance does not codify or amend any existing law. Where the Guidance is incompatible with existing law, the law takes precedence and prevails.	The reality is that the Guidance is likely to influence the development of case law because the Courts would take the Guidance into account as the Authority's governance expectations, even if they are not intended to be exhaustive. That is, the Guidance is prescriptive.
2.5 The governance structure of a Regulated Mutual Fund ~~must~~ should be appropriate and suitable to ensure the effective oversight of a Regulated Mutual Fund. The size, nature and complexity of a Regulated Mutual Fund are fundamental factors the directors should consider in determining the adequacy and suitability of its governance framework.	Agreed. The Regulated Mutual Fund's directors should determine what is adequate and suitable subject to their fiduciary duties under common law and stakeholder expectations as described in the fund documents.
[3.] Mutual Funds Law	
3.1 The actions in section 30(3) of the ~~Mutual Funds~~ Law ~~(2012 Revision) (as amended)~~ are available to the Authority where the governance of a Regulated Mutual Fund does not meet the governance standards endorsed in this Guidance.	IOSCO Principle 28, Key Question 8: The regulatory system should: (a) set standards for hedge fund managers/advisers; (b) empower the regulator to gain access to and inspect the hedge fund managers/advisers and their records and/or the hedge funds; and (c) empower the regulator to take action against wrongdoers. Thus, parts (b) and (c) of this question apply to hedge funds also, in addition to hedge fund managers/advisers. ***This means that the Authority should be empowered to take enforcement action[38] when a***

[38] The Authority's regulatory powers include:

(a) cancel the Mutual Fund's Licence or registration under section 4(1)(b) or 4(3);

(b) impose/amend/revoke conditions or further conditions on any Mutual Fund Licence;

(c) require the substitution of any promoter or operator of the mutual fund;

Statement of Guidance for Regulated Mutual Funds	DMS's Comments: CIMA SOG Fund Governance
	hedge fund director obstructs the Authority in gaining access to and inspecting a Regulated Mutual Fund's records. ***IOSCO Principle 28 does <u>NOT</u> suggest that the Authority must be empowered to take enforcement against a director for an infraction of any of the other stipulations in the Guidance.***
<u>3.2 The Authority shall follow the statutory complaints procedure established by section [NEW] of the Law before taking any enforcement action against an operator of a Regulated Mutual Fund for infraction of this Guidance. Any operator who feels aggrieved by the [NEW STATUTORY TRIBUNAL] may appeal that decision pursuant to section [NEW] of the Law.</u>	Before the Guidance takes effect, the Law should be amended to establish a statutory tribunal so that any director accused of breaching the Guidance has the right to a fair hearing and also the right to appeal any unfavourable decision of the tribunal to the Grand Court – Financial Services Division. This is required for compliance with the following section of the Bill of Rights in the Cayman Islands Constitution: "**Lawful administrative action** 19. – (1) All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair. (2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act."
[4.] Oversight Function	
4.1 The Operators are the directing will and mind of the Regulated Mutual Fund and have ultimate responsibility for effectively overseeing and supervising the activities and affairs of the Regulated Mutual Fund.	"A director must exercise his powers independently, without subordinating those powers to the will of others, except to the extent that they have properly delegated their powers. The Cayman Islands investment fund industry works on the basis that investment management,

(d) appoint a person to advise the fund on the proper conduct of its affairs; and

(e) appoint a person to assume control of the affairs of the mutual fund.

Statement of Guidance for Regulated Mutual Funds	DMS's Comments: CIMA SOG Fund Governance
	administration and accounting functions will be delegated to professional service providers and a company's independent non-executive directors will exercise a high level supervisory role." Weavering case: 2011 (2) CILR 211.
4.2 The Operators are responsible for ensuring the Regulated Mutual Fund conducts its affairs in accordance with all applicable Cayman Islands laws, regulations, rules and standards, including those of the Cayman Islands and the Authority.	Typically, a Regulated Mutual Fund's operations outside the Cayman Islands would be conducted by service providers such as the investment manager or administrator which would have primary responsibility for ensuring compliance with the laws of any applicable foreign jurisdiction.
4.3 The Operators should oversee~~monitor~~ compliance with ~~the~~ Cayman Islands laws, regulations, rules and standards, including anti-money laundering and terrorist financing requirements. They should request appropriate information to enable ongoing and effective oversight ~~monitoring~~ of compliance with these laws, regulations, rules and standards; and, where required, provide appropriate directions and supervision to rectify non-compliance.	Typically, the Operators would delegate functions that are subject to laws other than those of the Cayman Islands, for example to the US Investment Manager, for compliance with the Commodity Pool Operator duties imposed by the CFTC. "Directors would be required to supervise professional advisers, act with independent judgment, acquire an understanding of investment activities and the financial condition of the funds, and ensure compliance with investment restrictions. [They should not be] performing their functions nominally, as a favour to the investment manager, rather than exercising any real supervisory role." Weavering case: 2011 (2) CILR 206.
4.4 The Operators are responsible for ensuring that ~~board of~~ the Regulated Mutual Fund ~~documents its Conflict of Interests' policy and also for ensuring the policy is~~ adheres to its Articles of Association regarding disclosure of conflicts of interest.	Initial conflicts of interest are disclosed upfront in the Offering Memorandum. The Regulated Mutual Fund's Articles of Association address conflicts of interest generally so that they are disclosed when directors' resolutions to approve subsequent transactions are passed. This is also consistent with directors' fiduciary duties under Cayman law. It seems excessive for each Regulated Mutual Fund to adopt a more specific documented Conflicts of Interest policy than this.

Statement of Guidance for Regulated Mutual Funds	DMS's Comments: CIMA SOG Fund Governance
	This would be a new, unnecessary and burdensome requirement and expense for Regulated Mutual Funds. The Weavering case did not call for directors to adopt a formal Conflicts of Interest policy when it addressed the issue. 2011 (2) CILR 211. "Directors owe fiduciary duties to their companies to act bona fide in what they consider to be the best interests of the company, to exercise their powers for the purposes for which they are conferred and not to place themselves in a position where there is a conflict between their personal interests and their duty to the company."
4.5 The Operators should enquire into the affairs of the Regulated Mutual Fund, requesting information from Service Providers for board meetings and, where necessary, their presence at board meetings.	"Delegating power to service providers could not absolve directors from their duty to acquire information about the fund's financial affairs or exercise supervisory responsibility for the fund." Weavering case: 2011 (2) CILR 205.
4.6 The board should require regular reporting from the Regulated Mutual Fund's investment manager and other Service Providers to enable it to make informed decisions and to adequately oversee and supervise the Regulated Mutual Fund.	"Directors would be required to supervise professional advisers, act with independent judgment, acquire an understanding of investment activities and the financial condition of the funds and ensure compliance with investment restrictions. [Directors should not perform] their functions nominally, as a favour to the investment manager, rather than exercising any real supervisory role." Weavering case: 2011 (2) CILR 204.
4.7 The Operators should hold regular board meetings. Board meetings should be held sufficiently frequently so that the Board is able to carry out its role effectively~~, requesting the presence of Service Providers where necessary~~.	The deleted text repeats paragraph 4.5.
4.8 The board of a Regulated Mutual Fund~~s~~ should ~~meet at least twice a year~~conduct its business in accordance with its Articles of	Meetings may be held more or less frequently, depending on stakeholder expectations. The Guidance should allow directors this flexibility,

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Statement of Guidance for Regulated Mutual Funds	DMS's Comments: CIMA SOG Fund Governance
Association and otherwise as described in its offering memorandum.	otherwise directors run the risk of being subjected to enforcement action over failure to meet an arbitrary frequency and manner and without a real purpose.
4.8.1 Where the circumstances or the size, nature and complexity necessitate it, the board should meet more regularly than suggested in 4.11 so as to enable the Operators to fulfil their responsibilities effectively.	Agreed.
[5.] Operators Duties	
5.1 The Operator must exercise independent judgement always acting in the best interests of the Regulated Mutual Fund taking into consideration the interests of its investors as a whole.	"Directors of investment funds, whether remunerated or not, owed supervisory duties... to act in what they considered to be in the fund's interests." Weavering case: 2011 (2) CILR 205.
5.2 The Operator must operate with due skill, care and diligence.	"Directors of investment funds, whether remunerated or not, owed supervisory duties... to act with reasonable care, skill and diligence." Weavering case: 2011 (2) CILR 205.
~~5.2.1 The Operator must should make enquires where issues are raised that ; satisfying him/herself that appropriate and timely course of action is being taken.~~	This is so vague that it is totally meaningless. The Weavering case makes it very clear that a director cannot play the ostrich.
5.3 The Operator ~~must~~ should communicate ~~openly with it's~~ the Regulated Mutual Fund's investors ~~and act~~ honestly and in good faith ~~at all times~~ where that is necessary due to a material failure in investor communications by the Investment Manager and/or the Administrator subject always to the Operator's best judgment regarding materiality, reasonableness, fiduciary duties, confidentiality, legal privilege and general or specific legal advice.	The Operator's fiduciary duties are owed to the Regulated Mutual Fund and not directly to the investors. The Regulated Mutual Fund's shareholder communications are typically conducted by the Administrator in respect of net asset value and shareholder information and by the Investment Manager/Adviser in respect of investment performance. If investors are aggrieved by a director's action or inaction, they may bring a derivative action on behalf of the Regulated Mutual Fund[39].

[39] Schultz v. Reynolds and Newport Limited [1992–93 CILR 59]

Statement of Guidance for Regulated Mutual Funds	DMS's Comments: CIMA SOG Fund Governance
5.4 The Operator ~~must~~ should ensure s/he has sufficient time to apply his/her mind to overseeing and supervising each Regulated Mutual Fund s/he is an Operator of and to all matters falling within the scope of his/her responsibilities as an Operator of each Regulated Mutual Fund.	Agreed.
5.5 At the formation of a Regulated Mutual Fund, and on a continuing basis, the Operator is responsible for:	"It was the directors' duty to satisfy themselves that the overall structure of the [fund] was consistent with Cayman Islands industry standards and that the terms of the service providers' contracts, in particular those relating to the determination of NAV, remuneration and limitation of liability, were reasonable and consistent with industry standards… The directors had a duty to satisfy themselves that the scope of their own supervisory role was also clearly understood by all concerned. They could not seek to define or understand the scope of their own role without first obtaining a clear understanding of the roles of the other service providers. A desktop review of the contract documents is inherently unlikely to be sufficient for this purpose, especially if the promoter/investment manager is a start-up operation with which the other service providers have no prior business relationship and working experience." Weavering case: 2011 (2) CILR 216.
5.5.1 Ensuring that the constitutional and offering documents of the Regulated Mutual Fund comply with Cayman Islands law and, for licenced funds, the Authority's Rule on Contents of Offering Documents; and	"[The] directors had a duty to satisfy themselves that the [fund's] offering document complied with the requirements of the Mutual Funds Law, s.4(6). It must describe the rights attaching to the participating shares, which will be issued to the investors and contain all such other information as is necessary to enable a prospective investor to make an informed decision as to whether or not to subscribe for, or purchase, shares in the [fund]. They could not discharge their duty by saying to themselves that the content of the offering

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Statement of Guidance for Regulated Mutual Funds	DMS's Comments: CIMA SOG Fund Governance
	document must be alright because the promoter/investment manager, its lawyers, the prospective administrator, auditor and other service providers are all reputable firms having experience in their respective fields." Weavering case: 2011 (2) CILR 217-218.
5.5.2 Ensuring the investment strategy is clearly described in the offering documents.	"[The directors] are expected to satisfy themselves (on a continuing basis) that the investment manager's strategy is fairly described in the offering document and that the investment manager is complying with whatever investment criteria and restrictions have been adopted by the fund." Weavering case: 2011 (2) CILR 212.
5.6 The Operator retains responsibility for delegated functions and should~~, on a continuing basis, appropriately monitor and supervise~~ have appropriate oversight of~~-~~the delegated functions on a regular basis.	Agreed, except an independent non-executive director cannot be expected to continuously monitor and supervise the delegated functions without charging substantially higher fees which would be unacceptable to most Regulated Mutual Funds and their promoters and stakeholders. See Weavering quote for paragraph 4.3 above.
5.6.1 The Operator must regularly oversee~~continually monitor -~~whether the investment manager is performing in accordance with the defined investment criteria and restrictions.	Agreed, except this oversight should be regular and done in connection with scheduled and ad hoc board meetings and otherwise as the board members become aware of any material issues, such as unauthorised deviation from investment criteria and restrictions.
5.7 The Operator is responsible for approving the appointment and removal of the Regulated Mutual Fund's service providers ('Service Providers').	Agreed.
5.8 The Operator is responsible for ~~continually~~ regularly assessing the suitability and capability of the Service Providers.	See comment on 5.6.1 above.

Statement of Guidance for Regulated Mutual Funds	DMS's Comments: CIMA SOG Fund Governance
5.9 The Operator is responsible for ensuring that the role and responsibilities of the Regulated Mutual Fund's Service Providers are clearly set out and defined. The Operator should make sufficient enquiries enabling him/her to properly understand the scope and nature of the responsibilities of each Service Provider.	"[The directors] should have made enquiry to ensure that they properly understood the nature and scope of the work which each of the professional service providers were proposing to do or, perhaps more importantly, proposing not to do, and that it would result in a proper division of responsibility. In particular, they needed to satisfy themselves that the scope of the work intended to be performed by the investment manager and administrator in respect of the preparation of the macro fund's financial statements and determination of monthly NAVs". Weavering case: 2011 (2) CILR 216.
5.9.1 The Operator should satisfy him/herself that the Service Provider contracts ensure a proper division of responsibilities as between Service Providers and/or the Regulated Mutual Fund.	Agreed, except this amendment has been added to remove some ambiguity. The Operator cannot be expected to investigate a Service Provider's internal controls regarding internal division of responsibilities.
5.10 The Operator must satisfy him/herself that the various professional Service Providers are performing their functions in accordance with the terms of their respective contracts.	"In particular, [directors] needed to satisfy themselves that the scope of the work intended to be performed by the investment manager and administrator in respect of the preparation of the [fund]'s financial statements and determination of monthly NAVs was properly understood by all concerned and that it would result in an appropriate division of responsibility between [the investment manager/adviser and the administrator]." Weavering case: 2011 (2) CILR 216.
5.11 The Operator should ~~continuously~~ regularly verify that the Regulated Mutual Fund is acting in accordance with its constitutional documents and any other documents directing the supervision and operation of the Regulated Mutual Fund and/or its advisors or Service Providers.	Agreed.

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Statement of Guidance for Regulated Mutual Funds	DMS's Comments: CIMA SOG Fund Governance
5.12 The Operator should ~~continuously~~ regularly inform him/herself of the Regulated Mutual Fund's investment activities and financial position.	"It is the duty of the directors of an investment fund to inform themselves about its investment activities and have a proper understanding of its financial condition." Weavering case: 2011 (2) CILR 220.
5.12.1 The Operator should review the Regulated Mutual Fund's financial results at ~~their board meetings~~ least annually.	Agreed, except it is impractical to review financial results at all board meetings as results are usually only prepared annually in connection with the annual audit. Production of various periodic unaudited financial information, e.g. NAV and performance information, is typically prepared by the Administrator and reviewed periodically by the directors as part of their regular oversight. See Weavering quote for paragraph 4.3 above.
5.12.2 The Operator should ~~monitor~~ have regular oversight of the Regulated Mutual Fund's compliance with its investment strategy, criteria and restrictions of in accordance with the Regulated Mutual Fund's Articles of Association and offering memorandum and his/her fiduciary duties.	Agreed, except this is done at scheduled or ad hoc board meetings, not continuously.
5.12.3 The Operator should ~~continuously monitor~~ have regular oversight of the Regulated Mutual Fund's net asset valuation policy and the calculation of its net asset value of in accordance with the Regulated Mutual Fund's Articles of Association and offering memorandum and his/her fiduciary duties.	Agreed, except it is impractical to do this continuously.
5.13 The Operator ~~must ensure that all potential or actual conflicts are managed and controlled~~ should disclose, manage and control any potential or actual conflicts of interest that he is aware of in accordance with the Regulated Mutual Fund's Articles of Association and offering memorandum and his/her fiduciary duties.	**IOSCO Principle 28, Key Question 4: The regulatory system should set standards for hedge fund managers/advisers to appropriately manage conflicts of interest, provide full disclosure and transparency to the regulator and investors (including potential investors) about such conflicts and how they manage them.** **IOSCO has no such expectation for the hedge**

Statement of Guidance for Regulated Mutual Funds	DMS's Comments: CIMA SOG Fund Governance
	fund or its directors. The Articles of Association provide how certain conflicts of interest should be addressed. The offering memorandum typically discloses material conflicts of interest and the associated risks.
5.14 An Operator should not accept appointment unless reasonably satisfied ~~assess~~ that s/he has sufficient and relevant knowledge and experience or ready access to such expertise to carry out his/her duties as an Operator of the relevant Regulated Mutual Fund.	Agreed, except this provision should not be too restrictive to allow new entrants to the directorship business. What is important is that they have access to expertise. This is no different than the training and internship process that happens in every profession. Besides, the regulation of hedge funds is constantly evolving and every director must constantly learn new material.
5.14.1 An Operator must exercise care, skill and diligence that would be exercised by a reasonably diligent person with:	
a) the general knowledge, skill and experience that may reasonably be expected of an Operator; and	"The directors' duty to exercise reasonable care, skill and diligence comprises both an objective and a subjective element. They must exercise the care, skill and diligence that would be exercised by a reasonably diligent person having the general knowledge, skill and experience reasonably to be expected of a person acting as an independent non-executive director of an open-ended investment fund incorporated in this jurisdiction." Weavering case: 2011 (2) CILR 212.
b) the general knowledge, skill and experience that the Operator has.	"The duty to exercise care, skill and diligence also includes a subjective element. Directors are required to exercise the knowledge, skill and experience which they actually possess. It follows that the professional qualifications and business experience of the directors of an open-ended investment fund is material information which needs to be disclosed in its offering document, with the result that the directors have a duty to ensure that the disclosure is accurate and not

Statement of Guidance for Regulated Mutual Funds	DMS's Comments: CIMA SOG Fund Governance
	misleading." Weavering case: 2011 (2) CILR 213 and 214.
[6.] Documentation	
6.1 The board and Operators must fully, accurately and clearly record the board meetings and any material decisions and/or considerations <u>in accordance with the Regulated Mutual Fund's Articles of Association and offering memorandum and his/her fiduciary duties</u>.	The directors of investment funds have a duty to conduct their board meetings in a businesslike manner. This includes a duty to arrange for minutes to be taken of the meeting which fairly and accurately record the matters which were considered and the decisions which were made. The discussion should be summarised, at least to the extent that it is necessary for the reader to understand the basis upon which the decisions were made. Having been approved and signed by whoever was acting as chairman of the meeting, the minutes should be kept on the fund's minute book. Weavering case: 2011 (2) CILR 221-222. Generally, minutes are records of decisions made, not a transcript of discussions. Directors should be at liberty to exercise their judgment to choose what considerations they wish to include in the Fund's corporate records. Some information may be privileged and they may wish to keep certain non-privileged information confidential unless and until divulgence is compelled by a court of law in the course of a discovery for litigation involving the directors and/or the Fund.
6.2 The records should include:	
6.2.1 The agenda items and circulated documents;	
6.2.2 The matters considered and decisions made; and	
6.2.3 The information requested from, and provided by, advisors and Service Providers.	
[7.] Relations with the Authority	
7.1 The <u>Regulated Mutual Fund</u> ~~Board~~ and its Operators should conduct its affairs with the Authority in a transparent and honest manner always disclosing to the Authority any matter affecting the financial soundness of the Regulated Mutual Fund and any non-compliance with the laws, regulations, rules and standards applicable, including those of the Cayman Islands and the Authority.	Is "financial soundness" the correct standard for a Regulated Mutual Fund, given that insolvency and losses by creditors are rare due to their capital structure, whereas it is not uncommon for equity investors to sustain substantial losses?

Statement of Guidance for Regulated Mutual Funds	DMS's Comments: CIMA SOG Fund Governance
7.2 Where the ~~board or~~ Operator is uncertain whether to communicate information to the Authority it should be prudent and diligent and communicate the information subject to legal advice to the contrary or to legal privilege.	Communication to the Authority should be subject to reasonableness, materiality and legal advice/privilege.
[8.] Risk Management	
8.1 The board should ensure ~~it provides suitable oversight of~~ that the Investment Manager/Adviser is responsible for risk management ~~and will maintain a sound system of risk measurement and control~~.	**IOSCO Principle 28, Key Question 3: The regulatory system should set standards for internal organisation and operational conduct to be observed on an ongoing basis by the hedge fund manager/adviser.** **IOSCO has no such expectation for the hedge fund or its directors.** The EU's AIFM Directive is consistent with that also; risk management is a core function of the AIFM and sits with the AIFM; AIFMD imposes no obligations on the AIF or its directors to monitor the AIFM's risk management, which provides: "Management of AIFs should mean providing at least investment management services. The single AIFM to be appointed pursuant to this Directive should never be authorised to provide portfolio management without also providing risk management or vice versa."[40]

[40] DIRECTIVE 2011/61/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, recital (21).
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF

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Statement of Guidance for Regulated Mutual Funds	DMS's Comments: CIMA SOG Fund Governance
[9] Sole Corporate Directors	
9.1 Every Regulated Mutual Fund that is a company shall have a board of directors comprised of either: (a) subject to the following subsections 9.2, 9.3 and 9.4 below, at least one director that is, or is the wholly owned subsidiary of, a licensed mutual fund administrator; or (b) at least two directors, at least one of which is an individual. 9.2 A licensed mutual fund administrator may provide its wholly owned Cayman Islands or foreign subsidiary as the sole director of a Regulated Mutual Fund provided that such subsidiary itself has at least two directors and the licensee receives all fees and expenses that would otherwise be payable by the Regulated Mutual Fund to the director. 9.3 In the case of a Licensed Mutual Fund, any proposed sole corporate director thereof shall provide its current register of directors with the licence application. 9.4 The sole corporate director of a Licensed Mutual Fund shall obtain the Authority's' approval to any change in directors of the sole corporate director.	A licenced mutual fund administrator that is a company is required to always have at least two directors. Failure to comply is a criminal offence and punishable with a $20,000 fine on conviction[41]. Thus, a licenced mutual fund administrator will always have at least two directors and this should obviate the need for a second director when the licenced mutual fund administrator acts as sole director of a Regulated Mutual Fund. The Law defines "Mutual Fund Administrator" to include a company formed under the Companies Law (2012 Revision). The Law also provides that "'mutual fund administration', in respect of a mutual fund, means… to provide an operator to the mutual fund…"

[41] §22 of the Law.

EXHIBIT DMS2:
CILR SEARCH

http://www.judicial.ky/CILRSearch/index.php

Date	Citation	Parties	Court	Count by Court
14-Sep-09	2009 CILR 490	Helmsman v Bank of New York	Grand Court	1
22-Jun-09	2009 CILR 353	Phoenix Meridian v Lyxor	Grand Court	2
14-Apr-09	2009 CILR 268	Renova Resources Private Equity Ltd v Gilbertson	Grand Court	3
23-Feb-09	2009 CILR 28	In re SPhinX Group	Grand Court	4
10-Dec-08	2009 CILR 7	In re Lancelot Investors Fund	Grand Court	5
7-Nov-08	2008 CILR 486	TCB Credit Recoveries v Arthur Andersen LLP	Grand Court	6
14-Nov-07	2007 CILR Note 21	In re Circle Trust	Grand Court	7
17-Sep-07	2007 CILR 349	In re Fortuna Dev Corp	Grand Court	8
25-May-07	2007 CILR 225	In re Circle Trust	Grand Court	9
17-May-07	2007 CILR 193	In re Cairnwood Global Technology Fund Ltd	Grand Court	10
29-Mar-07	2007 CILR 18	Miller v Gianne	Grand Court	11
8-Jan-07	2007 CILR 55	Wahr-Hansen v Compass Trust Co Ltd	Grand Court	12
13-Oct-06	2006 CILR 460	In re Ontario Superior Court's Request	Grand Court	13
12-May-06	2006 CILR 171	In re Parmalat Capital Fin Ltd	Grand Court	14
26-Apr-06	2006 CILR 153	In re Parmalat Capital Fin Ltd	Grand Court	15
4-Jan-06	2006 CILR 80	In re Cybervest Fund	Grand Court	16
8-Apr-05	2004–05 CILR 308	In re ING Securities (Japan) Ltd	Grand Court	17
1-Mar-04	2004–05 CILR 22	In re Parmalat Capital Fin Ltd	Grand Court	18
4-Feb-04	2004–05 CILR 57	In re Pegasus Ins Co	Grand Court	19
30-Jul-03	2003 CILR 381	Lemos v Coutts (Cayman) Ltd	Grand Court	20
30-May-03	2003 CILR 250	JP Morgan Multi-Strategy Fund LP v Macro Fund Ltd	Grand Court	21
20-Dec-02	2002 CILR 606	In re Liberty Capital Ltd	Grand Court	22
28-Feb-02	2002 CILR 96	Telesystem Intl Wireless Inc v CVC/Opportunity Equity Partners LP	Grand Court	23
17-May-01	2001 CILR 214	In re Ansbacher (Cayman) Ltd	Grand Court	24
6-Feb-01	2001 CILR 68	Omni Secs Ltd v Deloitte & Touche	Grand Court	25
6-Oct-00	2000 CILR 473	Publishers Representatives Ltd v UBS (CI) Ltd	Grand Court	26
9-May-00	2000 CILR 147	Bonotto v Boccaletti	Grand Court	27
29-Jul-99	1999 CILR 378	In re CVC Opportunity Equity Partners Ltd	Grand Court	28
20-May-99	1999 CILR 237	Allied Inv Fund Ltd v Johnson	Grand Court	29
31-Jan-99	1999 CILR 21	Hampshire Cosmetic Labs Ltd v Mutschmann	Grand Court	30
23-Oct-98	1998 CILR 292	Banco Economico v Allied Leasing	Grand Court	31
29-Jun-98	1998 CILR 190	Allen v Ebanks	Grand Court	32
30-Jan-98	1998 CILR 43	Hutchinson Ltd v Cititrust	Grand Court	33
3-Sep-97	1997 CILR 390	Banco Provincial Intl v Windsor Invs Ltd	Grand Court	34
9-Dec-95	1996 CILR 9	RCB v Thai Asia Fund Ltd	Grand Court	35
21-Jun-12	2012 (1) CILR 360	Medley Opportunity v Fintan	Grand Court, FSD	1
18-May-12	2012 (1) CILR 445	In re Consistent Return	Grand Court, FSD	2
1-May-12	2012 (1) CILR 272	In re Alibabacom	Grand Court, FSD	3
23-Apr-12	2012 (1) CILR 248	In re FIA Leveraged Fund	Grand Court, FSD	4
5-Mar-12	2012 (1) CILR 178	In re Harley Intl (Cayman)	Grand Court, FSD	5
7-Feb-12	2012 (1) CILR 84	Ennismore Fund v Fenris	Grand Court, FSD	6
3-Feb-12	2012 (1) CILR 383	In re ICP Strategic Fund	Grand Court, FSD	7
2-Dec-11	2011 (2) CILR 434	Algosaibi v Saad Invs	Grand Court, FSD	8
23-Nov-11	2011 (2) CILR 329	In re Emergent Capital	Grand Court, FSD	9
26-Aug-11	2011 (2) CILR 203	Weavering Macro v Peterson	Grand Court, FSD	10
5-Aug-11	2011 (2) CILR 148	Renova Resources v Gilbertson	Grand Court, FSD	11
22-Jul-11	2011 (2) CILR 61	In re China Milk Products	Grand Court, FSD	12
7-Jan-11	2011 (1) CILR 26	In re Otu	Grand Court, FSD	13
4-Jan-11	2011 (1) CILR 1	In re Heriot Fund	Grand Court, FSD	14
12-Nov-10	2010 (2) CILR 388	ATC (Cayman) v Rothschild Trust	Grand Court, FSD	15
26-Oct-10	2010 (2) CILR 194	In re Wyser-Pratte EuroValue Fund	Grand Court, FSD	16
16-Sep-10	2010 (2) CILR 154	In re Freerider Ltd	Grand Court, FSD	17
29-Jun-10	2010 (1) CILR 531	Reserve Mgmt v Branch Banking	Grand Court, FSD	18
13-May-10	2010 (1) CILR 486	In re Freerider	Grand Court, FSD	19
5-May-10	2010 (1) CILR 452	In re SPhinX Group	Grand Court, FSD	20
19-Apr-10	2010 (1) CILR 553	Algosaibi Bros v Saad Invs	Grand Court, FSD	21
12-Feb-10	2010 (1) CILR 157	In re HSH Cayman	Grand Court, FSD	22
11-Nov-09	2009 CILR 604	In re Freerider Ltd	Grand Court, FSD	23
8-Feb-10	2010 (1) CILR 178	Terra Nex v Bliggensdorfer	Grand Court,Civil	1
25-May-12	2012 (1) CILR 300	ABC Co v J & Co	Court of Appeal	1
4-Aug-11	2011 (2) CILR 103	In re Freerider	Court of Appeal	2
1-Dec-10	2010 (2) CILR 289	Algosaibi Bros v Saad Invs	Court of Appeal	3
24-May-10	2010 (1) CILR 375	In re HSH Cayman	Court of Appeal	4
18-Mar-10	2010 (1) CILR 303	Camulos v Kathrein	Court of Appeal	5
9-Dec-09	2010 (1) CILR 114	HSH Cayman v ABN AMRO	Court of Appeal	6
24-Sep-09	2009 CILR 553	Lyxor v Phoenix Meridian	Court of Appeal	7
8-Apr-09	2009 CILR 255	W v W	Court of Appeal	8
12-Dec-08	2008 CILR 447	In re Strategic Turnaround Ltd	Court of Appeal	9
9-Apr-08	2008 CILR 211	Brasil Telecom v Opportunity Fund	Court of Appeal	10
14-Feb-08	2008 CILR 67	In re Fortuna Dev Corp	Court of Appeal	11
30-Jul-04	2004–05 CILR 138	In re Pegasus Ins Co	Court of Appeal	12
1-Aug-03	2003 CILR 328	In re Waterford Ins Ltd	Court of Appeal	13
12-Apr-02	2002 CILR 224	Doak v Doak	Court of Appeal	14
17-Aug-00	2000 CILR 320	In re CVC Opportunity Equity Partners Ltd	Court of Appeal	15
5-May-00	2000 CILR 118	Allied Leasing & Fin Corp v Banco Economico SA	Court of Appeal	16
30-Jul-98	1998 CILR 224	In re McCorkle	Court of Appeal	17
13-Dec-10	2010 (2) CILR 364	Culross Global v Strategic Turnaround	Privy Council	1
3-Oct-06	2006 CILR 430	Demarco Almeida v CVC/Opportunity Equity Partners Ltd	Privy Council	2
16-Apr-02	2002 CILR 254	Randall (BV) v R	Privy Council	3
21-Mar-02	2002 CILR 77	CVC/Opportunity Equity Partners Ltd v Demarco Almeida	Privy Council	4

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EXHIBIT DMS3:

TEN KEY QUESTIONS UNDER IOSCO PRINCIPLE 28

http://www.iosco.org/library/pubdocs/pdf/IOSCOPD359.pdf

Methodology

For Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation

INTERNATIONAL ORGANISATION OF SECURITIES COMMISSIONS

FR08/11 **SEPTEMBER 2011**

G. PRINCIPLES FOR COLLECTIVE INVESTMENT SCHEMES…

Principle 28 Regulation should ensure that hedge funds and/or hedge fund managers/advisers are subject to appropriate oversight.

Although some jurisdictions may regulate hedge funds as CIS, Principle 28 is the only principle in this section applicable in the assessment of hedge funds and/or hedge fund managers/advisers regulation.

In previous work,[271] IOSCO has recognised that there is no universal definition of hedge funds and that a variety of approaches to regulation of hedge funds and/or hedge fund managers/advisers are possible. The important point to note is that the regulatory system should set standards for the authorisation/registration and the regulation and supervision of those who wish to operate hedge funds (managers/advisers) (and/or – where relevant[272] – for the registration of the fund).

The relevant regulatory requirements should allow the regulator at the level of the funds themselves to get an overall picture of the risks posed by the hedge funds[273]. The information supplied through the registration/authorisation process could also be made available to all prospective investors prior to the execution of a subscription agreement or other investment management agreement[274].

G. PRINCIPLES RELATING TO COLLECTIVE INVESTMENT SCHEMES AND HEDGE FUNDS

Key Questions

Registration/authorisation of hedge fund managers/advisers and/or, where relevant, the hedge fund

1. Does the regulatory system set standards for:

(a) The registration/authorisation and the regulation of those who wish to operate hedge fund (managers/advisers)?

(b) And/or the registration of the fund?[284]

[See paragraph 2.1 of the Authority's Guidance on Fund Governance of Regulated Mutual Funds]

2. Does the regulatory system specify the information contemplated by Key Issue 2 that must be provided to the regulator at the time of the registration/authorisation?[285]

[Not addressed by the Authority's Guidance on Fund Governance of Regulated Mutual Funds]

Standards for internal organisation and operational conduct

3. Does the regulatory system set (in view of the risk posed) standards for internal organisation and operational conduct to be observed on an ongoing basis by the hedge fund manager/adviser, including appropriate risk management and protection and segregation of client money and assets?[286]

[See paragraph 8.1 of the Authority's Guidance on Fund Governance of Regulated Mutual Funds]

Conflicts of interest and other conduct of business rules

4. Does the regulatory system set standards for hedge fund managers/advisers to appropriately manage conflicts of interest[287] and provide full disclosure and transparency to the regulator and investors (including potential investors) about such conflicts and how they manage them?

[See paragraph 5.13 of the Authority's Guidance on Fund Governance of Regulated Mutual Funds]

Disclosure to the regulator and to investors

5. Is the regulator able to obtain from hedge fund managers/advisers appropriate information about their operations and about the funds they manage that allow it to assess the risks that hedge funds pose to systemic stability?[288]

[Not addressed by the Authority's Guidance on Fund Governance of Regulated Mutual Funds]

6. Does the regulatory system, in view of the risk posed, set standards for the proper disclosure by hedge fund managers/advisers or the fund to investors?[289]

[Not addressed by the Authority's Guidance on Fund Governance of Regulated Mutual Funds]

Prudential regulation

7. Are hedge fund managers/advisers, which are required to register, subject to appropriate ongoing prudential requirements that reflect the risks they pose?

[Not addressed by the Authority's Guidance on Fund Governance of Regulated Mutual Funds]

Supervision and enforcement

8.(a) Does the regulatory system provide for ongoing supervision of the hedge fund managers/advisers which are required to register?

(b) Does the regulator have the power to access and inspect the hedge fund managers/advisers and their records and/or the hedge funds?[290]

(c) Does the regulator have the authority to enforce against wrongdoers?[291]

[See paragraph 3.1 of the Authority's Guidance on Fund Governance of Regulated Mutual Funds]

9. Subject to appropriate confidentiality safeguards and national law restrictions, from the point of view of supervision and enforcement, does the regulator have the power to:

(a) Collect where necessary relevant information from hedge fund managers/advisers and/or hedge funds (and through cooperation with other domestic regulators from hedge fund counterparties) also on behalf of a foreign Regulator?

(b) Exchange information on a timely and ongoing basis, as deemed appropriate, with other relevant regulators on internationally active funds that may pose systemic or other significant risks?

[Not addressed by the Authority's Guidance on Fund Governance of Regulated Mutual Funds]

10. Is the securities regulator able to obtain from the hedge fund operator/adviser – if necessary working with other regulators – non-public reporting of information on the hedge funds' exposure to counterparties (which may include prime brokers, banks or OTC derivative counterparties)?

[Not addressed by the Authority's Guidance on Fund Governance of Regulated Mutual Funds

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271 See Hedge Funds Oversight, Final Report, Report of the Technical Committee of IOSCO, June 2009, available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD293.pdf

272 Some securities regulators may have regulatory requirements at the level of the funds themselves to facilitate obtaining fund specific information and to get an overall picture of the risks posed by the funds. Such a direct regulation at the fund level could involve a registration/authorisation of the fund, as well as ongoing supervision of the fund. Whether this additional layer of regulation is required to address systemic and market integrity risks will reflect local conditions and industry structure. Nothing in this Methodology should be interpreted to require the registration of the fund.

273 See Hedge Funds Oversight, Final Report, Report of the Technical Committee of IOSCO, June 2009, available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD293.pdf

274 Id.

284 Id. See also Explanatory Notes on exempted/lower regulated hedge funds and/or hedge fund managers/advisers.

285 Id. See also Explanatory Notes.

286 See Hedge Funds Oversight, Final Report, Report of the Technical Committee of IOSCO, June 2009, available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD293.pdf. In assessing the application of Key Question 3, the assessors should consider at least the issues mentioned in the Explanatory Notes.

287 Hedge fund managers, like other fund managers, are subject to significant conflicts of interest (institutional and personal). The first category included conflicts that affect the hedge fund manager as an institution, such as investment/trade/brokerage allocation practices; undisclosed compensation arrangements with affiliates; undisclosed compensation arrangements with counterparties, etc. The second category includes individual conflicts, such as personal trading; personal investing; personal or business relationships with issuers, etc. See Hedge Funds Oversight, Final Report, Report of the Technical Committee of IOSCO, June 2009, available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD293.pdf
As regards compensation/remuneration structures and practices, they should be subject to strong governance mechanisms

and to manage conflict of interest issues and to counter the short-term profit motives that are often inherent in hedge fund operations: see Hedge Funds Oversight, Final Report, Report of the Technical Committee of IOSCO, June 2009, available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD293.pdf. See also Principle 8.

288 This information gathering would help regulators to identify current or potential sources of systemic risk that hedge funds may pose, either individually or collectively and consequently help regulators in better understanding: the leverage used in different strategies and the size of funds "footprints"; the:

(a) scale of any asset/liability mismatch; substantial market or product concentration and liquidity issues; and

(b) hedge fund counterparty risks. See Hedge Funds Oversight, Final Report, Report of the Technical Committee of IOSCO, June 2009, available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD293.pdf. See also Explanatory Notes.

289 See Hedge Funds Oversight, Final Report, Report of the Technical Committee of IOSCO, June 2009, available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD293.pdf. The timing of such disclosure is determined by the regulator. See also Explanatory Notes.

290 Id.

291 Id. See also Explanatory Notes.