

# Professional Officers - a well-established regulated status in the Isle of Man

By Ita Mc Ardle

**A**IFMD - Isle of Man assured and confident that it can be part of the structure from initiation.

In the wake of the financial crisis that exploded from 2008 onwards and the effects of that on funds one issue has been the subject of harsh exposure. That is the corporate governance of funds suffering exposures and, more particularly, the acts or omissions of the directors of such funds. Differing concepts of ethics, probity and morality have been particularly explored in recent months as litigation has progressed in various affected jurisdictions.

Manifold “perfect frauds” which have involved complicit or, more usually, ill informed, boards have been revealed to have occurred including in onshore jurisdictions that tend to adopt moral high ground. “Madoff”, “Petters”, “subprime lending”, lack of independence of custodians have become buzzwords of which we are all painfully aware. How governing bodies have coped with the challenges arising as a result has been at the forefront of discussion.

As all who have ever been involved in the drafting of funds’ offering materials will testify, great efforts are made to provide for contingencies that have not been, and may not ever be, faced. While those were, at best, hypothetical and, at worst, improbable, the need to provide for them may have been practically dismissed. 2008 hit viciously and the improbable became reality and the hypothetical became fact.

Perceived wisdom was tested in different ways; would the funds’ documents, having been dusted off, cope with the legal and insolvency situations being faced? More critically, did the boards have the capacity, resources and experience to deal with the situation?

In the funds industry, governing bodies most usually consist of non-executive directors (“NEDs”) with the investment management being done by another party. One would expect that such NEDs would be “fit and proper” individuals i.e. skilled, ethically sound and morally competent. Regrettably, experience showed that this was often not the case. Many funds’ NEDs proved to have little grasp of the affairs of the business, often by virtue of the number of boards on which they sat. In some situations, as was highlighted by the Weaving case in Cayman<sup>1</sup> and subsequent press reportage, NEDs are often hopelessly ill equipped to act appropriately as NEDs or are NEDs of a staggering amount of companies.

I regret to say that this latter scenario is a firmly established model in some offshore jurisdictions.



The Isle of Man (“IOM”) has seen, and continues to see, steady growth in its financial services business including the funds sector and the independent custodian is a firmly embedded obligation. The aim of the participants in this highly successful industry has been to provide quality business with a first class regulatory environment. Everyone involved has subscribed to that ethos, from industry and trade associations to government and regulator<sup>2</sup>. To that end, as early as 2000 individuals on the IOM holding more than 10 directorships of independent entities have been subject to regulation as “Professional Officers”<sup>3</sup>.

Application for a license to act as a Professional Officer involves inter alia assessment of fitness, propriety and experience and, following issue, leads to on-going regulatory compliance and reporting

requirements and indemnity insurance maintenance. As a model, this regulation is, I believe, without compare in the offshore space, although some of IOM’s competitor jurisdictions may now follow.

The FSC is now working on a comprehensive code of corporate governance for governing bodies that will consolidate the various IOM statutory and regulatory provisions as a best practice guide. This will be supported by codifying the criminal and enforcement regime for breach of current statutory obligations for governing bodies of Isle of Man companies. The FSC also maintains “Guidance on the responsibilities and duties of directors under the laws of the Isle of Man”<sup>1</sup>. This is mandatory reading for everyone acting as a Director in IOM.

All of the foregoing demonstrates the continuing strong stance that the IOM has always taken; quality over volume and discernment over post box. This stance has led to those prepared to act as directors and members of governing bodies taking their position very seriously, whether regulated as a Professional Officer or exempt. Capacity, in terms of ability and in absolute number of positions is a key consideration. The Isle of Man considers this a fundamental element of its continuing determination to be the thought leader in effective and efficient standards of corporate governance.

Isle of Man Funds has been working closely and consistently with the FSC, the government, AIMA and other external advisors to follow the development of the AIFMD. To say that it has been and continues to be a roller coaster is an understatement. The political motivations behind the conception of the creature have been much discussed. I suggest that the storm of 2008 that might have been said to have spawned the AIFMD may have been brought under control by market forces, for example leverage is now virtually non-existent, it is also true to say that the scapegoats, private

equity and hedge funds, have now been shown not to have had any significant responsibility. We must all bear in mind that such funds are a tiny percentage of global financial services business and the overwhelming majority of them are based in the US. Their impact in Europe has been marginal at most.

AIMA representative Anna Larris spoke to a large audience of industry representatives and regulators on Wednesday 18 January at the Manx Museum in the IOM. The resulting comfort for all was that we in the Isle of Man are as up to speed and as engaged and well prepared as we can be bearing in mind that the directive is only at Level 2 in the Lamfalussy Structure that is being followed. The FSC has reaffirmed its commitment to the already drafted products which will be available to meet the final requirements.

This again showcases the Isle of Man at the forefront of measured and qualitative response to external challenges.

*Ita Mc Ardle was appointed Chair of the Isle of Man Funds Association (formerly Isle of Man Fund Management Association “FMA”) on 19 December 2010. Isle of Man Funds was established 25 years ago to support and develop the Funds industry in the Isle of Man. It has a broadly based membership of 60 companies and individuals representing Administrators, Custodians, Managers, Lawyers, Accountants and Directors among others. Isle of Man Funds runs numerous events both for both continuing education of its members and to promote the Isle of Man based industry generally which include attendance at international conferences, hosting conferences and seminars in various jurisdictions and an annual lunch in London to which an invitation is highly prized. Ita can be contacted at [ita@itamcardle.com](mailto:ita@itamcardle.com).*

